NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0419

STATE OF LOUISIANA

VERSUS

JASON FRANK ST. ROMAIN

On Appeal from the 18th Judicial District Court
Parish of Pointe Coupee, Louisiana
Docket No. 73623-F, Division "A"
Honorable James J. Best, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered September 10, 2010

PARRO, J.

The defendant, Jason Frank St. Romain, was charged by grand jury indictment with five counts of aggravated rape, violations of LSA-R.S. 14:42. He entered pleas of not guilty and waived his right to a jury trial. After hearing all of the evidence, the trial court determined the defendant was guilty of all counts and sentenced him to five terms of life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The trial court ordered that the sentences be served consecutively.

The defendant appeals, asserting the following assignments of error:

1. The motion for new trial should have been granted.
2. The state failed to present sufficient proof to uphold the convictions.
3. The sentences imposed were excessive.

Finding no error, we affirm the convictions and sentences.

FACTS

In 2004, the defendant had a friendly relationship with the victim's family, having worked with the victim's stepfather. DC, the victim, was a twelve-year-old girl at that time. On several occasions during 2004 and 2005, DC and her family spent time with the defendant's family at the defendant's False River camp. DC also baby-sat for the defendant's two-year-old daughter on occasion.

DC testified that the defendant engaged in sexual intercourse with her during spring break in April 2004 at his camp, where both families were staying for several days. She explained that, after everyone else had gone to bed, the defendant gave her alcohol and then began fondling her. He asked if she minded him rubbing on her arms and she said no. The fondling progressed until the defendant had DC on the ground, he pulled his pants down to his knees, she took her pajama bottoms off, and he climbed on top of DC and had vaginal intercourse with her. Afterward, the defendant said, "Please tell me you're at least thirteen years old." DC said she had just turned twelve, and the defendant told her not to tell anyone. The following day, he apologized to DC.

On another occasion, after spring break but before Memorial Day, the defendant

picked up DC to baby-sit. He bought her daiquiris on the way to his house. After the defendant's wife left for work in the early morning hours, the defendant got DC off the couch and took her to his bedroom, where he "had a lot of sex" with her in "many different ways." DC testified specifically that he penetrated her vagina while on top of her and was wearing a condom, which he later took off. Another time, he put her on her hands and knees and had sex with her in that position. DC testified that the defendant had sex with her many times, but only ejaculated twice. During that occasion, the defendant told DC that he was making plans to take her to Mexico where it is okay to be in love despite their age difference. The defendant also told DC that he loved her.

The next time that DC saw the defendant was on Memorial Day. DC's family once again went as the defendant's guests to his False River camp, and DC brought her friend, DI, as well. On the last night they were at the camp, after swimming and while everyone else was sleeping, the defendant gave DC and DI some leftover alcoholic drinks. He would say "chug, chug," and tell them that the end was the best part. After drinking for a while, DI went inside to change out of her swimsuit and the defendant followed her inside. DI testified that the defendant put his hand down her pants and put his finger in her vagina. He also penetrated her vagina with his tongue. DI testified that she told the defendant no because she did not want DC to be mad at her. DI also testified that she saw the defendant and DC kissing during the Memorial Day weekend.

Approximately three more times over the summer of 2004, DC baby-sat for the defendant's child. On the first occasion after Memorial Day, while the defendant's wife was in the shower, the defendant was on the couch with DC and began kissing her, then moved her hands to touch him and then penetrated her mouth with his penis. He also had vaginal intercourse with her on that occasion, while his wife was asleep.

On another occasion, the defendant bought DC daiquiris and took her to a pier and then to his house, where he engaged her in vaginal intercourse. He later told her that he clipped his fingernails and then digitally penetrated her vagina. The last time

that DC baby-sat for the defendant that summer, he again had vaginal intercourse with her.

DC testified that being raped by the defendant confused her and caused her to have many issues, including depression, bulimia, and drug use. DC explained that, although she began receiving medical treatment and counseling, she did not tell anyone about her relationship with the defendant. She was afraid they would think badly of her. She finally revealed what had occurred after her mother read a journal in which she had written about the defendant more than two years later.

MOTION FOR NEW TRIAL

In his first assignment of error, the defendant contends that the court erred in denying his motion for new trial, because the court erred in impermissibly limiting his cross-examination of DC and in allowing testimony regarding other crimes into evidence.

The denial of a motion for a new trial is not subject to appellate review except for error of law. See LSA-C.Cr.P. art. 858. The decision on a motion for new trial rests within the sound discretion of the trial judge. We will not disturb this ruling on appeal absent a clear showing of abuse of discretion. **State v. Henderson**, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 758, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235. The merits of such a motion must be viewed with extreme caution in the interest of preserving the finality of judgments. **State v. Haygood**, 26,102 (La. App. 2nd Cir. 8/17/94), 641 So.2d 1074, 1079, writ denied, 94-2373 (La. 1/13/95), 648 So.2d 1337. Generally, a motion for new trial will be denied unless injustice has been done the defendant. See LSA-C.Cr.P. art. 851.

LIMITED CROSS-EXAMINATION

A criminal defendant has the constitutional right to present a defense. **State v. Blank**, 04-0204 (La. 4/11/07), 955 So.2d 90, 130, cert. denied, 552 U.S. 994, 128 S.Ct. 494, 169 L.Ed.2d 346 (2007). However, the right to present a defense does not require the trial court to permit the introduction of evidence that is irrelevant or has so little probative value that it is substantially outweighed by other legitimate considerations in

the administration of justice. See **State v. Mosby**, 595 So.2d 1135, 1139 (La. 1992). A conviction will not be overturned where the defendant does not show that he was prejudiced by a limitation of the cross-examination of a witness. **State v. Savoie**, 448 So.2d 129, 134 (La. App. 1st Cir.), writ denied, 449 So.2d 1345 (La. 1984).

In the present case, the evidence showed that DC had two journals, one that included details regarding the defendant's rape of her, and another that she characterized as a dramatized story about DC and her boyfriend at the time. The dramatized story indicated that DC lost her virginity to her boyfriend at some point after she alleged that the defendant raped her. DC explained that she did not count having sex with the defendant as losing her virginity because it was not consensual. The defendant wanted to ask DC questions about an apparent suicide attempt, when she drank two bottles of cough syrup, but the court sustained the state's objections to relevancy. Because DC testified on direct examination that her "issues" resulted from being raped, the defendant argued that he should be allowed to ask specific questions about an alleged suicide attempt. The court responded that DC's mental health was not relevant to her age at the time she was raped or whether she was raped. The state clarified that the only thing objected to was the question regarding DC drinking large amounts of cough syrup more than two years after the rapes occurred. A short time later, the defendant attempted to offer into evidence one of DC's diaries in its entirety. The state objected and argued that most of the diary was irrelevant and that evidence of other relationships DC had that were discussed in the diary were irrelevant and inadmissible under LSA-C.E. art. 412. The defendant agreed that everything in the diary would not be relevant, but nevertheless wanted it admitted in its entirety to show that DC never mentioned the defendant in it. The state stipulated that the defendant was not mentioned in that particular diary. After defense counsel suggested that the court read the entire diary, the court stated:

> I've got better things to do. I'm in the middle of a rape trial here. I just don't start reading – I hope you don't start pulling out some old novels or something and introduce them. I'll have all my time tied up in reading. Listen, you can allow – you have that. I'm going to sustain the objection. You can allude to other parts, specifically. I don't have a

> problem with that. If there's something in there that you think is relevant, but I just don't go off reading these things just to look for something that might support your [argument.]

After some discussion about what was relevant within the diary, the defendant offered into evidence, and the court accepted, a redacted paragraph deemed relevant to the case.

The court acted within its discretion in excluding evidence that DC may have attempted suicide more than two years after the defendant raped her and in excluding from evidence DC's diary that failed to mention either the defendant or the fact that DC had been raped. See **State v. Chapman**, 410 So.2d 689, 702 (La. 1981). The defendant was not prevented from asking questions about relevant issues discussed in the diary. This portion of the defendant's first assignment of error is without merit.

ADMISSION OF OTHER CRIMES EVIDENCE

Louisiana Code of Evidence article 412.2 addresses the admission of evidence of similar crimes, wrongs, or acts in sex offense cases as follows:

> A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.
>
> B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.
>
> C. This Article shall not be construed to limit the admission or consideration of evidence under any other rule.

This provision allows admission of evidence of other similar crimes, even for general intent crimes such as aggravated rape, when the victim in the case at issue is a child under the age of 17. See LSA-C.E. art. 412.2(A).

Other crimes, wrongs, or acts involving sexually assaultive behavior or which indicate a lustful disposition toward children may be admissible if the probative value substantially outweighs the danger of unfair prejudice and confusion of the issues. See

LSA-C.E. art. 403. LSA-C.E. art. 404(B)(1) addresses the admissibility of other crimes evidence generally and states as follows:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Generally, a trial court's ruling on the admissibility of evidence of other crimes will not be overturned absent an abuse of discretion. **Mosby**, 595 So.2d at 1139. The introduction of inadmissible other crimes evidence results in a trial error subject to harmless-error analysis on appeal. **State v. Johnson**, 94-1379 (La. 11/27/95), 664 So.2d 94, 102.

The defendant contends that the court should not have admitted evidence that the defendant sexually assaulted DI, nor evidence that he rubbed the legs and arms of another of DC's friends, DC2, and attempted to unbutton DC2's pants while in bed with both DC and DC2. The defendant acknowledges that the evidence is admissible under LSA-C.E. art. 412.2, but contends that those allegations included the suggestion that the defendant acted forcefully and non-consensually, allegations that were not made in the primary case. Thus, he contends, the probative value was outweighed by the prejudicial effect.

The other crimes evidence showed that the defendant had attempted to engage or had, in fact, engaged in sexual contact with other twelve-year-old girls, showing the defendant to have a lustful disposition toward children. The court properly admitted the evidence under Article 412.2. The fact that DI testified that she said "no" and that DC2 indicated she did not want to have sexual contact with the defendant did not raise the prejudicial effect beyond the probative value of the evidence. This portion of the defendant's first assignment of error is also without merit.

SUFFICIENCY OF THE EVIDENCE

In his second assignment of error, the defendant challenges the sufficiency of the evidence to support his convictions for aggravated rape. The crime of aggravated rape is defined in LSA-R.S. 14:42(A), in pertinent part, as follows:

> 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.

Aggravated rape is a general intent crime. **State v. Morgan**, 99-1895 (La. 6/29/01), 791 So.2d 100, 103 (per curiam).

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved 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 LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). When circumstantial evidence is used to prove the commission of an offense, LSA-R.S. 15:438 requires that, assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. See **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 00-0895 (La. 11/17/00), 773 So.2d 732. This is not a separate test to be applied when circumstantial evidence forms the basis of a conviction; all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Ortiz**, 96-1609 (La. 10/21/97), 701 So.2d 922, 930, cert. denied, 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998).

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 fact

finder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932.

The defendant contends that his conviction is based solely upon DC's testimony, unsupported by physical evidence, and "fraught with inconsistencies." He suggests that DC's credibility is questionable because she had two diaries, only one in which she wrote about the defendant raping her, which he argues she left in the open after being punished so that her mother would find it. The defendant contends that DC was trying to take the spotlight off of her relationship with her boyfriend and put it on the defendant.

On the contrary, DC's testimony was clear, unequivocal, and supported by the testimony of other witnesses, including DI, DC2, Rebecca St. Romain, who was the defendant's ex-wife, and JE, who was DC's sister. DC testified that the defendant penetrated her vagina with his penis on at least five occasions. DC's sister testified that DC told her, shortly after it happened, that she had had sex with the defendant. DI testified that she saw the defendant and DC fondling and kissing one another. DC2 corroborated that the defendant snuck into DC's room in the middle of the night through her window and did not leave until the sun was rising. Rebecca St. Romain testified that she heard the defendant on the phone with DC in late evening hours and she verified that DC was alone in her house on several occasions with the defendant.

Furthermore, "[i]n the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion." **State v. Brown**, 03-1076 (La. App. 1st Cir. 12/31/03), 868 So.2d 775, 782, writ denied, 04-0269 (La. 6/4/04), 876 So.2d 76. In its reasons for judgment, the court detailed the incidents that supported each count of aggravated rape, and noted that if he believed DC, then he would find the defendant guilty, and if he did not believe her, then he would find the defendant to be not guilty. The court then stated:

> So, she was twelve, no question. Was she telling the truth? Of course she was, you bet.
>
> * * *

> And I listen carefully, and it's kind of nice not to have to make these decisions, but the jury makes them, and in this case compared to all of the cases, some of them I'd say it was close, not so close, but if I was going to grade veracity for the truth on zero I don't believe them at all, a hundred beyond a reasonable doubt, beyond all doubt and everything else in the middle somewhere in between, [DC], sweetheart you hit a hundred. You hit a grand slam.

We will not disturb the court's credibility determination. After a thorough review of the record, we are convinced that, viewing the evidence in the light most favorable to the prosecution, 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 five counts of aggravated rape. The defendant's second assignment of error is without merit.

EXCESSIVE SENTENCE

In his third assignment of error, the defendant acknowledges that the court had discretion in sentencing him to five life sentences, but argues that the sentences are excessive because the court ordered them served consecutively.

The penalty provision of the aggravated rape statute, LSA-R.S. 14:42(D)(1), provides:

> Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

The five counts of aggravated rape arose out of separate facts and represented five distinct convictions. Had the offenses been tried separately, the defendant would have received the mandated sentence of life imprisonment in each case and could have been ordered to serve them consecutively. The fact that the offenses were tried in one trial is of no consequence.

In sentencing the defendant, the court stated:

> A person of trust. [Defendant], you took a twelve year old child, and you just abused her repeatedly, while her folks lay in the other room. Repeatedly, you plied daiquiris to her. Not any daiquiris, you got Sex on the River was the name of the daiquiris you plied to her. You secreted her out and went and got the daiquiris.
>
> Do you fall in love with a twelve year old or is this just some perverted lust, which is wrong with people your age, thirty something

years old having sex with a twelve year old. You told her you loved her. You wanted to go to Mexico, where people like you could do to children south of the border, which is against the law here. . . .

* * *

And then I find out later you were drug screened, you tested positive for marijuana, cocaine and methamphetamines, that's why you were jumping out of your skin [during closing arguments]. Now, that just all fits the picture of somebody that's shy of a homicide, taking a twelve year old child and repeatedly abusing her. Under these circumstances, I would suggest there is no unconstitutionality about this sentence. It is most appropriate, where do you draw the line? Under ten you get life?

Oh, that's not fair. Ten year old -- she's ten years old. Six years old. Well, the legislators had to draw a line somewhere, so they drew it at the "T's", under thirteen life.

And that's what you get, Mr. St. Romain . . . .

* * *

I thought about giving you six months on each for contempt of court for popping off at the mouth, and running that consecutive, but I'll give you that. If that's what made you feel good after what you did [to] this child, it's okay.

The sentences are to run consecutive for five life sentences, which you will serve at our infamous prison called Angola, without the benefit of probation, parole nor suspension of sentence, that is the law. You have two years to file any post conviction relief.

In response to the defendant's motion to reconsider sentence, the court stated:

All right. Insofar as the motion to reconsider under 881.1, the Court finds that the legislators, in their infinite wisdom, were absolutely--are correct, in this Court's opinion that this man should get life imprisonment for having sex with a twelve year old child.

On 883, concerning concurrent and consecutive sentences, let it be known that this was five separate acts, and the heinousness of them, that he deserves that in the event--he deserves five consecutive life sentences. It should be ensured that after what I've learned in this trial, that he never steps forth on free ground ever again.

In **State v. Foley**, 456 So.2d 979, 981 (La. 1984), the Louisiana Supreme Court discussed the penalty for aggravated rape, noting that the "mandatory life sentence for aggravated rape is a valid exercise of the state legislature's prerogative to determine the length of sentence for crimes classified as felonies." Louisiana Code of Criminal Procedure article 883 provides, in pertinent part: "If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a

common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively." Here, the court expressly directed that the sentences be served consecutively. The court properly reasoned that the state presented five separate and distinct counts of aggravated rape perpetrated by the defendant against DC. Further, the court recognized the heinous nature of the offenses and noted that the safety of the community mandated that the defendant never again walk free. We cannot say that the sentences are grossly disproportionate to the severity of the crimes, considering the harm that the defendant caused to society and his potential for further harm. The court did not abuse its discretion in ordering that the sentences be served consecutively.

This assignment of error is without merit.

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Price**, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

CONCLUSION

Having found no merit in the defendant's assignments of error, the convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.