NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0952

STATE OF LOUISIANA

VERSUS

WARREN L. POUNDS

Judgment Rendered: FEB 13 2012

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of Washington
State of Louisiana
Docket No. 08 CR3 98014

Honorable Raymond S. Childress, Judge Presiding

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Welch, J. Concurs

McCLENDON, J.

Defendant, Warren L. Pounds, was charged by bill of information[1] with one count of molestation of a juvenile, a violation of LSA-R.S. 14:81.2, and pled not guilty. Following a jury trial, he was found guilty of the responsive offense of indecent behavior with a juvenile, a violation of LSA-R.S. 14:81. Defendant was sentenced to four years at hard labor. He now appeals, challenging the sufficiency of the evidence. For the following reasons, we affirm the conviction and sentence.

FACTS

The victim's mother, G.H., testified at trial. She has two children, the victim, M.H.,[2] whose date of birth is December 5, 2002, and another daughter. At the time of the offense, G.H. was still married to defendant, the biological father of M.H.'s sister. E.D. is the victim's biological father.

On January 19, 2008, the victim, her sister, G.H., E.D., and defendant were living in E.D.'s apartment in Bogalusa. G.H. indicated, on that date, she left her daughters alone with defendant when she went with E.D. to go wash clothes and get something to eat. According to G.H., when she returned home, she noticed that the victim appeared to be in pain when she sat down. G.H. asked the victim what had happened to her, and she was reluctant to answer. Thereafter, the victim indicated that defendant had touched her vagina. After speaking to the victim, G.H. believed that defendant had "stuck" his finger in his nose and then in the victim's vagina. The victim also stated that defendant had rubbed his nose before touching her vagina. Defendant told the victim she was lying and he "didn't do it." G.H. attempted to call the police using E.D.'s cell phone, but defendant took the phone away from her. G.H. attempted to use her own cell phone to call the police, but defendant also took that phone away from her. He also refused to let G.H. leave the apartment with her children. Defendant then tried to approach the

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[1] The State did not pursue the penalty provision of LSA-R.S. 14:81.2E(1) (prior to amendment by 2008 La. Acts No. 33, § 1 and 2011 La. Acts No. 67, § 1) in this matter.

[2] The victim is referenced herein only by her initials. See LSA-R.S. 46:1844W.

victim, but E.D. "stepped in the way." Thereafter, G.H. left the apartment with the victim, the victim's sister, and E.D., and reported the incident to the police using a cell phone in her car. G.H. took the victim to LSU Hospital in Bogalusa, and then to Children's Hospital in New Orleans. At LSU Hospital, the victim told the triage nurse that the victim's stepfather had put his fingers in her vagina.[3]

In a January 21, 2008 videotaped interview, the victim correctly identified the vagina on a sketch of a girl. She then indicated "Warren" was her sister's father, and he had touched her with his hand on the inside of her vagina.

The victim also testified at trial. She indicated that defendant had touched her on her vagina "in the bed." She stated that defendant touched the outside of her vagina with his fingers after wiping his nose. According to the victim, defendant had been watching television, but then pushed her on the bed. She indicated, at the time of the incident, she was wearing a shirt and pants and her mother was in the living room.

Defendant also testified at trial. He was thirty-two years old. He had prior convictions for possession of cocaine and illegal carrying of weapons. He claimed he had "problems with [the victim] telling me what she wanted to tell me and telling me what she don't want to do." He claimed he also had problems with G.H. because she was "always gone somewhere." He claimed the victim and G.H. were lying about the incident. According to defendant, while he was alone with the children on January 19, 2008, the victim tried to crawl into bed with him while she was naked from the waist down. He claimed he told her "[p]ut your mother-f------ clothes back on. You know you not supposed to be around a man like that." He conceded he took two cell phones away from G.H. because he "was mad and because they were lying on me." Defendant denied molesting or touching the victim.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, defendant argues that the evidence was insufficient to support the verdict because inconsistencies between the testimony

[3] No witnesses were presented from Children's Hospital.

of the victim and her other accounts of the alleged incident created a reasonable doubt.

The standard of review for 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 the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438; **State v. Wright**, 98-0601, p. 2 (La.App. 1 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.

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 98-0601 at p. 3, 730 So.2d at 487.

Louisiana Revised Statute 14:81, in pertinent part, provides:

> A. Indecent behavior with juveniles is the commission of any of the following acts with the intention of arousing or gratifying the sexual desires of either person:
>
> (1) Any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons. Lack of knowledge of the child's age shall not be a defense[.]

After a thorough review of the record, we are convinced that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find the evidence proved beyond a reasonable

doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of indecent behavior with a juvenile and defendant's identity as the perpetrator of that offense against the victim. The verdict rendered in this case indicates the jury rejected defendant's theory that the victim and G.H were "lying on" him. 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). No such hypothesis exists in the instant case. Further, the verdict indicates the jury accepted the victim's testimony and rejected defendant's testimony. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The testimony of the victim alone is sufficient to prove the elements of the offense. The trier of fact may 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. **State v. Lofton**, 96-1429, p. 5 (La.App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Additionally, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662. 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 jury. **State v. Calloway**, 07-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

REVIEW FOR ERROR

Defendant also requests 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, pp. 18-22 (La.App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION AND SENTENCE AFFIRMED.