NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

VERSUS

JAMES C. JEFFERSON

NO. 02-KA-336

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE 24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 00-408, DIVISION "C"
THE HONORABLE ALAN J. GREEN, JUDGE PRESIDING

JULY 30, 2002

SOL GOTHARD
JUDGE

Panel composed of Judges Edward A. Dufresne, Jr.,
Sol Gothard, and Walter J. Rothschild

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CONDITIONALLY AFFIRMED AND REMANDED

The defendant, James Jefferson, was found guilty of aggravated incest, a violation of LSA-R.S. 14:78.1, and was sentenced to twelve years of imprisonment at hard labor, suspended. The judge placed the defendant on active probation for five years with special conditions of probation, and he also imposed a fine of $5000.00, plus court costs and a commissioner's fee. This appeal followed.

At trial, sixteen-year-old D.J. related that the defendant, her biological father, had sexually abused her since she was approximately ten or eleven until she was fourteen years old.[1] The abuse began with inappropriate touching and became progressively worse, ultimately resulting in the defendant's having sexual intercourse with D.J.

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[1] The victim's initials are used to protect her privacy. See, LSA-R.S. 46:1844(W).

D.J. explained that the defendant did not live with her and her mother until 1991, when her parents married and her brother was born. According to D.J., the offensive contact started during the summer that she was ten or eleven years old when the family lived in Westwego. D.J. stated that her mother was at work and the defendant was "tickling" and wrestling with D.J. and her brother when the defendant "laid on top" of D.J. Later that day, the defendant had D.J. "sit on his lap." Both of these incidents made D.J. feel "uncomfortable."

Later that summer, the defendant touched her inappropriately during the family's trip to Biloxi. D.J. testified that she and the defendant were in the water, but her mother and brother were on the beach. While the defendant "pretended" to teach her how to swim, he slipped his hand under her bathing suit and placed it on her vagina Also on that trip, the defendant had D.J. lay on top of him and "move on him" while her mother was in the shower.

In 1994 or 1995, her parents separated and were ultimately divorced. The defendant moved to the home of his sister V. in Marrero, while the rest of the family went to live with D.J's grandmother. D.J. and her brother spent the weekends with the defendant at her aunt's house where defendant lived. According to D.J., the defendant touched her inappropriately every weekend that she visited the defendant at her Aunt V.'s house. As an example of the defendant's behavior, D.J. stated that "he'll unbutton my shorts and unbutton whatever he had on, and he'll pull his penis out and put it inside my underwear and he'll move or he'll just touch me with his hands

on my vagina." D.J. said defendant would move "to get himself a feeling or however you want to put it," and that defendant would sometimes "ejaculate."

She described other incidents of sexual abuse by the defendant. On one occasion, the defendant, D.J., and her little brother were on their way to her aunt's house. While D.J.'s brother slept in the back seat, defendant stopped the car in Nicholson Park in Marrero and walked around to the passenger's side where D.J. was sitting. According to D.J., defendant "placed his penis in [her] underwear and started moving until he ejaculated." Afterwards, defendant told D.J. they had to "stop doing this."

On another occasion, the defendant came to D.J.'s residence to drop off some school supplies. D.J. said that the defendant entered her room while she was resting in her bed. According to D.J., the defendant lifted the bed covers, "pulled [her] underwear to the side and put his tongue on [her] vagina." D.J. said that the defendant did this sort of thing twice more. After the next time, D.J. kicked the defendant and defendant responded, "'You're trying to hurt me.'" Thereafter, defendant attempted to insert his penis into her vagina. D.J. surmised that defendant's action was "his way of trying to hurt [her]." According to D.J., the defendant successfully penetrated her with his penis after the third occasion he placed his mouth on her vagina. D.J. testified that the defendant asked if "it [felt] good" on many of these occasions. It is not clear from D.J.'s testimony where she lived at this time.

D.J. stated that she never told the defendant to stop because she was afraid of the defendant and did not want him to hit her as he had beaten her mother. D.J. explained that the defendant used to "punch" her mother and strike her with belts and other objects. She also said that she had not told anyone about these incidents because she was afraid.

In November of 1998, D.J. wrote a letter to her mother describing her father's abuse. D.J. testified that she finally told her mother because she was afraid she would become pregnant after the final incident. In the letter, D.J. acknowledged that she was sexually active. However, she stated that the reason that she "[went] out and [had] sex" was to "get [her] mind off [her] Daddy." On cross-examination, D.J. testified that she had never engaged in sexual activity before her father began molesting her. However, she acknowledged that she had sexual intercourse with someone else by the time that her father actually had sexual intercourse with her.

D.J.'s mother testified that she was unaware of the inappropriate behavior until D.J.'s letter. D.J.'s grandmother, however, testified that she began suspecting that the defendant was molesting D.J. much earlier, approximately when D.J. was three or four-years old.

These incidents were ultimately reported to the police in the parishes of Jefferson and Orleans. Detective Larry Dyess handled the investigation for the Jefferson Parish Sheriff's Office. Detective Dyess testified that the defendant gave two statements during the investigation. In the first statement on January 18, 2000, the defendant denied the allegations. But later that day, the defendant entered his office in tears. The defendant made

another statement in which he said that he had "touched and fondled [his] daughter's breast and her vagina area" in November of 1998 in New Orleans.[2] Defendant denied that any inappropriate contact occurred in Jefferson Parish.

At trial, the defendant denied the allegations made against him. He acknowledged making a statement to Detective Dyess, but said that the incident in the statement had occurred accidently while he and the children were wrestling. Defendant testified that he believed the allegations were fabricated because D.J.'s mother was upset. According to defendant, he had told D.J.'s mother that he would not be able to purchase any gifts for D.J. in December of 1998, due to unexpected expenses. Defendant said that D.J.'s mother had left "foul language" on his answering machine soon after this conversation. Defendant's sister, V., testified that she did not believe the allegations against her brother and that she had never seen him engage in any inappropriate behavior with D.J. The defendant's new wife, B.J., also testified that she did not believe the allegations against defendant.

In this appeal, defendant alleges that the trial court erred in failing to grant his motion to quash, and in finding that La. C.Cr.P. art. 571.1 to be applicable to his prosecution for a violation of La. R.S. art. 14:78.1. The defendant further alleges that the evidence presented at trial was insufficient to support his conviction.

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[2] Detective Dyess prepared a supplemental report on this investigation on February 16, 2000, which was not introduced at trial, but was referred to by the defense in the hearing on the motion to quash. According to the report, the New Orleans Police Department "suspended" their investigation because they had not been able to contact the victim.

On appeal, where sufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) is raised, as well as to one or more trial errors, the reviewing court must first consider all of the evidence introduced at trial, even evidence that may have been admitted erroneously. *State v. Hearold*, 603 So.2d 731, 734 (La.1992). If the reviewing court determines that the evidence was insufficient, then the defendant may be entitled to a reduction of the conviction to a judgment of guilty of a lesser and included offense or an acquittal, and no further inquiry as to the trial errors is necessary. If, however, the reviewing court finds that the totality of the evidence presented satisfied the *Jackson* standard, it must then determine whether the trial court erred and, if so, whether the court's error was harmless or requires reversal of the conviction. *Id.* See also, *State v. Alexis*, 98-1145 (La. App. 5 Cir. 6/1/99), 738 So.2d 57, 64, *writ denied*, 99-1937 (La. 10/13/00), 770 So.2d 339.

The defendant contends that the evidence was insufficient to support his conviction because D.J.'s testimony was not credible and because the allegations were motivated by bitterness arising out of his divorce from D.J.'s mother.

In reviewing the sufficiency of evidence, an appellate court must determine that the evidence, whether direct or circumstantial, or a mixture of both, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime have been proven beyond a reasonable doubt. *Jackson v. Virginia*, *supra*; *State v. Juluke*, 98-0341 (La. 1/8/99), 725 So.2d 1291, 1293.

Defendant was convicted of aggravated incest, which is defined in LSA-R.S. 14:78.1, as follows:

> **A. Aggravated incest is the engaging in any prohibited act enumerated in Subsection B with a person who is under eighteen years of age and who is known to the offender to be related to the offender as any of the following biological, step, or adoptive relatives: child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew, or niece.**
>
> **B. The following are prohibited acts under this Section:**
>
> **(1) Sexual intercourse, sexual battery, aggravated sexual battery, carnal knowledge of a juvenile, indecent behavior with juveniles, pornography involving juveniles, molestation of a juvenile, crime against nature, cruelty to juveniles, parent enticing a child into prostitution, or any other involvement of a child in sexual activity constituting a crime under the laws of this state.**
>
> **(2) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child, the offender, or both.**

Sixteen-year-old D.J.'s testimony established that, in addition to other sexual acts the defendant, her biological father, touched and fondled her genitals with his hands and his penis on numerous occasions between 1995 and 1998. Thus, D.J.'s testimony demonstrated that the defendant committed aggravated incest.

Defendant argues that the evidence was insufficient because D.J.'s testimony was not credible. However, after hearing all of the testimony, the trial judge stated in his reasons for judgment that he found D.J. "to be a very credible witness and on the contrary, I question the veracity of the defendant." The credibility of the witnesses is within the sound discretion of the trier of fact, who may accept or reject, in whole or in part, the testimony

of any witness. The credibility of witnesses will not be reweighed on appeal. *State v. Rowan*, 97-21 (La. App. 5 Cir. 4/29/97), 694 So.2d 1052, 1056. We find that the evidence was sufficient to sustain the defendant's conviction for aggravated incest.

Defendant argues that, based on the evidence presented at trial, the charge of aggravated incest filed against Mr. Jefferson in August of 2000 was filed outside the four[-]year limitation for prosecution as set forth in La. C.Cr.P. art. 572; and is therefore, prescribed. Specifically, defendant contends that the State failed to show that defendant committed aggravated incest in Jefferson Parish after February of 1995, which was more than five years before the bill of information was filed. Defendant further argues that the trial court erred in finding La. C.Cr.P. art. 571.1 to be applicable to La. R.S. 14:78.1, improperly extending the limitation of prosecution to ten years.

Prosecution for a felony that is not necessarily punishable by imprisonment at hard labor must be instituted within four years of the offense having been committed. LSA-C.Cr.P. art. 572(2). The date prosecution is instituted is the date when the indictment is returned or the bill of information is filed. *State v. Gladden*, 260 La. 735, 743, 257 So.2d 388, 391 (La. 1972), *cert. denied*, 410 U.S. 920, 93 S.Ct. 1377, 35 L.Ed.2d 581 (1973). Where the issue of timeliness is raised, the State has the burden of proving the facts necessary to show that the prosecution was timely instituted. La. C.Cr.P. art. 577.

Because aggravated incest is a felony that is not necessarily punishable by imprisonment at hard labor, the applicable prescriptive period

is four years from the commission of the offense. See, LSA-R.S. 14:78.1(D). The State filed a bill of information on August 2, 2000, alleging that the defendant had committed aggravated incest in Jefferson Parish "on or between 1995 and 1998." Unless the time period was interrupted or suspended, the defendant could only be prosecuted for acts committed after August 2, 1996, which is four years prior to the filing of the bill of information.

Defendant alleged prescription first in a pre-trial motion to quash, that the trial court denied on the basis that the supplemental police report indicated that the offenses occurred between 1995-1998.

Thereafter, at the close of the State's evidence, the defendant moved for a judgment of acquittal on the same grounds. Without addressing the defendant's factual argument, the trial judge denied the motion, stating that prosecution was timely instituted based on LSA-C.Cr.P. art. 571.1. The defendant's emergency writ application filed with this Court was denied "on the showing made."

In this appeal, defendant contends that the trial judge incorrectly applied La. C.Cr.P. art. 571.1[3] to the present case because aggravated

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[3] In 1993, the Legislature deleted all sex offenses from Article 573 and enacted 571.1, which enumerates only sex offenses. *See*, 1993 La. Acts 592 § 1. For a discussion on the history of LSA-C.Cr.P. arts. 573 and 571.1, *see, State v. Farris*, 95-570 (La. App. 1 Cir. 11/16/95), 666 So.2d 337, 339-340.

In the 2001 Regular Session, the Legislature amended Article 571.1 to include incest and aggravated incest to the list of enumerated offenses. The amendments also deleted forcible rape and substituted "eighteen" for "seventeen" in the final sentence. The amendments were effective August 15, 2001, which was after the defendant's trial in June of 2001. See, 2001 La. Acts 2001, 533 § 1 and 207 § 1.

incest had not been included in the enumerated offenses for which there is an extended period for instituting prosecution at the time of defendant's trial. The judge acknowledged that aggravated incest was not among the enumerated offenses, but found that the article applied because La. R.S. 14:78.1(B), which defines aggravated incest, included many of the offenses enumerated in LSA-C.Cr.P. art. 571.1.

We find that, because aggravated incest was not included in LSA-C.Cr.P. art. 571.1 at the time the bill of information charging defendant was filed, the codal article did not extend the period for instituting prosecution for aggravated incest. In accord, *State v. Palmer*, 588 So.2d 746 (La. App. 5 Cir. 1991).

The defendant also contends that the trial judge improperly concluded that prosecution was timely instituted because the State failed to meet its burden of proof of showing that the bill of information was filed within four years of the last offense. In *State v. Hester*, 99-426 (La. App. 5 Cir. 9/28/99), 746 So.2d 95, 113, this Court recognized that evidence from both the hearing on the motion to quash and the trial may be considered in reviewing the denial of a motion to quash.

After carefully reviewing the evidence from the hearing and at trial, it appears that the defendant is correct in that the record does not identify any specific date after February of 1995 upon which aggravated incest occurred in Jefferson Parish. This seems to be due primarily to the fact that the

victim related the chronology of the events to her age or other circumstances, rather than to particular dates.[4]

We find that this matter should be remanded to reopen the hearing on the motion to quash. Compare *State v. Morris*, 99-3235 (La. 2/18/00), 755 So.2d 205[5]. In order for the State to meet its burden in the present case, the reopened hearing must reveal that an act of aggravated incest occurred within four years of the filing of the bill of information.

The defendant also requests that we review the record for errors patent. We have reviewed the record pursuant to La. C.Cr.P. art. 920, *State v. Oliveaux*, 312 So.2d 337 (La. 1975), and *State v. Weiland*, 556 So.2d 175 (La. App. 5 Cir. 1990), and find the following error.

The defendant's sentence is illegally lenient because the trial judge failed to impose certain mandatory conditions of probation. LSA-C.Cr.P.

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[4] For example, D.J. associated the first instances of abuse with living in Westwego, rather than a particular date. D.J. also linked some of the instances of abuse to her aunt's house where her father had lived, rather than to a particular date. She testified that nothing had occurred, however, at her grandmother's house in Marrero where she and her mother and brother had lived. She referenced her father's house on Dreaux Street, which was in New Orleans, as the location of the last incident of abuse. And, based on the context of the letter to her mother, the incidents where defendant actually had intercourse with D.J. occurred at the defendant's residence in New Orleans.

[5] In *Morris*, the Louisiana Supreme Court remanded for a rehearing on the defendant's motion to quash because the trial court had improperly given the State the "benefit of the doubt on the issue of prescription" regarding the time limitation for commencing trial. See also, *State v. Young*, 99-880 (La. App. 5 Cir. 1/12/00), 751 So.2d 364, in which this court remanded for a reopening of the suppression hearing because of the absence of a search warrant affidavit, and *State v. Green*, 96-0256 (La. App. 1 Cir. 12/10/96), in which the court remanded for a reopening of the motion to quash because it could not be determined whether the State would be able to meet its burden of proof regarding defendant's claim of double jeopardy.

art. 882(A) provides that "[a]n illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review." The Louisiana Supreme Court, in *State v. Williams*, 00-1725 (La. 11/28/01) 800 So.2d 790, recognized that a "defendant in a criminal case does not have a constitutional or statutory right to an illegal sentence." *Williams* further pointed out that "when a court complies with a nondiscretionary sentencing requirement, i.e., a mandatory minimum term or special parole provision(s), no due process violation is implicated. . . ." *Id.* at 798. Finally, the *Williams* court stated that an appellate court has the authority under the general provisions of Article 882 to correct sentencing errors other than those that fall under LSA-R.S. 15:301.1(A). *Id.* at 802. See also, *State v. Clemons*, 01-1032 (La. App. 5 Cir. 2/26/02), 811 So.2d 1047.

Thus, this Court is authorized to recognize and take appropriate action regarding correcting the defendant's illegally lenient. In this case, the trial judge suspended the *entire* sentence of imprisonment and placed defendant on active probation for five years without imposing the conditions of probation that are mandated when placing a sex offender on probation. The trial judge did not specify that the defendant would be prohibited from engaging in certain activities as a condition of his probation as provided by LSA-R.S. 15:538(A). The trial judge also failed to order the defendant to take a blood and saliva test as provided by LSA-C.Cr.P. art. 895(E) and La. R.S. 15:535.

Further, the record reflects that the defendant's sentence is indeterminate because the trial judge failed to specify the amount of the

defendant's probation supervision fee. La. C.Cr.P. art 879; La. C.Cr.P. 895.1(C). *State v. Roy*, 606 So.2d 77, 80 (La. App. 3 Cir. 1992).

We find that a remand for resentencing, under the procedures set out in *State v. Harris*, 93-1098 (La. 1/5/96), 665 So.2d 1164, is required in this case, because the failure of the sentencing court to abide by the statutes that contain mandatory conditions when placing a sex offender on probation, and because the judge did not specify the defendant's probation supervision fee.

For the above discussed reasons, the defendant's conviction and sentence are conditionally affirmed, and the matter is remanded to reopen the hearing on the motion to quash. We further remand for the trial court to impose the conditions of probation as required by law.

CONDITIONALLY AFFIRMED AND REMANDED

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA

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