NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 0947

STATE OF LOUISIANA

VERSUS

DAVID LANE JENKINS

TGW

Judgment Rendered: November 2, 2007

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of Washington, Louisiana
Trial Court Number 05-CR7-92869

Honorable Donald M. Fendlason, Judge

* * * * * * *

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BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

JJP Pettigrew, J. Concurs.
Carter, J. dissents and would affirm the conviction

WELCH, J.

The defendant, David Jenkins, was charged by grand jury indictment with one count of aggravated rape against the minor, R.J., a violation of La. R.S. 14:42(A)(4) (Count 1) and ten counts of sexual battery against the minor, E.J., violations of La. R.S. 14:43.1 (Counts 2-11). The defendant entered pleas of not guilty to all charges and was tried by a jury. The jury returned a responsive verdict of guilty of sexual battery on Count 1 and found the defendant not guilty on Counts 2-11. The trial court sentenced the defendant to a term of nine years at hard labor without benefit of probation, parole, or suspension of sentence. The trial court denied the defendant's post trial motions for new trial, verdict of acquittal, arrest of judgment, and reconsideration of sentence.

In this appeal, the defendant raised three counseled assignments of error and one pro se assignment of error. Because we have found a prejudicial trial error, we reverse the defendant's conviction, vacate his sentence, and remand this matter with instructions for a new trial.

FACTS

Background

Nancy and Durwood Jenkins are the parents of R.J. (the victim) and E.J. The defendant is the brother of Durwood Jenkins. At the time of trial, R.J. was approximately eleven years old. When R.J. was two-and-a-half years old, she was diagnosed with Pervasive Developmental Disorder, commonly referred to as autism. Autism is classified as a spectrum disorder, which generally affects communication and social skills. According to Rebekka Wascom, who was accepted by the trial court as an expert in the field of Education Diagnostics, autism is separate from a mental disability. Wascom explained that many people with autism have sensory processing dysfunctions, which means that they may be hypersensitive or hyposensitive to certain stimuli. Typically, people with autism

have difficulty with social interactions.

As the Educational Diagnostician for Washington Parish, Wascom is familiar with R.J. both professionally and personally. Wascom testified R.J. is considered to be classically autistic, in that her primary difficulty is with behavior and sensory-processing deficits, and she has extreme difficulty transitioning from a familiar environment to an unfamiliar environment. Although R.J. speaks, the rhythm of her speech is unusual in that it may be too slow or too fast.

Dr. William Colomb, Jr., accepted by the trial court as an expert in psychiatry and child and adolescent psychiatry, testified that the symptoms of autism center around difficulty in social skills, particularly verbal communication. Dr. Colomb testified that someone with autism usually exhibits a concrete thought process. According to Dr. Colomb, autistic children struggle socially, and tend to do things in a routine. Any disruption of an autistic child's routine is very distressing to that child. Because autistic children do not grasp abstract thoughts, they do not utilize lying as a method to get themselves into and out of situations. Dr. Colomb testified that it would be very difficult to coach an autistic child to say something had occurred that had not.

Dr. Colomb also testified that normally, girls begin to have an interest in sexual matters after reaching puberty, which is usually around the age of twelve to thirteen. However, autistic children typically do not seek out companionship, thus any sexual interest they develop tends to be "auto-interest." According to Dr. Colomb, it is highly unlikely that an eleven or twelve-year-old autistic girl would be able to fantasize about a sexual encounter and express such.

In late 2002, the defendant, who was single and lived in Lafayette, began to visit Nancy and Durwood more often. As the defendant grew closer to R.J. and E.J. he offered to baby-sit the girls. Nancy and Durwood agreed. Nancy became suspicious when R.J. began to exhibit strange behavior not long after the defendant

began spending time with her. Specifically, following some of the times when the defendant watched their children, both Nancy and Durwood experienced R.J. attempting to stick her tongue into their mouths when she kissed them good night. Both Nancy and Durwood explained to R.J. that this was improper. At other times, R.J. would tell her parents, "Let's play," and begin to unbuckle her parents' belts. Although this behavior was strange, Durwood admitted he never asked R.J. where she had learned it. Nancy testified that when she questioned R.J. as to where this behavior originated, R.J. did not respond.

Nancy also testified that several times after the defendant had watched her daughters, R.J. would break from the routine of laying on her back when her mother would clean her genital and anal area, by getting on her hands and knees and sticking her butt into the air.[1] Nancy also testified that for a while, R.J. could not get on any bed without taking her pants off. Nancy testified that other than the defendant, the children had no other regular sitter. In speaking with her husband, Nancy raised her concern that these behaviors were linked to the defendant; however, Durwood dismissed them, reasoning that his brother would never hurt their children.

Finally, a week prior to Christmas 2004, the defendant was at the Jenkins' home helping them prepare for a family reunion that was going to be held the next day. While the defendant was there, Nancy discovered he and R.J. had left the house and gone outside between the fence and a horse trailer. Nancy, not wanting to alert the defendant to her suspicions, and knowing she could not walk quietly through the fallen leaves to where they were, walked outside and called to them to help her feed the horses. According to Nancy, when she walked to where the defendant and R.J. were, the defendant was leaning against the bumper of the horse

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[1] Nancy explained that because R.J. still needed assistance with bathroom hygiene, she regularly cleaned her.

trailer, and R.J. was seated on the defendant's lap facing him with her legs wrapped around his legs. Nancy testified that this gave her a "bad feeling." As a result, Nancy resolved that she would not leave the defendant and R.J. alone again, and would decline his offers to baby-sit the girls.

December 25, 2004 incident

On Christmas morning of 2004, Nancy and Durwood were celebrating Christmas with R.J. and E.J., who were approximately seven and eight years old, along with Durwood's father, D.W.; Durwood's stepmother, Ann; and the defendant.

Around mid-morning, R.J. sat in the defendant's lap and asked him to go play with her. The defendant agreed and the two got up and went upstairs to R.J.'s room, which was the first room off the top of the staircase. Because of her suspicions about the defendant, Nancy decided to quietly see what R.J. and the defendant were doing. After the defendant and R.J. had been in R.J.'s room for a few minutes, Nancy walked halfway up the stairs and sat on the landing to listen. Nancy heard R.J. giggling and heard R.J. make a "strange noise" that she described as a "sexual noise." Nancy heard R.J. say, "I, you are, I am watering you." Alarmed, Nancy went up the stairs and into R.J.'s bedroom (the door was open). Nancy observed R.J. on her hands and knees on her bed with her clothes on. R.J. was pointing at the defendant's groin area and saying "You were watering me." The defendant was backing away from R.J. with the zipper of his pants down and his pants fly spread wide open. The defendant looked at Nancy and said, "I am sorry."

Nancy grabbed R.J. and carried her downstairs. According to Nancy, R.J. did not comprehend that her mother was upset. Nancy and her husband were able to put their children into a separate room. Not knowing what had occurred and concerned that Nancy was physically hurt, Ann Jenkins asked Nancy if anything

was wrong. The defendant came in and said, "Oh, she saw [R.J.] grabbing my crotch." Nancy responded, "No, you [were] standing there with your zipper wide open." At that point, Durwood angrily ordered the defendant from the house. Later that evening, when Nancy began to clean R.J., as she laid R.J. on her back to try to clean near her genitals, R.J. began screaming and kicking.

The following day, while her husband was at work, Nancy tried to speak with R.J. about what happened the previous day. According to Nancy, she tried to explain to R.J. why she had been crying the day before, so she told R.J. that the defendant had hurt her (Nancy) and whatever he did to R.J., he had also done to her.

Nancy then asked R.J. if she could demonstrate what the defendant did to her. According to Nancy, she told R.J. to pretend that she was the defendant and that Nancy would be R.J. R.J. then pushed her mother down on the bed, spread her mother's legs apart, and placed her mouth near her mother's genital area. Nancy asked R.J. if the defendant put his mouth on her private parts and R.J. responded that the defendant did. R.J. also answered "yes" to Nancy's questions addressing whether the defendant had put his "private parts" on or inside of R.J.'s "private parts." Nancy asked R.J. if she wanted the defendant to do this and R.J. said, "Yes."

The following day, Nancy and Durwood were referred to Detective Justin Brown of the Washington Parish Sheriff's Office so they could report what happened Christmas Day. Detective Brown went to the Jenkins's home and collected some items from R.J.'s bedroom that might have the presence of bodily fluids. The items, including R.J.'s blanket, were tested at the Louisiana State Police Crime Laboratory. No semen was detected on any of the items.

Detective Brown also arranged for R.J. to be interviewed by Jo Beth Rickles at the Children's Advocacy Center, but because of R.J.'s problems in

communicating, there was no statement given by R.J. Nancy testified she also took R.J. to the rape crisis center, but Nancy felt the sessions were of no help to R.J. and they upset R.J., so they stopped attending them. Nancy decided that she would not speak with R.J. about what had occurred.

Then, just prior to Thanksgiving in 2005, while at home, R.J. became upset and began to cry. When Nancy asked R.J. why she was crying, R.J. indicated that she was "worried" about Thanksgiving. In an effort to soothe R.J.'s apprehension over Thanksgiving, Nancy began to talk about what a good time they had at the previous Thanksgiving. During this interchange, R.J. revealed that she and the defendant had been alone in her room the previous Thanksgiving. When Nancy asked R.J. if the defendant had hurt her, R.J. responded, "He did hurt me." Nancy then asked R.J. if that was when the defendant "put his private part into your private part," and R.J. replied, "Yes."

In conjunction with the investigation of this matter, Dr. Monica Weiner, who worked for Children's Hospital, examined R.J. on January 4, 2005. Dr. Scott Benton, the Medical Director of the Audrey Hepburn Children at Risk Evaluation Center of Children's Hospital, reviewed Dr. Weiner's exam notes and report. Dr. Benton was accepted by the trial court as an expert in pediatric forensic medicine. Based on his review of Dr. Weiner's exam, there was no physical evidence to prove that R.J. neither did nor did not engage in sexual intercourse; however, physical findings indicating such would be rare. Dr. Benton testified that the fact that a child demonstrates a sex act to her parents is indicative that the child has had exposure to that sex act.

Following the Jenkins's complaint and investigation of this matter, a warrant was obtained for the defendant's arrest. The defendant voluntarily turned himself in to Detective Brown on May 25, 2005. After being advised of his rights, the defendant voluntarily made a statement. According to the defendant's statement,

on Christmas Day 2004, he and R.J. were playing in her room when R.J. dropped her pants, as if to "flash" him. The defendant admitted he quickly pulled his own pants down, exposing his penis to R.J., then pulled them back in place. Following this episode, R.J. came over to him and hugged him. At that point, R.J.'s mother entered the room and saw the defendant with his pants unzipped. The defendant denied any type of sexual activity occurred.

The State also presented testimony from E.J. at trial. E.J. testified that the defendant had tickled her in the wrong places, and she had witnessed the defendant frequently doing the same to R.J.

The defense presented testimony from Ann Jenkins, the stepmother of the defendant. According to Ann, this situation created great turmoil in their family. Ann testified that she did not believe the defendant harmed either R.J. or E.J. Although Ann was initially called by the State to testify as to what she observed on Christmas Day 2004, Ann revealed that Nancy never liked the defendant and displayed a bad attitude toward him.

Cornelia Holmes, the daughter-in-law of Ann Jenkins, also testified on the defendant's behalf at trial.[2] Holmes testified that she participated in a telephone conversation with Nancy after these charges were brought, wherein Nancy stated that she believed R.J. was made autistic by God so she could take the defendant off the street. Holmes reiterated that Nancy was not fond of the defendant. Nancy also told Holmes that she would get her way by whatever means necessary and that she would say whatever needed to be said because as the mother of a handicapped child, she had more credibility.

The defendant did not testify at trial.

SUFFICIENCY OF THE EVIDENCE

In his second counseled assignment of error, the defendant argues the trial

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[2] Cornelia Holmes is married to Clark Holmes, Ann Jenkins's son from her first marriage.

court erred in failing to grant a post-verdict judgment of acquittal. When issues are raised on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. The reason for reviewing sufficiency first is that the accused may be entitled to an acquittal under **Hudson v. Louisiana**, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), if a rational trier of fact, viewing the evidence in accordance with **Jackson v. Virginia,** 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) in the light most favorable to the prosecution, could not reasonably conclude that all of the essential elements of the offense have been proved beyond a reasonable doubt.[3] When the entirety of the evidence, including inadmissible evidence (which was erroneously admitted) is insufficient to support the conviction, the accused must be discharged as to that crime, and any discussion by the court of the trial error issues as to that crime would be pure dicta, since those issues are moot. **State v. Hearold**, 603 So.2d 731, 734 (La. 1992).

On the other hand, when the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must then consider the assignments of trial error to determine whether the accused is entitled to a new trial. If the reviewing court determines there has been trial error (which was not harmless) in cases in which the entirety of the evidence was sufficient to support the conviction, then the accused must receive a new trial, but is not entitled to an acquittal even though the admissible evidence, considered alone, was insufficient. **Hearold**, 603 So.2d at 734.

Thus, we must initially determine whether the entirety of the evidence, both admissible and inadmissible, was sufficient to support the conviction. The

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[3] Alternatively, the accused could be entitled to a reduction of his conviction to a judgment of guilty of a lesser-included offense. La. C.Cr.P. art. 821(E); **State v. Byrd**, 385 So.2d 248, 251 (La. 1980).

defendant was convicted of sexual battery. Louisiana Revised Statute 14:43.1 provides in pertinent part:

> A. Sexual battery is the intentional engaging in any of the following acts with another person where the offender acts without the consent of the victim, or where the act is consensual but the other person, who is not the spouse of the offender, has not yet attained fifteen years of age and is at least three years younger than the offender:
>
> (1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender; or
>
> (2) The touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim.

The evidence against the defendant consisted of expert testimony presented to bolster the credibility of R.J. Through the testimony of Wascom, Dr. Colomb, and Dr. Benton, the State presented a characterization of a typical autistic child as one who has difficulty communicating and one who struggles socially. Both Wascom and Dr. Colomb testified that in their opinions, it would be very difficult to coach this type of individual into reporting a fabricated encounter. Both Wascom and Dr. Colomb testified as to how autistic children operate in a world of concrete thought, as opposed to abstract thought. Dr. Colomb added that because lying is an abstract thought process, autistic children do not tell lies in order to get themselves into or out of certain situations.

Dr. Colomb further testified that children without autism generally develop an interest in sexual matters following puberty, at about age twelve or thirteen. Dr. Colomb stated that autistic children do not seek out companionship, and any sexual interest they develop would be an auto-interest. According to Dr. Colomb, seeking a sexual partner is not an interest autistics have. Dr. Colomb opined that it would be highly unlikely for an eleven or twelve-year-old autistic girl to fantasize about a sexual encounter and express those feelings.

Dr. Benton testified that R.J.'s mother reported to Dr. Weiner that R.J. had

demonstrated what had occurred between she and the defendant. According to Dr. Benton, in general, a child who demonstrates a sexual act has had exposure to that sexual act.

Nancy and Durwood both testified as to how R.J. began to exhibit strange behavior after the defendant had become their baby-sitter. This behavior included R.J.'s attempting to stick her tongue in her parents' mouths while kissing them good night and attempts by R.J. to unbuckle her parents' belt buckles while asking to play. Nancy further testified about the incident of finding R.J. in the defendant's lap as he leaned on the bumper of the horse trailer the week before Christmas 2004, and how it had given her a "bad feeling."

Nancy also provided an eyewitness account of finding the defendant and R.J. alone in R.J.'s room with the defendant's zipper wide open and R.J. on all fours on top of her bed. At the time, R.J. was pointing to the defendant's groin and made a statement regarding the defendant had been "watering" her.

According to Nancy, R.J. is not capable of lying. Nancy testified as to R.J.'s answers when Nancy questioned her on December 26, 2004, about what had occurred in R.J.'s bedroom. According to Nancy's testimony, R.J. clearly indicated that the defendant had touched her "private parts" with his mouth and his own genitals. Nancy also testified that when addressing R.J.'s apprehension about Thanksgiving, R.J. would respond affirmatively to Nancy's questions establishing that the defendant had raped R.J. the previous Thanksgiving. Clearly, this evidence, if admissible, when considered with the other testimony bolstering R.J.'s credibility, could provide a basis for a rational trier of fact to conclude beyond a reasonable doubt that the defendant committed a sexual battery on R.J.

R.J.'s own trial testimony established that she spoke with her mother about the defendant "hurting every boy or girl." R.J. testified that the defendant was present at their home for Thanksgiving 2004, and also remembered her mother

crying at Christmas 2004. When asked why her mother was crying at Christmas, R.J. responded that the defendant had "put her -- his private part inside her and made her cry."[4] R.J.'s testimony indicated this occurred on Christmas Day two years prior to trial. R.J. further testified that she remembered playing a game with the defendant upstairs at Thanksgiving. In reference to what occurred at Thanksgiving, the prosecutor then specifically asked R.J. if she remembered if what the defendant did to her mother, he also did to her, and R.J. replied, "he just did it to me."

We note the jury returned the responsive verdict of guilty of sexual battery. See La. C.Cr.P. art. 814(A)(8). As recognized by the Louisiana Supreme Court, our system of responsive verdicts is a distinct aspect of state law. See **State v. Porter**, 93-1106, p. 4 (La. 7/5/94), 639 So.2d 1137, 1140. Such a system provides a jury the opportunity to reach a "compromise" verdict. It is well settled that a jury may return a "compromise" verdict for whatever reason they deem fair, so long as the evidence is sufficient to sustain a conviction for the charged offense. **State v. Odom**, 2003-1772, p. 7 (La. App. 1st Cir. 4/2/04), 878 So.2d 582, 588, writ denied, 2004-1105 (La. 10/8/04), 883 So.2d 1026. We find the evidence in this case is sufficient to establish that the defendant committed the charged offense of an aggravated rape of R.J. Thus, the evidence also supports the compromise verdict of sexual battery.

Accordingly, while the defendant is entitled to a reversal of the conviction because of other trial errors (an issue discussed hereafter), he is not entitled to an acquittal based on the insufficiency of the overall evidence.

MOTIONS FOR MISTRIAL

In his first counseled assignment of error, the defendant argues the trial court

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[4] There is no allegation or evidence of any type of sexual relationship between Nancy and the defendant. Clearly, R.J.'s statement refers to Nancy's attempt to explain that whatever happened to R.J., also happened to her.

erred in failing to grant any of his motions for mistrial. At various times during the trial of this matter, the defendant moved for mistrial, but the trial court denied all of his motions. The defendant's motions for mistrial were based on the erroneous admission of hearsay statements, discovery violations, and the admission of evidence of other crimes.

Admission of Hearsay Testimony

In this portion of the assignment of error, the defendant argues the trial court erred in denying his motions for mistrial based on the admission of Nancy's testimony as to what R.J. told her about the defendant's actions involving her.

During the portion of Nancy's testimony wherein she described speaking with R.J. on December 26, 2004, regarding what had occurred the previous day, Nancy testified that she asked R.J. if she knew why she (Nancy) had been crying the day before, in an attempt to elicit information from R.J. Nancy testified she asked R.J. if she thought R.J. could show her, or tell her, what the defendant did. The defendant objected on the basis that Nancy had seen the December 25 incident and thus, it could not be considered a "first reporting" exception to hearsay. The defense counsel also objected to Nancy's relaying her statement to R.J. that whatever the defendant did to her, he did the same to her mother.

In overruling the defense counsel's objection, the trial court noted that Nancy's testimony was admissible under La. C.E. art. 801(D)(1)(d) as a first report by R.J. The trial court also noted the uniqueness of the situation in that R.J. is autistic and uses different methods of communication.

Nancy's testimony continued with her describing how she got R.J. to demonstrate what the defendant had done. Later, during Nancy's testimony in describing the conversation with R.J. wherein R.J. exhibited apprehension about the upcoming Thanksgiving 2005 holiday, which lead to R.J.'s revelation that the rape had occurred on Thanksgiving 2004, the defendant again objected and

informed the trial court that he would like to make a motion outside of the presence of the jury. The trial court "reserve[d] [the defendant's] right to the objection," allowed Nancy's testimony to continue, and the testimony of Ann and Durwood Jenkins to be heard prior to entertaining the motion. Later, the defense counsel was able to articulate his objection and reasons for his motion for mistrial. Although the defense counsel objected to the fact Nancy's testimony seemingly revealed another crime and/or a discovery violation by the State, the defense counsel did not argue his previous objection to Nancy's testimony about what R.J. told her just prior to Thanksgiving 2005 being a violation of the first reporter hearsay exception.

Under La. C.E. art. 801(D)(1)(d), the "initial complaint" of a victim concerning "sexually assaultive behavior" is considered to be nonhearsay. To qualify for admission under this provision, the declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement; and the statement must be consistent with the declarant's testimony. **State v. Jones**, 94-2579, p. 9 (La. App. 1st Cir. 2/23/96), 668 So.2d 751, 756.

In the instant case, R.J. testified at trial that she remembered speaking with her mother about the defendant "hurting every boy or girl." According to R.J.'s trial testimony, the defendant did not take his pants off when playing with her in her room. R.J. remembered her mother crying on Christmas Day and explained the reason was "Because [defendant] put her -- his private part inside her and made her cry."

The prosecutor then asked R.J. if she remembered playing with the defendant at Thanksgiving, to which R.J. replied that she remembered. The prosecutor asked R.J. if she remembered if "what [defendant] did to your mother he also did to you," R.J. responded, "Um -- he just did it to me."

Under these circumstances, we find R.J.'s trial testimony to be consistent

with Nancy's testimony as to what R.J. reported. Clearly, R.J.'s autism affects how she communicates. However, it is also evident from R.J.'s testimony that she was able to convey that the defendant had done the same thing to her, *i.e.*, put his "private" inside her "private," which R.J. understood to have happened to her mother. The fact that R.J.'s mother and the defendant did not have a sexual relationship does not affect the reference point used by R.J. to describe what occurred. At trial, R.J. was able to convey that the defendant had raped her. Because R.J.'s statements to her mother were the first statements R.J. made about the defendant's actions, the trial court properly ruled that Nancy's testimony was admissible as an exception to hearsay under La. C.E. art. 801(D)(1)(d).

This portion of the assignment of error is without merit.

Discovery Violations and Other Crimes Evidence

We also note that the defendant objected to E.J.'s testimony that she had seen the defendant tickling R.J. in the "wrong" places. The defendant objected on the basis that E.J.'s testimony improperly referenced other crimes since these actions could be viewed as a sexual battery. The trial court overruled the defendant's objection, reasoning that sexual battery was a responsive verdict to the offense of aggravated rape.

Louisiana Code of Evidence article 412.2(A), provides that when an accused is charged with acts that constitute a sex offense with a victim 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 of La. C.E. art. 403. Thus, the testimony of E.J. could also have been properly admitted using the procedure specified in La. C.E. art. 412.2.

This portion of the assignment of error has no merit.

In this portion of the assignment of error, the defendant asserts the trial court erred in failing to grant his motion for mistrial based on the State's failure to comply with its continuing duty to provide discovery. The defendant specifically argues the State indicated in pretrial discovery that the aggravated rape occurred on December 25, 2004; however, at trial, the State presented testimony from Nancy's relating how R.J. described being raped by the defendant on Thanksgiving Day 2004. Following this testimony, the defendant objected and moved for a mistrial.

The grand jury indictment in this matter alleges that the eleven counts the defendant was charged with committing occurred between January 1, 2003 and December 25, 2004. On November 4, 2005, the defendant filed a pro se motion for a bill of particulars and discovery and inspection. In the motion, the defendant requested the exact date and time of the commission of the offenses charged. On December 7, 2005, counsel for the defendant filed a motion for discovery requesting this same information.

The record reflects the State provided written answers to the defendant's motions for discovery, albeit, there is no file stamp indicating when these pleadings were filed into the record, nor are the pleadings actually signed by a prosecutor. Nevertheless, the State's answer sets forth that as to Count 1 (aggravated rape of R.J.) the time of the offense was alleged to be December 25, 2004, between 9:00 a.m. and 12:00 p.m. Moreover, in the State's answer to discovery, the State sets forth only two witnesses to the aggravated rape charge, R.J. and the defendant. In these answers, the State provided that Nancy heard sounds, which may have occurred during the commission of the offense. Clearly, this tracks Nancy's description of the December 25, 2004 incident, despite the fact that the State maintained at trial that specific incident would not be alleged as the aggravated rape the defendant was charged with committing.

In arguing against the motion for mistrial, the prosecutor explained that the

grand jury indictment dated all of the offenses the defendant was charged with as occurring in 2003 or 2004, and that Nancy's testimony explained that when she spoke to R.J. the day after the Christmas 2004 incident, she thought the rape had occurred at another time because of the way R.J. expressed it. The prosecutor also explained that he provided the defendant's original trial counsel (Chris Richaud) with written answers because he was unfamiliar with him and at that particular time, it was the State's position that the aggravated rape occurred on December 25, 2004. The prosecutor indicated that when Marion Farmer, the defendant's trial counsel, enrolled as counsel (order signed October 25, 2005) he granted Mr. Farmer open-file discovery. According to the prosecutor, it was not until shortly before Thanksgiving 2005, that he learned that R.J. indicated the rape had occurred the previous Thanksgiving. The prosecutor went on to indicate the State would not be presenting any evidence that an aggravated rape occurred on December 25, 2004.

The defense counsel countered that all of the testimony, including the history given to the doctor, related to a Christmas Day incident. The only indication of a Thanksgiving Day incident came during Nancy's testimony. The defense counsel further argued that such references of other crimes should have been addressed in a pretrial hearing.

In denying the defendant's motion for mistrial, the trial court noted that the charging instrument alleged the offenses, including the aggravated rape, occurred between January 1, 2003 and December 25, 2004. The trial court also noted that the prosecutor argued in his opening statement that the aggravated rape occurred on Thanksgiving Day 2004. Regarding the issue of the State's discovery response indicating that December 25, 2004 was the date of the aggravated rape, the trial court stated, "the Court does not know what the position to take in that regard other than to deny the mistrial."

The articles regulating discovery are intended to eliminate unwarranted prejudice that could arise from surprise testimony. Discovery procedures enable the 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 failure to fully disclose, such prejudice may constitute reversible error. **State v. Selvage**, 93-1435, p. 6 (La. App. 1st Cir. 10/7/94), 644 So.2d 745, 750, writ denied, 94-2744 (La. 3/10/95), 650 So.2d 1174.

It has long been held that the State is limited in its proof at trial by the facts recited in its bill of particulars. **State v. Ford**, 349 So.2d 300, 304 (La. 1977); see **State v. Mann**, 250 La. 1086, 1094, 202 So.2d 259, 262 (1967). The nature of the State's answers to the defendant's discovery request makes it questionable whether they can be considered an actual bill of particulars. Nevertheless, the State did represent that it maintained the aggravated rape charge occurred on December 25, 2004.

Louisiana Code of Criminal Procedure article 729.3 requires a party to "promptly" notify the other party and the court of the existence of additional evidence discovered after compliance with an earlier discovery order. The court may impose sanctions when it is brought to its attention that a party has failed to comply with discovery and inspection or an order issued pursuant thereto. La. C.Cr.P. art. 729.5(A). These sanctions include ordering the party to permit the discovery or inspection, granting a continuance, ordering a mistrial (on the defendant's motion), excluding the evidence, or entering such other order, other than dismissal, as may be appropriate. Louisiana Code of Criminal Procedure article 729.5 is permissive and does not mandate any particular remedy. Mistrial is a drastic remedy, which should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Failure to comply with discovery merits a mistrial only when the State's

conduct substantially affects the defendant's right to prepare a defense, see **State v. Mitchell**, 412 So.2d 1042, 1044-45 (La. 1982), **Selvage**, 93-1435 at pp. 5-6, 644 So.2d at 749-50, or when it rises to the level of a legal defect. **State v. Black**, 34, 688, p. 13 (La. App. 2nd Cir. 5/9/01), 786 So.2d 289, 298, writ denied, 2001-1781 (La. 5/10/02), 815 So.2d 831.

In **Mitchell**, the Louisiana Supreme Court addressed what constituted conduct that substantially affected a defendant's right to prepare a defense. In that case, the defendant was charged with indecent behavior with a juvenile. On the morning of the second day of trial, the prosecutor received a letter written by the defendant and sent to the victim's parents wherein he sought their forgiveness. It was not until the State's cross-examination of the defendant that it provided the defense with notice of the existence of the letter and its contents. The defendant objected and moved for a mistrial. **Mitchell**, 412 So.2d at 1043-44.

The supreme court found that if the State had furnished the defendant with the letter prior to trial, or even prior to the beginning of his testimony, that the defendant might have had time to prepare a defense. The court also noted that arguably, had the defendant been aware of the existence of the letter, he may have pursued a different trial strategy, including the choice of not testifying on his own behalf. Because the State's failure to abide by its continuing duty to disclose this type of evidence,[5] the supreme court held that the defendant had been prejudiced in his right to prepare a defense and a mistrial should have been granted, or the State should have been prevented from introducing the letter. **Mitchell**, 412 So.2d at 1044-45.

In **State v. Smith**, 489 So.2d 255 (La. App. 5th Cir. 1986) (on rehearing), the court was faced with a similar situation wherein the State failed to fulfill its

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[5] The defendant in **Mitchell** had sought discovery on any inculpatory evidence, confession, statements, and/or admissions.

discovery obligations. In that case, the defendant was charged with aggravated crime against nature. After open file discovery was granted, the prosecutor learned that the defendant had made a statement to his wife indicating he had molested the victim. The prosecutor was then allowed to introduce this statement at the defendant's trial. The court held that the prosecutor had a duty to disclose the existence of such a statement as soon as he discovered it. Following **Mitchell**, the fifth circuit held that the State's failure to disclose the existence of this statement impaired a substantial right of the defendant's, *i.e.*, the right to prepare his defense. The court reversed the defendant's conviction and remanded the matter for further proceedings. **Smith**, 489 So.2d at 264.

In the present case, the defendant argues that it was impossible for him to defend against the charge of aggravated rape when the State provided December 25, 2004, as the date of the offense in response to discovery, yet asserted at trial the aggravated rape occurred on Thanksgiving Day 2004. The defendant argues that the fact there was no physical evidence found for the Christmas Day incident had no evidentiary value to him in attempting to defend against an alleged Thanksgiving Day offense. The defendant also maintains that there were many guests at the Jenkins's home on Thanksgiving and had he been aware the allegations arose from that date, he could have called witnesses to dispute that charge.

We agree. The State's actions in this case are entirely too prejudicial for the defendant to have received a fair trial. Clearly, when this investigation began, the State was operating under the theory that the allegation of aggravated rape occurred during the December 25, 2004 incident at the Jenkins's home. By Nancy's own testimony, it was not until just prior to Thanksgiving 2005, that she learned that R.J. associated the previous Thanksgiving holiday with being raped by the defendant. To the contrary, the State's written responses to the defendant's

discovery requests indicated the rape occurred on December 25, 2004.

Although the prosecutor maintained that he offered Mr. Farmer "open-file" discovery after Mr. Farmer replaced the defendant's original trial counsel, there is no indication that Mr. Farmer was ever informed that the date provided in the State's answer to the bill of particulars was erroneous in light of the November 2005 revelation by R.J. to her mother.

It is clear that in November 2005, the State learned that R.J. was claiming to have been raped on Thanksgiving Day 2004, which contradicted the State's earlier allegation that the aggravated rape occurred on Christmas Day 2004. Trial in this matter began on August 28, 2006. There is no evidence that the State supplemented its discovery answers to reflect this change, in violation of its continuing duty to disclose under La. C.Cr.P. art. 729.3. We note the defendant was only charged with one count of aggravated rape and that charge was the only offense allegedly committed against this particular victim. The severity of this charge in light of the other counts charged against the defendant, makes the State's identification of December 25, 2004, all the more important to an accused attempting to prepare a defense.

Trial courts may offset the effect of late disclosure by calling a recess or granting a continuance. See **State v. Busby**, 464 So.2d 262, 264 (La. 1985), cert. denied, 474 U.S. 873, 106 S.Ct. 196, 88 L.Ed.2d 165 (1985). Although the trial court has wide discretion in fashioning a remedy, the propriety of the remedy depends upon the circumstances of the case. See **State v. Knighton**, 436 So.2d 1141, 1153 (La. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed. 725 (1984); **State v. Norwood**, 396 So.2d 1307, 1309 (La. 1981).

Under these circumstances, the State's failure to notify the defendant that the date of the alleged offense had changed to a completely different holiday constitutes reversible error. By not being informed that following the defendant's

arrest for the December 25, 2004 incident, R.J. later claimed the rape occurred on Thanksgiving Day 2004, the defendant's right to present a defense was substantially affected. It is inherently unfair to a defendant to inform him that the offense he is charged with occurred on a specific date, then at trial, allege a different date of offense. We cannot see how such an error could not affect the preparation of his defense. The record indicates that until Nancy's testimony revealed an allegation of a Thanksgiving Day 2004 incident, the defendant had not cross-examined any of the witnesses the State used to bolster R.J.'s credibility about such an occurrence. Moreover, we are not persuaded that the range of dates alleged in the indictment placed the defendant on notice that he would be tried with an offense that differed from the date provided by the State's discovery responses. This particular charge differed from the remainder of the counts contained in the bill of indictment in severity and was against a different victim. Accordingly, a mistrial should have been granted.

This assignment of error has merit.

PRO SE ASSIGNMENT OF ERROR

The defendant filed a pro se brief raising as error that the trial court failed to assign appropriate responsive verdicts in accordance with La. C.Cr.P. art. 814(A)(8.1). In conjunction with this assignment of error, the defendant also asserts the sufficiency of the evidence used to support his conviction. We note that we have already addressed the sufficiency of the evidence in this matter. However, we note that the only objection made by the defense counsel to the jury charges was that the trial court unnecessarily inserted a reference to clothing in the definition of sexual battery, which objection was overruled by the trial court.

A conviction will not be overturned on the grounds of an erroneous jury charge unless the disputed portion, when considered in connection with the remainder of the charge, is erroneous and prejudicial. An erroneous instruction is

subject to harmless error review or in the case of an ineffective assistance of counsel claim, an analysis of whether the defendant was prejudiced by the error. The question becomes, whether it appears beyond a reasonable doubt, that the erroneous instruction did not contribute to the jury's finding of guilt or whether the error is unimportant in relation to everything else the jury considered, as revealed in the record. Stated another way, the appropriate standard for determining harmless error is whether the guilty verdict was surely unattributable to the jury charge error. **State v. Cooper**, 2005-2070, p. 9 (La. App. 1st Cir. 5/5/06), 935 So.2d 194, 199-200, writ denied, 2006-1314 (La. 11/22/06), 942 So.2d 554. As stated earlier, the jury's verdict of guilty of sexual battery is supported by the evidence, thus, we find any error regarding the definition of sexual battery to be harmless.

This is not the only error that the defendant now complains of on appeal. As noted above, he raised the issue of the appropriate responsive verdicts under La. C.Cr.P. art. 814(A)(8.1).[6] A claim that a jury charge was improper will not be considered on appeal if no contemporaneous objection was made. La. C.Cr.P. arts. 801(A) and 841. **Cooper**, 2005-2070 at p. 8, 935 So.2d at 199. Accordingly, the defendant has not preserved any other issue for review regarding the jury charges.

This assignment of error lacks merit.

CONCLUSION

In reversing the defendant's conviction because of trial error, we must remand this matter for a new trial. We note that the defendant was originally charged with one count of aggravated rape against R.J. In his previous trial, the jury returned a responsive verdict of guilty of sexual battery. In **State v. Simmons**, 2001-0293, p. 7 n.5 (La. 5/14/02), 817 So.2d 16, 21 n.5, the Louisiana

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[6] This list of responsive verdicts was added in 2006 and took effect less than two weeks prior to the instant trial.

Supreme Court noted that under La. C.Cr.P. art. 598, a conviction of a lesser offense is an acquittal of the charged offense. Therefore, the defendant in that case could not be retried on a charge of unauthorized entry of an inhabited dwelling when the jury returned a responsive verdict of the lesser crime of attempted unauthorized entry of an inhabited dwelling. The supreme court found the trial court erred in refusing the defendant's request to instruct the jury that the offense of criminal trespass, a misdemeanor offense, would be a responsive verdict to the charge of unauthorized entry of an inhabited dwelling.

Louisiana Code of Criminal Procedure article 598(A) states:

> When a person is found guilty of a lesser degree of the offense charged, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial.

The Louisiana Supreme Court in **Simmons** reasoned that the defendant could not be retried for the greater offense with which he was originally charged, because under La. C.Cr.P. art. 598(A), he was acquitted of that charge when the jury returned a responsive verdict of a lesser charge. Likewise, in the present case, the defendant can only be retried for the offense of sexual battery against R.J., having been acquitted of aggravated rape because the jury returned a responsive verdict of a lesser charge.

Because of the result achieved in this matter, we pretermit discussion of the defendant's third counseled assignment of error regarding his sentence.

For the above and foregoing reasons, the defendant's conviction is reversed, his sentence vacated, and this matter is remanded for a new trial on sexual battery consistent with the views expressed in this opinion.

CONVICTION REVERSED, SENTENCE VACATED, REMANDED FOR NEW TRIAL.