NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 0656

STATE OF LOUISIANA

VERSUS

RANDALL SCOTT LAURENT

Judgment Rendered: October 31, 2008

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 404213

The Honorable Elaine W. Dimiceli, Judge Presiding

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Walter P. Reed **District Attorney** **By: Kathryn Landry** **Special Appeals Counsel** **Baton Rouge, Louisiana**	**Counsel for Appellee** **State of Louisiana**
Frank Sloan **Mandeville, Louisiana**	**Counsel for Defendant/Appellant** **Randall Scott Laurant**

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BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

JJ, Guidry J. dissents and assigns reasons

GAIDRY, J.

The defendant, Randall Scott Laurent, was charged by bill of information with molestation of a juvenile when the offender has control or supervision over the juvenile, a violation of La. R.S. 14:81.2A. The defendant entered a plea of not guilty and was tried before a jury. The jury found the defendant guilty as charged. The trial court sentenced the defendant to fifteen years imprisonment at hard labor. The State filed a habitual offender bill of information. A hearing was held on the habitual offender bill of information, and the defendant was adjudicated a fourth-felony habitual offender. The trial court vacated the prior sentence and sentenced the defendant to thirty-five years imprisonment at hard labor. The defendant now appeals, challenging the sufficiency of the evidence to support the conviction and habitual offender adjudication. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

During the summer of 2004, F.L.[1], the fifteen-year-old victim, was living with her family in Lacombe, Louisiana. During the evening hours of July 9, 2005, the victim's mother, V.T., instructed her to walk across the street to her grandmother's residence to store a bag of ice. The family had purchased food and supplies in preparation for a hurricane in the area. V.T. gave F.L. a key to the residence since her grandmother was not home. After F.L. placed the ice in her grandmother's freezer, she observed the defendant, F.L.'s adult cousin, standing in the living room. According to F.L., the defendant "stopped" her and started kissing her on the neck and mouth. F.L. told the defendant, "we can't do anything," but the defendant continued. He instructed her to sit on the sofa and removed her lower clothing, including shorts and underwear. The victim further

[1] The victim's date of birth is June 11, 1989. In accordance with La. R.S. 46:1844W, the victim herein is referenced only by her initials or as "the victim." We have also referenced the minor victim's immediate family members by initials to protect her privacy.

detailed acts that included oral sex and vaginal penetration. Similar incidents occurred at the defendant's residence, on prior occasions when F.L. was there to babysit the defendant's children.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant argues that the evidence was insufficient to support the verdict. The defendant contends that the statute on which his conviction is based, La. R.S. 14:81.2, is ambiguous. The defendant notes that the definition of the offense in section A of the statute includes the following language, "by the use of influence by virtue of a position of control or supervision over the juvenile[,]" while section C, which specifies the penalty, eliminates the words "a position of." The defendant supposes that section C was intended to establish a more severe punishment for an offender who used a position of control or supervision as set out in section A, rather than to create a separate element of supervision or control. The defendant argues that confusion was magnified at the trial in this case because the State argued to the jury that the nearly ten-year difference in age between the defendant and the victim and the victim's special-education status made her susceptible to being intimidated or controlled. The defendant notes that during deliberations the jury sent a note to the court requesting clarification on the words control and supervision. Without providing definitions, the trial court read La. R.S. 14:3 to the jury. The trial court further instructed the jury to use its common sense. The defendant concludes that any ambiguity about the elements of the offense must be resolved in his favor.

The defendant also contends that there was an absence of testimony or evidence that the defendant had any position of authority or control over the victim. The defendant further contends that there was insufficient evidence that he used force, violence, duress, menace, psychological intimidation, or threat of great bodily harm. The defendant argues that there was no testimony that the victim

resisted the defendant. While the victim testified that the defendant pushed her head down to his penis, the defendant argues that the pushing could have been part of the sex act. As noted by the defendant, Detective Wanda Jarvis testified that the victim indicated that the defendant never forced her to do anything and concluded that the victim was doing what an adult told her to do, as taught by her parents.

The Constitutionality of La. R.S. 14:81.2

We will begin with the defendant's challenge of the constitutionality of La. R.S. 14:81.2. We note that while the defendant briefed this argument, it is not formally assigned as error. Further, the defendant is raising this issue for the first time on appeal. Ordinarily, a defendant is not entitled on appeal to complain of errors not raised below. La. Code Crim. P. art. 841. However, the Louisiana Supreme Court has consistently held that the facial unconstitutionality of a statute on which a conviction is based is an error discoverable by the mere inspection of the pleadings and proceedings, without inspection of the evidence. Thus, this issue is subject to appellate review under La. Code Crim. P. art. 920, even though the defendant did not comply with the contemporaneous objection rule of La. Code Crim. P. art. 841. *State v. Hoofkin*, 596 So.2d 536 (La. 1992) (per curiam).

Statutes are presumed to be valid; whenever possible, the constitutionality of a statute should be upheld. Because a state statute is presumed constitutional, the party challenging the statute bears the burden of proving its unconstitutionality. Attacks on the constitutionality of a statute may be made by two methods. The statute itself can be challenged, or the statute's application to a particular defendant can be the basis of the attack. Constitutional challenges may be based upon vagueness. *State v. Gamberella*, 633 So.2d 595, 601-02 (La. App. 1st Cir. 1993), writ denied, 94-0200 (La. 6/24/94), 640 So.2d 1341.

In this case, the defendant does not attack the statute's application to his particular conduct but argues the statute is unconstitutional on its face because it is

ambiguous. The constitutional guarantee that an accused shall be informed of the nature and cause of the accusation against him requires that penal statutes describe unlawful conduct with sufficient particularity and clarity that ordinary persons of reasonable intelligence are capable of discerning the statute's meaning and conforming their conduct thereto. *Gamberella*, 633 So.2d at 602. See U.S. Const. amend. XIV, § 1; La. Const. art. I, §§ 2 & 13. In addition, a penal statute must provide adequate standards by which the guilt or innocence of the accused can be determined. In determining the meaning of a statute and hence its constitutionality, penal statutes must be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision. La. R.S. 14:3; *Gamberella*, 633 So.2d at 602.

The crime of molestation of a juvenile is, in pertinent part, defined by La. R.S. 14:81.2A as follows:

> the commission by anyone over the age of seventeen of 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, with the intention of arousing or gratifying the sexual desires of either person ... by the use of influence by virtue of a position of control or supervision over the juvenile.

First, we note that the defendant's argument in support of his claim that the statute is ambiguous is not clearly developed. Nonetheless, we find that La. R.S. 14:81.2 satisfies the above-noted requirements under the applicable rules of construction. Under the terms of the statute, the conduct proscribed is unambiguous. As noted in Section A, the use of control or supervision is involved in one form of the offense. As noted by the defendant, Section C governs the punishment for this form of the offense. The elements are plainly stated in Subsection A of the statute. We find that the statute describes the prohibited conduct with sufficient particularity and clarity that ordinary persons of reasonable intelligence are

capable of discerning the statute's meaning and conforming their conduct thereto. Moreover, we do not find that jury confusion contributed to the verdict. Thus, we now turn to the other arguments raised in this assignment of error.

The Sufficiency of the Evidence

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That standard of appellate review, adopted by the Legislature in enacting La. Code Crim. P. art. 821, is whether the evidence, when 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 had been proved beyond a reasonable doubt. *State v. Brown*, 2003-0897, p. 22 (La. 4/12/05), 907 So.2d 1, 18. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. *State v. Graham*, 2002-1492, p. 5 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420.

As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. *State v. Richardson*, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. *Richardson*, 459 So.2d at 38. When a case involves circumstantial evidence and the trier of fact reasonably rejects a hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. *State v. Moten*, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is

contrary to the weight of the evidence. *State v. Smith*, 600 So.2d 1319, 1324 (La. 1992). In 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. Thomas*, 2005-2210, p. 8 (La. App. 1st Cir. 6/9/06), 938 So.2d 168, 174, writ denied, 2006-2403 (La. 4/27/07), 955 So.2d 683.

According to the testimony presented at the trial, F.L. was a fifteen-year-old special-education student at the outset of the incidents in question. The victim was also obese and suffered from sleep apnea. The defendant is the victim's distant cousin as her great-grandmother and the defendant's grandfather are siblings. Thus, the victim knew the defendant as she grew up and the defendant attended family gatherings. V.T. testified that she had a good relationship with and trusted the defendant around her daughter before the incidents in question were divulged. F.L. was seventeen years old at the time of the trial. The incident that occurred at the victim's grandmother's home was the most recent. During the trial and during her interview that took place at the Children's Advocacy Center (CAC), F.L. specifically described the acts that took place when she and the defendant were alone in her grandmother's home. During the trial, the victim specifically testified that after the defendant removed her lower clothing and instructed her to lie down on the sofa, he got on top of her and "penetrated" her vagina with his penis. She added that he also licked her vagina. During the CAC interview, F.L.'s account of this incident was similar. However, therein F.L. specified that the defendant "tried" to penetrate her vagina with his penis and began using his fingers when he had difficulty doing so. F.L. also stated during that interview that the defendant touched her butt with his finger and grabbed her legs. She specified that the defendant placed his tongue inside her vagina.

F.L.'s parents became concerned when they noticed that she had not returned from her grandmother's home. The defendant's actions were interrupted when the victim's father knocked on the door to check on her. At that point, F.L. was able to leave the home as the defendant ran to hide. V.T. noticed that some of F.L.'s hair rollers were missing as she passed her parents to enter their home. F.L. went to the bathroom, locked herself in, and began to cry. F.L. did not want to disclose any details but ultimately divulged some facts to an uncle with whom she had a close relationship. After being privy to the conversation F.L. had with her uncle, V.T. called the police and F.L. was taken to a local emergency room.

Detective Wanda Jarvis investigated the incident and was present during the emergency room examination. Detective Jarvis testified that the examination was ended prematurely, as the victim was in pain. Based on her observations and interview of the victim, Detective Jarvis concluded that the defendant did not use physical force in committing the acts and that the victim complied with his desires because he was an adult. The examination of the victim was postponed for three days (it was scheduled to be resumed July 12th).

The defendant was arrested on July 9th. After his arrest, the defendant gave a recorded statement to the police. During the defendant's statement, he confessed to engaging in oral sex (specifying that the victim performed oral sex on him), digital penetration, and further admitted that he tried to have intercourse with the victim on more than one occasion. The defendant stated that all of the incidents were consensual and that he did not rape the victim. As to the incident that took place at the victim's grandmother's residence, the defendant claimed that the victim told him to come to the residence and began to kiss and hug him when he got there. He stated that he put his finger in the victim's vagina before her father knocked on the door. The defendant stated that he ran and hid under the victim's instruction. The defendant stated that the acts of oral sex took place at his house.

He confirmed that the victim previously babysat for him. He added that he had been consuming alcohol and smoking marijuana before returning home on an occasion when the victim babysat for him. He stated that he did not think any sexual activity took place between him and the victim on that particular occasion but admitted that he could not remember. The defendant stated that he did not know the victim's age at the time of the offenses and did not think she was "that young." The defendant's date of birth was stipulated to as October 1, 1979.

After the most recent incident was reported, F.L. began divulging her factual accounts of the prior incidents that took place at the defendant's residence. F.L. babysat for the defendant and his wife during the summer of 2004, just after F.L.'s fifteenth birthday. One of the incidents that occurred during a babysitting occasion took place in the defendant's living room in the middle of the night, after the defendant and his wife returned home. When the other occupants, including the defendant's wife and children, were asleep, the defendant started kissing the victim, removed her clothing, and placed his body over her body. The victim testified that the defendant then "started to have sex" with her, clarifying that he penetrated her "privates" with his penis. She further clarified that "privates" was a reference to her vagina. She stated that the actions were painful and the defendant told her to be quiet as she groaned. During the CAC interview, F.L. stated that she told the defendant that he was hurting her and recalled him telling her to be tough and to take it. She stated that the defendant did not wear a condom. After conveying that the defendant ejaculated on her leg, she stated, "and that really grossed me out." The victim stated that when the defendant's wife would ask her to babysit, she did not want to refuse because she did not want to be questioned.

One of the incidents took place in the defendant's shed, also during nighttime hours. On that occasion, the defendant "made me give him oral sex" by repeatedly pushing her head down as she attempted to lift it and slapping his penis

on her lips when she initially refused to open her mouth. At the end of the CAC interview, F.L. clearly conveyed that she had no desire to engage in these activities with the defendant and felt as though he "raped" her. The victim also stated that the defendant was "way older" and "kin" to her. She stated that she wanted to wait until she was married to engage in such activities and noted that the defendant took that opportunity away from her.

Dr. Scott Benton, of the Children's Hospital (an expert in forensic pediatric medicine), performed follow-up services to the victim's emergency room visit. Dr. Benton noted the victim's weight problem, sleeping disorder, and education status. Dr. Benton noted that F.L.'s emergency room physical examination showed that she had an excoriation (a superficial tearing of the skin) in the back end of the entrance of her vagina. Since F.L. was uncomfortable with the evaluation of her genitalia, Dr. Benton's physical examination of F.L. was incomplete and did not produce any further physical findings.

Dr. Benton testified that the delayed and sporadic disclosure of the incidents is common among victims. He also testified that the victim's education status was significant since it could enhance the effects of naivete and external factors like intimidation on a person's likelihood to become victimized and delay disclosure. He added that such a victim would be more likely to assign blame to him or herself. Age discrepancy should also be a factor in assessing the absence or presence of intimidation or control. Dr. Benton also noted that the chance of finding physical evidence is low in sexual assault cases.

The victim's mother testified that she trusted the defendant before the incidents in question were uncovered. As the defendant was the victim's older-adult cousin, she was entrusted in the defendant's care when she stayed at the defendant's home overnight on the babysitting occasions. The defendant was the

only adult present during the instant offense that took place at the victim's grandmother's home.

Viewing the evidence in the light most favorable to the prosecution, we find that the evidence in the record sufficiently supports the instant conviction. It is clear that the defendant had a position of authority and control over the victim and also used physical force in at least some instances. The State's evidence, including the defendant's confession and the victim's specific accounts of the incidents, overwhelmingly established the elements of molestation of a juvenile. The victim was under seventeen years of age at the time of the incidents and there was a near ten-year gap between the victim's age and the defendant's age. The defendant committed lewd or lascivious acts upon the victim with the intention of gratifying his sexual desires by use of influence by virtue of his position of control or supervision over the victim. For the above reasons, assignment of error number one is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant contends that in accordance with the minutes and the list of evidence filed by the State on July 26, 2007, the State only introduced evidence of two prior convictions. The defendant concludes that his adjudication as a fourth-felony offender is, therefore, not supported by sufficient evidence.

In order to obtain a multiple offender conviction, the State is required to establish both the prior felony convictions and that the defendant is the same person convicted of those felonies. The habitual offender bill of information is based on the following prior convictions: a September 23, 1997 conviction for possession of Diazepam in case number 267525 of the 22nd Judicial District Court; a May 7, 1999 conviction for illegal possession of stolen things in case number 298234 of the 22nd Judicial District Court; and an April 17, 2002

conviction for possession of marijuana, second offense, in case number 330339 of the 22nd Judicial District Court. All three prior convictions are based on guilty pleas.

The July 26, 2007 proceedings were set for a habitual offender hearing and the matter was continued. As noted by the defendant, the minute entry and the State's list of evidence (located in the record, immediately following the habitual offender bill of information) for the July 26, 2007 proceedings only list two prior convictions. However, a review of the transcript for the July 26, 2007 proceedings reveals the following. The State filed into evidence Exhibit 1 and specified that it contained certified evidence of the defendant's "three prior convictions." The defense attorney acknowledged receipt of such evidence. The defense attorney also stipulated to the defendant's fingerprints on the felony bills of information and noted before subsequent sentencing that there was no objection to identity. While the defendant filed objections to the form of two of the predicate guilty pleas, he did not contest the number of predicates as clearly listed in the habitual offender bill of information. The trial court filed reasons for judgment that set forth the evidence of the three predicates listed above relied on in the adjudication. We have reviewed the State's exhibit (Exhibit 1) and we note that it consists of certified copies of the bills of information, extracts of minute entries, and transcripts for all three prior convictions listed above. The record is clear that the defendant's habitual offender adjudication is based on evidence of three prior convictions. This assignment of error lacks merit.

DECREE

For the reasons assigned hereinabove, the defendant's conviction, habitual offender adjudication, and sentence are affirmed.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

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STATE OF LOUISIANA

VERSUS

RANDALL SCOTT LAURANT

Guidry, J., dissents and assigns reasons.

Guidry, J., dissenting.

I respectfully dissent from the majority's opinion, affirming the defendant's conviction, habitual offender adjudication, and sentence. Particularly, I disagree with the majority's determination that the evidence presented at trial was sufficient for the state to prove beyond a reasonable doubt that the defendant had a position of control or supervision over the victim.

In order to convict a defendant of molestation of a juvenile, the state must prove: (1) the defendant is a person over the age of seventeen; (2) the victim is a person under the age of 17; (3) there is an age difference of at least two years; (4) the defendant committed a lewd or lascivious act upon the person or in the presence of the victim; (5) the defendant committed such act with the intention of arousing or gratifying the sexual desires of either the defendant or the victim; and (6) the defendant committed the act either by the use of (a) force, violence, duress, menace, psychological intimidation, or threat of great bodily harm, or (b) influence by virtue of a position of control or supervision over the victim. La. R.S. 14:81.2A; State v. Teague, 04-1132, pp. 2-3 (La. App. 3rd Cir. 2/2/05), 893 So. 2d 198, 201.

In the instant matter, the verdict returned by the jury found the defendant guilty of molestation of a juvenile when the offender has a position of control or supervision over the juvenile. However, the defendant argues on appeal that there was an absence of testimony or evidence at trial that he had any position of control or supervision over the victim.

According to the testimony at trial, F.L. was fifteen years old when the incidents in question commenced. She was also obese, suffered from sleep apnea, and attended special education classes in school. The defendant is F.L.'s distant cousin and is approximately ten years older than her. The defendant and F.L. knew each other and attended family gatherings. Additionally, F.L. testified that she was friends with the defendant's wife.

The incidents in question began in the summer of 2004 and generally occurred when F.L. was at the defendant's house babysitting his children. According to F.L., the babysitting entailed helping the defendant and his wife, with whom F.L. was friends, with the children when they were home and watching the children when the defendant and his wife left the house. On one occasion, F.L. was babysitting the defendant's children when the defendant and his wife returned home late at night. F.L. was watching television in the living room. After the defendant's wife went to her bedroom, the defendant went to the living room, kissed F.L., removed her clothing, and had sexual intercourse with her. According to the record, F.L. spent the night at the house and returned home the next day.

On another occasion, F.L. was at the defendant's house speaking with him outside in his shed. According to F.L.'s testimony, the defendant made her give him oral sex. F.L. stated that the incident ended when she walked away and went into his house.

The most recent incident occurred in July of 2005 when F.L. walked across the street to her grandmother's house. After placing a bag of ice in her

grandmother's freezer, she noticed the defendant in the living room. According to F.L., the defendant stopped her and started to kiss her. The defendant then instructed F.L. to sit on the sofa, removed her lower clothing, and engaged in oral sex and vaginal penetration. These actions were interrupted when F.L.'s father knocked on the door. At that point, F.L. left the house.

Dr. Scott Benton, the state's expert in forensic pediatric medicine, evaluated F.L. and testified that a special education status effects naiveté, meaning the child does not know they are engaging in something that they need to disclose. Dr. Benton also stated that age discrepancy is relevant in determining whether there is an absence or presence of intimidation or control.

However, from my review of the evidence in the light most favorable to the prosecution, and from a plain reading of La. R.S. 14:81.2A and the jurisprudence addressing the control and supervision element of the offense, I disagree with the majority's determination that the state proved beyond a reasonable doubt that the defendant had a position of control or supervision over F.L.

First, La. R.S. 14:81.2A requires as one of the elements of the offense that the age difference between the defendant and the victim be *at least* two years. Accordingly, the legislature set a minimum of a two year age difference, acknowledging, implicitly, that age differences could be greater. In the instant case, the state and the majority of this court, rely on the ten year age difference between the defendant and F.L. as support for the jury's determination that the defendant had control or supervision over F.L. However, while this arguably can be a factor to consider, to view it as a determinative factor in the analysis of whether a defendant had control and supervision over a victim ignores the legislature's inclusion of the minimum age difference of two years as a separate element of the offense.

Further, cases which have interpreted the control or supervision element have found that in order to establish that the defendant was in a position of control or supervision over a victim, the state had to present some evidence that the victim was entrusted to the custody of the defendant; the defendant performed caretaking functions for the victim; the defendant had rules for the victim; the defendant had decision-making authority over the victim; or the defendant was the only adult present, requiring him to supervise the victim. See State v. Teague, 04-1132 (La. App. 3rd Cir. 2/2/05), 893 So. 2d 198; State v. Onstead, 03-1413 (La. App. 5th Cir. 5/26/04), 875 So. 2d 908; State v. Rideaux, 05-446 (La. App. 3rd Cir. 10/2/05), 916 So. 2d 488; State v. Forbes, 97-1839 (La. App. 1st Cir. 6/29/98), 716 So. 2d 424. All of these cases describe some activity that comports with the general meaning of "control" and "supervision," which are defined, respectively, as "power or authority to guide or manage" and "a critical watching and directing." Merriam Webster's Collegiate Dictionary 252 & 1184 (10th ed., Merriam-Webster, Inc. 1996); see also La. R.S. 14:3.[1]

In the instant case, there is no evidence in the record establishing that the defendant had a position of control or supervision over F.L. as those words are generally and usually understood. There is no evidence that the defendant had any authority to guide or manage F.L., nor that he critically watched or directed her at any time. Further, contrary to the assumption made by the majority, there is no evidence that F.L.'s mother gave the defendant permission to supervise F.L. or that she entrusted F.L. to the care of the defendant. While there was some evidence that F.L. spent the night at the defendant's home on occasion when she was babysitting his children, defendant's wife was also present in the house, and it was

[1] Louisiana Revised Statute 14:3 provides:

> The articles of this Code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.

not a situation where F.L. was there because the defendant was babysitting her or that F.L. was otherwise under the defendant's authority.

Additionally, the state relies on the fact that at least on the last occasion, the defendant was the only adult present. The key, however, is whether, because the defendant was the only adult present, he was required to supervise the juvenile. On this occasion, F.L. went to her grandmother's solely to place a bag of ice in the freezer. This was supposed to be a short errand, across the street from her parents' home. The defendant entered the house and confronted F.L. in the living room when she was on her way home. F.L.'s parents were not aware that the defendant was going to go to the grandmother's house, and certainly did not give him permission to supervise F.L. on this errand or otherwise entrust F.L. to his care on this occasion. Further, there is nothing in the nature of the situation that would infer that the defendant had any authority to manage or was critically watching or directing F.L. on this occasion.

Finally, the majority seems to conclude that because F.L. was a special education student and the defendant was older than F.L. and was the only adult present, at least during the most recent incident, that this amounts to evidence sufficient to establish beyond a reasonable doubt that he had a position of control or supervision. However, with respect to F.L.'s special education status, there is no evidence in the record as to why F.L. attended special education classes, what the level of her mental impairment, if any, was, or how her specific special education status influenced her response to possible intimidation. Further, Dr. Benton spoke in generalizations, encompassing ranges from small children to juveniles with special needs to children who are mentally retarded, and never addressed F.L.'s specific mental capabilities and how her particular condition affected his considerations. Therefore, for the foregoing reasons, I find that the

record is devoid of evidence sufficient for the state to prove beyond a reasonable doubt that the defendant had control or supervision over the victim.

In addition, the state failed to prove that the defendant achieved the offense by the use of force, violence, duress, menace, psychological intimidation, or threat of great bodily harm. Detective Wanda Jarvis who investigated the incident, stated that from her observations and interview with F.L., the defendant did not use physical force in committing the acts, and F.L. complied with his desires because he was an adult. Further, the force element refers to the forcible means of overcoming the will or the resistance of the victim, which requires a use of force in addition to any mere touching or minimum effort exerted in performing the lewd act. See State v. LeBlanc, 506 So. 2d 119, 120 (La. 1987). The majority seems to imply that the incident wherein the defendant made F.L. perform oral sex on him involved force. However, F.L. admitted that the incident ended when *she* stopped and walked away. Accordingly, the state, likewise, did not present any evidence that the defendant forcibly overcame the will or the resistance of the victim.

While the evidence in the record is insufficient to prove that the defendant was guilty of molestation of a juvenile, it does establish that he is guilty of the lesser offense of indecent behavior with juveniles. See La. R.S. 14:81A.[2] Accordingly, I disagree with the majority's decision affirming the conviction of molestation of a juvenile and rather, would find the defendant guilty of indecent behavior with a juvenile in violation of La. R.S. 14:81A. See La. Code Crim. P. art. 821(C).

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[2] Louisiana Revised Statute 14:81A provides, in pertinent part:

> 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[.]