

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 1324

STATE OF LOUISIANA

VERSUS

DENNIS CAFARELLA

Judgment Rendered: December 23, 2008.

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On Appeal from the
21st Judicial District Court,
in and for the Parish of Tangipahoa
State of Louisiana
District Court No. 603531

The Honorable Robert M. Morrison, III, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

CARTER, C.J.

The defendant, Dennis Cafarella, was charged by bill of information with aggravated incest, a violation of La. R.S. 14:78.1. The defendant pled not guilty. He waived his right to a trial by jury, and following a bench trial, he was found guilty as charged. The defendant was sentenced to thirty-five years at hard labor with at least twenty-five years of the sentence to be served without benefit of parole, probation, or suspension of sentence. The defendant filed a motion to correct illegal sentence, which was denied. The defendant now appeals, designating two assignments of error. We affirm the conviction, vacate the sentence, and remand for resentencing.

FACTS

D.S., the victim, lived with her stepmother, Scarlet, and her father, Joseph. D.S. and her brother spent a lot of time in Amite with Lois, her aunt.¹ According to Lois, who testified at trial, D.S. stayed with her while she was in kindergarten and for the first half of first grade. Also living with Lois were her husband, Jeff Smith, and her nephew, the defendant. D.S.'s mother, Nicole, was the defendant's sister and Joseph's ex-girlfriend. As such, the defendant was D.S.'s uncle. Since Nicole had problems with drugs and, according to Scarlet, had bipolar disorder, Nicole, who considered Lois as a mother, sent D.S. to live with Lois for about six months. Following this, D.S. began living with Scarlet and her father, but continued to sleep at Lois's on the weekends.

¹ D.S. referred to Lois as her grandmother.

Scarlet testified at trial that D.S. had always been unruly, but in July 2006, her behavior had become worse. Sometime during July, D.S. was at her Aunt Rosemary's house swimming in her pool with her cousin, Nick, and several other children. According to Scarlet's testimony, it came to her attention that Nick and D.S. had touched each others' "private parts." D.S. had also confided in one of her cousins that the defendant had molested her. D.S. and her cousin then told Scarlet about the defendant. Scarlet testified that D.S. told her that when Lois would leave the house, the defendant would take D.S. into his room and touch her "private parts" and make her touch his "private parts." D.S. was about seven or eight years old, and the defendant was about twenty years old. Two days later, Scarlet took D.S. to Our Lady of the Lake Hospital in Baton Rouge, where a rape kit was performed on D.S. There was no indication D.S. was raped. Scarlet further testified that Cheryl, D.S.'s paternal grandmother, spoke with D.S. and made an audiotape of D.S. talking about the molestation.

Detective Nick Vinterella, with the Tangipahoa Parish Sheriff's Office, testified at trial that he arranged for D.S. to be interviewed at the Children's Advocacy Center (CAC). Detective Vinterella observed the interview and testified that D.S. stated in her interview that the defendant molested her over an approximately eight-month period of time. The defendant touched different parts of her body and forced her to perform oral sex on him. On one occasion, the defendant rubbed his penis on her buttocks. However, she did not indicate there was any type of penetration. The incidents of molestation occurred either at night, while the other family members were sleeping, or when only D.S. and the defendant were at home.

According to Detective Vinterella, the incidents of molestation occurred when D.S. was visiting Lois's house but was physically living with Scarlet and her father.

D.S. testified at trial on direct examination that she stayed at Lois's house for Bible school and on the weekends. While she was there, the defendant made her "suck his wee wee," which she indicated meant his penis. She testified that if she refused, the defendant said he would whip her. On cross-examination, D.S. testified that incidents of molestation by the defendant occurred both at Lois's house and in a trailer owned by her "Maw Maw" and "Paw Paw." D.S. did not know which town the trailer was in. Lois testified at trial that they lived in a trailer before living in the house. D.S. further testified on cross-examination that the period of molestation was a year and that the number of incidents were "[l]ike 23."

The defendant testified at trial and denied the allegations of molestation. He stated he never did anything inappropriate with D.S., and he never took her into his bedroom. He stated that his relationship with D.S. was not that good. He felt D.S. was a discipline problem in that she would not listen and would holler and scream and do whatever she wanted. The defendant suggested in his testimony that D.S. made up the story about the molestation because she was angry with him for calling the police on her mother. According to the defendant, during this incident, D.S. told him that since he was getting her mother in trouble, she was going to get him in trouble. The defendant also testified that he lived with Lois in a trailer in Greensburg about two years ago.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the evidence was not sufficient to support a conviction. Specifically, the defendant contends that D.S. had a history of lying and fabricated the story of incest because she was angry with the defendant for calling the police on her mother.

The proper procedural vehicle for raising the issue of the sufficiency of the evidence is by a motion for a post-verdict judgment of acquittal. La. Code Crim. P. art. 821. No such motion was filed herein. However, despite the defendant's failure to proceed properly, a reviewing court must consider the evidence, when briefed pursuant to an assignment of error, to determine whether or not it meets the constitutional standards of **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), now codified in La. Code Crim. P. art. 821. **State v. Baudoin**, 583 So.2d 907, 908 (La. App. 1st Cir. 1991).

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson**, 443 U.S. at 319, 99 S.Ct. at 2789. See also La. Code Crim. P. art. 821B; **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-1309 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both

direct and circumstantial, for reasonable doubt. **State v. Patorno**, 2001-2585, p. 5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **Patorno**, 2001-2585 at p. 5, 822 So.2d at 144.

Louisiana Revised Statutes 14:78.1 provides in pertinent part:

- 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 . . . or niece.
- B. The following are prohibited acts under this Section:
 - (1) Sexual intercourse, sexual battery, second degree 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.

According to Scarlet, once D.S. confided in her cousin that the defendant had molested her, D.S. and her cousin went to Scarlet with the information. Scarlet testified that D.S. told her that, when she was living with the defendant, he would take her into his room and touch her “private parts” and make her touch his “private parts.” Detective Vinterella testified at trial that he observed the CAC interview. According to Detective Vinterella, D.S. stated during the interview that, for about eight months to a year, the defendant touched her on different parts of her body and forced her to perform oral sex on him by taking the back of her head and pushing it

toward his crotch. He had also rubbed his penis near her buttocks area. Detective Vinterella further testified that he also listened to the audiotape made by Cheryl and that he found the audiotape and the CAC interview “to be rather consistent.”² D.S. testified the defendant would wake her up in the living room where she slept and would bring her to his room. He would then sit in a chair with his pants down and make her “suck his wee wee” while she was on her knees. She stated that if she refused, he would whip her. She further testified that, while performing oral sex on the defendant, “[s]ome yellow stuff” would come out of his penis, and she would go to the bathroom and spit it out. She testified she did not tell what was going on because she was afraid she would get in trouble with her father.

The defendant suggests in his brief that D.S. had a history of lying and was often uncontrollable. On cross-examination, Scarlet testified that when she first knew D.S., she had ADHD, was loud, very uncontrollable, disrespectful, and disobedient. On redirect examination, however, Scarlet testified that over time, D.S. improved greatly, and when D.S. moved in with her and her father, she changed a lot. When D.S. told Scarlet about the defendant, they began having trouble with D.S. again. D.S. testified at trial that she did not lie, including about her grades. However, Nicole, D.S.’s mother, testified that D.S. told “[l]ittle small lies.” Also, Lois testified that D.S. had been known to lie quite a bit. Scarlet testified about an incident at D.S.’s Aunt Rosemary’s house in Independence where D.S., her cousin,

² This court listened to the audiotape and viewed the CAC interview tape. On both tapes, D.S. stated the defendant forced her to perform oral sex on him. We find, as did Detective Vinterella, that the information and details provided by D.S. on both tapes were consistent.

Nick or "Nick Nick," and several other children were swimming in her pool. Allegedly, D.S. and Nick touched each other on their "private parts," and the other children got upset and told on them. Detective Vinterella testified that D.S. had mentioned on the audiotape that a little boy had touched her on her private areas. However, at trial, D.S. testified that the incident with Nick did not occur. According to D.S., Nick did not touch her, and the others lied. The defendant also notes in his brief factual discrepancies regarding a chair in the defendant's bedroom and a lock on the defendant's bedroom door. During direct examination of the defendant, defense counsel stated that during the CAC interview, D.S. said the chair in the defendant's room is "just like your shirt," which, according to defense counsel, was orange. However, the defendant testified that he did not have an orange chair in his room, and Lois testified that she had no orange furniture. Also, during direct examination of Lois, defense counsel noted that on the CAC tape, D.S. spoke about the defendant taking her to his room and locking the door. Lois testified that the lock was broken. The defendant testified that his room did not have a lock.

The defendant asserts D.S. concocted the story about the molestation because she was angry with the defendant for calling the police on her mother. The defendant testified about an incident between him and Nicole. One weekend night, Nicole went to Lois's house and said she was going to take her children, D.S. and her brother. Joseph had told Lois and the defendant to not let the children leave unless he gave them permission. Refusing to allow the children to leave, the defendant and Nicole began arguing. The defendant told Nicole how bad of a parent he thought she was.

Nicole grabbed a knife from the kitchen and ran after the defendant. Lois and Jeff (the defendant's uncle) grabbed Nicole, and the defendant called the police. D.S. told the defendant that since he was getting her mother in trouble, she was going to get him in trouble. Lois and Jeff testified to essentially the same facts regarding the fight. Lois testified that she heard D.S. say, "If you get my Momma in trouble and she goes to jail, I'm going to get you in trouble." Jeff testified that he heard D.S. say, "You call the police on my Momma, I'm going to call the police on you and have you put in jail." No charges were pressed, and Nicole was allowed to go home. The children remained at Lois's through the weekend. It is not clear from the record when the fight between the defendant and Nicole occurred, that is, before, during, or after the alleged molestation occurred.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Taylor**, 97-2261, p. 5 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **Taylor**, 97-2261 at pp. 5-6, 721 So.2d at 932. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. **Taylor**, 97-2261 at p. 6, 721 So.2d at 932. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **Taylor**, 97-2261 at p. 6, 721 So.2d at 932.

When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defendant's

own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. See State v. Captville, 448 So.2d 676, 680 (La. 1984). The defendant denied all allegations of molestation. His hypothesis of innocence was based on the theory that D.S. lied about being molested because she had a history of telling lies and because she was angry with him for getting her mother in trouble with the police.

The trial judge's verdict reflected the reasonable conclusion that, based on the testimony of Scarlet, Detective Vinterella, and the detailed, rather graphic testimony of nine-year-old D.S., the defendant molested D.S. In finding the defendant guilty, it is clear the trial judge rejected the defendant's claim of innocence and concluded that his version of the events was a fabrication designed to deflect blame from him. The conclusion by the trial judge that the defendant did not testify truthfully could reasonably support an inference that the "truth" would have been unfavorable to his claim that he never molested her. See Captville, 448 So.2d at 680. Despite some inconsistencies and conflicting testimony, the trial judge found credible D.S.'s testimony regarding the defendant's molestation of her. Although there was no corroborating medical evidence, the testimony of the victim alone is sufficient to prove the elements of the offense. See State v. Orgeron, 512 So.2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So.2d 113 (La. 1988). The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. State v. Quinn, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). We are constitutionally precluded

from acting as a “thirteenth juror” in assessing what weight to give evidence in criminal cases. See State v. Mitchell, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83.

Based on the foregoing and after a thorough review of the record, we find that the evidence supports the guilty verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence that the defendant was guilty of aggravated incest.

The assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that he was sentenced under the wrong version of La. R.S. 14:78.1. This argument has merit.

The bill of information charges that the dates the defendant committed aggravated incest were from April 1, 2006, to July 31, 2006. The defendant was sentenced under La. R.S. 14:78.1D(2)³ to thirty-five years at hard labor with at least twenty-five years of the sentence to be served without benefit of

³ At the time of the commission of defendant’s acts, Louisiana Revised Statute 14:78.1D(2) provided:

Whoever commits the crime of aggravated incest on a victim under the age of thirteen years when the offender is seventeen years of age or older shall be punished by imprisonment at hard labor for not less than twenty-five years nor more than life imprisonment. At least twenty-five years of the sentence imposed shall be without benefit of parole, probation, or suspension of sentence.

parole, probation, or suspension of sentence.⁴ In 2006, La. R.S. 14:78.1 was amended to include provision D(2). 2006 La. Acts No. 325, § 2. Louisiana Revised Statutes 14:78.1D(2) became effective on August 15, 2006. Accordingly, the defendant's commission of the crime of aggravated incest occurred prior to La. R.S. 14:78.1D(2) being enacted into law.

The law in effect at the time of the commission of the offense is determinative of the penalty that the convicted accused must suffer. A defendant must be sentenced according to sentencing provisions in effect at the time of the commission of the offense. See State v. Sugasti, 2001-3407, p. 4 (La. 6/21/02), 820 So.2d 518, 520. Ex post facto laws are prohibited by United States Constitution article 1, sections 9 and 10, and Louisiana Constitution article 1, section 23. This prohibition extends to the enforcement of any enactment that changes the punishment to inflict a greater penalty than that authorized for the crime at the time of its commission. Thus, legislation passed after the crime occurred cannot be applied to persons convicted of offenses committed prior to the enactment. **State v. Robinson**, 423 So.2d 1053, 1063 (La. 1982).

The law in effect at the time the defendant committed aggravated incest provided that a "person convicted of aggravated incest shall be fined an amount not to exceed fifty thousand dollars, or imprisoned, with or

⁴ The defendant was sentenced on December 5, 2007. In a March 31, 2008, Interim Order by this court, based on a motion by the defendant to correct the illegal sentence, the State was ordered to file a response addressing the legality of the sentence. The Order further informed the trial judge that he may file a per curiam if he so elected. The trial judge subsequently filed a per curiam, wherein he stated that the defendant's contention was erroneously based on the sentencing provision under La. R.S. 14:78.1D(1), which provides the ordinary sentence of five to twenty years. However, since the victim, born June 6, 1997, was under thirteen years of age, the appropriate sentence fell under La. R.S. 14:78.1D(2), which provided for a sentence of not less than twenty-five years nor more than life imprisonment and that at least twenty-five years of the sentence was without benefit of parole, probation, or suspension of sentence.

without hard labor, for a term not less than five years nor more than twenty years, or both.” La. R.S. 14:78.1D. Under the new law, the above-quoted provision is now La. R.S. 14:78.1D(1).

Having been sentenced under a provision which did not exist at the time the aggravated incest was committed, the defendant’s sentence was illegal. We, therefore, vacate the sentence and remand the case to the trial judge to correct the illegal sentence by sentencing the defendant under the applicable law.

**CONVICTION AFFIRMED; SENTENCE VACATED;
REMANDED FOR RESENTENCING.**