NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

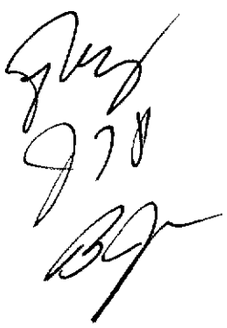
NUMBER 2009 KA 2059

STATE OF LOUISIANA

VERSUS

WILL PATRICK TRAHAN

Judgment Rendered:



* * * * * *

Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case Number 453,368
Honorable Randall L. Bethancourt, Presiding

* * * * * *

Joseph L. Waitz, Jr.
District Attorney
Ellen Daigle Doskey
Assistant District Attorney
Houma, LA

Counsel for Appellee
State of Louisiana

Lieu T. Vo Clark
Louisiana Appellate Project
Slidell, LA

Counsel for
Defendant/Appellant
Will Patrick Trahan

* * * * * *

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

GUIDRY, J.

The defendant, Will Patrick Trahan, was charged by bill of information with indecent behavior with juveniles, a violation of La. R.S. 14:81. The defendant pled not guilty and, following a jury trial, he was found guilty as charged. The defendant was sentenced to five years at hard labor. The defendant was subsequently adjudicated a third-felony habitual offender. The trial court vacated the previous five-year sentence, and sentenced the defendant to seven and one-half years at hard labor without benefit of probation or suspension of sentence. The defendant now appeals designating four assignments of error. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On April 11, 2005, sixteen-year-old N.L. was at home in her trailer with her mother, Melina Smith, stepfather, Michael Smith, little sister, and grandmother, in Chauvin, Terrebonne Parish. The defendant, who was forty-one years old, lived a few blocks from N.L. Michael had just met the defendant the previous day. N.L. knew the defendant's son, Jarrett. The defendant entered the trailer and he and N.L. began talking about one of Jarrett's fights at a party, which N.L. had on videotape. N.L. gave the defendant the videotape to watch. Melina told them they were going to take naps, so the defendant left. About forty-five minutes later, the defendant returned to the trailer looking for N.L. The defendant was wearing shorts. N.L.'s grandmother let the defendant inside. She then went to the living room. N.L.'s little sister, Michael, and Melina were sleeping. The defendant went down the hall off of the living room toward N.L.'s bedroom. He met N.L. in the hall and returned the videotape.

According to N.L.'s testimony at trial, N.L. was holding a kitten while talking to the defendant. The defendant moved down the hallway so that N.L.'s grandmother could not see them from the living room. The defendant petted N.L.'s

kitten and, while doing so, his hand brushed up against N.L.'s breast. The defendant told N.L. that he could not believe she was only sixteen years old. When N.L. put the kitten down, the defendant squatted down with his legs open, and his penis came out of one of the legs of his shorts. His penis was not erect. According to N.L., the defendant looked down at his penis, and then looked back up at N.L. to gauge her reaction. However, N.L. acted like she did not see these actions by the defendant. With his penis exposed, the defendant told N.L. that he had not had a "blow job" in a long time, and that he had been in jail for the last couple of years for supposedly getting a "blow job" from some little girl. The defendant explained that the girl had not given him a "blow job," but that he wished he would have gotten one. The defendant's penis remained out of his shorts for about five minutes. The defendant then stood up and asked N.L. if she wanted him to leave. N.L. nodded in the affirmative. The defendant touched N.L.'s hair and told her that she was so pretty, that he wished she were eighteen years old, and that she needed to call him when she turned eighteen. The defendant then lifted up her head and kissed her on the cheek. He again asked N.L. if she wanted him to leave. She again nodded in the affirmative, and the defendant left.

N.L. told her mother what happened. Melina called the police. The police arrived and began combing the neighborhood for the defendant. Melina's neighbor, Monique Lapeyrouse, called Melina and told her the defendant was hiding in her (Monique's) backyard near the wooded area. Monique testified at trial that the defendant took off his shirt and tried to observe what was happening on the road. The defendant eventually made it back to his house. Several police officers went to the defendant's house. The defendant opened his back door and saw a police officer standing there. The defendant tried to shut the door. As the defendant pushed on the door, two police officers pushed back, preventing the door from being closed. The officers soon made entrance into the house and chased the

defendant into a back bedroom, where he was subdued and handcuffed. N.L. gave an audiotaped statement to the police.

R.R. testified at trial that in 1994, when she was nine years old, she was swimming at a public swimming pool with girlfriends. R.R. testified the defendant jumped in the pool and offered the girls money for performing oral sex on him. The girls swam away. Later, the defendant asked the girls if they wanted to touch his penis. The defendant showed them his penis. R.R. further testified the defendant touched her buttock with his hand. The girls told the lifeguard what happened.

S.O., who was at the pool with R.R., also testified at trial. In 1994, S.O. was ten or eleven years old. According to her testimony, which was very similar to R.R.'s testimony, the defendant showed them his penis and offered them money in exchange for oral sex from them. The defendant also touched S.O. on the buttock with his hand.

For these offenses committed against S.O. and R.R. in 1994, the defendant was charged with indecent behavior with juveniles and crime against nature. He pled guilty to the charges and was sentenced to several years imprisonment.

Natalie Bergeron, the defendant's sister, testified at trial. Natalie testified that in 2005 the defendant wore glasses. She noticed the defendant was having trouble seeing, so she brought him to the eye doctor. The defendant got a prescription for new glasses. However, the defendant had not yet gotten his new glasses at the time of the instant offense.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in admitting into evidence his prior sex offense conviction pursuant to La. C. E. art. 412.2. Specifically, the defendant contends the trial court failed to conduct a

balancing test pursuant to La. C.E. art. 403 when allowing the introduction of other crimes evidence under La. C. E. art. 412.2.

Louisiana Code of Evidence art. 412.2 states in pertinent part:

> A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was 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 provided in Article 403.
>
> B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. La. C.E. art. 403.

At trial, at a bench conference outside the presence of the jury shortly after N.L. took the stand, the prosecutor informed the trial court that N.L. was likely to testify about how she knew the defendant had been in jail before. Since the defendant had been in jail for a crime similar to the crime he was presently charged with, the prior conviction would be admissible other crimes evidence. Defense counsel argued that he was never notified of the State's intent to use other crimes evidence at trial. The prosecutor responded that it had provided the proper notice, as well as open-file discovery. After lengthy discussion and argument, the trial court found that defense counsel had been put on notice and that, therefore, it would allow this other crimes evidence to be used. Defense counsel objected to the trial court's ruling and further requested that it be a continuing objection.

Later in the trial, the State called to the stand S.O., one of the victims of the defendant's previous crimes of indecent behavior with juveniles and crime against

nature, for which the defendant pled guilty and was sentenced to prison. Before S.O. began to testify, defense counsel requested a bench conference and moved the trial court for a Prieur hearing. According to defense counsel, "had I known there was a notice, I would have filed a motion for a Prieur hearing prior to today." In denying the motion, the trial court stated:

> All right. Well, you know, I have in fact already ruled on this matter in this case. The motion comes woefully late, but it was never requested. I'm not even sure that it was necessitated, and the defendant has had the benefit of several lawyers. The lawyers who represented him beforehand had notice, it's obvious. The present lawyer had access to the entire file of the district attorney's office. In a case such as this I would believe the No. 1 thing on a defense lawyer's checklist would be to check prior pleas for obvious reasons, and deal with it appropriately.
>
> But coming in the middle of a trial, where there has been adequate notice given beforehand, when it is pretty obvious it's going to be used, comes woefully too late. So for those reasons your motion is denied.

The trial court properly denied defense counsel's motion. The motion for a Prieur hearing was untimely. Moreover, a pre-trial Prieur hearing is not required for the admissibility of other crimes evidence of sexual assault pursuant to La. C.E. art. 412.2. See State v. Williams, 02-1030, pp. 1-6 (La. 10/15/02), 830 So. 2d 984, 984-87.

At trial, following the testimony of two of the victims of the defendant's previous sexual assault crimes for which he was convicted, the prosecutor offered into evidence the Terrebonne Parish bill of information and minutes of the defendant's guilty pleas and sentences for the indecent behavior with juveniles and crime against nature convictions. Defense counsel objected to the introduction of the documents, stating, "Again, I believe all my previous objections to this part of the proceedings. [sic] I feel it's in -- I'm in the same mode, because of my previous objections I object to these, also." The objection was overruled, and the bill of information and minutes were admitted into evidence.

The defendant's argument in his brief is that the trial court failed to conduct a balancing test under La. C.E. art. 403 when it admitted into evidence the defendant's prior convictions of indecent behavior with juveniles and crime against nature. The probative value of the evidence, according to the defendant, was outweighed by the prejudice to him. However, defense counsel objected to the admissibility of the other crimes evidence on the grounds that he lacked notice by the State that it intended to use such evidence at trial. Later, when the State introduced into evidence the defendant's bill of information and minutes of his previous convictions, defense counsel simply objected on the grounds of his "previous objections."

There was no request by either party that the trial court conduct a balancing test under La. C.E. art. 403. At no time during trial did defense counsel mention, much less argue, the issue of the balancing test. It is only for the first time on appeal that the defendant has raised the issue that the trial court failed to conduct a balancing test. To preserve the right to appeal the introduction of testimony or evidence, the defendant must make a timely objection and state the specific ground of objection. See La. C.E. art. 103(A)(1); La. C.Cr. P. art. 841; State v. Dilosa, 01-0024, p. 16 (La. App. 1st Cir. 5/9/03), 849 So. 2d 657, 671, writ denied, 03-1601 (La. 12/12/03), 860 So. 2d 1153. A defendant is limited on appeal to the grounds for the objection which were articulated at trial. State v. Wisinger, 618 So. 2d 923, 927 (La. App. 1st Cir.), writ denied, 625 So. 2d 1063 (La. 1993). Accordingly, this issue has not been preserved for appeal.

The failure to preserve the issue for appeal notwithstanding, we note that if a balancing test had been applied, the evidence would have been properly admitted. This assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 2, 3, and 4

In these assignments of error, the defendant argues the evidence was not

sufficient to support a conviction. Specifically, the defendant contends the State failed to prove beyond a reasonable doubt that he intentionally exposed his penis with the intention of arousing or gratifying the sexual desires of either person.[1]

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 or not, 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 v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); State v. Ordodi, 06-0207, p. 10 (La. 11/29/06), 946 So. 2d 654, 660; State v. Mussall, 523 So. 2d 1305, 1308-09 (La. 1988). The Jackson v. Virginia standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. State v. Patorno, 01-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144.

At the time of the commission of the offense, La. R.S. 14:81(A) provided:

> Indecent behavior with juveniles is the commission 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. Lack of knowledge of the child's age shall not be a defense.

---

[1] In his second assignment of error, the defendant argues the evidence was insufficient to support the conviction. The defendant filed a motion for a new trial, which was denied. In his third assignment of error, the defendant argues the trial court erred in denying the motion for new trial. The defendant's appeal addresses the sufficiency of the evidence. Sufficiency is properly raised by a motion for postverdict judgment of acquittal, not by a motion for new trial. Under La. C.Cr. P. art. 851(1), the trial court can consider only the weight of the evidence, not the sufficiency. See State v. Williams, 458 So. 2d 1315, 1324 (La. App. 1st Cir. 1984), writ denied, 463 So. 2d 1317 (La. 1985). We find no abuse of discretion in the instant matter of the trial court's denial of the defendant's motion for new trial. In his fourth assignment of error, the defendant argues the trial court erred in denying "the motion for judgment not withstanding [sic] the verdict." The proper motion to file would have been a motion for postverdict judgment of acquittal. See La. C.Cr. P. art. 821.

The defendant suggests in his brief that a reasonable hypothesis of innocence is that his penis became exposed accidentally when he squatted down to pet the cat, and that he was never aware of the exposure. The testimony at trial established that the defendant spoke to N.L. about his desire for oral sex while squatting down on the ground with his penis hanging out of his shorts. Testimony also established that the defendant had previously been convicted of similar crimes based on similar behavior, namely approaching young girls in a swimming pool, showing them his penis, and asking them if they wanted to perform oral sex on him.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. State v. Taylor, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. The testimony of the victim alone is sufficient to prove the elements of the offense. State v. Orgeron, 512 So. 2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So. 2d 113 (La. 1988).

The jury was presented with two theories: the State's theory that the defendant exposed his penis and spoke to N.L. about oral sex with the intention of arousing or gratifying his or N.L.'s sexual desires; and the defense theory that the defendant inadvertently exposed his penis and had no intention of arousing or gratifying his or N.L.'s sexual desires. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126 (La. 1987).

In finding the defendant guilty, it is clear the jurors rejected the hypothesis of innocence. The State established that in the past the defendant had openly exhibited a lustful disposition toward young girls. Under the circumstances, the

jurors could have reasonably concluded that the defendant, while engaging N.L. in conversation fraught with sexual references and innuendoes about receiving oral sex, was aware that his penis was exposed and, as such, committed a lewd or lascivious act with the intention to arouse his sexual desire of a young female. Furthermore, the defendant attempted to avoid the police when they began looking for him. A finding of purposeful misrepresentation, as in the case of flight following an offense, reasonably raises the inference of a "guilty mind." State v. Captville, 448 So. 2d 676, 680 n.4 (La. 1984).

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 indecent behavior with juveniles. See Moten, 510 So. 2d at 61-62.

These assignments of error are without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.