

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 KA 0512

STATE OF LOUISIANA

VERSUS

CHARLES L. PINEDA

Judgment Rendered: DEC 21 2018

**Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 562011**

Honorable Raymond S. Childress, Judge Presiding

**Warren L. Montgomery
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Covington, LA**

**Counsel for Appellee,
State of Louisiana**

**Michael S. Fawer
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**Counsel for Defendant/Appellant,
Charles L. Pineda**

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

Higginbotham, J. concurs.

WHIPPLE, C.J.

The defendant, Charles L. Pineda, was charged by bill of information with two counts of sexual battery on a victim under the age of thirteen years, violations of LSA-R.S. 14:43.1(C)(2), and pled not guilty.¹ After a trial by jury, the defendant was found guilty as charged on both counts. The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for new trial. The trial court sentenced the defendant to thirty-years imprisonment at hard labor on each count, to be served concurrently. The trial court further ordered, as to each sentence, that the first twenty-five years be served without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, alleging that the conviction on count two is reversible due to A.D.'s inability to distinguish between the truth and a lie and that a new trial is warranted on count one due to the prejudicial effect of A.D.'s testimony. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

S.K., the victim on count one, indicated that when she was between the ages of six and eleven years old, the defendant, whom she referenced as "Charlie" or "Mr. Charlie," would sometimes touch the outside of her vagina with his hand. S.K. was fourteen years old when she was interviewed at the Children's Advocacy Center (C.A.C.) Hope House in Covington.² During the interview, S.K. described the defendant as "Paw-Paw's friend," and she noted that he would act "weird" before the incidents began, but was always helping her family. She further stated

¹According to the amended bill of information, on count one, the date of birth of the victim, S.K., is February 24, 2000, and the offense was alleged to have occurred between August 15, 2008, and February 24, 2012. On count two, the date of birth of the victim, A.D., is August 24, 2009, and the offense was alleged to have been committed on or about October 21, 2014. Herein, we reference the child victims and their immediate family members by initials only. See LSA-R.S. 46:1844(W).

²S.K. was seventeen years old when she testified at trial. Her trial testimony was consistent with her C.A.C. interview. She noted that the behavior occurred about a "handful" or five times.

that the defendant was “pushy” and would often “try to get me in the room by myself.” She noted that the incidents happened while she was living with her great-grandparents. She recalled that her great-grandmother had asked the defendant to help her with her homework, and she indicated that the defendant would attempt to touch her under those circumstances. She indicated that the defendant would touch her on the skin, as opposed to on top of her underwear. She added that while he would also try to pull her hand to his pants, and would try to touch the inside of her vagina, she would push him away and run out of the room before he could go any further. She stated that the defendant would tell her that the incidents were their “little secret,” and she noted that she was confused, scared, and embarrassed. S.K. also indicated that she did not initially tell anyone about the incidents because she did not want to hurt her Paw-Paw. However, when she was eleven years old, prior to February 24, 2012, she told her best friend and her older cousin, B.D. (the mother of the victim on count two).³

According to A.D., the victim on count two, on October 21, 2014, when she was five years old, the defendant, whom A.D. referenced as “Mr. Charlie,” picked her up, sat her in his truck, and “scratched” the inside of her “private spot” with his finger. She confirmed that the defendant touched her underneath her underwear. She further stated that the defendant told her not to tell anyone, but that she did not listen and instead immediately told her mother, father, other family members, and the police. The incident occurred when A.D. came across the defendant as she was walking from her grandparents’ home to her great-grandparents’ home nearby.

³S.K. testified that when she confided in her best friend and her cousin, B.D., who was six years older, she pleaded with them to not tell anyone. B.D. also testified at trial, confirming that when they were younger, S.K. told her that the defendant had touched her multiple times while tutoring her. B.D. added, “And at that time, I was young and I just -- I don’t know why I did not tell. I did not tell anyone.” B.D. regretted her decision when her own daughter later made the same claim against the defendant.

A.D. was still five years old at the time of the C.A.C. interview on October 27, 2014.⁴

The defendant testified at trial and confirmed that S.K.'s great-grandmother asked him to tutor the child and that he recalled doing so three times. He stated that the tutoring took place in S.K.'s bedroom on one occasion and in the dining room and kitchen on the other occasions. The defendant denied ever touching S.K. inappropriately on those occasions and further stated that he "[n]ever touched her inappropriately." The defendant also confirmed that on October 21, 2014, A.D.'s great-grandparents asked him to come over to their house to repair their washing machine and refrigerator. When he saw A.D. that day, he was outside at his van, which was parked close to the house. The defendant stated that A.D. ran up to the van and started asking several questions about his tools. According to the defendant, she asked if she could get in the van and he responded positively. He stated that as she attempted to climb in, he picked her up, noting that the van had a "step up," and that she needed assistance. The defendant further testified that the victim kept asking him questions, stating, "She pestered the heck out of me." He added, "When she was, when she finally kept going at the van, the vehicle thing, I tickled her to try to break her concentration cycle on the van vehicle." The defendant stated that he specifically tickled her on the sides and on the tummy and denied touching her private area.

⁴During the C.A.C. interview, A.D. also stated that after the defendant scratched her private spot, she told him to stop, and he punched her on her "butt" with a hammer. Previously thereto, she similarly stated that her teacher and her uncle had hit her on occasions. A.D. was eight years old at the time of the trial. At trial, A.D. repeatedly confirmed that the defendant touched her "private" when she was five years old, but admitted that she lied about the defendant, her teacher, and her uncle hitting her. During the C.A.C. interview, A.D. indicated that she knew the difference between a lie and the truth, but on cross-examination at trial, she responded negatively when asked if she could distinguish between the two.

DISCUSSION

In assignment of error number one, the defendant argues that the conviction on count two is reversible, pursuant to LSA-C.E. art. 601. Specifically, the defendant contends that the victim on count two, A.D., was unable to distinguish between the truth and a lie and that the trial court erred in not making a competency determination. The defendant contends that the conviction was wholly dependent upon A.D.'s credibility. Acknowledging that he did not seek a pretrial determination as to A.D.'s competency to testify, the defendant notes that A.D. confirmed to the C.A.C. interviewer that she knew the difference between the truth and a lie.⁵ Thus, the defendant contends that he saw no need to seek such a pretrial determination. He further contends that a pretrial hearing is not mandatory. The defendant claims that he was totally surprised when the victim admitted during cross-examination, and again on redirect examination, that she could not distinguish between the truth and a falsehood. The defendant avers that the victim's admission made her incompetent to testify, pursuant to Article 601. He argues that absent A.D.'s testimony, there was no evidence to sustain the conviction on count two, contending that she alone was privy to the alleged sexual battery, and that her physical examination and the DNA analysis did not lend credence to her claim. He concludes that the trial court committed manifest error in permitting A.D. to testify without further inquiry regarding her candid admission under oath that she could not distinguish between truth and falsity.

In assignment of error number two, the defendant argues that he is entitled to a new trial on count one due to the alleged prejudicial effect of A.D.'s testimony. The defendant claims that although S.K.'s veracity was damaged by

⁵As the defendant further notes, this issue was first raised in his joint motion for post-verdict judgment of acquittal and motion for new trial. As on appeal, in the joint motion, he argued that due to the admission of A.D.'s testimony without a competency determination, he was entitled to an acquittal on count two and a new trial on count one.

other testimony, it was buttressed by A.D.'s testimony. The defendant notes that the State repeatedly argued that a finding of guilt would be supported by the parallel stories of the victims. He argues that A.D.'s improperly admitted testimony prejudiced him in the eyes of the jury in assessing his guilt as to S.K., the victim on count one. Further, the defendant argues that based upon the record, it cannot be said that the guilty verdict as to S.K. was surely not attributable to the admission of A.D.'s testimony.

The record shows A.D. was questioned during the trial regarding her ability to distinguish between the truth and a lie during cross-examination and again on redirect examination. At no point before, during the time of her testimony, or after her testimony concluded, did the defendant challenge A.D.'s competency to testify. As acknowledged on appeal, the defendant first raised this issue in his joint motion for post-verdict of judgment of acquittal and motion for new trial, wherein he argued that A.D. was disqualified as a witness under Article 601. The same argument was made at the hearing on the post-trial joint motion, and the trial court denied the joint motion.

In order to preserve the right to seek appellate review of an alleged trial court error, the party alleging the error must state an objection contemporaneously with the occurrence of the alleged error, as well as the grounds for that objection. LSA-C.Cr.P. art. 841; State v. Benoit, 2017-187 (La. App. 5th Cir. 12/29/17), 237 So. 3d 1214, 1219. Thus, an irregularity cannot be availed of after the verdict unless it was objected to at the time of the occurrence. LSA-C.Cr.P. art. 841(A); State v. Cockerham, 2017-0535 (La. App. 1st Cir. 9/21/17), 231 So. 3d 698, 707, writ denied, 2017-1802 (La. 6/15/18), 245 So. 3d 1035. The purpose of the contemporaneous objection rule is to put the trial judge on notice of an alleged irregularity, allowing him the opportunity to make the proper ruling and correct any claimed prejudice to the defendant, procedural irregularity, or evidentiary

mistake. Benoit, 237 So. 3d at 1219. Further, a defendant is limited to the grounds for objection that he articulated in the trial court, and a new basis for the objection may not be raised for the first time on appeal. State v. Taylor, 2004-346 (La. App. 5th Cir. 10/26/04), 887 So. 2d 589, 594; see also State v. Pelas, 99-0150 (La. App. 1st Cir. 11/5/99), 745 So. 2d 1215, 1217. Because there was no timely objection made as to A.D.'s competency before, during, or after her testimony, the defendant has not properly preserved for appeal any issues in that regard.

Moreover, a defendant must establish that an alleged error affected a substantial right or otherwise influenced the jury to convict the defendant before his conviction may be reversed. LSA-C.Cr.P. art. 921. In this case, the jury heard the C.A.C. interviews and trial testimony of both victims. A.D. was questioned in the presence of the jury by the State and the defense attorney regarding the veracity of her claim and her ability to distinguish between the truth and a falsehood. While she responded negatively when asked on cross-examination whether she knew the difference between a lie and a truth, she did not falter regarding her claim that the defendant touched her private area. During direct examination, she stated, “[i]t’s bad,” when asked if it was good or bad to tell lies about people, and she stated that she was telling the jury the truth. Moreover, during redirect examination, she confirmed that she was confused while being cross-examined, specifically responding “No, sir” and “Not really” when asked if she understood what the defense attorney asked her. Thus, although she gave an answer indicating otherwise, A.H. demonstrated her ability to distinguish between a lie and the truth in the following exchange:

Q. Okay, if I told you I was wearing a black tie, would that be the truth or a lie?

A. A lie.

Q. Why is that?

A. Because you're wearing a red one.

Q. Do you know what a truth is compared to a lie?

A. Not really.

Q. But if I told you I was wearing a black tie that would be a lie?

A. Yes.

The trier of fact's determination of the weight to be given evidence is not subject to appellate review. State v. Taylor, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. We further note that it is the role of the fact finder to weigh the respective credibilities of the witnesses, and the trial court should not second-guess the credibility determinations of the trier of fact. See LSA-C.Cr.P. art. 821(B); see also State ex rel. Graffagnino v. King, 436 So. 2d 559, 563 (La. 1983), (citing State v. Richardson, 425 So. 2d 1228 (La. 1983)). Accordingly, we find no error in the trial court's denial of the motion for post-verdict judgment of acquittal.⁶ Considering the foregoing, we further find no basis to suggest that the trial court erred in denying the defendant's motion for new trial as to count one.⁷ Thus, we find that assignments of error numbers one and two lack merit.

⁶The defendant has not assigned error to the sufficiency of the evidence to support the convictions. Nonetheless, as noted herein, A.D.'s competency to testify was raised in the context of a motion for post-verdict judgment of acquittal pursuant to LSA-C.Cr.P. art. 821. Louisiana Code of Criminal Procedure art. 821 codified the constitutional standard for testing the sufficiency of evidence enunciated in the U.S. Supreme Court decision of Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Further, this court's analysis regarding the trial court's denial of the motion for post-verdict judgment of acquittal would be equally applicable to any discussion regarding the sufficiency of the evidence.

⁷We note that the defendant did not below, or on appeal, indicate which grounds for a new trial under LSA-C.Cr.P. art. 851 that he is attempting to rely on. Nonetheless, we find the defendant has failed to present any argument warranting a new trial on either count.

CONCLUSION

For the above and foregoing reasons, we affirm the defendant's convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED.