

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 2121

STATE OF LOUISIANA

VERSUS

TERRY JOSEPH KRAEMER, JR.

Judgment Rendered: May 4, 2007

Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne, Louisiana
Trial Court Number 448,808

Honorable David W. Arceneaux, Judge

Joseph L. Waitz, Jr., District Attorney
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State – Appellee

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Defendant – Appellant
Terry J. Kraemer, Jr.

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

The defendant, Terry Joseph Kraemer, Jr., was charged by grand jury indictment with aggravated rape, a violation of La. R.S. 14:42. The defendant entered a plea of not guilty.¹ After a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motion for new trial and motion for post-verdict judgment of acquittal. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence.² The defendant now appeals, raising the following assignments of error:

1. The trial court erred in failing to grant the motion for new trial or motion for post verdict judgment of acquittal based on the fact that the evidence was insufficient to sustain the jury's verdict.
2. The trial court erred in imposing an excessive sentence.

For the forthcoming reasons, we affirm the conviction and sentence.

FACTS

J.R., the victim herein, was eleven years old at the time of the trial, December 5, 2005.³ J.R. testified to several instances of abuse by the defendant. The defendant was a friend of J.R.'s mother, Angel, and lived in their Houma, Louisiana household for a brief period of time from late 2000 to early 2001.⁴ The first incident recalled by J.R. occurred at night in her bedroom. J.R. testified that she was "probably in Head Start" at the time of the offense. J.R.'s family was

¹ This case (district court number 448,808) was consolidated for trial with 2006 KA 2120 (district court number 443,787), in which the defendant was charged with the aggravated rape of another minor child.

² The defendant was also found guilty of the aggravated rape offense charged in 2006 KA 2120 and was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The sentences are to be served consecutively.

³ J.R.'s date of birth is September 22, 1994. The victim is identified herein only by her initials. See La. R.S. 46:1844(W).

⁴ The parents of K.M. (the juvenile victim in 2006 KA 2120) also lived in this household for several weeks during the same time period and K.M. and her sibling, who lived with their grandmother, stayed there on the weekends. K.M.'s date of birth is August 6, 1994. She will also be identified herein by her initials only. See La. R.S. 46:1844(W).

asleep at the time. J.R. was lying on her back with her nightclothes on. The defendant instructed her to remove her clothing and she complied. During her trial testimony, J.R. specifically stated, “[h]e put his penis in my vagina.” J.R. testified that the sexual contact with the defendant was ongoing.

J.R. ultimately informed her mother of the abuse.⁵ On January 29, 2001, Angel contacted the police. Detective Gary Tullis of the Lafourche Parish Sheriff’s Office investigated the complaint.⁶ According to Detective Tullis, J.R. neither disclosed anything to the police nor denied that something had happened; and therefore, the case was closed for lack of probable cause. The defendant did not communicate with J.R. or her family for approximately two years.

In December of 2003, the defendant and Angel rekindled their friendship. The defendant resumed spending time with Angel and her children. During a videotaped interview and in her trial testimony, J.R. discussed several instances of sexual abuse that occurred after December 2003, at several different locations, including the Holiday Motel in Houma, Louisiana, the home of Tiffany Burnett (the defendant’s girlfriend) in Thibodaux, Louisiana, and the Holiday Inn in Houma, Louisiana. Sometime near Mardi Gras (presumably in 2004), an incident of abuse specifically detailed by the victim occurred in the back of Angel’s vehicle.

Another incident occurred when the victim, her family, and the defendant stayed at Donald Rupert’s residence for a brief period of time. During this incident, the defendant and J.R. were sleeping on an air mattress, and J.R. testified that “[h]e put his penis in [her] vagina ... [a]nd [she] bled that time.”

⁵ According to Angel, J.R. initially reported the abuse to a counselor and the counselor informed Angel. At the time of the trial, J.R. did not remember discussing the abuse with a counselor.

⁶ Detective Tullis had previously investigated a complaint against the victim’s father, who was charged with the aggravated rape of J.R. and pled guilty to forcible rape. At the time of this trial, he was incarcerated for this crime.

J.R. testified that the defendant took her to the Holiday Motel in Houma, Louisiana “about two or three times.” She further testified that she stayed overnight at the motel with the defendant on those occasions and he “did the same thing I told you, like put his penis in my vagina.” During one of those occasions at the Holiday Motel, J.R. witnessed the defendant’s sexual abuse of K.M. Both girls were ten years old at that time. As the defendant abused K.M., he instructed J.R. to position herself behind him and to pinch his nipples. The facts of that incident form the basis for the charge and conviction in 2006 KA 2120, also handed down this date.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant argues that the trial court erred in denying his motion for post verdict judgment of acquittal and motion for new trial on the basis that the evidence is insufficient to support the verdict. The defendant argues that the verdict was solely based on the testimony of the victims, which he argues was incredible. The defendant contends that the victims were more likely recalling prior incidents of abuse by J.R.’s biological father instead of any abuse by the defendant. The defendant contends that the victims’ separate accounts of the alleged incidents of abuse by the defendant were inconsistent and that the victims’ testimony was inconsistent with their prior statements. Finally, the defendant contends that both victims had faulty memories.

The constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), and adopted by the Legislature in enacting La. C.Cr.P. art. 821, requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. The **Jackson** standard of review 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 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. When a case involves circumstantial evidence and the jury 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. **State v. Captville**, 448 So.2d 676, 680 (La. 1984).

In order to support a conviction of aggravated rape, the State was required to prove beyond a reasonable doubt that defendant had oral, vaginal, or anal sexual intercourse with a victim who was under thirteen years of age. La. R.S. 14:42(A)(4).⁷ “[A]ny sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime.” La. R.S. 14:41(B). Any penetration, however slight, of the aperture of the female genitalia, even its external features, is sufficient sexual penetration. **State v. Ross**, 2003-0564, p. 11 (La. App. 3rd Cir. 12/17/03), 861 So.2d 888, 895, writ denied, 2004-0376 (La. 6/25/04), 876 So.2d 829 (quoting State v. Bertrand, 461 So.2d 1159, 1161 (La. App. 3rd Cir. 1984), writ denied, 464 So.2d 314 (La. 1985)). The testimony of the victim alone is sufficient to prove the elements of the offense. **State v. Oregon**, 512 So.2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So.2d 113 (La. 1988).

The trial began on December 5, 2005. Lead investigator of the case, Terrebonne Parish Sheriff's Detective Sheila Guidry, began investigating the defendant after a report by K.M.'s maternal grandmother (Patricia). Detective Guidry collected several Holiday Motel receipts from April 2004 to June 2004,

⁷ The instant offense against J.R. was charged with a time period between 1999 and June 2004 for the date of commission. During that time period, La. R.S. 14:41 and La. R.S. 14:42 were amended to add “oral” (2001 La. Acts No. 301, § 1) and the age element of La. R.S. 14:42 was increased from twelve to thirteen years of age (2003 La. Acts No. 795, § 1).

evidencing room rentals by the defendant and his girlfriend, Tiffany Burnett. Specifically, the receipts are dated as follows: April 7th to April 13th, April 14th to April 15th and (on the same receipt) April 18th to April 22nd, April 23rd to April 29th, May 10th, May 27th to May 28th, June 16th, and June 19th. The room was registered in the defendant's name on May 10th. The rooms were registered in Tiffany's name for the rest of the dates.

State witness Detective Dawn Buquet, a forensic interviewer and investigator at the Children's Advocacy Center, conducted videotaped interviews of K.M. and J.R. The interview of K.M. took place on September 21, 2004. During the videotaped interview of K.M., she described the defendant as a friend of J.R.'s mother, Angel. K.M. stated that the defendant took her and J.R. to the Holiday Motel. K.M. stated that the incident occurred in the summer, just after she completed the third grade. According to K.M., she, the defendant, and J.R. arrived at the motel room around 7:00 p.m. K.M. specified that the defendant told her to bend over, pushed her body down, and "put his thing in [her] front and back." The defendant was positioned behind K.M. as she held on to the bed. She further stated that the defendant told her to suck his "private part" and that the defendant "licked me." She specified that the defendant instructed her to open her mouth and then he "slid it in" her mouth. She stated that the defendant referred to his "private" as a "bird." K.M. stated that the defendant "made" her participate in these acts and told her not to tell anyone. K.M. did not see the defendant touch J.R. during this incident and stated that J.R. watched as these acts took place. She stated that the defendant took J.R. with him into the bathroom at some point and the door was closed. She could provide no details as to what happened when the defendant took J.R. to the bathroom. According to K.M., they left the motel room around 10:00 p.m. She stated that she initially did not tell anyone about the incident because the defendant was a friend of her mother, Shawn, but she later told her grandmother

and her sister. K.M. described the defendant as bald, with no tattoos, and as having scars on his face, one by his nose and the other on the back of his head. She also stated that the defendant wore a silver watch.

K.M.'s trial testimony was consistent with the statements provided during her interview with Detective Buquet. She added that the defendant told her to sit on his lap and "[h]e wanted us to try to kiss him with the tongue, but I didn't want to." She confirmed that she, too, had previously been abused by J.R.'s father. K.M. could not remember how old she was when that incident took place, but responded positively when asked whether it occurred years before the trial. K.M. testified that J.R.'s father touched her private part with "[j]ust his hands." She responded negatively when specifically asked whether J.R.'s father ever put his private part in her private part.

The videotaped interview of J.R. took place on January 18th, 2005. During the videotaped interview of J.R., she stated that the defendant and her mother were friends. Regarding the incident involving both victims, J.R. stated that her mother had rented the motel room for the defendant. When they first arrived at the room they played for a while and "then, after that[,] something happened to [K.M.]." The defendant told K.M. to take her clothes off and she "had to put [her] mouth on Terry's penis." She stated that both K.M. and the defendant were on the ground, on their knees. She further stated that the defendant sat on the bed as K.M. kneeled on the bed. The defendant instructed J.R. to position herself behind the defendant, put her hands around his upper body and pinch his chest. She stated that the defendant kissed K.M. on the mouth. The defendant then told K.M. to lie on the bed. K.M.'s legs were dangling off the bed. The defendant "got on his knees and put his mouth on [K.M.'s] front middle spot and was licking." According to J.R., the defendant did not commit any sexual acts with her on the date in question. She stated that she was afraid to tell anyone what happened to K.M. because she believed that it was

her fault that it happened, that she may get in trouble, and that maybe no one would believe her.

J.R. stated that the defendant “either licks [her] on [her] front or makes [her] [do] stuff.” She further detailed that “he put his penis in [her] front middle spot and he did that to K.M.” She stated that the first incident of abuse by the defendant occurred when she was “about three” years old, in her bed at her residence in Houma. The defendant instructed her to get on the bed, pushed her arms on the bed, and “kept putting his penis in [her] front middle spot.” She told him to stop and continued to cry. J.R. stated that she kept telling her mother about the abuse, but then decided to “take it back” and told her mother that it did not happen.

J.R. stated that the defendant made her have sex with him in several different rooms on different occasions at the Holiday Motel; “I’m guessing twenty” times. She stated that the defendant placed his penis in her “front,” “back,” and mouth, and that he licked her. She stated that the defendant once made her drink apple juice and “wine” which she said made her feel “gross” and forced her to swallow what the defendant referred to as “sex pills.” She stated that the defendant put “oily stuff” on his penis and on her body each time before sex.

J.R. testified that during the 2004 school year while she was in the fourth grade, the defendant had sex with her at Tiffany’s house in Thibodaux while Tiffany was at work. J.R. also stated that the defendant abused her more than once during a weekend stay at the Holiday Inn in Houma. She, her mother, her brother, the defendant, the defendant’s mother, and several others were at the Holiday Inn on that occasion. According to J.R., everyone had gone outside to the pool when the defendant abused her. This incident also occurred during the 2004 school year.

J.R. described another incident of abuse when she, her mother, her brother, and the defendant stayed at a relative’s house. J.R.’s mother slept on the sofa and J.R. slept with the defendant on an inflatable mattress, which she described as

“normal.” She stated that the defendant woke her up and made her have sex. This time he “made me bleed.” The defendant told her to take a bath and he washed her underwear and shorts.

J.R. stated that she saw “white stuff” come out of the defendant’s penis on more than one occasion. Because they slept together in the same bed all the time, she stated that the defendant did not own or wear underwear; he would sleep either in his pants or shorts. She ultimately divulged information to her mother, explaining that “it exploded out of me.”

J.R. testified that the defendant lived with her family at some point. She noted that K.M. and her family also lived with J.R. while the defendant lived there. J.R. could not remember how old she was when she first met the defendant. She merely specified that the defendant came to live in her household “[l]ike when I was little.” She stated that the defendant lived in her household for an unknown period of time, left for an unknown period of time (“probably two or three months”), and then came back. She testified that her biological father “put his penis in my vagina” when she was younger. J.R. met the defendant after her father was incarcerated. Someone that she referred to only as “Peanut” also abused her. J.R. specifically stated that Peanut “touched [her] in another kind of way with his hands.” When asked whether anyone else ever touched her in a sexual way, she responded, “Terry Kraemer did.” She recounted several incidents of sexual abuse by the defendant. J.R. stated that the first incident of abuse by the defendant occurred when she was “probably in Head Start.” J.R.’s trial testimony regarding the incidents of abuse by the defendant was essentially the same as the factual accounts presented during the videotaped interview conducted by Detective Buquet.

During her trial testimony, J.R. detailed an incident that took place in her mother’s vehicle. J.R. specifically testified that the defendant “[p]ut my mouth on his penis.” J.R.’s brother, D.R., approached the vehicle just after the act took place.

J.R. specified that the incident where she slept on an inflatable mattress with the defendant occurred when she, her family, and the defendant stayed at Donald Rupert's house for a few nights. J.R. observed a brown mark on the defendant's penis during the first time period of abuse, before she made the initial complaint. She did not recall seeing the mark during the second time period of abuse. J.R. testified that her biological father did not have sex with her at the Holiday Motel or at Donald Rupert's house. She confirmed that the incidents of abuse that took place at the Holiday Motel, Rupert's house, and the Holiday Inn were all by the defendant.

During cross-examination, J.R. confirmed that she met the defendant sometime after her father went to jail, which would have been July of 2000. Thus, J.R. was nearly near six years of age when she met the defendant. J.R. was also questioned regarding greeting cards that were mailed to the defendant before the trial, while he was in prison. One card was signed, "I love you, [J.R.]" J.R. was questioned regarding flashbacks that she had at school. J.R. stated that she faked flashbacks and seizures while in the third and fourth grade. During re-direct examination, J.R. stated that her mother made her send the cards to the defendant and also made her fake the flashbacks and seizures.

Dr. Adrienne Atzemis, a forensic pediatrician at the New Orleans Children's Hospital and expert in pediatrics, examined J.R. on April 25, 2005. During a pre-exam interview, J.R. detailed the incidents of abuse by the defendant. J.R. was shown diagrams and asked to identify different body parts. She initially referred to genitalia as a "middle spot" and then used the words "penis" and "vagina" when referring to the diagram. According to Dr. Atzemis, J.R. talked about penile/vaginal, penile/oral, and penile/anal contact with the defendant. J.R. also talked about the defendant touching her vagina with his hand. She specifically named the Holiday Motel and her mother's vehicle as locations of the incidents of

abuse by the defendant. J.R. talked about blood coming from her vagina during a Holiday Motel incident. J.R. also stated that she saw “white stuff” on the floor. The defendant warned J.R. that if she told anyone she would “get in big trouble.” J.R. further stated that the defendant made her drink alcohol with apple juice. She also discussed her observation of the defendant abusing K.M. at the Holiday Motel. She specifically stated that she saw the defendant put his penis in K.M.’s vagina. J.R. informed Dr. Atzemis that the last incident of abuse occurred when she was ten years old (her age at the time of the interview).

Dr. Atzemis reviewed the hospital’s records of prior examinations of J.R. by Dr. Van Nguyen on August 25, 2000, and April 2, 2001. During the 2000 visit, J.R. made disclosures of penile/vaginal contact with her biological father. During the 2001 visit, J.R. made disclosures of penile/vaginal contact with the defendant. During the 2000 examination, it was determined that a portion of J.R.’s hymen (a piece of skin or thin membrane that surrounds the opening of the vaginal wall) was missing at the 6:00 position (near the buttocks, by the anus). The same condition was observed during the 2001 examination.⁸

Dr. Atzemis’s physical examination findings were consistent with the prior findings. She noted that J.R.’s hymen was now missing from the 4:00 to the 7:00 position. She stated that the change in position does not necessarily mean that J.R. had an additional injury. The scar may have grown with the child. Dr. Atzemis referred to the injury as a transection and noted that from a medical standpoint, it is definitive for blunt penetrating trauma sometime in the past. The finding of the more recent examination by Dr. Atzemis did not confirm or deny vaginal penetration during the interim period between examinations.

⁸ While J.R.’s examination resulted in an abnormal finding, Dr. Atzemis stated that it is uncommon to have a physical finding of sexual activity. According to Dr. Atzemis, an overwhelming majority of child patients with a sexually active history have a normal examination.

During cross-examination, it was noted that J.R. reported (during the 2000 visit) that a peer child touched her genitals with his hand. During that visit, J.R. also reported her father put his “private” in K.M.’s. It was also noted that in the 2001 record, J.R. stated that K.M. told her that the defendant “did something” with her. J.R. was not sure what happened to K.M. back then.

During re-direct examination, Dr. Atzemis explained that the skin around the anus and vagina is similar to the skin inside one’s mouth in that it is designed to stretch and designed for trauma. Moreover, injuries heal very quickly and things can go past the hole in the hymen into the vaginal vault without leaving any injury because of the stretchiness.

Dana Davis, a clinical social worker and psychotherapist who counseled K.M. and J.R., testified as an expert in the field of counseling and clinical therapy. Davis stated that the two girls had never been counseled together and diligent steps had been taken to keep the girls separate. Davis testified that children commonly delay discussing traumatic events for a number of reasons including fear of the perpetrator or that they will be blamed for the incident. Other reasons for “delayed disclosure” include embarrassment or to protect someone. She confirmed that children often feel affectionate toward perpetrators of abuse, noting that perpetrators often spend a long time building a relationship with the children and making them feel special. Davis also explained that children have a limited ability to understand time and space, noting that they may say “a long time ago” to describe something that happened a week before such a description. She also stated that children sometimes minimize the seriousness of trauma.

Davis’ first session with J.R. took place on September 22, 2004. Davis diagnosed J.R. with post-traumatic stress syndrome. J.R. exhibited extreme hypervigilance, disassociation (psychological removal after confrontation with disturbing recollections or information), depression and anxiety. Davis noted that

disassociation could be a symptom of post-traumatic stress syndrome or a separate diagnosis, dissociative disorder. Davis noted J.R.'s academic delays. Davis further noted that J.R. has had a very disruptive and labile relationship with her mother. She explained that the relationship is "changeable" and that J.R. tries very hard to seek the approval of the primary person in her life, her parent. Davis noted that J.R. has had a very disorganized childhood due to the number of adult people in and out of her life, making it very difficult for her to establish a primary, trustworthy person. During cross-examination, Davis confirmed that the symptoms noted in J.R.'s diagnosis were associated with varying diagnoses.

State witness D.R., J.R.'s brother, was thirteen years old at the time of the trial. D.R. was in the seventh grade and taking special-education courses. D.R. was questioned regarding his observations of the defendant and J.R. while they were in the backseat of Angel's vehicle around Mardi Gras. As D.R. approached Angel's vehicle, he observed the defendant zipping his pants while J.R. was wiping her mouth. J.R. was on her knees at the time of D.R.'s observations and the defendant was sitting on the seat. D.R. stated that the defendant slept in the same bed with J.R. "I think a lot of times." D.R. also recalled his family spending the night at Donald Rupert's residence. D.R. slept on the floor in a sleeping bag between the front room and the kitchen. The defendant and J.R. slept in the same area on an air mattress. D.R. testified that he heard a repeated noise and concluded that something was causing the air mattress to move. During cross-examination, D.R. testified that he never actually saw the defendant have sex with his sister.

Defense witnesses Robert Billiot, Jr. (the defendant's cousin), Terry Kraemer, Sr. (the defendant's father), Stacy Verdin (the defendant's friend), the defendant's two minor sons, Rosalie Dupre (the defendant's grandmother), and Kem Kraemer (the defendant's mother) testified that they never observed any inappropriate behavior by the defendant regarding children. Robert Billiot had a

seven-year-old daughter at the time of the trial. The defendant lived with Billiot for about six months and would occasionally take care of his daughter. Billiot's daughter was about six months old at the time. Billiot stated that he would still trust the defendant to take care of his daughter. Stacy Verdin met the defendant at a local club. They exchanged telephone numbers and became friends. Verdin had two children at the time of the trial, a daughter and a son. She testified that her daughter was two years old when she met the defendant. She further testified that, although her daughter would rarely feel comfortable with outsiders, "for some reason she just took up with him. She really looked up to him." Verdin stated that she still trusts the defendant with her kids. Rosalie Dupre and Kem Kraemer testified that the defendant had a stable, normal childhood.

Defense witness Tiffany Burnett, the defendant's girlfriend, met the defendant in February of 2004, one night when she was out with friends. She was present and recalled the bowling event with the defendant, K.M., and J.R. Tiffany testified that K.M. did not appear to be afraid of the defendant and that the group joked and laughed. Angel eventually joined them. When they left the bowling alley, the girls chose to ride home with the defendant and Tiffany. Tiffany testified that she and the defendant have never had sexual intercourse. Although they had tried several times, the defendant was never able to obtain a full erection, and they ultimately stopped trying to have intercourse. Tiffany had observed the defendant around children on several occasions and never saw him do anything inappropriate with the children.

Tiffany rented a room at the Holiday Motel for the defendant several times. She stated that the rooms were often registered in her name. She stated that the first time she rented a room for him, he was looking for a job and did not have money to rent a room. Tiffany lived with her mother in Thibodaux. Tiffany confirmed that J.R. and D.R. had occasionally been to her home. Tiffany also confirmed that the

defendant would often baby-sit J.R. and D.R., usually together, but separately on rare occasions. She and the defendant would often rent a room when they would “go out” and “drink” in Houma. The Holiday Motel was across the street from an establishment that they frequented. During cross-examination, Tiffany responded positively when asked whether the defendant was welcome to stay at her home during their relationship. She stated that the defendant’s offshore work was “hit and miss.” She further stated that the defendant would rent a motel room sometimes when he came in from offshore since he did not have a vehicle and could walk to the store for necessities from the motel. She confirmed that the defendant was alone with J.R. in the motel room on occasion. Tiffany also testified that the defendant does not wear underwear.

Defense witness, Angel, had two children at the time of the trial, J.R. and D.R. Angel testified that her children’s father, her ex-husband, “raped” J.R. and K.M. J.R. informed Angel that her father began abusing her when she started dancing at about two years of age. The abuse was discovered when J.R. was approximately five years of age. J.R. did not provide her mother with details regarding the abuse. Angel stated that she had a conversation with K.M. at some point wherein K.M. stated that J.R.’s father did to her “what he did to [J.R.],” adding “he put his privates in hers.” According to Angel, J.R.’s father was sentenced to forty years imprisonment.

Angel met the defendant in a barroom around September of 2000, and they developed a friendship. The defendant moved in with Angel around October of 2000. Angel stated that their relationship was not romantic although they “slept together” once prior to the defendant moving in with her. The defendant lived with Angel and her children until January of 2001. In October of 2000, the defendant, Shawn, who is K.M.’s mother, and Shawn’s ex-husband lived with Angel and her children in their trailer. Shawn’s children, including K.M., stayed in the trailer on

weekends. Shawn's children stayed with their grandmother, Patricia, during the week. Shawn lived with Angel for several weeks. Thus, K.M. had common living arrangements with the defendant for several weekends in the year 2000. Angel never saw the defendant do anything inappropriate with K.M. or J.R.

In January of 2001, during a counseling session, J.R. made an allegation of sexual abuse by the defendant, but later recanted. Angel reported the allegation to the police. J.R. did not divulge any information to the police. The Office of Child Services (OCS) also investigated J.R.'s claim. The case was validated and Angel was prohibited from having any contact with the defendant.⁹ The defendant moved out and Angel did not see the defendant again for approximately two years.

According to Angel, J.R. began exhibiting emotional instability. Angel stated, "[J.R.] would freak out for no reason." J.R. would suddenly begin to cry hysterically at school. J.R.'s therapist suggested that J.R. could be having flashbacks. J.R. also began having seizures. Angel further testified that J.R. was ultimately suicidal and put a knife to her chest on an occasion. J.R. was admitted to the New Orleans Adolescent Hospital (NOAH) for approximately one month. Without any further details, J.R. told Angel that she touched someone sexually while she was at NOAH (during May of 2002). J.R. was admitted to River Oaks Hospital in New Orleans after another suicide attempt. She was placed on medication and released after approximately eleven days. J.R. ultimately informed Angel that the flashbacks and seizures were not real. Angel stated that she never told J.R. to fake anything. Sometime after the abuse by J.R.'s father, Angel purchased a vibrator for J.R. as a last resort when J.R. started acting out sexually in ways that included an incident of touching a male cousin's "privates" and masturbating with Angel's vibrator and a Barbie doll. Angel testified that

⁹ Angel confirmed that J.R. also made a claim of alleged abuse against Lawrence Voisin (also known as "Peanut"). According to Angel, the claim was never investigated.

counseling did not appease J.R., so she purchased J.R. the vibrator because she did not want J.R. to hurt herself. According to Angel, J.R. ceased acting out sexually after she purchased the vibrator for her. She detailed an incident where J.R. fell asleep using the vibrator. J.R. woke up when her mother removed the vibrator. According to Angel, she informed J.R. that it was inappropriate for her to sleep with the vibrator between her legs.

In December of 2003, Angel saw the defendant at a bar. Angel and the defendant decided that they needed to talk to each other and they did so. That same evening, J.R. was awake when Angel arrived home. Angel asked J.R. if anyone had been touching her and J.R. responded negatively. She stated, “[a]nd for some reason she brought Terry up that night. She said that [defendant] hadn’t done her anything; that Peanut had tried to touch her.” The next day Angel asked J.R. if she was certain about the statements she made the night before. J.R. responded positively. Angel informed J.R. that she saw the defendant, and J.R. stated that she also wanted to see the defendant. The family rekindled their relationship with the defendant. Angel testified that she and the defendant became the “best of friends.” She stated that she and her children could depend on the defendant. The defendant would baby-sit for her at times. The defendant stayed at the Holiday Motel in 2003, near the week of Christmas and continued to stay there periodically. Angel rented a room for the defendant on several instances. The defendant often kept J.R. and D.R. at his motel room during the time period from December of 2003 to September of 2004. On some occasions, the defendant kept only J.R.

Angel testified that the allegations made by K.M. and J.R. against the defendant were similar to their allegations against J.R.’s father. She stated that just after her ex-husband went to prison, K.M. told her that he had sex with her in J.R.’s room on J.R.’s bed and J.R. watched. Angel confirmed that the defendant and J.R. routinely slept in the same bed. Angel initially thought this was inappropriate but

J.R. told her that she “felt more protected in the same bed with him.”

Angel recalled D.R. informing her that on one occasion, he saw the defendant zipping his pants as J.R. wiped her mouth. Angel testified that the defendant “is always making sure his pants are zipped” and J.R. “when she drinks, she wipes her mouth.” Angel also recalled being present during an event at the Holiday Inn. She specified that it was a birthday party for the defendant’s brother. The defendant, Tiffany, Angel, the defendant’s brother and Tiffany, and several children were present for the celebration. They had one room for the group and the room faced the pool. The defendant and his brother were drinking alcoholic beverages. She added, “[a] couple of us had some beer, some wine I believe one was drinking. Terry went in the room and pretty much passed out.” Angel did not see the defendant go in the room with J.R. She stated that Tiffany, J.R., and the defendant slept in one bed while she and D.R. slept in the other bed.

While it was not specified as to what incidents the charges stemmed from, Angel was charged with principal to aggravated rape and criminal obstruction. J.R. and D.R. were removed from her care. The aggravated rape charge was dropped while the other charge was pending at the time of the trial. The record is unclear as to whether the criminal obstruction charge is related to the instant case. Angel’s credibility was attacked during cross-examination after she was questioned regarding her purchase of a vibrator for J.R. In a statement to Detective Buquet, Angel stated that she had disposed of the vibrators that she had purchased for herself and for J.R. However, the vibrators were later confiscated from Angel’s mother’s house. Also during cross-examination, Angel confirmed that the defendant had a bad temper and that she was afraid of him at times. She also stated that J.R. might have also been afraid of the defendant at times.

Consistent with Angel’s testimony, the defendant testified that he met Angel in 2000 at a nightclub and they had a “one night stand.” The defendant began

staying in a motel room when he was working offshore on Torch barges for ABC Welders. The defendant did not have anywhere to go in between offshore trips. The defendant confirmed that he stayed with Angel at the end of 2000 and beginning of 2001, along with K.M.'s parents (with K.M. and her siblings staying with them on the weekends). After getting injured on the job, the defendant would stay with the Angel's children while she worked. During the approximate three-month period between late 2000 and early 2001, the defendant saw K.M. during four to six weekend visits. The defendant became aware of J.R.'s prior abuse by her father after he witnessed an inappropriate incident with J.R. and K.M.'s brother. According to the defendant, the two children were bouncing on the bed and the defendant left the room. When he returned, J.R. was under the blanket. The defendant pulled back the blanket and discovered that J.R.'s outer clothing had been removed. The defendant discussed the incident with Angel and she informed the defendant of J.R.'s history of abuse.

The police questioned the defendant in January of 2001 as to whether he had any sexual contact with J.R. The defendant denied any sexual contact with J.R. and stopped answering questions when they became repetitive. The defendant temporarily moved to Sulphur, Louisiana, to work with his father. He informed the police of his forwarding address.

After the defendant and Angel resumed their friendship, the defendant had Angel's children with him "on a regular basis on weekends." The defendant confirmed that he brought K.M. and J.R. to his room at the Holiday Motel in early May of 2004. The defendant stated that he was alone with the girls in his room for approximately thirty to forty-five minutes. The defendant stated that he never touched either girl inappropriately. The defendant also recalled his brother's birthday party at Holiday Inn. He confirmed sleeping in the same bed with J.R. and Tiffany, but responded negatively when asked if anything happened. When asked

if he recalled the Mardi Gras event described in prior testimony, the defendant stated he remembered going with Angel to purchase “beads or balls or something.” He stated that he did not do anything inappropriate with J.R. on that occasion. The defendant also recalled the nights they slept at Donald Rupert’s house. The defendant stated that he had plans to move out of the motel and move in with Rupert. Angel was supposed to pay for the first month’s rent but did not have the money. During the “couple of days” that they spent at Rupert’s house, the defendant explained that “something happened that kind of ticked [him] off” (as discussed below, further explanation was sought and given during cross-examination). The defendant confirmed that he slept on an air mattress with J.R. during the brief stay there. The defendant further confirmed that D.R. slept in the same room. He stated that he did not have sex with J.R. The defendant testified that he did not have a birthmark or mole on his penis. Photographs of the defendant’s genitals were admitted into evidence. The defendant did not wear a watch, but did have two scars on his face below his eyes.

During cross-examination, the defendant speculated that J.R. made the claim against him to get attention. The defendant stated that the incident where J.R.’s outer clothes were removed while she was in the room with K.M.’s brother was the only inappropriate incident he witnessed. The State impeached the defendant by quoting his prior statement to OCS in January 2001, in which the defendant stated, “One morning [J.R.] . . . woke [him] up because she was jacking [him] off.” The defendant testified that the incident did occur but it “slipped [his] mind.”

When further questioned regarding the Mardi Gras incident, the defendant confirmed that he stayed in the vehicle when Angel went to purchase Mardi Gras items. The defendant instructed D.R. to bring Angel her telephone when she received a call. The defendant and J.R. were alone in the vehicle until D.R. returned. Regarding the stay with Donald Rupert, the defendant explained that

Rupert “kind of ticked me off” when he was “playing around with the kids, and he was saying how fat they got. He grabbed [D.R.’s] tit, and he turned around and grab [sic] at [J.R.’s].”

The defendant responded positively when asked whether he carried a sexual lubricant with him during the time that he dated Tiffany. When asked whether he had a sexual relationship with Tiffany, the defendant stated that they “[t]ried, but we didn’t, couldn’t.” The defendant confirmed that he did not use the lubricant with Tiffany and stated that he had it in his bag “a long time before everybody else went around, too.”

Rebuttal State witness, Donald Rupert, corroborated the defendant, J.R., and her family stayed briefly in his home. Rupert stated that he had “some words with the [d]efendant” pertaining to his sleeping arrangements with J.R. Rupert testified, “I told him it wasn’t going to go down in my house.” He explained that the defendant and J.R. shared the same bed. On cross-examination, Rupert confirmed that the defendant and J.R. had clothes on during his observations.

Shirley Billiot knew the defendant, and was present one night when the defendant and J.R. visited Billiot’s sister. She stated that their behavior made her uncomfortable. She specified that J.R. would get upset when the defendant talked to someone else. She further stated that their relationship appeared to be a “girlfriend/boyfriend friendship.” Billiot sat on the defendant’s lap at one point and J.R. got very upset with her. The defendant explained to her that J.R. “didn’t look at him as a friend, more of a boyfriend/girlfriend situation.” During cross-examination it was noted that Billiot did not include the defendant’s comments in her statement to the police. Her statement did, however, include her observations of J.R.’s behavior.

Tallula Cantrelle, Billiot’s sister, also testified. Regarding an occasion when the defendant and J.R. interacted at her home, she stated, “it’s just the way like [sic]

she was hanging on him and, you know, like she was always by him, just didn't— didn't look right to me.” She also noted that J.R. got angry when Billiot sat on the defendant's lap. Cantrelle relayed her concerns to Angel near the end of 2003.

J.R. was the final rebuttal witness. J.R. testified that her mother used the sexual device (vibrator) on her on one occasion. She also stated that her mother told her not to tell the truth in court. During cross-examination, J.R. denied using toys or her mother's device to touch herself. On re-direct examination, J.R. reiterated that she was telling the truth about her claims against her biological father, against Peanut, and against the defendant.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. 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. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. 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.

The defendant argues that the verdict herein is irrational and that the victim's testimony was incredible and inconsistent. We disagree. Although the defendant hypothesizes that the victims are confusing him with their prior abuser, J.R.'s father, the defendant does not deny bringing the girls to the motel room and, in particular, being alone with J.R. in a motel room and routinely sleeping in the same bed with J.R. at different locations. The defendant admitted that J.R. masturbated him on one occasion. D.R.'s observations were consistent with J.R.'s factual claims regarding the Mardi Gras incident and the abuse that occurred at Donald

Rupert's home. The victim convincingly and consistently rehashed several instances of sexual abuse by the defendant. The jury was reasonable in rejecting the defendant's hypothesis of innocence. After a thorough review of the record, viewing the evidence in the light most favorable to the State, we are convinced that any rational trier of fact could have found that the evidence, to the exclusion of every reasonable hypothesis of innocence, was sufficient to prove all of the elements of aggravated rape of J.R. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO¹⁰

In his second assignment of error, the defendant avers that the trial court erred in imposing excessive sentences. The defendant notes that he had no prior felony convictions, and argues that there was no reason for the trial court to impose the life sentences in 2006 KA 2120 and 2006 KA 2121 consecutively. The defendant argues that the convictions were based on weak testimony and that the trial court failed to consider mitigating factors. The defendant argues that the imposition of consecutive sentences herein is cruel and unusual punishment.

Both the United States and Louisiana Constitutions prohibit the imposition of excessive or cruel punishment. U.S. Const. amend. VIII; La. Const. art. I, § 20. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. **State v. Hurst**, 99-2868, p. 10 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

Although a sentence may be within statutory limits, it may violate a

¹⁰ The defendant also raises this assignment of error in 2006 KA 2120. This court's response to the defendant's argument that the consecutive nature of the sentences imposed is unconstitutional will be included in both opinions. The propriety of the life sentences is otherwise reviewed independently although the findings are analogous.

defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979); **State v. Lanieu**, 98-1260, p. 12 (La. App. 1st Cir. 4/1/99), 734 So.2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So.2d 962. However, a trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

Louisiana Code of Criminal Procedure article 883 provides:

If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be served consecutively unless the court expressly directs that some or all of them be served concurrently. In the case of the concurrent sentence, the judge shall specify, and the court minutes shall reflect, the date from which the sentences are to run concurrently.

Consecutive sentences for convictions stemming from a common scheme or plan require particular justification. **State v. Thibodeaux**, 2004-1166, p. 5 (La. App. 1st Cir. 4/20/05), 915 So.2d 807, 810.

The penalty for aggravated rape, as set forth in La. R.S. 14:42(D)(1), is life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. In **State v. Johnson**, 97-1906, p. 8 (La. 3/4/98), 709 So.2d 672, 676, in the context of habitual offender sentencing, the Supreme Court stated:

[T]o rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that:

[he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

While noting the mandatory nature of the sentence to be imposed herein, the trial court expressly considered the defendant's actions and the testimony presented

during the trial. The trial court imposed life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for both aggravated rape convictions and ordered that the sentences be served consecutively. The offenses occurred on different dates and to two different juvenile victims. Thus, consecutive sentences are indicated under La. C.Cr.P. art. 883. **State v. Davis**, 2006-922, p. 4 (La. App. 3rd Cir. 12/29/06), 947 So.2d 201, 204; **State v. Boros**, 94-453, 94-454, pp. 11-12 (La. App. 5th Cir. 11/29/94), 646 So.2d 1183, 1189, writ denied, 94-3148 (La. 5/12/95), 654 So.2d 347 (overruled on other grounds noted in **State v. Young**, 96-0195, pp. 4-7 (La. 10/15/96), 680 So.2d 1171, 1173-1175). Furthermore, much discretion should be afforded the trial court's determination that consecutive sentences were appropriate in this case. We find that the reasons given by the trial court support its imposition of consecutive sentences, particularly in light of the severity of the offenses and the harm suffered by the victims. The defendant was aware of the fact that the victim had been previously abused. He worsened her condition by submitting her to several more acts of sexual abuse. Considering the ongoing abuse of the victim by the defendant, we find that the life sentence imposed herein is meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. Thus, to the extent that the defendant argues that his sentence is unconstitutionally excessive, he has failed to clearly and convincingly show that he is exceptional. This assignment of error lacks merit.

REVIEW FOR ERROR¹¹

The defendant asks that this court examine the record for error under La. C.Cr.P. art. 920(2). This court routinely reviews the record for such error, whether or not such a request is made by a defendant. Under La. C.Cr.P. art. 920(2), we are

¹¹ The defendant also requests such a review in 2006 KA 2120. We note that the records are virtually identical and this court's response will be included in both opinions.

limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See State v. Price, 2005-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), ____ So.2d ____, ____, (en banc).

CONVICTION AND SENTENCE AFFIRMED.