NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 2190

STATE OF LOUISIANA

VERSUS

CLARENCE W. SANDERS, III

Judgment Rendered:

* * * * * *

MAY 22 2009

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court Number 422,047

Honorable Donald M. Fendlason, Judge

* * * * * *

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Defendant/Appellant
Clarence W. Sanders, III

* * * * * *

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

GUIDRY, J.

Defendant, Clarence W. Sanders, was charged by grand jury indictment with two counts of aggravated rape in violation of La. R.S. 14:42.[1] Defendant entered a plea of not guilty and proceeded to trial before a jury. The jury unanimously determined defendant was guilty as charged. The trial court subsequently sentenced defendant to a term of life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence on both counts, to be served concurrently.

Defendant appeals, citing the following as error (citations omitted):

> I. Did the trial court's refusal to grant a continuance or require Mr. Farmer's presence in court and participation in the trial violate [defendant's] right to choice of counsel and to due process of law?
>
> II. Did the trial court's refusal to grant a continuance or require Mr. Farmer's presence in court and participation in trial violate [defendant's] right to effective assistance of counsel in that he in effect faced trial with no counsel at all?
>
> III. Did the trial court's refusal to grant a continuance or require Mr. Farmer's presence in court and participation in trial violate [defendant's] right to effective assistance of counsel?
>
> IV. Did the trial court violate due process and the right to a fair trial in allowing the introduction of inadmissible other crimes, wrongs or acts, evidence without reasonable notice?
>
> V. Did the trial [court] err in denying the Motion to Suppress?
>
> VI. Did the trial court's denial of a motion to vacate the convictions for insufficient evidence violate [defendant's] right to due process?

FACTS

On September 28, 2006, A.C. was at the home of her close friend, S.P., before they both left for school at Mandeville Junior High School. A.C. had previously confided to S.P. that she and her younger cousin, S.C., were being sexually abused by S.C.'s stepfather, the defendant. S.P. had noticed that A.C. had

[1] The grand jury indictment alleged these crimes were committed between January 1, 2004 and September 28, 2006 against S.C., who was born October 27, 1994, and A.C., who was born December 4, 1993.

become very depressed, had begun to wear revealing clothing, and had begun to cut herself. Despite S.P. encouraging A.C. to tell an adult about the situation, A.C. refused.

On the morning of September 28, 2006, S.P. finally convinced A.C. to tell an adult. A.C.'s mother, Valerie Carpenter, was summoned to S.P.'s home, where A.C. finally revealed to her mother that defendant had been sexually abusing her and S.C.

Carpenter immediately contacted her brother, Greg Chaisson, who was the father of the cousin, S.C. Chaisson and his wife, Donna (S.C.'s stepmother), drove to the school that S.C. and her older brother attended, withdrew them, and questioned them about what had been occurring with the defendant. [2] Chaisson then contacted the St. Tammany Parish Sheriff's Office and filed a complaint.

The complaint was assigned to Sgt. Wanda Jarvis of the Juvenile Division. During the course of the investigation, Sgt. Jarvis and Chaisson discussed the possibility of S.C. participating in a telephone call that law enforcement representatives could monitor in an effort to get defendant to discuss the allegations. Chaisson declined because he was concerned over S.C.'s fragile emotional state.

The parents of S.C. and A.C. permitted their children to be interviewed at the Children's Advocacy Center (CAC). Sgt. Jarvis monitored the interviews via closed-circuit television. On October 6, 2006, S.C. was interviewed. According to Sgt. Jarvis, S.C. was reluctant to speak and kept blaming herself for what happened. However, A.C. appeared more open to discussing the abuse and admitted that defendant had touched her with his hands and mouth.

[2] S.C.'s older brother, Al.C., is not the subject of any allegations involving defendant.

Initially, S.C.'s mother, M.S., supported defendant and disputed the allegations regarding her husband. After A.C.'s September 28, 2006 disclosure, S.C. did not return to the home shared by her mother and defendant. Sgt. Jarvis instructed M.S. not to question S.C. or discuss the allegations with her child because she was also concerned about S.C.'s mental state. However, when M.S. spent the night with S.C. at the home of S.C.'s grandmother, Linda Libert, she awakened S.C. and questioned her about the allegations. M.S. had consumed alcohol that night, prior to questioning S.C. S.C. became upset and M.S. left the residence. When Sgt. Jarvis learned of this incident, she informed M.S. that she had interfered with an on-going investigation, and if it happened again, she would arrest her.

During the course of the investigation, Sgt. Jarvis learned that A.C. and S.C. had previously disclosed that they were being sexually abused by defendant to A.A., S.C.'s stepsister, while on vacation in February 2004. Sgt. Jarvis also learned that there had been previous incidents wherein defendant reportedly acted inappropriately toward B.S., the twelve-year-old girlfriend of S.C.'s brother, and S.T., a friend of S.C. Both incidents formed the basis of two separate charges of indecent behavior with a juvenile against defendant.

Based on the information learned during the investigation, Sgt. Jarvis obtained a search warrant for defendant's Folsom residence and executed the warrant on October 26, 2006. When she arrived at defendant's residence to execute the warrant, Sgt. Jarvis noted that the area used for S.C.'s bedroom had been completely emptied. Defendant's residence was a two-bedroom home, wherein defendant and his wife used one of the bedrooms, and S.C.'s older brother used the other. S.C. had used an area next to defendant's office that was bordered by a bookcase as her bedroom. This area had no doors or walls; however, when the police arrived with the search warrant, S.C.'s bed had been removed.

Both S.C. and A.C. were examined by physicians in connection with this investigation. On October 24, 2006, Dr. Scott Benton, the medical director of the Audrey Hepburn Children at Risk Evaluation Center of Children's Hospital, examined A.C. Dr. Benton was accepted by the trial court as an expert in pediatric forensic medicine. In obtaining a history from A.C., Dr. Benton noted that she stated that defendant had, on several occasions, touched her private area with his hands and mouth and made her touch his penis. A.C. indicated that S.C. was present when the abuse occurred. Dr. Benton testified that A.C. denied any penile-oral penetration prior to his asking about it. According to Dr. Benton, there were no physical findings observed during his exam of A.C. that would either bolster or dispute the allegations of sexual abuse.

On October 31, 2006, Dr. Adrienne Atzemis examined S.C. Dr. Benton reviewed the report and testified that S.C. provided a history of being touched on her vagina by defendant, who used his mouth and hands. S.C. reported that A.C. was present when the abuse occurred. S.C. also presented a normal physical exam.

According to Dr. Benton, both A.C. and S.C. provided what were described as delayed reports of sexual abuse. Dr. Benton testified that there are three general reasons why children do not report sexual abuse when it is occurring. These reasons include the naiveté of the child who does not understand the activity as wrong; threats or bribes used by the perpetrator to keep the child from revealing what has occurred; and shame and self-blame experienced by the child because of what occurred. Dr. Benton also explained that oftentimes, even after revealing that something inappropriate had happened to them, children are very reluctant to provide graphic details of the abuse because they are scared or embarrassed.

At trial, S.C. testified that her mother married defendant when she was eight years old. When she was in the third grade, defendant would show her magazines containing pictures of naked people. S.C. indicated that defendant kept these

magazines in a drawer of his nightstand next to his bed. A.C. also was present when defendant would show such pictures, which were sometimes on a computer. No one else was ever around.

According to S.C., defendant also began touching her breast and vagina using his hands and mouth. Defendant also instructed her to touch his penis and put her mouth on his penis "a lot." S.C. testified that A.C. was usually in the same room, and she saw defendant engage in the same acts with A.C. S.C. testified that these acts by defendant finally stopped after her father removed her from school and notified the police on September 28, 2006.

S.C. stated that she did not disclose what was occurring because she feared it would disrupt her mother's happiness. S.C. also explained she did not tell everything that happened in her first CAC interview out of fear, and later requested a second interview at the CAC where she was more forthcoming with information. S.C. testified she had been in therapy for quite a length of time regarding these incidents.

A.C. testified that she spent a great deal of time with S.C. because they were cousins and good friends. Much of this time was spent at defendant's residence in Folsom following his marriage to S.C.'s mother. A.C. testified that defendant began abusing her when she was nine years old by touching her breasts and vagina with his hands and his mouth. According to A.C., this occurred whenever she visited S.C., and S.C. was present in the room. A.C. witnessed defendant do the same acts on S.C. A.C. testified that defendant would show her and S.C. pornographic magazines that he kept in a hidden drawer of his nightstand in his bedroom.

A.C. acknowledged that she and S.C. had told her friend, S.P., about the abuse, and S.C. then said it was only a joke. A.C. testified that they were afraid S.P. would tell someone. A.C. also explained that she did not disclose every detail

of the abuse, such as telling Dr. Benton about the defendant putting his penis in her mouth, out of fear. A.C. testified that she requested a second CAC interview because she was too embarrassed to reveal all the details in the first interview.

The State also presented testimony from S.T., who was thirteen at the time of trial and a friend of S.C. S.T. testified she had been to defendant's residence twice as a guest of S.C. According to S.T., on her second visit, she was spending the night and she and S.C. were seated on S.C.'s bed. Defendant entered the area and began to tickle both S.C. and S.T. S.T. testified that during this tickling episode, defendant began tickling her in the "wrong spot," which she described as near her vagina at the top of her leg. Because she had such a negative feeling about the episode, S.T. wound up not spending the night. S.T. testified she never told her mother about this until the police contacted them during the investigation of the present offense. S.T. also testified she never returned to defendant's residence following this incident.

The State also presented testimony from B.S., who was fifteen at the time of trial. In 2005, B.S. attended a Christmas party at defendant's residence as the guest of S.C.'s brother, Al.C. According to B.S., defendant acted inappropriately towards her several times that night. First, when greeting her, he hugged her and placed his fingers in the dimples of her buttocks, or lower back area, and commented that she had a "cute butt" for a twelve-year-old. Later, while B.S. was in Al.C.'s bedroom watching a movie, defendant entered and sat behind her on the bed, whereupon he attempted to place his hands up the front of her sweater. B.S. pushed his hands away. Lastly, when telling defendant goodnight outside near a bonfire, defendant hugged her and kissed her on the neck.

B.S. testified she never returned to defendant's residence and told her aunt, Lynn McDonald, about what had occurred. McDonald informed Marilyn Siren, B.S.'s grandmother, who had custody of B.S. Siren contacted the Sanders's

residence and spoke with defendant's wife about the inappropriate acts defendant had done. Shortly thereafter, defendant contacted Siren and apologized for anything he may have done and explained he was drunk and had no memory of anything. Defendant then offered to do anything for B.S. Siren declined and suggested that defendant get help.

Defendant testified on his own behalf and began by explaining he had "insisted" to his attorney that he be allowed to tell his side of the story. According to defendant, following his marriage to M.S., when she and her two children moved into his Folsom home, he assigned chores for each child to do and insisted that they bring home at least a B in all subjects of their schoolwork. Defendant claimed the children had never had this type of discipline in their lives.

Defendant denied any type of sexual contact with S.C., A.C., or any other child. Defendant admitted he kept a *Hustler* magazine in his nightstand. According to defendant, his wife was home "24/7" except when she went to the store or had to pick up the children. When the prosecutor asked defendant if A.C. and S.C. were at his home while his wife was gone, he replied "Well, I wouldn't be in the house. Usually, I was out in the barn or in the fields, you know." Defendant further claimed A.C. "never really talked to me." Defendant testified that A.C. did not like having to do chores when she visited S.C. at his house and had issues with some of his rules.

Defendant disputed the testimony of Marilyn Siren and stated that he never apologized for any actions on his part toward B.S., but admitted he apologized for any statement he may have said to her. Defendant also testified that the tickling incident involving S.T. was unintentional in that he customarily tickled children on their legs on either side of their knees.

The defense presented testimony from several witnesses, including Richard Dupont, defendant's brother-in-law; Janet Sanders, defendant's sister; Victoria

Sanders, defendant's cousin; and Dr. Richard Sanders, another of defendant's cousins. Each of these witnesses testified that they never observed any inappropriate behavior by defendant toward any child.

DENIAL OF MOTION TO CONTINUE

Through defendant's first three assignments of error, he contends the trial court erred in denying his motion to continue or in failing to require his lead counsel's presence in court and participation in the trial. Specifically, defendant alleges that these failures of the trial court further violated his right to choice of counsel, to due process of law, and to effective assistance of counsel in that he, in effect, faced trial with no counsel at all.

A motion for a continuance shall be in writing and shall allege specifically the grounds upon which it is based. La. C. Cr. P. art. 707. The granting or denial of a motion for continuance rests within the sound discretion of the trial court, and its ruling shall not be disturbed on appeal absent a showing of a clear abuse of discretion. La. C. Cr. P. art. 712; State v. Castleberry, 98-1388, p. 5 (La. 4/13/99), 758 So.2d 749, 755, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999). Whether refusal of a motion for continuance is justified depends on the circumstances of the case. Generally, the denial of a motion for continuance is not reversible absent a showing of specific prejudice. State v. Strickland, 94-0025, p. 23 (La. 11/1/96), 683 So. 2d 218, 229.

Right to Choice of Counsel

Beginning with defendant's December 22, 2006 arraignment, he was represented by retained counsel, Marion Farmer. By order dated March 11, 2008, Kevin Boshea, who also had been retained by defendant, enrolled as counsel. The minute entries reflect that between the first assigned trial date of February 12, 2007, and the commencement of trial on May 6, 2008, there were five continuances of the trial (four at the request of defendant), and motion dates were

continued six times (four at the request of defendant). Trial was eventually set for Tuesday, May 6, 2008.

On Thursday, May 1, 2008, Farmer filed a motion to continue defendant's trial, for the following reason:

> Counsel is going through the dissolution of his law firm and has not had time to properly prepare for the trial on this case and is not in a position to proceed to trial at the present time. Counsel respectively [sic] requests that the trial on this matter be continued to a later date.

On Friday May 2, 2008, the trial court denied Farmer's motion to continue. On the morning of trial, Farmer again moved to continue the trial citing a "severe" problem with his law firm and admitted that the problems were "driving [him] crazy" and that he and his law partner had almost "come to blows" in the office. Farmer told the trial court, "I cannot get the work done," and also stated, "I could not try anything more than a traffic ticket at this time, and I'm not going to try anything more than a traffic ticket at this time. That's just the way it is."

Farmer then stated, "[t]his man here [Boshea] has done a great job of trying to get ready, but he's done a very minimal part on the case. I'm instructing him as lead counsel not to participate one iota in the selection of a jury in the trial of this case; that this will be malpractice on his part and my part if we go forward."

Boshea later addressed the trial court and stated that he learned through the prosecutor on the Friday prior to trial about Farmer's request for a continuance and the denial of the continuance. Boshea stated that he had been told by defendant, defendant's family, and Farmer that he was not to proceed at that time.

The prosecutor opposed Farmer's motion to continue the trial on the basis that the allegations concerned events that occurred in 2003, and the minor witnesses were thirteen and fourteen years old and on the brink of a nervous breakdown due to the stress of testifying at trial. The prosecutor articulated that it would be unfair to put these witnesses through this type of stress again. The

prosecutor further explained that he was retiring on June 20, 2008, and although he could be replaced by another prosecutor, he had spent a great deal of time with the minor witnesses preparing them for trial.

In denying the continuance, the trial court noted that defendant had obtained at least four continuances since the trial had originally been scheduled. The record indicates that Boshea enrolled as co-counsel in this matter on March 11, 2008. The trial court noted that Boshea had been a prosecutor with the New Orleans District Attorney's Office for a period of ten years under Harry Connick and had been licensed to practice law for more than twenty years. The trial court considered Boshea to be "quite competent."

Farmer again objected that the trial court was ignoring the "minor tragedy" in his life and the fact he was not prepared to go forward at that time. Farmer then stated:

> I'm not going to allow this man [Boshea], as the second chair, to proceed. I am telling him: Do not ask a single question. I'm not going to ask a single question. I'm going to tell the jury exactly what I'm telling you.
>
> Now, I think you need to rethink this.

Following this exchange, the trial court met with all attorneys in chambers for an off-the-record discussion. Following that discussion, the parties returned to the courtroom, and the trial court reiterated its denial of the motion to continue and stated that the victims in this case, who were approximately twelve years old and had been undergoing counseling in connection with the allegations at issue, were present and ready to testify. The trial court noted that Farmer had admitted he was not competent to proceed with the matter that day, and the court was well aware of Boshea's reputation and ability and was confident he could proceed with the trial.

The trial court further noted that if defendant instructed Boshea not to participate in the trial, such an act would be tantamount to firing his attorney on the

day of trial, which would not be grounds for obtaining a continuance. Boshea then moved to withdraw as counsel, which also was denied. Jury selection and trial proceeded with defendant represented by only Boshea. Farmer never returned to the courtroom following the trial court's denial of his motion to continue. Defendant contends that the trial court's denial of Farmer's motion to continue deprived him of his right to be represented by his choice of counsel.

The United States Constitution guarantees that the accused, in all criminal proceedings, shall have the assistance of counsel for his own defense. U.S. Const. amends. VI and XIV. The Supreme Court has further stated that an element of this right is the right of a defendant, who does not require appointed counsel, to choose who will represent him. See Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988). The right of choice of counsel is also recognized by the Louisiana Constitution. La. Const. art. I § 13; see also State v. Seiss, 428 So. 2d 444, 447 (La. 1983). An arbitrary or erroneous denial of counsel of choice, made without any regard for the circumstances of the particular case, is a constitutional violation requiring reversal. See United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); Fuller v. Diesslin, 868 F.2d 604, 608 (3rd Cir.), cert. denied, 493 U.S. 873, 110 S.Ct. 203, 107 L.Ed.2d 156 (1989).

However, the right to counsel of choice is not absolute. Wheat, 486 U.S. at 159, 108 S.Ct. at 1697. Where considerations of judicial administration supervene, the presumption in favor of counsel of choice is rebutted and the right must give way. Fuller, 868 F.2d at 607 n.3.

Defendant argues his situation is analogous to the situation addressed by the Second Circuit in State v. Roberts, 569 So. 2d 671 (La. App. 2d Cir. 1990). In Roberts, the defendant initially retained local counsel for arraignment, but approximately one month later, an out-of-state attorney filed a motion to enroll,

setting forth that he had been hired after the defendant's arrest and had agreed to work with local counsel in representing the defendant. The trial court took no action on the motion to enroll. Roberts, 569 So. 2d at 672-73. The matter proceeded through the pretrial stages and the out-of-state attorney filed a motion to continue the trial due to a conflict with his federal trial schedule. When the trial court learned that the out-of-state attorney was not admitted to practice in Louisiana, the trial court told him he would not be allowed to participate in the case and denied the out-of-state attorney's motion to continue. Roberts, 569 So. 2d at 673. Following trial, the defendant appealed, arguing the trial court erred in barring his out-of-state attorney from participating and in denying his motion to continue. Roberts, 569 So. 2d at 674. The Second Circuit determined the trial court's prohibition from allowing the defendant's out-of-state attorney to enroll was reversible error per se. In reaching this result, the Second Circuit noted that the situation was different from an "eleventh hour" motion to change counsel, because the out-of-state attorney had sought to enroll one year prior to the pretrial hearings. Moreover, the State had acknowledged the out-of-state attorney's right to participate by signing a joint motion for continuance to accommodate his federal trial schedule. The Second Circuit noted that there was nothing to suggest the out-of-state attorney's enrollment was an attempt to obstruct or interfere with the administration of justice. Roberts, 569 So. 2d at 675.

The Second Circuit in Roberts examined the trial court's reason for refusing to allow the out-of-state attorney to enroll as counsel. According to the record, the trial court stated that excluding out-of-state attorneys was a "practice of this court ever since I've been on the bench and as far as I know long prior to my ever coming on the bench." Roberts, 569 So. 2d at 675. The Second Circuit placed particular emphasis on the fact that prevailing state law held to the contrary, and that the out-of-state attorney had complied with the applicable provisions that

would allow him to participate in the matter. Roberts, 569 So. 2d at 675-76. The Second Circuit further stated that each case turns on its own facts and the trial court's decision to grant or deny a continuance balances a defendant's right to counsel of his choice against the public's interest in the orderly administration of justice. The Second Circuit noted that ruling on the out-of-state attorney's motion to continue was inextricably related to the ruling excluding him from participating in the case. Once the trial court denied the out-of-state attorney's request to participate, his motion to continue was rendered moot, thereby foreclosing all consideration of the balancing of defendant's right to counsel of choice and the orderly administration of justice that would allow the trial court to grant or deny the continuance. Roberts, 569 So. 2d at 676. The factors mentioned by the Second Circuit that would have been relevant to this balancing of interests were whether the out-of-state attorney could have made other arrangements for his federal trials; all previous continuances in the case had been obtained with the consent of the State and for good cause; defendant was not responsible for the trial court's unexpected denial of the motion to enroll; defendant obviously wanted the out-of-state attorney to represent him as lead counsel; and the primary reason for the State's opposition to the continuance (i.e., the shipping and guarding of bulky physical evidence) had not materialized, since the evidence would not be transferred until after the jury was sworn. Roberts, 569 So. 2d at 676-77. The circumstances of Roberts, notably the erroneous exclusion of the out-of-state counsel of choice, mandated a finding that the trial court failed to perform the minimal balancing test necessary to support a denial of a continuance. Roberts, 569 So. 2d at 677.

In the present case, our review of the record leads us to conclude the trial court clearly balanced defendant's right to choice of counsel with the interest of the orderly administration of justice in denying defendant's motion for continuance.

Farmer had been defendant's primary counsel of choice since the initiation of the proceedings in December 2006. Farmer admitted that due to the stress of the dissolution of his law practice, he had been unable to concentrate on defendant's case. However, the trial court noted that defendant had obtained four continuances of the trial prior to the May 6, 2008 date. The trial court further articulated its consideration that the minor victims were approximately twelve years old and had been undergoing counseling associated with the allegations of the indictment. The trial court stated that retained co-counsel, Boshea, was an experienced criminal trial attorney whom it considered "quite competent," and he had been retained on this matter two months prior to the trial date.

We further note that both Farmer and Boshea were aware that the trial court denied the motion to continue on Friday, May 2. Despite Farmer's statements that the dissolution of his law firm was a "minor tragedy," he offered the trial court no timetable regarding when he could resume competent representation of defendant in this matter. Rather, Farmer chose to attempt to dictate to the trial court that the continuance be granted since he had instructed Boshea not to participate in jury selection. Moreover, the trial court was aware that the prosecutor was retiring on June 20, 2008.

Considering the circumstances, we cannot say the trial court abused its wide discretion in balancing the competing interests of defendant being represented by his retained counsel, Farmer, and a situation wherein the orderly administration of justice would be, in effect, held hostage by Farmer's personal dilemma. Despite Farmer's purported problems, defendant's other retained counsel, Boshea, was still available to represent him at trial. Boshea had been retained several months earlier and was an experienced criminal trial attorney. Moreover, we note that despite Farmer's attempt to cajole Boshea into not participating in jury selection and

witness examination, Boshea conducted voir dire and the examination of witnesses on the defendant's behalf.

Defendant claims his rights to choice of counsel and due process were violated when the trial court refused to grant a continuance or require Farmer's presence in court. In addition to citing Roberts, defendant also cites Gandy v. State of Alabama, 569 F.2d 1318 (5th Cir. 1978) to support this argument. As previously explained, the Roberts court found the denial of a continuance violated the defendant's rights because the trial court had not balanced the defendant's right to choice of counsel with the State's interest in the orderly administration of justice. In Gandy, the court made a similar finding that the trial court had not balanced these competing interests when it ordered the law partner of the defendant's counsel of choice to handle the case on the morning of trial when a conflict arose in the defendant's chosen counsel's schedule. Gandy, 569 F.2d at 1324. The Gandy court noted that the trial court failed to consider any alternatives, and the lawyer ordered to replace the defendant's original counsel was completely unfamiliar with the case prior to the commencement of trial. Gandy, 569 F.2d at 1326-28.

The present case is distinguishable because in addition to retaining Farmer, defendant also retained Boshea, an experienced criminal trial attorney, who planned to participate in the trial. Moreover, in light of the fact that the trial court performed the necessary balancing of defendant's choice of counsel rights with the orderly administration of justice, we decline to apply a presumption of prejudice to the trial court's actions in denying Farmer's motion to continue.

This assignment of error is without merit.

Presumption of Ineffective Assistance of Counsel

In defendant's second assignment of error, he argues the trial court's refusal to grant a continuance or require Farmer's presence in court and participation in the

trial violated his right to effective assistance of counsel in that he, in effect, faced trial with no counsel at all. In support of his argument that he is entitled to a presumption of prejudice under these circumstances, defendant cites United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Defendant contends that the circumstances of his proceeding to trial without Farmer and only with Boshea, whom defendant claims did not even have possession of Farmer's file until trial began, created a situation whereby the likelihood that Boshea could provide effective assistance was so small that there should be a presumption of prejudice without inquiry into the actual conduct of the trial.

We disagree. First, we note that in Cronic, the Supreme Court recognized ineffectiveness of counsel could be presumed without a showing of prejudice when either: there was a complete denial of counsel; counsel actively failed to subject the prosecution's case to meaningful adversarial testing; or the likelihood that any lawyer, even a fully competent one, would provide effective assistance is so small that a presumption of prejudice was appropriate without inquiry into the actual conduct of trial. Cronic, 466 U.S. at 659-60, 104 S.Ct. at 2047.

The record fails to support defendant's claims of a presumption of prejudice. First, we note that Boshea filed a motion to enroll as counsel on February 15, 2008, indicating he had been retained by defendant. The order was signed on March 11, 2008. An April 28, 2008 minute entry indicates Boshea was present for a scheduled hearing on the Motion for Preliminary Examination and a Motion to Suppress Evidence, both of which were continued to the date of trial.

Boshea himself represented to the trial court that he had learned of Farmer's attempt to obtain a continuance from the prosecutor on May 1, and was aware the following morning that Farmer's continuance had been denied. Boshea stated he

had spoken with Farmer at approximately 1:40 p.m. on Friday, May 2, wherein Farmer relayed what had been going on with his law firm.

However, the trial court noted that all counsel had been aware of the May 6 trial date when it was originally set in February 2008. Moreover, the trial court observed that it was "impressed with [Boshea's] professionalism," as evidenced in all the pretrial conferences held in connection with this matter.

It is important to note that while Boshea stated he did not have physical possession of Farmer's file, he never represented to the trial court that he had not prepared for the trial. Further, an instanter subpoena was issued for Farmer to produce his file, which Farmer complied with prior to the commencement of trial. Finally, the lack of physical possession of Farmer's file is not indicative that Boshea was unfamiliar with the case. To the contrary, Boshea appeared to be sufficiently familiar with the case as demonstrated when he reminded the trial court that the Motion to Suppress Evidence was supposed to be heard prior to jury selection.

Under the circumstances of this case, we cannot say defendant is entitled to a presumption of prejudice arising from Boshea not having physical possession of Farmer's file. Boshea had been retained by defendant in February and had been involved in selecting a trial date. Boshea was aware that the trial court denied Farmer's motion to continue on Friday, May 2. Moreover, Farmer provided Boshea with the defendant's file prior to the commencement of trial. Therefore, defendant failed to prove that his counsel's actions fell within one of the three situations outlined in Cronic for which prejudice should be presumed.

This assignment of error is without merit.

Ineffective Assistance of Counsel

In his third assignment of error, defendant argues that the trial court's resolution of the problems arising from Farmer's abandonment resulted in ineffective assistance of counsel by Boshea, who he contends was unprepared to perform adequately as his counsel.

Specifically, defendant contends that Boshea made repeated references to Farmer's absence and his role was to only "assist" Farmer. Boshea further elicited testimony from defendant that Farmer was his "primary attorney." Defendant argues these remarks, coupled with Farmer's absence, could only have left the jury with the impression that Farmer was unwilling to represent him. Further, defendant contends that Boshea's comments in opening statements that he was only "assisting" Farmer and that Farmer would not be present for trial, coupled with Boshea's opening statement that indicated if defendant had committed these crimes, he was "a monster, he is an animal, and ... life imprisonment isn't good enough for him," could have caused the jury to conclude that Farmer abandoned defendant due to his guilt.

In Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. State v.

Morgan, 472 So. 2d 934, 937 (La. App. 1st Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. State v. Robinson, 471 So. 2d 1035, 1038-39 (La. App. 1st Cir.), writ denied, 476 So. 2d 350 (La. 1985).

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. State v. Carter, 96-0337, p. 10 (La. App. 1st Cir. 11/8/96), 684 So. 2d 432, 438.

In the present case, at the outset of defense counsel's opening statement, he stated,

> As I said before, I am assisting Marion Farmer, who will not be with us today for this trial.
>
> I listened very, very intently to the State's opening statement ... And as far as I am concerned, he is a monster, he is an animal, and to be candid with you, life imprisonment isn't good enough for him. That's what this man is. That's what this man is, that's what they told you that he is. An inhuman, vile, disgusting monster. If it happened. If it happened.
>
> I have only been involved in this case for several months, and I would like to tell you that I am going to try and do my level best to get to what happened in this case. I am truly going to try. And as I told you in voir dire, the allegations are disgusting, despicable and horrible; of that there is no doubt. If they happened.

Defendant argues that these remarks, made in the presence of the jury without further explanation, could only have left the jury with the impression that Farmer was unwilling to represent defendant due to his guilt. Defendant further argues that there is a reasonable probability that the outcome would have been different had Boshea not made the jury aware of Farmer's abandonment of

defendant, coupled with Boshea's expression of his views that anyone who would commit such crimes is a "monster."

In evaluating these comments under the first prong of the Strickland test, we cannot say Boshea's actions in mentioning Farmer, who chose not to participate in the trial, were deficient. Prior to the commencement of trial, when Farmer did not obtain his continuance, he was given the option of withdrawing from representation of defendant or participating in the trial. Farmer chose neither option, but instead absented himself from the courtroom prior to the voir dire and never returned. Because Farmer had not withdrawn, there was the possibility that he could have returned to participate at a later point in the trial. It is understandable that Boshea would not have wanted to explain to the jury that Farmer was having problems associated with the breakup of his law firm.

Additionally, we cannot say Boshea's references to someone guilty of these crimes as a monster, etc., amount to deficient representation. Taken in context, Boshea used them to indirectly draw attention to the crux of the defense, which was that the crimes never occurred and were fabricated by the victims.

Finally, even if we consider these statements and references by Boshea to have been deficient, we cannot say these actions prejudiced the defense to the point of making the outcome of the trial unreliable. As stated earlier, the defense argued that the allegations had been fabricated by the two young children. It is evident that Boshea carefully cross-examined the State's witnesses and emphasized how the initial allegations were not consistent with the victims' trial testimony and the fact that there was no physical evidence to support the allegations. Considering the evidence in the record, we cannot say Boshea's few references to "assisting" the absent Farmer were so serious as to undermine the outcome of this proceeding.

This assignment of error is without merit.

NOTICE OF EVIDENCE OF OTHER CRIMES

In his fourth assignment of error, defendant argues that the trial court violated due process and the right to a fair trial in allowing the introduction of inadmissible other crimes, wrongs, or acts evidence without reasonable notice. Defendant contends that the inevitable consequence of the counsel issue was that Boshea did not receive timely notice of other crimes evidence as required by La. C.E. arts. 404(B) and 412.2.

The first instance occurred during direct examination of Sgt. Jarvis when the State introduced a photograph, taken during the execution of the search warrant at defendant's residence, of an empty Jack Daniels bottle in a wastebasket. Sgt. Jarvis testified that the victims indicated during the investigation that defendant would have them make alcoholic drinks for him. The second instance involved the introduction of evidence of alleged prior inappropriate conduct by defendant towards S.T. and B.S., through the introduction of a *Hustler* magazine recovered from defendant's residence during the execution of a search warrant.

Our review of the record indicates that when the State responded to defendant's discovery request, it also complied with the notice of use of other crimes or bad acts by defendant. Specifically in the answers to defendant's discovery request filed April 12, 2007 (more than a year prior to trial), the State set forth the bill of information charging defendant with two counts of indecent behavior with a juvenile regarding S.T. and B.S. Included in this notice was also the arrest warrant for these other crimes setting forth the facts and circumstances supporting defendant's arrest on these charges.

Further, we note the April 12, 2007 filing by the State contained a return on all items seized from defendant's residence, specifically listing the *Hustler* magazine recovered exactly where both of the victims described. Moreover, the

filing also contains the investigative report that references S.C.'s statement that defendant would have her make alcoholic beverages for him.

In reviewing the record and considering the circumstances of this matter, we decline to find defendant did not have notice that the State intended to use these other instances of bad acts. Although Boshea was not enrolled as counsel at the time this notice was given, he represented to the trial court that he had been retained as additional counsel in February 2008. Moreover, Boshea was clearly involved in the setting of the May 6, 2008 trial date. Finally, Boshea also was aware that Farmer's May 1, 2008 Motion to Continue had been denied and that the trial court intended to hear the trial on May 6, 2008. By our review, Boshea had been retained and acted on defendant's behalf for some three months prior to trial. Under these circumstances, any unfamiliarity Boshea claims with respect to the notices filed by the State cannot be attributable to the prosecution or the trial court.

This assignment of error is without merit.

MOTION TO SUPPRESS EVIDENCE

In his fifth assignment of error, defendant argues the trial court erred in denying his motion to suppress the evidence. Defendant specifically argues that the information used to obtain the search warrant in this case failed to rise to the level of probable cause because there was nothing in the affidavit in support of the search warrant that would indicate a belief that the items were still in defendant's residence.

A defendant who seeks suppression of evidence seized pursuant to a warrant has the burden of proving the grounds of his motion. La. C. Cr. P. art. 703(D); State v. McCutcheon, 93-0488, p. 6 (La. App. 1st Cir. 3/11/94), 633 So. 2d 1338, 1342, writ denied, 94-0834 (La. 6/17/94), 638 So. 2d 1093.

A person is constitutionally protected against unreasonable search and seizure of his house, papers, and effects. Thus, a search and seizure of such shall

only be made upon a warrant issued on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and thing(s) to be seized. U.S. Const. amend. IV; La. Const. art. I, § 5. The general rule is that probable cause sufficient to issue a search warrant "exists when the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched." State v. Johnson, 408 So. 2d 1280, 1283 (La. 1982); see La. C. Cr. P. art. 162. The issuing magistrate must make a practical, common sense decision whether, given all the circumstances set forth in the affidavit, a fair probability exists that the evidence of a crime will be found in a particular place. Additionally, a search warrant must establish a probable continuing nexus between the place sought to be searched and the property sought to be seized. Further, an affidavit must contain, within its four corners, the facts establishing the existence of probable cause for issuing the warrant. State v. Casey, 99-0023, pp. 3-4 (La. 1/26/00), 775 So. 2d 1022, 1027-28, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000).

In the present case, the affidavit accompanying the search warrant set forth facts indicating that defendant had shown each victim pornographic photographs on either the computer or in magazines. The affidavit further indicated that the victims stated defendant would take them in separate rooms and make them look at magazines of nude people and that defendant kept these magazines in a drawer by the bed on the left side.

In arguing the affidavit failed to establish probable cause to believe these items were still at his residence, defendant cites the case of State v. Boneventure, 374 So.2d 1238 (La. 1979). In Boneventure, an officer applied for a search warrant to search a defendant's residence. The affidavit indicated that two days

earlier an informant had observed a quantity of marijuana that had been offered for consumption by the defendant. In finding that the affidavit failed to establish probable cause to believe the evidence observed by the informant would still be located at the residence, the court emphasized that within the general concept of probable cause is a necessary element of a reasonable belief that contraband or evidence will not be disposed of, but rather will remain at the place to be searched at the time of the search. Boneventure, 374 So. 2d at 1239. Under the circumstances of Boneventure, as set forth in the affidavit, there could be no probable cause to believe the same consumable amount offered to the informant two days earlier would still be in the residence at the time of the search. Boneventure, 374 So. 2d at 1239.

In the present case, we cannot say the affidavit fails to establish a reasonable belief that the photographs of nude people, whether on a computer or in a magazine in the location described by the victims, would still be there. The photographs, unlike the quantity of marijuana at issue in Boneventure, are not something that is regarded as susceptible to being consumed.

Under the circumstances of the present case, we cannot say the affidavit failed to establish probable cause that the photographs of nude people would still be in defendant's residence. Therefore, the trial court correctly denied the motion to suppress.

This assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE

In his final assignment of error, defendant argues the trial court erred in denying his Motion for Judgment Notwithstanding the Verdict. Defendant contends that the evidence does not support the verdicts returned by the jury. Specifically, defendant notes: the credibility of the victims is questionable due to the delay in reporting these incidents; the coercion used to obtain the cooperation

of his wife; the fact S.C. was interviewed several times before providing a detailed statement; the fact that S.C. claimed she was "joking" about the allegations to a friend; and the fact A.C. denied any oral sexual contact involving defendant when evaluated at Children's Hospital.

In reviewing claims challenging the sufficiency of the evidence, this court must consider whether, after 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. 2871, 2789, 61 L.Ed.2d 560 (1979); see also La. C. Cr. P. art. 821(B).

Louisiana Revised Statutes 14:41 provides in pertinent part:

> A. Rape is the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent.
>
> B. Emission is not necessary, and any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime.

Louisiana Revised Statutes 14:42 provides in pertinent part:

> A. Aggravated rape is a rape ... where the ... oral ... sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> * * * * *
>
> (4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.[3]

After a thorough review of the record, 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 that defendant was guilty of the aggravated rapes of S.C. and A.C. The verdicts rendered against defendant indicate the jury accepted the testimony of the State's witnesses, including the accounts given by S.C. and A.C. of the incidents.

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[3] Amended by 2006 La. Acts, No. 178, § 1, effective August 15, 2006, to change the penalty provision of the crime of aggravated rape found in subsection D(2) to conform to one of the circumstances defining the crime, being when the victim is under the age of thirteen years, as stated in subsection A(4) of the statute.

This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The testimony of the victim alone is sufficient to prove the elements of the offense. The trier of fact may 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. State v. Verret, 06-1337, pp. 6-7 (La. App. 1st Cir. 3/23/07), 960 So. 2d 208, 214, writ denied, 07-0830 (La. 11/16/07), 967 So. 2d 520.

This assignment of error is without merit.

CONCLUSION

Thus, based on the foregoing discussion, we find the defendant was not prejudiced in the proceedings before the trial court and that the evidence presented to the jury was sufficient to support the defendant's convictions for the crimes charged. Accordingly, we affirm the defendant's convictions and sentences rendered in this matter.

CONVICTIONS AND SENTENCES AFFIRMED.