NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0103

STATE OF LOUISIANA

VERSUS

DANIEL JOSEPH MOORE

DATE OF JUDGMENT: JUL - 8 2010

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 383,668, DIV. H, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE ALLISON H. PENZATO, JUDGE

* * * * * *

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Disposition: CONVICTIONS AND SENTENCES ON COUNTS I, II, AND III AFFIRMED; PROTECTIVE ORDER ISSUED.

KUHN, J.

Defendant, Daniel Joseph Moore, was charged by grand jury indictment with three counts of aggravated rape (counts I – III), violations of La. R.S. 14:42, and one count of attempted aggravated rape (count IV), a violation of La. R.S 14:27 and La. R.S. 14:42, and he pled not guilty on all counts. Following a jury trial, he was found guilty as charged on counts I – III, and not guilty on count IV. On counts I – III, he was sentenced on each count to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The trial court ordered that the sentences run consecutively. He now appeals, challenging the sufficiency of the evidence and a portion of the opening statement of the State. For the following reasons, we affirm the convictions and sentences on counts I – III.

FACTS

On April 6, 2004, the St. Tammany Parish Sheriff's Office was alerted to a handwritten, anonymous note found at Honey Island Elementary School. The note claimed to be from a ten-year-old boy. It stated, "They have a man that picks up little boys at your school hes [sic] name is Danule More[.]" The boy claimed he had been molested by "Danule More" but was "scard" to tell his dad because he knew that he would kill "Danule More." The boy claimed that "Danule More" had "rapt" him "fore" times when he was six and seven years old and "payed" him a lot of money to not "tell on him." The boy claimed that "Danule More" had a big jar with yellow grease in it, and that he had used it on him. The boy also claimed that "Danule More" "hangs around a lot of little boys and baby sits them." Defendant, whose date of birth was June 24, 1976, was a temporary janitor at the school. As a

result of the note, the St. Tammany Parish Sheriff's Office began questioning children who had been left in the care of defendant.

The victim of count I, J.B.,[1] testified at trial. His date of birth was November 18, 1990. He conceded he had misdemeanor convictions for possession of alcohol and possession of marijuana paraphernalia. When he was five or six years old, the defendant was his baby-sitter. According to J.B., defendant would let J.B. play with defendant's Nintendo 64 video game and computer at his trailer. J.B. stated that defendant "used to take his penis and put it in my butt whenever I was like seven years old." J.B. indicated that defendant used Vaseline during the rapes, and the rapes continued until he was nine or ten years old. J.B. also indicated that defendant had put his mouth on J.B.'s penis once or twice. J.B. stated he did not report the rapes for seven years because he was afraid of humiliating himself. He conceded that David Meters, a convicted sex offender, was his father's good friend and had lived in his home when J.B. was a child. J.B. stated that Meters never tried to abuse him and always treated him like a nephew or son. J.B. had also seen B.T. at defendant's trailer.

On April 30, 2004, J.B. made a controlled telephone call to defendant. J.B. told defendant that J.B. was having flashbacks about "those things you did to me." Defendant replied, "I don't fuck with nobody, no more." J.B. asked defendant, "[t]hen why did you do it to me then?" Defendant replied, "I don't know, f---in' ... [J.B.], I was stupid. I was stupid. I don't know why I did that to you." J.B. told

[1] The victims are referenced herein only by their initials. See La. R.S. 46:1844(W).

defendant that J.B. was thinking about talking to someone "about that." Defendant tried to dissuade J.B. and stated that he had been told that "David" had tried something with J.B. J.B. replied that David had never touched him. Defendant asked J.B. if he wanted to put defendant in jail, and J.B. said "No." Defendant then stated, "Just, I don't know what to do [J.B.]. I am f---ing ... I'm sorry. I mean, I did it, what, a couple of times with you?" J.B. replied, "[y]ou did it almost my whole life." Defendant became frustrated and stated, "[o]kay, I f---ed up. I regret it. You want me to shoot myself?" J.B. stated that he did not care what defendant did. Defendant offered to give J.B. money and stated, "I'm sorry about that, man. I don't wanna get in no trouble, I mean ... I mean."

The victim of count II, B.T., also testified at trial. His date of birth was July 12, 1995. Defendant was his baby-sitter when B.T. attended Bayou Woods Elementary School in Slidell, from kindergarten through third grade. According to B.T., when he wanted to play the games at defendant's trailer, defendant would take him to the laundry room in the trailer and "[stick] his penis in [B.T.'s] rear end." B.T. described the pain of the anal rapes as "excruciating." He defined "excruciating" as hurting very badly and being very painful. B.T. could not remember how many times defendant raped him, but knew it was more than once.

The State also played a videotape of an interview with B.T., conducted when he was eight years old. B.T. indicated that defendant was an adult who was his friend and who "used to work at school." Defendant would come to B.T.'s house, and B.T. would go to defendant's house. B.T. indicated that "Tina, another adult," was at defendant's home sometimes. B.T. indicated that when he was seven or eight years old, defendant had pulled B.T.'s clothes off and touched his penis with his

hands "plenty" of times. B.T. also indicated that defendant had touched the inside of B.T.'s rectum with defendant's penis "many" times.

The victim of count III, C.A., also testified at trial. His date of birth was December 10, 1991. When he was "little," defendant was his baby-sitter. From the time C.A. was five or six years old until he was twelve years old, he would go to defendant's house or trailer[2] and play with defendant's Nintendo video game and computer. According to C.A., defendant placed his penis in C.A.'s butt on more than one occasion. C.A. also indicated that defendant forced him to put his mouth on defendant's penis on more than one occasion. C.A. claimed he refused to talk to the doctor at Children's Hospital about the sexual abuse because he was scared of being judged.

Dr. Scott Anthony Benton, an expert in the field of pediatric forensic medicine, also testified at trial. He examined J.B. on May 21, 2004. J.B. was receiving special education in the fifth grade and had behavior problems related to mood swings. He also had a hearing loss. J.B. told Dr. Benton that, from an "early age" until age eleven, he had experienced penile-anal penetration from defendant, penile-oral contact from defendant, and digital-penile contact from defendant with subsequent ejaculation by defendant. A physical exam of J.B. was within normal limits. Dr. Benton indicated, however, that a "normal" physical exam neither confirmed nor denied J.B.'s claims of abuse because there were various reasons why a person who had experienced an abusive act could still have a normal exam. Dr.

[2] C.A. indicated that defendant lived in a trailer, then a house, and then another trailer.

Benton noted that studies on the healing of the anus structure following rape found that it was exceedingly rare for there to be scars or any "residual" given sufficient time from the event.

Dr. Benton also examined B.T. in May 2004. B.T. was receiving special education at the second-grade level. B.T. indicated that defendant had taken him to a back room and pulled his pants down, but claimed that defendant "didn't do nothing." B.T. conceded, however, that he had previously reported penile-anal penetration to a detective. B.T. had a normal physical exam.

Dr. Benton examined C.A. prior to C.A.'s birthday in 2004. C.A. had failed the fourth grade and had behavioral issues. C.A. maintained a nonresponsive or denial position. While being examined, C.A. indicated that something happened to him, but he "didn't want to say." C.A. had a normal exam.

Dr. Benton indicated that children delay reporting or fail to report sexual abuse for many reasons. Most children presume that everything done by adults is correct, even adults engaging them in sexual behavior. Further, even if an abused child realizes that he is being abused, he may not know to whom to turn, particularly if the abusive adult is the person to whom he would normally turn. Dr. Benton also indicated that abused children were susceptible to threats and bribes from their abusers and might also blame themselves for the abuse.

Mary Stone Moore, defendant's mother, also testified at trial. She claimed that when defendant was one year old, he was diagnosed as being mildly mentally retarded, and had special education classes until he left school in the eleventh grade. According to Ms. Moore, she was around "most of the time" when defendant would baby-sit, and her friend "Tina" was generally around. Ms. Moore claimed that J.B.

and the other kids that defendant was baby-sitting wanted to come over to her trailer all the time to play and would get angry at defendant when he would not buy them things they wanted. She also claimed that B.T. stole a chain and a watch from defendant. She indicated that defendant had two Nintendo game systems -- one in his room and one in the front room -- and a computer in his room. According to Mary Moore, the kids defendant was baby-sitting were not allowed "in the back."

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, defendant asserts the jury irrationally weighed the evidence in favor of the State because the controlled conversation did not reflect that defendant had sexual contact with J.B., the alleged victims delayed reporting the alleged abuse, the alleged victims "had mental deficiencies," and there was no physical evidence of the alleged rapes.

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. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. C.Cr.P. art. 821(B); ***State v. Mussall***, 523 So.2d 1305, 1308-09 (La. 1988).

La. R.S. 14:41, prior to amendment by 2001 La. Acts No. 301, § 1, in pertinent part, provided:

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

La. R.S. 14:42, prior to amendment by 2001 La. Acts No. 301, § 1, and 2003 La. Acts No. 795, § 1, in pertinent part, provided:

> A. Aggravated rape is a rape ... where the anal ... 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 twelve years. Lack of knowledge of the victim's age shall not be a defense.

Effective August 15, 2001, La. R.S. 14:41 was amended to also include oral sexual intercourse, *i.e.*, the intentional touching of the anus or genitals of the victim by the offender using the mouth or tongue of the offender or the intentional touching of the anus or genitals of the offender by the victim using the mouth or tongue of the victim. 2001 La. Acts, No. 301, § 1. Effective August 15, 2001, La. R.S. 14:42(A) was also amended by Act 301 to include oral sexual intercourse.

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 counts I, II, and III. The verdicts rendered against defendant indicate the jury accepted the testimony of the victims of counts I, II, and III and rejected the testimony of defendant's mother. This court cannot 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 on a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. ***State v. Lofton***, 96-1429, p. 5 (La. App. 1st Cir.

3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby errs in overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. ***State v. Calloway***, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

IMPROPER OPENING STATEMENT

In assignment of error number 2, defendant contends that during its opening statement, the State improperly read from the transcript of the controlled telephone conversation rather than telling the jury that it would present a tape in which defendant indicated he had "done some regretful things."

The opening statement of the State shall explain the nature of the charge, and set forth, in general terms, the nature of the evidence by which the State expects to prove the charge. La. C.Cr.P. art. 766.

On September 1, 2009, during its opening statement, the State told the jury that in investigating the case, the St. Tammany Parish Sheriff's Office had conducted a controlled phone call between J.B. and defendant, and the jury would hear a recording of that phone call. The State then quoted portions of the phone call. The State had granted the defense open-file discovery and had filed a copy of the transcript of the controlled phone call into the suit record on October 13, 2008.

During its opening statement, the defense told the jury that they would hear the controlled phone call, but "it was set up by the police. [J.B.] was told what to say. He was told what to ask."

During trial, the State offered Exhibit #3, an audio-cassette recording of the controlled phone call, and Exhibit #4, a transcript of the recording, into evidence. The defense did not object to the tape but did object to the transcript. The trial court sustained the objection as to the transcript, and the tape was played for the jury.

Initially, we note defendant failed to contemporaneously object to the challenged portion of the opening statement. An irregularity or error cannot be availed of after verdict unless, at the time the ruling or order of the court was made or sought, the party made known to the court the action which he desired the court to take, or of his objections to the action of the court, and the grounds therefor. La. C.Cr.P. art. 841(A). Moreover, the error, if any, in the opening statement did not affect substantial rights of the defendant. See La. C.Cr.P. art. 921. The defense was notified of the controlled conversation well in advance of trial, responded to the State's reference to the conversation, and the entire conversation was played for the jury without objection by the defense.

This assignment of error is without merit.

PROTECTIVE ORDER

La. R.S. 15:440.6 requires that a videotape of a child's statement admitted under La. R.S. 15:440.5 be preserved under a protective order of the court to protect the privacy of the child. Accordingly, it is hereby ordered that the videotaped statements[3] of the victims be placed under a protective order. See ***State v. Ledet***, 96-0142, p. 19 (La. App. 1st Cir. 11/8/96), 694 So.2d 336, 347, writ denied, 96-3029 (La. 9/19/97), 701 So.2d 163.

DECREE

[3] The State introduced four videotaped interviews into evidence.

For these reasons, we affirm the convictions and sentences on Counts I, II, and III. Furthermore, we place the videotapes of the victim's statements under a protective order in accordance with La. R.S. 15:440.6.

CONVICTIONS AND SENTENCES ON COUNTS I, II, AND III AFFIRMED; PROTECTIVE ORDER ISSUED.