NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1612

STATE OF LOUISIANA

VERSUS

SHANE L. AUSTIN

Judgment Rendered: April 26, 2013

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of Washington, State of Louisiana
Trial Court Number 09 CR8 102299

Honorable William J. Crain, Judge Presiding

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Walter P. Reed **Lewis V. Murray, III** **Franklin, LA**	**Counsel for Appellee,** **State of Louisiana**
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BEFORE: WHIPPLE, C.J., McCLENDON AND HIGGINBOTHAM, JJ.

McClendon, J. concurs and assigns reasons.

WHIPPLE, C.J.

The defendant, Shane L. Austin, was charged by amended grand jury indictment[1] with two counts of aggravated rape (count I against "K.A."; count II against "L.A.")[2], violations of LSA-R.S. 14:42, and pled not guilty on both counts. Following a jury trial, he was found guilty as charged on both counts. He was sentenced, on each count, to serve the remainder of his natural life at hard labor without benefit of parole, probation, or suspension of sentence. Additionally, the trial court ordered that the sentences were to run consecutively.[3] The defendant now appeals, contending the trial court denied him his right to present a complete defense and to confront his accusers. For the following reasons, we affirm the convictions and sentences.

FACTS

K.A. testified at trial. Her date of birth was December 27, 1999. At the time of her testimony on October 26, 2011, she had been living with her "Nana" and "Paw Paw" for four years. Prior to that time, she lived in Bogalusa with her mother, her mother's husband, the defendant (her uncle), and her sister and brother. She testified that when she was six or seven years old, the defendant would hurt her. Using pictures, she indicated the defendant had touched her front and back "private parts." She stated the defendant would hurt her when she was alone in her bedroom playing with her toys. She testified the defendant would force her to remove her clothes and touched her with his "boy private." She indicated the defendant forced her to get on her stomach and touched her "back

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[1]The indictment was amended to nol-pros a charge that the defendant had also committed aggravated rape against J.A.

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

[3]The sentencing minutes indicate the trial court imposed concurrent sentences. The sentencing transcript, however, indicates the trial court imposed consecutive sentences. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. State v. Lynch, 441 So. 2d 732, 734 (La. 1983).

private" with his boy private. She also indicated he touched the inside of her "front private" with his front private. She denied that her brother, J.A., had hurt her.

L.A. also testified at trial. Her date of birth was October 10, 1997. She stated she went to live with her "Nana" and "Paw Paw" in 2008. Prior to that time she lived in Franklinton and Bogalusa with her mother, her stepfather, her sister, and her brother. She indicated "sometimes" the defendant (her uncle) and Eugene (another uncle) would come over. She testified the defendant hurt her more than one time in her bedroom at night. She stated she would pretend to be asleep because "then maybe he wouldn't do it to [her]." She indicated the defendant would undo his belt and pull his pants down. He would also pull her pants and her panties down. He would then hurt her with his penis. He would touch her vagina and her butt with his penis. Sometimes he would put his penis in her vagina when she was lying on her back. Sometimes he would roll her over onto her stomach and hurt her butt with his penis by putting it inside her butt. She stated "pee" would come out of his penis "[a]fter he was done," and it would get on her legs. She testified the "pee" felt "[i]cky and sticky." She also indicated that in the living room, the defendant would take her hand and make her rub his penis.

The defendant also testified at trial. He denied in any way sexually molesting or raping either K.A. or L.A.

RIGHT TO PRESENT A DEFENSE

In his sole assignment of error, the defendant argues the trial court denied him his constitutional right to present a defense by refusing to allow him to introduce evidence that J.A., the older brother of L.A. and K.A., had confessed to sexually abusing L.A. and K.A.

In a prosecution for sexually assaultive behavior, LSA-C.E. art. 412

prohibits the introduction of evidence of the victim's past sexual behavior, with certain limited exceptions. An exception is made for evidence of past sexual behavior with persons other than the accused, upon the issue of whether or not the accused was the source of semen or injury; provided that such evidence is limited to a period not to exceed seventy-two hours prior to the time of the offense, and further provided that the jury be instructed at the time and in its final charge regarding the limited purpose for which the evidence is admitted. LSA-C.E. art. 412(B)(1). "Past sexual behavior" is defined as sexual behavior other than the sexual behavior with respect to which the offense of sexually assaultive behavior is alleged. LSA-C.E. art. 412(F). If a defendant wishes to offer evidence of past sexual behavior pursuant to one of the exceptions, he must file a motion stating his intent to do so. LSA-C.E. art. 412(C). The trial court must then hold a closed hearing to determine whether the offered evidence is admissible. LSA-C.E. art. 412(E). State v. Freeman, 2007-0470 (La. App. 1st Cir. 9/14/07), 970 So. 2d 621, 624, writ denied, 2007-2129 (La. 3/14/08), 977 So. 2d 930.

Notably, the Louisiana Supreme Court has held that a defendant may present evidence that a victim made prior false allegations regarding sexual activity for impeachment purposes pursuant to LSA-C.E. art. 607(C). State v. Smith, 98-2045 (La. 9/8/99), 743 So. 2d 199. However, as set forth in Smith:

> When a defendant seeks to introduce evidence that the victim has made such prior false accusations, the trial judge must evaluate that evidence by determining whether reasonable jurors could find, based on the evidence presented by defendant, that the victim had made prior false accusations and whether all other requirements of the Code of Evidence have been satisfied.

Smith, 743 So. 2d at 203-04.

Thus, two requirements exist before evidence of prior sexual activity can be admitted for impeachment purposes. First, the activity must be of a sexual nature.

Second, there must be evidence that the statement is false. Assuming this initial burden is met, all other standards for the admissibility of evidence apply. Freeman, 970 So. 2d at 624.

Constitutional guarantees do not assure the defendant the right to the admissibility of any type of evidence, only that which is deemed trustworthy and has probative value. "Relevant evidence" is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. LSA-C.E. art. 401. In deciding the issue of relevancy, the trial judge must determine whether the evidence bears a rational connection to the fact at issue in the case. Except as limited by the Code of Evidence and other laws, all relevant evidence is admissible and all irrelevant evidence is inadmissible. LSA-C.E. art. 402. Although relevant, evidence may nonetheless be excluded if the probative value is substantially outweighed by its prejudicial effect. See LSA-C.E. art. 403. A trial judge's determination regarding the relevancy and admissibility of evidence will not be overturned on appeal absent a clear abuse of discretion. Freeman, 970 So. 2d at 624-25.

Prior to trial, the defendant moved to offer evidence of the past sexual behavior of the victims. In the motion, he alleged a July 17, 2008 Office of Child and Family Services letter indicated J.A. had disclosed he had anal sexual intercourse with his sisters, L.A. and K.A. The motion additionally set forth that in a July 28, 2008 interview with the Bogalusa Police Department, J.A. confessed in an audiotaped interview to having anal and digital sexual contact with L.A. and K.A. in the early part of 2008.

The trial court denied the motion, finding the defense failed to meet the requirements of LSA-C.E. art. 412(B), in that the alleged past sexual behavior had

not occurred within seventy-two hours of the offense and did not concern the source of semen or injury. The court rejected the defense argument that the evidence was admissible to show that L.A. and K.A. were motivated to falsely accuse the defendant, noting there was no evidence that L.A. and K.A. had falsely accused anyone of sexually assaultive behavior. The court additionally found:

> The fact that [J.A.] has supposedly confessed to sexually assaulting [L.A. and K.A.], in my opinion, is not relevant to whether these two victims have falsely accused [the defendant] of sexually abusing them. There is no suggestion that the acts to which [J.A.] supposedly confessed are the same acts to which the victims are accusing the defendant.
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> When considering all of the evidence presented and the purpose for which it is being presented, even if it were relevant, then I think it would be subject to a 403 analysis of whether the probative value would be substantially outweighed by its prejudicial effect, and in my opinion[,] it would be; and, therefore, I would exclude it under the 403 analysis.

There was no violation of the defendant's constitutional right to present a defense in this case. Louisiana Code of Evidence article 412 was not applied to deny admission of highly reliable and relevant evidence critical to the accused's defense. See State v. Vaughn, 448 So. 2d 1260, 1267 (La. 1984) (on rehearing). The defense failed to establish that J.A.'s confession to alleged past sexual behavior involving L.A. and K.A. was admissible under LSA-C.E. art. 412(B)(1). Additionally, for the reasons set forth by the trial court, there was no clear abuse of discretion in finding the evidence of past sexual behavior inadmissible under LSA-C.E. art. 403. The defense also failed to establish the admissibility of the evidence for impeachment purposes pursuant to LSA-C.E. art. 607(C). The defense failed to establish that reasonable jurors could find, based on the evidence presented, that L.A. and K.A. had made prior false accusations of sexual behavior.

This assignment of error is without merit.

PROTECTIVE ORDER

Louisiana Revised Statute 15:440.6 requires that a "videotape" of a protected person's statement admitted under LSA-R.S. 15:440.5 be preserved under a protective order of the court to protect the privacy of the protected person. The trial court failed to issue such an order. Accordingly, it is hereby ordered that the recorded statements of the victims be placed under a protective order. See State v. Ledet, 96-0142 (La. App. 1st Cir. 11/8/96), 694 So. 2d 336, 347, writ denied, 96-3029 (La. 9/19/97), 701 So. 2d 163.

CONVICTIONS AND SENTENCES AFFIRMED; PROTECTIVE ORDER ISSUED.

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McCLENDON, J., concurs and assigns reasons.

I concur with the result reached by the majority.