NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 0627

STATE OF LOUISIANA

VERSUS

ROY L. ESTEP

Judgment Rendered: FEB 1 8 2014

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 465865

The Honorable William J. Burris, Judge Presiding

* * * * *

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* * * * *

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

CRAIN, J.

The defendant, Roy L. Estep, was charged by grand jury indictment with aggravated incest, a violation of Louisiana Revised Statute 14:78.1. He pled not guilty. After a trial by jury, he was found guilty as charged. The trial court denied the defendant's motion for postverdict judgment of acquittal and motion for new trial, and sentenced him to seven years imprisonment at hard labor.[1] The defendant appeals challenging the sufficiency of the evidence and claiming that the trial court erred in admitting other crimes evidence, denying the motion to continue, admitting hearsay evidence, and excluding evidence of prior molestation allegations by the victim and her family. We affirm the conviction and sentence.

STATEMENT OF FACTS

The defendant is the step-great-grandfather of the victim, M.G.[2] When M.G. was nine years old and in the second grade, the defendant began touching her inappropriately. The incidents of abuse took place in the basement-like area in the defendant's home and in his bedroom. The first incident occurred when M.G. and the defendant were talking and he grabbed her, unbuttoned her pants, pulled down her zipper, put his hand underneath her underwear, and touched the outside and inside of her vagina with his fingers. The same behavior occurred during the other incidents of abuse. M.G. indicated that the defendant committed the acts when they were alone, and that her great-grandmother, who had limited mobility and was confined to a wheelchair, was unaware of the incidents. After watching a video at school about inappropriate touching, M.G. disclosed the abuse to V.G., her younger sister. V.G. then disclosed the abuse to their parents. Two days later,

[1] The minutes indicate that the sentence was imposed without the benefit of probation, parole, or suspension of sentence. However, the sentencing transcript reflects that the trial court imposed the sentence without restricting parole eligibility. Where a discrepancy exists between the minutes and the transcript, the transcript prevails. *State v. Lynch*, 441 So. 2d 732, 734 (La. 1983).

M.G. was interviewed by forensic interviewer Jo Beth Richols of the Children's Advocacy Center (CAC), and was then examined at Children's Hospital, both times describing the abuse by the defendant.

SUFFICIENCY OF THE EVIDENCE

The defendant argues that no rational juror could have found beyond a reasonable doubt that the State proved all of the elements of the crime of aggravated incest. Specifically, the defendant contends his conviction was based on the uncorroborated word of a child from a troubled household and a troubled extended family, and there was no physical evidence to support the allegations of sexual abuse. The defendant claims that M.G.'s story changed regarding the number of fingers he allegedly used to digitally penetrate her, that M.G. gave varying accounts to her examining doctor, stating that it was anywhere from one to four fingers, and then at trial denied making such a statement. Thus, the defendant argues that M.G.'s statements were inconsistent and that the inconsistency is relevant to M.G.'s credibility. Additionally, he theorizes that M.G. may have been suffering from post-traumatic stress disorder after witnessing her father hold a gun to his head and threaten to kill himself. He further argues that he was seventy-six years old when he was accused of the instant offense, he had no prior sex-crime accusations, he had only one prior felony conviction, for burglary, which occurred more than fifty years previous, and that another great-granddaughter who spent more time with him testified that he never did anything inappropriate with her.

The defendant also claims the following hypotheses of innocence: (1) M.G. may have made up the sexual abuse allegations as a ploy to keep her parents together, to get attention from her troubled parents, or to offer an explanation for abnormal behavior that was actually the result of her parents' troubled marriage;

[2] Initials will be used to identify the victim and her immediate family. *See* La. R.S. 46:1844(W).

(2) M.G. may have been molested by someone else and simply blamed the defendant; or (3) M.G. may have mimicked another sexual abuse situation in her family. The defendant argues that the State failed to exclude these reasonable hypotheses of innocence and that no rational juror could have believed that he committed the offense based on the evidence presented.

A conviction based on insufficient evidence cannot stand, as it violates Due Process. *See* U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, 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* La. Code Crim. Pro. art. 821(B); *State v. Ordodi*, 06–0207 (La. 11/29/06), 946 So. 2d 654, 660; *State v. Mussall*, 523 So. 2d 1305, 1308–09 (La. 1988). The *Jackson* standard of review, incorporated in Article 821B, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, Louisiana Revised Statute 15:438 provides that the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. *State v. Patorno*, 01–2585 (La. App. 1 Cir. 6/21/02), 822 So. 2d 141, 144.

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 that raises a reasonable doubt. *State v. Captville*, 448 So. 2d 676, 680 (La. 1984). A reviewing court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally

rejected by, the fact finder. *See State v. Calloway*, 07–2306 (La. 1/21/09), 1 So. 3d 417, 418 (*per curiam*).

Aggravated incest is defined in Louisiana Revised Statute 14:78.1, which pertinently provides:

> A. Aggravated incest is the engaging in any prohibited act enumerated in Subsection B with a person who is under eighteen years of age and who is known to the offender to be related to the offender as any of the following biological, step, or adoptive relatives: child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew, or niece.
>
> B. The following are prohibited acts under this Section:
>
> (1) Sexual intercourse, sexual battery, second degree sexual battery, carnal knowledge of a juvenile, indecent behavior with juveniles, pornography involving juveniles, molestation of a juvenile or a person with a physical or mental disability, crime against nature, cruelty to juveniles, parent enticing a child into prostitution, or any other involvement of a child in sexual activity constituting a crime under the laws of this state.
>
> (2) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child, the offender, or both.

Thus, to establish the offense of aggravated incest, the State must show: (1) that the victim was less than eighteen years of age, (2) that the offender knew that the victim was related to him within the specified degrees, and (3) that the defendant has engaged in one of the prohibited acts with the victim. *State v. Flores*, 27,736 (La. App. 2 Cir. 2/28/96), 669 So. 2d 646, 650.

The victim was less than eighteen years of age

M.G.'s date of birth is May 2, 1998. She was fourteen years old when she testified at the trial. Her CAC interview took place when she was a ten-year-old third grader. According to the CAC interview and M.G.'s trial testimony, the incidents of abuse occurred when she was in the second grade. We find that the State established beyond a reasonable doubt that M.G. was below the age of eighteen at the time the sexual abuse occurred.

The defendant knew that the victim was related to him within the specified degrees

The defendant married M.G.'s paternal great-grandmother, W.E., several decades before M.G. was born, and M.G. commonly referred to him as her grandfather or "Paw-Paw." In recalling the details of M.G.'s disclosure of abuse by the defendant, M.G.'s mother, S.G., said her younger daughter ran in her bedroom and stated that "Pawpaw" was touching M.G. When S.G. asked M.G. which grandfather was touching her, she said "Pawpaw Roy". We find that the State established beyond a reasonable doubt that the defendant knew that he was the step-great-grandfather of M.G., and, therefore, the requirements of Louisiana Revised Statute 14:78.1A were satisfied.

The defendant engaged in prohibited acts with the victim

M.G. testified that during overnight visits, when she was in the second grade, the defendant touched her "private." The defendant touched the inside and outside of her "private" or "vagina," digitally penetrating her during each incident. M.G. testified that it hurt during and after each incident. The incidents occurred in the basement-like area and back bedroom of the defendant's home. The defendant told M.G. not to tell anyone about the incidents. M.G. finally revealed the abuse after seeing an educational video about inappropriate touching. She disclosed the behavior to her sister, knowing her sister would tell their parents. She said there was no doubt or confusion in her mind as to the incidents of abuse committed by the defendant.

Describing the abuse in her CAC interview, M.G. stated that the defendant used one finger, sometimes two fingers, and used his whole hand in a wiping motion. At trial she testified that she told the police that the defendant put the tip of his finger in her vagina, and that she told the CAC interviewer that the defendant inserted one or two fingers into her vagina. She denied telling Dr.

Yamika Head, who examined her at Children's Hospital, it could have been one, two, three or four fingers that the defendant put in her vagina. M.G. was also questioned about her father's mistress and confirmed that she was initially upset about that relationship. M.G. confirmed that she reported suicidal thoughts based on all the things she had been through.

S.G. (M.G.'s mother) testified that before M.G. disclosed the sexual abuse, M.G. occasionally spent nights with her great-grandparents without her parents being present. S.G. never witnessed any inappropriate behavior by the defendant, but the defendant used to put money in S.G.'s back pocket and bra which made her feel ashamed. She believed her daughter's allegations against the defendant, which never wavered. M.G.'s behavior changed after the disclosure in that she seemed to have relief or acted as if she had unburdened herself.

S.G. testified that she and M.G.'s father were separated for a period of time but that their marriage had been solid since around 2006. She said any issues exhibited by M.G. based on the marital issues improved with the strengthening of the marriage. M.G. began to exhibit new behavioral issues around 2008 (the year prior to the disclosure), becoming withdrawn and wetting the bed, and she attempted self-strangulation by squeezing her neck with her hands. S.G. also acknowledged that M.G. was noticeably or overly sexual.

Dr. Scott Benton testified as an expert in the field of pediatric forensic medicine. Dr. Benton explained that he trained Dr. Head and described Dr. Head's interview as consistent with his own procedure and methods. Based on his review of Dr. Head's report, Dr. Benton testified that M.G. never wavered in her identification of the defendant as her sexual abuser. He described the factors that generally contribute to a child delaying disclosure of abuse such as naivety, psychological issues, external factors such as threats or bribery of the child or people around the child, or the child's confusion as to her role or fault. Delayed

disclosure is more common when the perpetrator is related to the victim. He further explained concepts like grooming and Child Sexual Abuse Accommodation Syndrome in which children in the process of being seduced acquiesce in order to avoid getting anyone in trouble and to avoid further disruption in their lives. Dr. Benton explained why children go back to the abusers during the process of seduction, including misconceptions that the abuse will cease, or benefits that the child receives from other aspects of the relationship separate from the abhorrent or immoral aspect. He explained that there is a temporal association between displays of relief subsequent to disclosure, noting that the elimination of contact with the alleged abuser would be significant.

Dr. Benton testified that in the vast majority of cases involving claims of digital fondling, there is no evidence of trauma, particularly if the timing of the examination is distant from the event. He testified that most girls experience puberty at age eight or nine, which results in a decrease in the likelihood of injury and increase in the likelihood of healing from any injury that did occur, and that M.G. had gone through puberty by the time of her examination. Dr. Benton testified that the history given in M.G.'s medical records did not conflict with the accusations of abuse. He acknowledged that he did not personally examine or speak to M.G., and his knowledge as to her feelings was solely based on her communication with Dr. Head.

N.E., the defendant's biological great-granddaughter, also testified. She was eleven years old at the time of the trial. She spent a lot of time with the defendant and was often present when M.G. was there. She and the defendant wrestled a lot but he never touched the private area of her body. M.G. and her sister, V.G., did not want to wrestle with the defendant, but N.E. did not know why. N.E. testified that the defendant's bedroom door was always kept open. The children would spend time in the basement-like area, but she denied that the defendant would

remain there alone with M.G. N.E. confirmed that she and M.G. had been informed about sex offenders and were instructed to report incidents of improper touching.

The defendant maintained his innocence when he was interviewed by the police. He also testified at trial that M.G. and her sister only spent the night at his home a couple of times and they only wanted to come when N.E. was there so they could play with her. N.E. was the only one of the three children with whom he had much interaction. He testified that he was never alone with M.G. and never molested her. He said he never took M.G. to the back bedroom, but said he watched hunting shows in the back bedroom and that M.G. would sometimes come into the bedroom. When asked if he ever wrestled with the girls where one girl would be on the bottom, the defendant on top, and another child on his back, he said he did so only once and the girls wanted to engage in the act and called it making a "pancake."

The testimony of the victim alone can be sufficient to establish the elements of a sexual offense, even where the State does not introduce medical, scientific, or physical evidence to prove the commission of the offense. *State v. James*, 02–2079 (La. App. 1 Cir. 5/9/03), 849 So. 2d 574, 581. In this case, the jury apparently found M.G. to be more credible than the defendant. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness, and where 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. Richardson*, 459 So. 2d 31, 38 (La. App. 1 Cir. 1984). 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 fact finder's determination of guilt. *State v. Taylor*, 97–2261 (La. App. 1 Cir. 9/25/98), 721 So. 2d 929, 932.

The defendant asserts that M.G.'s account of sexual abuse was inconsistent and, therefore, not credible. With great detail M.G. described sexual acts by the defendant on several occasions that included digital penetration and fondling. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. *See Ordodie*, 946 So. 2d at 662. The evidence, including the CAC interview and M.G.'s trial testimony, was sufficient to support the verdict of guilty of aggravated incest. Considering the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the essential elements of aggravated incest proven beyond a reasonable doubt, and to the exclusion of the hypotheses of innocence suggested by the defense. The defendant's fourth assignment of error is without merit.

DENIAL OF MOTION TO CONTINUE - HEARSAY

In assignment of error number two, the defendant contends that the trial court erred in denying his motion to continue the trial. In his motion, the defendant asserted that the State intended to present evidence of the post-offense physical examination of the victim, including dialogue between the victim and Dr. Head that was testimonial in nature. He further asserted that the State would be unable to produce the testimony of Dr. Head, and instead planned to produce the testimony of another physician, Dr. Benton, who would testify from Dr. Head's report.[3] The defendant argued that a continuance was necessary because proceeding to trial would inevitably violate his constitutional right to confront his accusers.

The trial court has great discretion in deciding whether to grant a continuance, and its ruling will not be overturned absent an abuse of discretion. *See* La. Code Crim. Pro. art. 712; *State v. Strickland*, 94–0025 (La. 11/1/96), 683

[3] We note that during closing arguments, the State indicated that Dr. Head was unavailable because of a conflicting trial setting.

So. 2d 218, 229. We find no abuse of the trial court's discretion in denying the motion to continue. Dr. Head was not subpoenaed for the trial by the defense. Rather, the defendant sought a continuance arguing that Dr. Head would not be present to testify *on behalf of the State.* He did not, and does not now, suggest that the continuance was necessary so that Dr. Head could be called to testify *on behalf of the defense.*

The State had the burden at trial of proving the defendant's guilt beyond a reasonable doubt. The decisions the State made relative to who would be called to testify in support of the prosecution involved strategies that were properly left to the State's discretion. If, at trial, those decisions proved to be legally deficient, then the prosecution risked failing. Nevertheless, the defendant has cited no legal authority for granting the defendant a trial continuance so that the State could be compelled to present State witnesses that the defendant deemed necessary.

Furthermore, a conviction generally will not be reversed due to an improper ruling on a motion to continue unless there is a showing of specific prejudice to the defendant as a result of the denial of the continuance. *Strickland,* 683 So. 2d at 229. The defendant has not shown specific prejudice. He argues that by denying the continuance, the trial court failed to protect his constitutional right to confront his accuser. However, the argument is misguided in its focus. Through its ruling on the requested continuance, the trial court correctly focused on protecting the defendant's confrontation rights in the event that the expert witness, Dr. Benton, was actually called by the State to testify, not on whether the defendant could compel the State to call Dr. Head.

In anticipation of the State calling the expert witness, the trial court used available procedures to safeguard the defendant's confrontation rights. For example, the defendant made an oral motion *in limine* to exclude Dr. Head's report. That report included a transcript created at the time of M.G.'s physical

examination, which was described as a verbatim transcription of questions by Dr. Head as well as M.G.'s answers. The motion was granted and Dr. Head's report was not received as evidence. The trial court explained that during Dr. Benton's expert testimony, the State would be allowed to question Dr. Benton regarding certain information in the transcript, with the defendant having the right to object as the testimony proceeded. The defendant did not object to this procedure.

During the trial, the State called Dr. Benton as an expert and the defendant objected to portions of his testimony. When the State asked Dr. Benton if M.G. confirmed that the abuse began when she was nine, and ended when she was ten, the defendant objected, claiming the State's attorney was reading from the transcript. The trial court overruled the objection; however, after that ruling, Dr. Benton was asked a different question and never answered the objected to question. The defendant also objected to Dr. Benton "rambling on about theories." The trial court ruled that as an expert Dr. Benton could testify about "concepts and things like that." But, the objection was partially sustained because Dr. Benton had not been asked about the concept being explained, so his answer was nonresponsive to the State's question. The question was rephrased, and then was asked and answered without objection. The trial court also overruled the defendant's objection to the State asking leading questions to Dr. Benton, a qualified expert. Based upon our review of the record, the trial court's denial of the motion to continue did not prejudice the defendant.

The defendant also contends that information contained in Dr. Head's report should have been excluded at trial because it did not fall within a hearsay exception or violated his right to confront his accuser. Specifically, the objectionable information was described in the following argument presented on appeal:

> Dr. Benton was allowed to testify as to certain portions of a transcribed statement, parts of Dr. Head's interview with M.G. where M.G. answered questions regarding the incidents. This is where the problem with admitting the hearsay statements comes in.
>
> Dr. Head took statements from M.G. where M.G. claimed that the appellant inserted anywhere from one to four fingers into her vagina. While M.G. was subject to cross-examination herself as to this statement, she denied ever saying it. Dr. Head, who took the statement, could not be questioned as to this statement, nor any other statements made by M.G.
>
> Dr. Benton was not able to testify as to M.G.'s demeanor or credibility when she made the statements because he was not the one who took the statements. This is not a case where the statement provided was cumulative of other statements, but was a statement the victim denied ever making.

A contemporaneous objection is required to preserve an error for appellate review. La. Code Evid. art. 103A(1); La. Code Crim. Pro. art. 841A. An objection to the information described in the above argument was not raised at trial. In fact, the detailed information about which the defendant complains was introduced at the trial by the defense.

Moreover, the Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This provides a criminal defendant with the right to physically face those who testify against him, and the right to conduct cross-examination. *Coy v. Iowa*, 487 U.S. 1012, 1017, 108 S.Ct. 2798, 2801, 101 L.Ed.2d 857 (1988); *State v. Welch*, 99-1283 (La. 4/11/00), 760 So. 2d 317, 320. The basic objective of the Confrontation Clause "is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." *Michigan v. Bryant*, __U.S. ___, 131 S.Ct. 1143, 1155, 179 L.Ed.2d 93. Simply stated, the Confrontation Clause requires the State to present its witnesses. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324, 129 S.Ct. 2527, 2540, 174 L.Ed.2d 314 (2009).

M.G. testified at trial and was subject to cross-examination. During cross-examination, defense counsel asked her if she made a specific statement to Dr. Head about the number of fingers the defendant used to digitally penetrate her. The purpose of the question was to reveal presumably a conflict between M.G.'s trial testimony and what she told Dr. Head. However, this specific line of questioning was not presented in the State's direct examination of M.G., and was raised for the first time by the defense on cross-examination. M.G. denied making that statement. Dr. Benton then testified. Again, on cross-examination the defense elicited further testimony regarding M.G.'s alleged statement to Dr. Head regarding the number of fingers the defendant used to digitally penetrate her. Having elicited this testimony from both the victim and Dr. Benton, the defendant now argues that he was prejudiced in his inability to challenge M.G.'s veracity by cross-examining Dr. Head at trial. He does not argue that the State failed to present Dr. Head as a witness *against* him. Rather, the defendant argues that the State failed to produce Dr. Head so that the defense could cross-examine him for the purpose of attacking the credibility of M.G. We find that this does not raise an issue under the Confrontation Clause. The defendant's confrontation rights were not violated. This assignment of error is without merit.

OTHER CRIMES EVIDENCE

In assignment of error number one, the defendant contends that evidence of a previous incident where the defendant allegedly molested M.G. during a family vacation in Gatlinburg, Tennessee should not have been presented to the jury. The defendant argues that this evidence was inadmissible because it involved an alleged crime that occurred in another jurisdiction, the State did not designate an applicable provision of Louisiana Code of Evidence article 404, and there was no hearing on the issue. The defendant contends that the admission of the Tennessee

allegation confused the jury and that the guilty verdict was possibly based solely on the Tennessee allegation.

This issue was raised for the first time in defendant's motion for new trial. The evidence was not objected to during the trial and no limiting instruction was given to the jury relative to the other crimes evidence. However, the defendant argues that any preclusion of review on appeal should result in consideration of the issue as an ineffective assistance of counsel claim. He contends that had either the other crimes evidence been excluded or a limiting instruction been given, there is a likelihood that the jury would have returned a not guilty verdict. The defendant concludes that his conviction was likely due to his attorney's non-strategic failure to request a hearing and limiting jury instruction relative to the other crimes evidence.

We reiterate that a contemporaneous objection is required to preserve an error for appellate review. La. Code Evid. art. 103A(1); La. Code Crim. Pro. art. 841A. However, while a claim of ineffectiveness is generally relegated to postconviction proceedings, it can be considered on appeal when the record permits a definitive resolution of the issue. *State v. Miller*, 99-0192 (La. 9/6/00), 776 So. 2d 396, 411, *cert. denied*, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001). We find that the record contains the evidence necessary to definitively resolve the ineffective assistance of counsel issue on appeal.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Louisiana Constitution. In assessing a claim of ineffectiveness, a two-pronged test is employed. The defendant must show that (1) his attorney's performance was deficient, and (2) the deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The error is prejudicial if it was so serious as to deprive the defendant of a fair trial or "a trial

whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. In order to show prejudice, the defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *State v. Thomas*, 12-1410 (La. 9/4/13), 124 So. 3d 1049, 1053.

When asked by the State whether the type of incidents that she described had ever occurred any place other than in the basement-like area and the back bedroom of the Estep home, M.G. said it also occurred during a family vacation in Tennessee. We find that, under the circumstances of this case, that answer constitutes evidence of other sexually assaultive behavior that was elicited by the State.

Louisiana Code of Evidence article 412.2 provides:

> A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.
>
> B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.
>
> C. This Article shall not be construed to limit the admission or consideration of evidence under any other rule.

The evidence of sexually assaultive behavior committed by the defendant in Tennessee was admissible under Article 412.2 to show the defendant's lustful disposition toward young children. *See State v. Buckenberger*, 07–1422 (La. App. 1 Cir. 2/8/08), 984 So. 2d 751, 757, *writ denied*, 08–0877 (La. 11/21/08), 996 So. 2d 1104. Where the complained of evidence is in fact admissible, there is no deficiency in the performance of defense counsel in not objecting to the admission

of the evidence. *See State v. Williams*, 632 So. 2d 351, 362 (La. App. 1 Cir. 1993), *writ denied*, 643 So. 2d 139 (La. 1994). Accordingly, the defendant was not prejudiced by his attorney's failure to request a limiting instruction and the trial court's failure to hold a hearing. *See* La. Code Evid. art. 412.2; *State v. Williams*, 02-1030 (La. 10/15/02), 830 So. 2d 984, 987. Assignment of error number one lacks merit.

EXCLUSION OF EVIDENCE

In assignment of error number three, the defendant contends that the trial court erred in excluding evidence that M.G.'s grandmother, D.G., had a history of making false accusations and causing others to make false accusations of sexual abuse. He argues that D.G. accused her first husband of child molestation, accused her mother, W.E., of masturbating in front of children, accused her daughter's boyfriend of raping her daughter, and accused her son of molesting his daughter. The defendant further argues that D.G. has been hospitalized at least three times for mental illness and a suicide attempt and that the Office of Child Services placed two of D.G.'s children in the defendant's custody because D.G.'s daughter was molested by D.G.'s second husband. The defendant theorizes that D.G. made up allegations of sexual abuse whenever things did not go her way or in order to seek revenge, and that the instant allegations stemmed from the announcement that W.E. was cutting D.G. out of her will. The defendant argues that the family history or pattern of filing false sexual abuse charges is relevant to show that M.G. learned this behavior.

A criminal defendant's right to present a defense is guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 16 of the Louisiana Constitution. However, 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. *State v. Governor*, 331 So. 2d 443,

449 (La. 1976). "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 without the evidence. La. Code Evid. art. 401. The trial judge, in deciding the issue of relevancy, must determine whether the evidence bears a rational connection to the fact in issue in the case. *State v. Williams*, 341 So. 2d 370, 374 (La. 1976); *State v. Harris*, 11–0779 (La. App. 1 Cir. 11/9/11), 79 So. 3d 1037, 1046. Except as limited by the Code of Evidence and other laws, all relevant evidence is admissible and all irrelevant evidence is inadmissible. La. Code Evid. art. 402. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, risk of misleading the jury, or by considerations of undue delay, or waste of time. La. Code Evid. art. 403. Ultimately, questions of relevancy and admissibility are within the discretion of the trial court, and its determinations regarding relevancy and admissibility should not be overturned absent a clear abuse of that discretion. *State v. Duncan*, 98–1730 (La. App. 1 Cir. 6/25/99), 738 So. 2d 706, 712-713.

The defendant filed a pre-trial notice of his intent to introduce the sexual abuse accusation evidence and a hearing was held to determine its admissibility. At the hearing, D.G. testified that she accused her first husband of abusing her children and that the charges against him "expired." She further confirmed that her other husband was charged with the molestation of her daughter and pled guilty. She denied being involved in other sexual abuse allegations raised within her family. The trial court ruled the evidence was not relevant and was therefore inadmissible. We find the trial court did not abuse its discretion in excluding this evidence. Assignment of error number three lacks merit.

CONVICTION AND SENTENCE AFFIRMED.