NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 2013 KA 1847

STATE OF LOUISIANA

VERSUS

JOSHUA T. CUMBERLAND

Judgment Rendered: JUN 25 2014

On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
No. 484,724, Division E

The Honorable William J. Burris, Judge Presiding

* * * * *

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* * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.

The defendant, Joshua T. Cumberland, was charged by grand jury indictment with aggravated rape on counts one and two, in violation of La. R.S. 14:42, and with sexual battery on counts three and four, in violation of La. R.S. 14:43.1.[1] The defendant pled not guilty. After a jury trial, the defendant was found guilty as charged on counts one and three, guilty of the responsive offense of molestation of a juvenile on count two, in violation of La. R.S. 14:81.2, and not guilty on count four.[2] The trial court denied the defendant's motion for postverdict judgment of acquittal and motion for new trial. On count one, the defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. On count two, the defendant was sentenced to ten years imprisonment at hard labor. On count three, the defendant was sentenced to forty years imprisonment at hard labor, with twenty-five years to be served without the benefit of probation, parole, or suspension of sentence. The court ordered the sentences to be served concurrently. The defendant now appeals, assigning error[3] to the sufficiency of the evidence and the constitutionality of the mandatory life sentence imposed on count one, and raising trial court error

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[1] As indicated in the indictment, W.D., whose date of birth is October 1, 2001, is the victim on counts one and three; and R.C., whose date of birth is March 31, 2003, is the victim on counts two and four. Herein, only initials will be used to identify the victims. *See* La. R.S. 46:1844(W).

[2] Prior to the instant trial, the trial court granted a mistrial and dismissed the previous jury due to the lack of participation by the defendant's former counsel.

[3] As assignment of error number three, the defendant assigns error to the trial court's ruling that Ms. Clement could testify pursuant to La. Code Evid. art. 801(D)(1)(d). However, the defendant failed to brief this assignment of error. Accordingly, it is considered abandoned and will not be addressed by this court. *See* Uniform Rules of Louisiana Courts of Appeal, Rule 2-12.4.

regarding his constitutional right to present a defense. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

On a Saturday morning, November 7, 2009, in Slidell, Amy Fazzio responded to what she described as someone banging on her apartment door, noting that she ignored the same type of banging when it occurred a couple of minutes earlier. When she opened the door, her neighbor and acquaintance (the defendant) was shaking as he informed her that his stepdaughter, W.D. (who was eight years old at the time), was hurt. Mrs. Fazzio also observed a small amount of blood on the defendant. Mrs. Fazzio went with the defendant to his apartment to check on W.D., and he led her to her bedroom located in the back of the apartment. As the defendant tried to explain how W.D. fell on a toy box located at the foot-end of her bed, Mrs. Fazzio repeatedly inquired as to W.D.'s whereabouts and the defendant told her she was in his bathroom. When Mrs. Fazzio opened the bathroom door, W.D. was standing in the shower naked and soaking wet. Mrs. Fazzio knelt down to examine the victim and as the victim slightly opened her legs, she observed that the victim was bleeding profusely. Mrs. Fazzio immediately began instructing the defendant to call 911 and indicating that the victim needed to go to the hospital. After the defendant informed her that he did not have a vehicle, Mrs. Fazzio ran back to her apartment, alerted her husband, Sam Fazzio, of the situation, and he transported the defendant and W.D. to the hospital.

While being interviewed at the hospital, W.D. made statements consistent with the defendant's claim that she injured herself by falling on the toy box in her bedroom. However, according to W.D.'s interviews at the Children's Advocacy Center (CAC) and trial testimony, her injuries were inflicted by the defendant while she was in his bedroom. Regarding objects the defendant inserted into her

"private," she specifically stated, "I was hurt by Josh, and he would put this little ball thing up in me and it was like this big at the top and it kept getting smaller and smaller, and he would put this red thing in there that looked like an "H" and it had big balls at the top and bottom." She further testified that the defendant put a "little ball thing" inside of her and her younger sister, R.C. (who was six years old on the day in question). She indicated that the painful abuse began when she was five years old. W.D. testified that her mother was at work at the time of the incidents. W.D. further testified that prior to the day in question, the defendant put his "private" in her "private" "all the time." During her second CAC interview and trial testimony, R.C. also indicated that the defendant used his penis (for which she did not initially have a name but identified by use of an anatomical drawing) to penetrate her vagina and used other objects to vaginally and anally penetrate her. R.C. stated that the abuse occurred while she was six years old and that it was painful. Both victims indicated that the defendant used straps to restrain them and threatened them to prevent them from telling anyone about the incidents.[4]

ASSIGNMENT OF ERROR NUMBER ONE

In assignment of error number one, the defendant argues that no rational juror could have accepted the evidence presented in support of the convictions. The defendant argues that the State's case was riddled with internal inconsistencies, repudiation of contemporaneous documents, and improbabilities. The defendant argues that W.D.'s version of events rendered impossible R.C.'s recorded version. The defendant contends that R.C. denied statements that were

[4] Among the items that the police photographed and seized from the defendant's apartment were body lubricant, suspected sex objects (including an object with blue balls, a red object approximately shaped like an "H," and an object with purple balls), vibrators (including a blue vibrator and a yellow vibrator with a blue or purple tip), and straps.

included in her recorded interview, and that her testimony was inconsistent with her medical examination. The defendant argues that the absence of W.D.'s DNA on any of the sex toys collected was relevant. Finally, the defendant argues that R.C.'s admission that she handled the sex toys renders the finding of her DNA meaningless.

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 also* La. Code Crim. P. 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 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that, in order to convict, the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. *See State v. Patorno*, 01-2585 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statute 14:42(A)(4) specifically defines the crime of aggravated rape as a rape committed where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed when the victim is under the age of thirteen years. To obtain a conviction for sexual battery, the State was required to prove that the defendant intentionally touched the victim's anus or genitals with any instrumentality or any part of his body or that the victim touched his anus or genitals with any instrumentality or any part of her body. The State was further required to prove

that the act was performed without the victim's consent, or that the victim was under the age of fifteen and at least three years younger than the offender. The applicable statute also requires that the victim cannot be the offender's spouse. La. R.S. 14:43.1.

Molestation of a juvenile is defined in La. R.S. 14:81.2(A). Under this statute, the State must prove beyond a reasonable doubt that: (1) the defendant was over the age of seventeen; (2) the accused committed a lewd or lascivious act upon the person or in the presence of a child under the age of seventeen; (3) the accused was more than two years older than the victim; (4) the accused had the specific intent to arouse or gratify either the child's sexual desires or his own sexual desires; and (5) the accused committed the lewd or lascivious act by use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile. A "lewd or lascivious act," for purposes of molestation of a juvenile, is one which tends to excite lust and to deprave morals with respect to sexual relations and which is obscene, indecent, and related to sexual impurity or incontinence carried on in a wanton manner. *See State v. Holstead*, 354 So.2d 493, 497-98 (La. 1977); *State v. Cloud*, 06-877 (La. App. 3d Cir. 12/13/06), 946 So.2d 265, 272, *writ denied*, 07-0086 (La. 9/21/07), 964 So.2d 331.

According to her trial testimony, Mrs. Fazzio was a resident of Canterbury Apartments, with her apartment on the other side of the street located diagonally across from the defendant's apartment, and had known the defendant, his wife, and his stepchildren for about six months. On the Saturday morning in question, around November 7, 2009, the Fazzios suspected that it was the defendant and initially did not respond when they heard someone banging on their apartment door. Mrs. Fazzio responded a couple of minutes later, however, when the banging started again. She specifically testified that the defendant was at the door

"shaking and had a little bit of blood on him, and he was saying, '[W.D.]'s hurt' ... and indicating down there." According to Mrs. Fazzio, when the defendant indicated that the victim was hurt, he said, "They're going to think I ...hurt her."

When they entered the defendant's apartment, the defendant led Mrs. Fazzio to the back bedroom [W.D.'s bedroom] and repeatedly stated that W.D. was jumping on the bed when she fell on the toy box. Mrs. Fazzio did not observe any blood in the bedroom. She further noted that the bedroom looked "untouched," and that the bed was made and did not look as though a child had been jumping on it. The defendant repositioned the toy box in an attempt to explain how W.D. was injured. Mrs. Fazzio did not observe any blood in the path to the defendant's bathroom (from the hallway to the living room, to the hallway leading to the master bedroom and bathroom). At the time, R.C. was sitting on the living room sofa dressed solely in her panties and watching cartoons. Mrs. Fazzio observed blood and a bloody garment on the floor in the master bedroom and blood in the walkway from the bed into the bathroom. She noted that a blue towel and blood were on the bed, but there were no sheets. Along with observing the victim, Mrs. Fazzio noticed blood and bloody panties on the bathroom floor. When the victim slightly opened her legs, Mrs. Fazzio observed blood "pouring down her." Mrs. Fazzio further testified as follows regarding the defendant's response when she told him that the victim needed emergency medical assistance, "he kept just shaking, freaking out, saying he -- they're going to think that he did this and he doesn't have a car."

While Mr. Fazzio took W.D. and the defendant to the hospital, Mrs. Fazzio took R.C. and her younger sister (the defendant's third stepdaughter who is not a victim in this case) to her apartment. Mrs. Fazzio waited at her apartment across the street with the door open until the police arrived on the scene. During cross-examination, Mrs. Fazzio was questioned regarding her pretrial testimony and her

failure to indicate at that time that the defendant stated that he would be blamed for the victim's injuries. She testified that although she did not relay his statement before, she was certain that he made the statement more than once.

Mr. Fazzio testified that the banging on their apartment door started between 7:30 and 8:00 a.m. W.D. was wet and wrapped in a towel when Mr. Fazzio transported her and the defendant to the hospital. Mr. Fazzio further testified that on the way to the hospital the defendant kept telling the victim that she got hurt as follows, "So you were jumping on the bed and you fell off onto the chest and hurt yourself, right?" She responded, "Yes, yes, yes." Mr. Fazzio testified that the defendant stated this explanation to W.D. at least five times. Mr. Fazzio did not see any blood.

The victim arrived at the Slidell Memorial Hospital at approximately 8:32 a.m. The complaint by the defendant indicated that W.D. fell on the lid of her toy box. The defendant's complaint further indicated that W.D. was sexually abused by her biological father when she was two years old and that he would put his fingers and objects in her vagina at times. The emergency room physician, Dr. Ursin Stafford (an expert in emergency medicine), testified that the examination of the victim's vaginal area revealed a tear on the right bottom, outer portion of her vagina. She further stated that there was bleeding and bruised tissue in the labia area. She explained that the tear would have resulted in immediate bleeding and noted that based on the explanation given by the defendant, there should have been blood on or near the toy box. The victim also had blood clotted in her vagina at the time of the examination.

Dr. Stafford noted that the victim complained of burning during urination, and when asked what happened to her at one point stated, "my dad told me not to talk about it." While W.D. was at the hospital, she was interviewed by Dr. Yameika Head, an expert in forensic pediatrics. She told Dr. Head that her

"vagina" was "bleeding a lot" because she was jumping on her bed and landed on her toy box made out of solid wood. When further questioned, she stated that she could not remember how she fell, but later stated that she believed it was from jumping. She indicated that she was in the shower when her dad found out that she was hurt. Dr. Head also testified during the trial regarding W.D.'s injuries. Regarding the vaginal examination, Dr. Head noted that the victim had abnormal lacerations in two different places of her hymen and several abrasions. Dr. Head maintained that while the surgeon with whom she performed the examination indicated that the victim's lacerations were superficial, she would classify them as deep. Dr. Stafford and Dr. Head concluded that the victim did not provide an explanation that correlated with the physical findings, which indicated that force was applied to the vaginal area.[5] Dr. Stafford contacted the Children's Hospital and had the victim admitted for further evaluation.

At approximately 9:47 a.m., Sergeant Chris Newman responded to secure the scene until crime scene investigators and detectives from the Slidell Police Department (SPD) arrived. The sergeant testified that there was one entry/exit door, and he was assured that no one exited or entered the apartment after his arrival. He encountered potential witnesses and gave them statement forms to complete (including Amy whose last name was Boone then, but Fazzio at the time of trial). Sergeant Newman entered the bedrooms and noted there was blood on the mattress in the master bedroom and inside the shower in the master bathroom. He testified that there was no blood in W.D.'s bedroom. Sergeant Newman turned over the crime scene to Detectives Bobby Campbell and Ralph Morel.

Detective Campbell conducted a walk-through upon his arrival and photographed and collected evidence, including W.D.'s T-shirt and her panties that

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[5] Dr. Head concluded the force was applied with a penetrating object consistent with the objects in evidence and/or a penis.

were located in the master bathroom. He confirmed that there were no sheets on the bed in the master bedroom and further testified that bedding materials were located in the washing machine, which had been run. Detective Campbell testified that he was still at the apartment when the defendant returned. The defendant told the detective that he discovered W.D. in her bedroom sitting on the floor by the toy box crying and bleeding. Detective Campbell observed and photographed the bedroom with the toy box. He looked at the toy box and did not observe any blood on it or in that part of the apartment. During cross-examination, Detective Campbell admitted that some additional evidentiary items were removed from the apartment after November 7, when the apartment was no longer secured.

Detective Morel contacted Detective Stan Rabalais of the Slidell Police Department regarding this incident, informed him that the case possibly involved child abuse, and instructed him to begin investigating possible abuse the following Monday (November 9). When Detective Rabalais began his investigation, W.D. was still in the Children's Hospital. The dectective contacted CAC to have W.D. interviewed that day. R.C. was interviewed by Dr. Head at the Care Center that day.

During Dr. Head's interview of R.C., she maintained that W.D. was injured when she was jumping on her bed and landed on her toy box. R.C. admitted that she did not see the incident and indicated that she knew about it because her dad told her how the injury occurred. She denied ever being inappropriately touched, but did say that she had been kicked in the vagina by a bully. She also stated that the defendant put his fingers in her mouth on one occasion.

W.D.'s November 9, 2009 CAC interview was conducted by Daniel Dooley. On November 13, 2009, she was interviewed by JoBeth Rickles. During the CAC interviews, the victim gave a different explanation for her injury, which then implicated the defendant. She indicated that her dad, whom she also referred to as

"Josh," was bad and used to hurt her and do "stuff" that she was not supposed to talk about. W.D. drew several pictures and used anatomical diagrams to explain how the defendant would routinely penetrate her vagina with objects, his finger, and his penis ("those things that boys have"). She stated that it would make her sad, would hurt badly and burn, she would try to pull it out sometimes, and the defendant would yell at her. She explained that on the day in question, the defendant put one of the objects far into her vagina.

W.D. further indicated that the defendant would sometimes put "white icky stuff" in her mouth, and she would have to drink something to get the taste out of her mouth. She stated that he would put the stuff elsewhere on other occasions and then clean it up. When further questioned about where the white stuff came from, W.D. stated that the defendant would make himself feel good (as she used her hand to motion masturbation) and that the stuff would come out later. She stated that he would use "his thing that boys have" a lot because he wanted to feel good, adding, "it doesn't feel good to me." During the interview with Rickles, W.D. indicated that the defendant would also put his penis in her mouth. W.D. also talked about the straps that the defendant would use to restrain her and stated that he would do all of the same things to R.C. W.D. indicated that she was about five years old when the abuse began. When asked if anyone other than the defendant had ever touched her inappropriately, W.D. indicated that when she was about one year old, "Luke" (whom she further described as, "my old father when I was a baby") "touched it and it hurt." The initial CAC interview of W.D. took place before she was discharged from the Children's Hospital.[6]

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[6] During cross-examination of Dr. Head, the defense elicited testimony and introduced the Nursing Progress Record to show that the victim's grandmother was at her bedside the day of the first CAC interview. According to Dr. Head and the progress notes, the victim's grandmother was present in the room at 3:00 a.m., when the victim requested to speak to a nurse to make disclosures consistent with the allegations against the defendant given in her CAC interview.

R.C. was interviewed at the CAC on November 10, 2009 (by Lisa Tadlock), and November 13, 2009 (by Rickles).[7] She consistently indicated that the defendant put his fingers in her mouth, and during the second interview (conducted by Rickles), she indicated that the defendant was in jail for "doing stuff to me and [W.D.]." When asked what kind of things the defendant did to her, R.C. pointed to her vaginal area and indicated that he put his thing in her "vagina." She initially stated that it happened once in the defendant's bedroom, and the defendant (whom she called Dad and "booger snot") told her to keep it a secret. She stated that it happened when her mother was at work. R.C. also stated that the defendant put a "purple thing" in her butt and in W.D.'s butt one Saturday morning while her mother was at work. She also stated that the defendant put a red thing in her vagina on one occasion. She indicated that she was six years old when these things occurred, that it would sometimes occur daily, and that it would be painful. When asked if anything came out when the defendant put his part inside of her, she said she did not know what it was and referred to it as jelly.

Based on the CAC disclosures of abuse, Detective Rabalais instructed Detective Morel to prepare an affidavit requesting an arrest warrant for the defendant and obtained consent from the victims' mother to search the apartment. Detective Rabalais specifically sought, photographed, and seized "sex toy devices" consistent with the descriptions given by the victims. One of the items was produced by R.C. and given to the detective. A cargo strap, handcuffs, and body lubricant were also seized. On cross-examination, Detective Rabalais admitted that he did not have a log or any knowledge of the number of people who had been in and out of the apartment before he collected evidence.

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[7] During the cross-examination of JoBeth Rickles, the defense introduced an exhibit (an ano-genital diagram with handwritten notations) to show that prior to R.C.'s CAC interviews, on November 9, 2009, she was examined at the Children's Hospital and the examiner concluded that she had a "normal" hymen and anus.

The victims' trial testimony was held in chambers and presented to the jury via closed circuit television pursuant to La. R.S. 15:283. W.D. was eleven years old, in fourth grade, and living with her grandmother in Kentucky at the time of the trial. When asked if anything bad happened to her on a Saturday morning in 2009, when she lived with her mother in Slidell, Louisiana, W.D. stated that she was hurt by the defendant. When asked how many times the defendant placed an object in her private, W.D. stated, "Several." She further testified that it was painful and not enjoyable. She also stated that it was painful when he put his "private" in her "private" and indicated that he did so, "like, every day." W.D. stated that the defendant would wait for her mother to go to work to "do that stuff." She also stated that the defendant would sometimes tie her up with a "rope." She further testified that the incidents started when she was five years old and that she did not tell anyone about the incidents because the defendant threatened to kill her if she told anyone. The victim identified her underwear and recalled bleeding on the day in question. Regarding the events that took place that morning, the victim testified:

> Well, he was doing that stuff to me like he normally would do. He would take the ball thing all the time and everything else he would use. And also he would ... after a while he would put his private inside me and then my -- some part inside my private was coming out. It was blood and something kind of, I don't know, what it would be called, but it was kind of hard. And he put me in the shower to hide me, and that's pretty much what I remember.

W.D. recalled being brought to the hospital after she was injured. She testified that the defendant would use "clear stuff" that she also referred to as soap, or put body lotion on their privates or the objects, "so he could get his, you know, materials in easier." She also stated that the defendant would sometimes use a chain to tie or handcuff their hands behind their back so they could not resist while being hurt with his private or his red "H thing." W.D. identified two of the State's exhibits as vibrators that the defendant would use to penetrate and hurt her and

R.C. She testified that the devices that the defendant used to penetrate her would sometimes get blood on them. According to the victim, on the day in question, "the ball thing that had the blue and purple ones" was used by the defendant and caused her to bleed. The victim confirmed that she did not fall on the toy box and injure herself on the day in question, that the incident on the day in question occurred in her parent's bedroom, and responded negatively when asked on cross-examination if her grandmother always wanted her to live with her.

R.C. was in the third grade, nine years old, and also lived with her grandmother at the time of the trial. Consistent with her second CAC interview, R.C. testified that the defendant occasionally put his private in her when her mother was not at home and that it would hurt. As she was questioned about the pictures that she drew during the second CAC interview, R.C. also stated that the defendant would put "beads" inside of her "behind" and an item that was shaped like the letter "H." She confirmed that she recognized the items in State's exhibits 51 and 61 and confirmed that the defendant placed at least one of the items in her and that it was painful. She identified State's exhibit 53 as the straps the defendant used to "trap" her arms and legs to the bed so she could not move when he would hurt her with his privates. R.C. further testified that the defendant would act innocent around her mother and that she was too scared to tell her mother about the defendant's actions because, "[h]e threatened that he would kill my Mammy and her daddy and me." During cross-examination, the victim responded positively when asked if she was being truthful when she told Lisa Tadlock at CAC that the defendant was in his bedroom when she heard W.D. scream from her bedroom on the day in question. During further cross-examination, she indicated that her statements in the initial CAC interview were not true and that the defendant "put something inside of [W.D.] real heavy to make it bleed that hard." R.C. also indicated that she was not being truthful during her first interview (with Dr. Head)

when she stated a bully kicked her in the vagina and that, at the time, she was afraid the defendant might hit her. She also contended that the defendant told her to say the things that she said when initially discussing W.D.'s injury. R.C. confirmed that her grandmother disliked the defendant.

The victims' maternal grandmother, Tammera Clement (referred to as "Mammy" by the victims), testified at the trial. Clement confirmed that her daughter contacted her on November 7, that she went straight to the Children's Hospital when she arrived in Louisiana from her home in Kentucky, and that she stayed with W.D. during most of her hospitalization. Clement also indicated that she was present when W.D. made drawings and verbal disclosures and allegations of sexual abuse by the defendant to the nurses. She stated that she also went to the apartment and noted that blood was still in the master bathroom bathtub when she arrived. When she went in the laundry room, she observed dirty clothes and a bloody sheet hanging out of the washing machine, and she washed the clothes. She admitted that a social worker encouraged her to try to get W.D. to talk about her injury, but denied ever telling her grandchildren to say things about the defendant that were not true.

On cross-examination, Clement was asked if she liked the defendant prior to November 7, 2009, and she stated, "At times." Clement denied having a desire to raise the victims before the allegations of abuse. Clement confirmed that she told Detective Rabalais about the blood-stained sheet that she washed along with other clothing while cleaning up the apartment. Clement noted that the girls stayed with her in Kentucky for six weeks during the summer of 2009, a few months before the date in question. During that summer visit, Clement became suspicious when W.D. told her that the defendant would put his hands in the bathtub with her, touch her, and get in the shower with her. The girls left to go back to Louisiana within a day or so of W.D.'s comment.

Natasha Poe, a DNA expert, was provided with DNA samples from the victims, the defendant, and the victims' mother. State's exhibit number 62 (identified as a blue vibrator) tested positive for the presumptive test for seminal fluid, and positive for the prostate specific antigen test for seminal fluid. The results (from the same stain) also included a partial profile off of the epithelial fraction from the sample that was consistent with the reference sample profile of R.C.[8] Poe was unable to determine the type of bodily fluid (blood, saliva, urine, feces, or perspiration) from R.C. that produced the DNA sample. When asked if it was possible that it came from R.C.'s hand, she noted that she would not expect the profile to be the result of mere contact DNA. She noted that the stain on the object was visible without the alternate light source, and that it flaked off and was very crusty, which was inconsistent with a contact DNA sample. During cross-examination, Poe confirmed that the seminal fluid and R.C.'s DNA profile did not necessarily accompany each other and that one could have been overlaid over the other.

The sole defense witness, Dr. Gregory Hampikian, was another DNA expert who was present during Poe's testimony and evaluated the DNA testing in this case. Dr. Hampikian noted that he was surprised to hear Poe refer to a "female fraction," and further noted that you cannot separate female cells from the rest of an epithelial fraction, though sperm cells can be separated out. He further indicated that it was not possible to determine what part of the body R.C.'s DNA came from or whether it was the result of a touch. Dr. Hampikian noted that a total of nine objects were tested, five of the tested devices had the victims' mother's DNA on them, three of those five devices had the defendant's DNA on them, and none of those five devices that had the victim's mother's DNA on them had either

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[8] Poe specified that the profile was greater than 100 billion times likely to be that of R.C. than an unrelated random individual of the African-American, Caucasian, or Hispanic population.

victims' DNA on them. During cross-examination, Dr. Hampikian admitted that DNA could be readily removed with soap and water.

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. Herein, the trier of fact obviously found the victims' testimony credible. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, 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. Further, 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 jury. *See State v. Calloway*, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. *State v. Moten*, 510 So.2d 55, 61 (La. App. 1st Cir.), *writ denied*, 514 So.2d 126 (La. 1987).

With great detail, the youthful victims described sexual acts by the defendant that included penal vaginal penetration and penetration with objects. In reviewing the evidence, we cannot say that the jury's determination was irrational

under the facts and circumstances presented to them. *See Ordodi*, 946 So.2d at 662. The evidence presented, including the victims' most recent CAC interviews and trial testimony, was clearly sufficient to support the verdicts of guilty of aggravated rape and sexual battery of W.D., and guilty of molestation of R.C. Therefore, we find that in viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the offenses were proven beyond a reasonable doubt. We find no merit in the first assignment of error.

ASSIGNMENTS OF ERROR NUMBERS TWO AND FOUR

In assignment of error number two, the defendant argues that the trial court erred in refusing to allow the defense to question Mr. Dooley concerning interview techniques and the effect that certain questions may have on child interviewees. The defendant argues that since the State relied on the interviews of the victims, he should have been allowed to cross-examine Mr. Dooley on questioning techniques as routinely permitted with respect to the concept of delayed disclosure. The defendant notes that the defense counsel made it clear that questions regarding the credibility of the victims would not be elicited had the questioning been allowed. The defendant argues that the trial court's reliance on the unpublished case of *State v. Ballard*, 10-1026 (La. App. 1 Cir. 2/14/11), 57 So.3d 613, *writ denied*, 11-0447 (La. 9/23/11), 69 So.3d 1154, in this regard was misplaced since in that case the expert would have been asked to provide an opinion on the alleged victim's credibility had the proposed questioning been allowed. In assignment of error number four, the defendant contends that the specification of error assigned under assignment of error number two deprived him of his constitutional right to present a defense. In addition to his Sixth Amendment constitutional right to present a defense, the defendant cites *State v. Vidrine*, 08-1059 (La. App. 3d Cir. 4/29/09), 9

So.3d 1095, *writ denied*, 09-1179 (La. 2/26/10), 28 So.3d 268, and *State v. Foret*, 628 So.2d 1116 (La. 1993), as authority for the proposed line of questioning.

A criminal defendant's right to present a defense is guaranteed by the Sixth Amendment of the United States Constitution and Article I, § 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 discretion calls for the trial court, and its determinations regarding relevancy and admissibility should not be overturned absent a clear abuse of discretion. *State v. Duncan*, 98-1730 (La. App. 1 Cir. 6/25/99), 738 So.2d 706, 712-13.

During the cross-examination of Mr. Dooley, an expert in forensic interviews, defense counsel questioned him about interview protocol. Mr. Dooley explained that by following protocol, safe, nonleading, nonsuggestive questions that will hopefully elicit a narrative, are used. Mr. Dooley confirmed that a child,

though interviewed according to protocol, may still provide misleading answers if the child has been otherwise interviewed or spoken to before the interview. The defense counsel asked if the classification of a question as suggestive depended upon whether or not a child had been prompted to respond to that question beforehand. At that point, Mr. Dooley explained that a suggestive question would consist of a question wherein the answer was implied. The State objected when the defense counsel continued as follows: "Well, that's what [is] suggestive to you, but depending on what the child's been told beforehand, questions asked in other fashions may be suggestive to them?" The trial court sustained the objection, agreeing that the question was argumentative. The State further objected to the line of questioning as being irrelevant and the trial court held a sidebar conference. During the conference, the defense counsel indicated that he specifically wanted to question Mr. Dooley regarding his familiarity with possible misconceptions about the way in which questions are asked of children. In questioning Mr. Dooley, the defense counsel wanted to refer to information covered in a learned article on the subject, but did not intend to introduce the article during the trial. The trial judge took a recess to research the issue and subsequently sustained the State's objection. In doing so, the trial judge cited the annotations to La. Code Evid. art. 803(18) and *Ballard, supra.* Nonetheless, despite the State's additional objection, the defense was allowed to thoroughly question Mr. Dooley regarding the concept of coaching. Mr. Dooley admitted that he had no way of knowing for sure whether a child had been coached or interviewed in a suggestive manner prior to his interview. In response, on re-direct examination, the State attempted to question Mr. Dooley about possible coaching by the defendant and the trial court sustained the defense objection, again citing *Ballard.*

Louisiana Code of Evidence article 702 dictates the admissibility of expert testimony. It provides, "[i]f scientific, technical, or other specialized knowledge

will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *State v. Higgins*, 03-1980 (La. 4/1/05), 898 So.2d 1219, 1239, *cert. denied*, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). The supreme court has placed limitations on this codal provision in that, "[e]xpert testimony, while not limited to matters of science, art or skill, cannot invade the field of common knowledge, experience and education of men." *State v. Stucke*, 419 So.2d 939, 945 (La. 1982); *State v. Young*, 09-1177 (La. 4/5/10), 35 So.3d 1042, 1047, *cert. denied*, ___ U.S. ___, 131 S.Ct. 597, 178 L.Ed.2d 434 (2010). *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *State v. Foret*, 628 So.2d at 1128-29.

Testimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact. However, in a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused. La. Code Evid. art. 704. Credibility determinations are made by the trier of fact. *See State v. Taylor*, 97-2261 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932.

At the outset, we note that the defense counsel did not attempt to establish the referenced learned article as a reliable authority by expert testimony or judicial notice in conformity with La. Code Evid. art. 803(18). Thus, consistent with the trial court's ruling, the learned treatise exception to the hearsay rule in Article 803 was inapplicable. Further, allowing Mr. Dooley to testify about whether or not the victims were being misleading would have, as noted by the trial court, invaded the province of the jurors as factfinders. *See Young*, 35 So.3d at 1047-48. Moreover, the trial court granted the defense latitude in questioning Mr. Dooley on the concept of coaching and suggestiveness. Under these circumstances, we find no

abuse of discretion or violation of the defendant's constitutional right to present a defense in the trial court's ruling. Assignments of error numbers two and four lack merit.

ASSIGNMENT OF ERROR NUMBER FIVE

In the fifth assignment of error, the defendant contends that based on the "peculiar facts of this case" the mandatory sentence of life imprisonment imposed on count one is excessive. In addition to reiterating his argument that the evidence, when rationally considered, does not prove guilt beyond a reasonable doubt, the defendant contends that Ms. Clement pursued an agenda that was contrary to the evidence and well being of the victims, that the jury was motivated by disgust at the nature of the offenses and substituted passion and sympathy for reason, and that the sentence is cruel and unusual.

The Eighth Amendment to the United States Constitution and Article I, Section 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. Although a sentence may fall within statutory limits, it may nevertheless violate a defendant's constitutional right against excessive punishment and is subject to appellate review. *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979). Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. *State v. Reed,* 409 So.2d 266, 267 (La. 1982). A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. *State v. Lanclos*, 419 So.2d 475, 478 (La. 1982); *State v. Fairley*, 97-1026 (La. App. 1 Cir. 4/8/98), 711 So.2d 349, 352-53.

The Code of Criminal Procedure sets forth, in Article 894.1, items which must be considered by the trial court before imposing sentence. Generally, the trial court need not recite the entire checklist of factors, but the record must reflect that it adequately considered the criteria. *Fairley*, 711 So.2d at 352. However, the failure to articulate reasons for the sentence as set forth in Article 894.1 when imposing a mandatory life sentence is not an error; articulating reasons or factors would be an exercise in futility since the court has no discretion. *State v. Felder,* 00-2887 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 371, *writ denied*, 01-3027 (La. 10/25/02), 827 So.2d 1173.

Under La. R.S. 14:42(D)(1), a person convicted of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Courts are charged with applying a statutorily mandated punishment unless it is unconstitutional. *State v. Dorthey*, 623 So.2d 1276, 1278 (La. 1993). In *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So.2d 672, 676, the Louisiana Supreme Court re-examined the issue of when *Dorthey* permits a downward departure from a mandatory minimum sentence, albeit in the context of the Habitual Offender Law. The Court held that to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

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

Johnson, 709 So.2d at 676. While both *Dorthey* and *Johnson* involve the mandatory minimum sentences imposed under the Habitual Offender Law, the Louisiana Supreme Court has held that the sentencing review principles espoused in *Dorthey* are not restricted in application to the penalties provided by La. R.S. 15:529.1. *See State v. Fobbs*, 99-1024 (La. 9/24/99), 744 So.2d 1274 (per curiam);

State v. Henderson, 99-1945 (La. App. 1 Cir. 6/23/00), 762 So.2d 747, 760 n.5, *writ denied*, 00-2223 (La. 6/15/01), 793 So.2d 1235; *State v. Davis*, 94-2332 (La. App. 1 Cir. 12/15/95), 666 So.2d 400, 407-08, *writ denied*, 96-0127 (La. 4/19/96), 671 So.2d 925.

In this case, the trial court imposed the mandatory sentence for an aggravated rape conviction. We find that the defendant failed to rebut the presumption that the mandatory life sentence is constitutional. The defendant has not presented below or on appeal, any particular or special circumstances that would support a deviation from the mandatory life sentence provided in La. R.S. 14:42(D)(1). Based on the record before us, we find that the defendant has failed to show that he is exceptional or that the mandatory life sentence is not meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Thus, we find that a downward departure from the mandatory life sentence was not required in this case. The mandated life sentence imposed is not excessive and assignment of error number five lacks merit.

REVIEW FOR ERROR

Under La. Code Crim. P. art. 920(2), which limits our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence, we have discovered a sentencing error. The victims were under the age of thirteen at the time of the offenses. Thus, the sentencing range on the conviction of molestation of a juvenile on count two is imprisonment at hard labor for not less than twenty-five years and not more than ninety-nine years, with twenty-five years to be served without the benefit of probation, parole, or suspension of sentence. La. R.S. 14:81.2(E)(1) (prior to renumbering by 2011 La. Acts, No. 67, § 1). Therefore, we note that the ten-year term of imprisonment imposed on count two is illegally lenient. However, since the sentence is not inherently prejudicial to the defendant and neither the State nor the defendant has

raised this sentencing issue on appeal, we decline to correct this error. *See State v. Price*, 05-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), *writ denied*, 07-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTIONS AND SENTENCES AFFIRMED.