

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

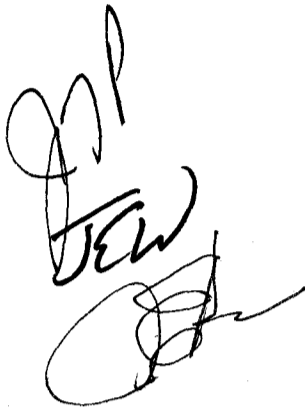
FIRST CIRCUIT

NO. 2014 KA 0923

STATE OF LOUISIANA

VERSUS

GARY LYNN FOGG



Judgment rendered December 23, 2014.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 523830
Honorable Allison H. Penzato, Judge

* * * * *

WALTER P. REED
DISTRICT ATTORNEY
COVINGTON, LA
AND
KATHRYN LANDRY
SPECIAL APPEALS COUNSEL
BATON ROUGE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

POWELL MILLER
NEW ORLEANS, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
GARY LYNN FOGG

* * * * *

BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

PETTIGREW, J.

The defendant, Gary L. Fogg, was charged by bill of information with aggravated incest,¹ a violation of La. R.S. 14:78.1.² The defendant pled not guilty, but was found guilty as charged after a trial by jury. The trial court denied the defendant's subsequent motion for postverdict judgment of acquittal and motion for new trial. The trial court sentenced the defendant to thirty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, challenging the sufficiency of the evidence. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

According to the victim, U.B., when she was about eight or nine years old and in about the second grade, the defendant entered her bedroom and made her rub his "private part" (which she specifically identified as his penis) with her hand.³ The victim indicated there were several other times when the defendant would repeatedly tell her to rub his penis, but on that occasion, he continued to yell at her until she complied. On March 9, 2012, when the victim was ten years old, Mrs. Fogg (the mother of the victim and wife of the defendant) arrived home and observed the defendant sleeping on the sofa in the den with his genitals exposed. She used her cell phone to take a photograph of the defendant and questioned the victim, who had been home with the defendant. Mrs. Fogg specifically asked the victim what she saw in the den that day and, based on her response, further asked whether the defendant had asked her to do what she saw him doing (rubbing his penis). The victim ultimately responded positively. Mrs. Fogg called 911 (at approximately 11:42 a.m.), and Deputy Florian Lizana of the St. Tammany Parish Sheriff's Office (STPSO) was

¹ The bill of information sets forth that the victim's date of birth is March 30, 2001, and that the offense was committed on or between March 30, 2009 and March 9, 2012.

² We note while the crime of aggravated incest has been repealed, that conduct is now incorporated into the crime of aggravated crime against nature. See 2014 La. Acts Nos. 177, §§ 1, 2 & 602, §§ 4, 7.

³ Herein, only initials will be used to identify the victim. See La. R.S. 46:1844(W).

dispatched to the Slidell residence. The defendant left before Deputy Lizana arrived. Deputy Lizana took a verbal statement from Mrs. Fogg and, later, had her make a written statement that was consistent with the verbal account. Deputy Lizana retrieved a copy of the photograph of the defendant taken by Mrs. Fogg, transported Mrs. Fogg and her children to the Sherriff's Office, and turned the case over to a trained detective, Detective Jason Mire of the STPSO.

During a subsequent interview at the Children's Advocacy Center (CAC) and during her trial testimony, the victim confirmed that she was able to successfully resist the defendant's requests on March 9. After detailing the incident that occurred when she was about eight or nine years old, the victim revealed that she was forced to comply on about two other occasions while she and the defendant were alone in her parents' bedroom and that the incidents began when she and her mother first came to Louisiana. The victim also indicated that the defendant occasionally rubbed his penis in front of her, occasionally touched her front and back private areas, and would tell her to rub his back and feet. She stated that she would always tell the defendant "no" and try to run away, as he would make repeated requests and grab her arm. The victim indicated that other than the approximate three incidents (once in her bedroom and twice in her parents' bedroom) when she was forced to rub the defendant's penis, she was able to run away on most occasions. She further indicated that the defendant would allow her to leave if her little brother entered the room. The victim stated that she did not tell anyone about the incidents before March 9 because she was afraid of the defendant, who had instructed her not to tell anyone and had told her that she and her little brother would be abandoned if she told anyone.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant contends that the evidence is insufficient to support the verdict. The defendant argues that the accusation of abuse by the victim originated during aggressive questioning by Mrs. Fogg. The defendant notes that the State's expert forensic investigator testified that the questioning of the victim by Mrs. Fogg before the 911 call was troubling and suggestive. The defendant

also notes that prior to the day that Mrs. Fogg questioned the victim regarding abuse, there was no indication that the defendant was anything but a loving, caring, and generous stepfather to the victim. The defendant claims that the terms of his relationship with the victim was evidenced by her diary and journal entries praising him, cards she created for him, and her testimony indicating that she loved the defendant very much. The defendant further notes that physical evidence including bank statements, phone records, immigration documents, and casino gambling records support his allegations that Mrs. Fogg secreted funds from him, had an extra-marital affair, had a gambling habit that she could not afford, and had requested expedited passports just before the allegations in question came to light. The defendant argues that noted physical evidence supports his claim that Mrs. Fogg forced the victim to make the allegations of abuse in order to obtain sole custody of the children after obtaining U.S. passports for herself and the victim.

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**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-1309 (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 the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, p. 4 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statutes 14:78.1 provided, in pertinent part (prior to its repeal as previously noted herein):

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, the State must prove several elements to establish the offense of aggravated incest. First, the State must show that the victim was less than eighteen years of age.⁴ Second, the State must show that the offender knew that the victim was related to him within the specified degrees. Finally, the State must prove that the defendant has engaged in one of the prohibited acts with the victim. **State v. Flores**, 27,736, p. 5 (La. App. 2 Cir. 2/28/96), 669 So.2d 646, 650. Only the third element is in dispute in this case.

Deputy Lizana testified that upon his arrival at the residence, Mrs. Fogg gave a verbal statement consistent with her complaint to the 911 dispatcher. He indicated that Mrs. Fogg was upset and crying at the time. While at the residence and while transporting them to the Sheriff's Office, the deputy did not hear Mrs. Fogg discuss the allegations with the victim or threaten or fuss the victim.

During the March 13, 2012 CAC interview of the victim, conducted by Jo Beth Rickles, the victim indicated that on the day her mother called the police, she was exercising on a treadmill when the defendant asked, "can you rub me a little bit?" The

⁴ In this case, the victim was under the age of thirteen years during the time period in which she indicated that the acts in question occurred. Thus, the defendant was sentenced within the range provided in La. R.S. 14:78.1(D)(2).

defendant kept making the same request as she repeatedly responded negatively. When asked to be more specific, the victim specifically indicated that the defendant wanted her to rub his private part and circled the penis on an anatomically correct diagram of a male. The victim stated that this was not the first time that the defendant asked her to rub his penis and indicated that, during other incidents (estimated as three) where she was made to comply, she rubbed the defendant's bare (on the skin as opposed to over clothing) penis. She indicated that she was standing up at the time while the defendant was on the bed. When asked if the defendant's penis was hard or soft, she stated, "It was hard I guess." The victim stated that during the incidents, consistent with the photograph taken on March 9, the defendant was wearing only a t-shirt, underwear, and socks. The victim stated that her mother observed one of the occasions when the defendant touched her "butt" and told him not to do it anymore. The victim also stated that the defendant would often buy her things, but that he yelled at her and her brother a lot, and that the defendant and her mother argued a lot. She indicated that she and her brother were scared of the defendant.

Rickles testified that delayed reporting is very common and indicated that it was one of the considerations when conducting such interviews. During cross-examination, Rickles described common suggestibility concerns and confirmed that untrained deputies or parents could influence a child's responses. The defense attorney further questioned Rickles after playing (before the jury) a cell phone recording apparently made on March 9 by Mrs. Fogg as the initial report of the abuse, consisting of her questioning of the victim just prior to and including her 911 call. During the recording, after the victim admitted that she saw the defendant "rubbing his thing," the victim can be heard initially only making whiney noises, as Mrs. Fogg repeatedly asked her if the defendant told her to do anything. As the victim refused to answer, Mrs. Fogg told her not to be scared and further stated, "you need to tell me ... this is for your good, this is for our own good." Mrs. Fogg then repeatedly asked, "He asked you to what?" She further made statements like, "tell me," and "say it," before the victim finally responded positively when she directly asked if the defendant asked her to rub his penis. Rickles

confirmed that the questioning raised concerns regarding pressure and trauma, and responded positively when asked if the questioning could be described as "the classic definition of suggestibility." Rickles also confirmed that she would have asked the victim if anyone told her what to say if she had heard the recording before the CAC interview.

During redirect examination, Rickles confirmed that while conducting the interview she did not have any concerns about the victim being untruthful. She noted that while it sounded like the victim was under stress during the recorded questioning by her mother, she did not feel that the victim was under undue stress during the CAC interview. She further confirmed that the delay between the initial report by the victim on March 9, a Friday, and the CAC interview that took place that following Tuesday, was normal and that the victim had been taken to Safe Harbor so her safety during the delay was not a concern.

The victim's trial testimony took place ten days before her thirteenth birthday while she was in the seventh grade. According to the victim, her younger brother was five or six years old at the time of the trial. The victim stated that the defendant was her stepdad. She indicated that six years of age was the earliest age that she could remember knowing the defendant and that she never knew her real father. She indicated that Louisiana was the first American state that she lived in after being born in the Philippines. When asked to describe how things were in the home and what she thought about the defendant before her little brother was born, the victim stated that the defendant bought her "stuff," like toys and "a golden ring and a diamond ring"; and when asked whether it was a lot or just on holidays, she stated, "A lot." She conveyed that she was often home alone with the defendant while her mother was working or gambling, and that the defendant would sometimes come into her bedroom and share her bed during the morning and at nighttime. She noted that the defendant always wore only a shirt and underwear, but would get dressed if someone came to their home. When asked how she and the defendant got along after her brother was born, the victim testified that after her brother was born, he got more attention.

When asked why the police came to their house, the victim stated, "Gary was doing something inappropriate." When asked if the defendant did something inappropriate the day that the police were called, the victim stated, "I think so," and added "I don't know. Forcing me to touch him." When asked what parts of his body the defendant wanted her to touch, she stated, "Private part." She testified that the first time the defendant tried to make her touch his private part occurred "more or less a year after I came here." The victim indicated that she was in the first grade when she first came to the United States. She indicated that the times the defendant forced her to touch him, it would sometimes be over his clothes and other times under his clothes. She denied it when asked if the defendant ever touched her with any part of his body. The victim indicated that the defendant would take her to the mall and buy toys for her after the incidents.

Consistent with her CAC interview, the victim further testified that on some occasions, she was able to run away from the defendant and avoid his requests. The victim recalled the defendant telling her that she would be alone if she told anyone, which she assumed meant she would end up in foster care. She stated that on March 9, the day the police were called, the defendant asked her to touch him while they were in the den. At the time of the trial, the victim stated that she could not recall whether she actually touched the defendant that particular day, but she did recall seeing his private part. She further testified that whenever she successfully refused to touch the defendant, he would "Do it himself." The victim testified that her mother did not tell her what to say to the police and that she told the police what happened even though it was difficult to talk about it at the time. The victim also indicated that her relationship with her mother was strained at the time of the trial, specifically stating that her mother did not seem like a mother and that she was upset about the fact that her mother was not with her during the incidents in question. She testified that her mother did not tell her to make things up about the defendant and that she was not on speaking terms with her mother at the time of the trial.

On cross-examination, the victim was asked if she recalled making cards and letters for the defendant on special occasions, and she indicated that her mother would force her to write them. When asked if she ever made cards for the defendant or wrote him letters just because she loved him, she stated, "At the time, I guess." In response to being asked if she loved the defendant at any time, the victim stated, "When he bought me stuff." After noting the importance of telling the truth, the defense attorney asked the victim if she needed to change any portion of her testimony and she responded, "I didn't say anything untrue." The victim further specifically denied that her mother ever threatened her by telling her that something bad would happen to her if she did not say certain things about the defendant. The victim also confirmed that she was telling the truth when her mother first questioned her on March 9. The victim testified that her mother did not know how to console her, and while she confirmed that her mother often screamed, she denied that her mother was intimidating. The victim also confirmed that she wrote positive journal entries about the defendant. On redirect examination, consistent with her CAC interview, the victim indicated that she did not tell anyone sooner because she was scared of the defendant.

Mrs. Fogg testified that she met the defendant after he sent her a message on a Filipino friendship-dating website in December 2005, about five or six months after the victim's biological father died. While she lived in the Philippines, some of the messages she received on the website were from United States citizens, including the defendant. In February 2006, she responded to the defendant's message and they began communicating back and forth through e-mails and Yahoo messenger. In April, the defendant came to the Philippines on a business trip, and they met in person for the first time on or about April 21. At this point, the defendant also met the victim who was five years old at the time. Mrs. Fogg further testified that she was twenty-four years old at the time, and the defendant was fifty-three or fifty-four years of age. She stated that they got engaged on April 28, about seven days after initially meeting in the Philippines, and were married on July 24, in the city where she lived in the Philippines. She testified that the victim was happy to have a father. The defendant started buying

the victim gifts early on, including a pair of earrings, a dress, and a bathing suit. A few days after the marriage, the defendant indicated he would file a petition for her and the victim to move to the United States with him. According to Mrs. Fogg, when she suggested that she would temporarily leave the victim in the Philippines so she could assess the United States first, noting that she had never been to America before, the defendant became angry, started discussing adoption plans, and filed a petition for adoption within a few days later, but the adoption was never finalized.

Mrs. Fogg and the victim stayed in the Philippines, as they waited for documentation, before finally joining the defendant in the United States in September 2007, at the Slidell residence. (Mrs. Fogg added that her grandmother accompanied them to America, but left Slidell after a few days to live with Mrs. Fogg's aunt in Florida.) She testified that the victim had her own bedroom. After Mrs. Fogg became pregnant, the defendant stopped having sex with her, which led to arguments, and the defendant began periodically sleeping in the victim's room. She recalled one night when she woke up around midnight and found the defendant sleeping with the victim in the victim's bed. In 2009, the defendant stopped working and started taking classes at Delgado College but did not finish the program. Mrs. Fogg noted that the defendant took care of the children by himself while she worked, went to the casino, or took classes at Delgado, except for about ten months in 2010, when her grandmother lived with them and helped them care for the kids. Mrs. Fogg testified that she spoke to the defendant several times about his habit of walking around the house in his underwear in front of the kids, but she got tired asking him about it and requesting that he wear pants. She noted that sometimes his underwear would have holes in them, and he would still refuse to wear pants. In 2011 (as March and the victim's birthday was approaching), Mrs. Fogg noticed that the victim seemed to be unhappy and recalled the victim telling her several times that she did not want her to leave home or go to work. Mrs. Fogg admitted to having an extramarital affair that started in 2011.

As to the March 9 incident in question, Mrs. Fogg testified that she got out of class early that day. When she arrived home, the defendant was asleep on the sofa in

the den, his penis and testicles were hanging out of the hole in the front-middle portion of his underwear, and his hand was on his penis. She decided to take a photograph of the defendant to show him how he looked while he was sleeping and warn him about it. After taking the photograph, she awakened the defendant and questioned him about his appearance. The defendant told her he did not know his genitals were exposed and immediately put his pants on that were sitting on a box near the sofa. At that point, Mrs. Fogg began questioning the victim. Mrs. Fogg was expecting the defendant to leave to go pick up their son from his mother's house, so she waited for him to leave and then continued questioning the victim and recorded the conversation. Mrs. Fogg noted that the victim was scared, crying, hesitant to talk, and initially denied that anything happened. She admitted that she did not have any training on questioning potential victims of abuse and never expected her daughter to be exposed to any kind of abuse. Mrs. Fogg denied coaching or telling the victim what to tell the police or the CAC interviewer, and stated that she did not question the victim about the incident after the recorded conversation consisting of the initial disclosure. She further testified that her relationship with the victim was strained, noting that the victim was often angry adding, "She just tells me she hates me."

During cross-examination, Mrs. Fogg testified that she married the defendant because she loved him. She confirmed that the defendant often slept during the day and admitted that the defendant would sometimes complain about the mattress in their bedroom being too soft. She further confirmed that the defendant had neck problems and would sometimes sleep in the victim's bedroom even when the victim was not there. She admitted to having plans to leave the defendant at one point in 2011, and to opening bank accounts without the defendant's knowledge, and noted that he did not want her to have her own bank account. Regarding her questioning the victim on March 9, Mrs. Fogg testified that she was not aware if the victim knew she was being recorded.

Detective Mire confirmed at trial that Mrs. Fogg was present during the preliminary interview of the victim at the Sheriff's Office, but noted that Mrs. Fogg did

not participate in the interview. The interview was brief and consisted of open-ended questions. He stated that the victim was emotional, but did disclose some things. Explaining that he is not a forensic interviewer, Detective Mire asserted that he ceased the interview once the victim herself made the disclosures, so an actual forensic interview could be set up.

The first defense witness was the defendant's mother, Hazel Fogg. Hazel testified that she lived across the street from the defendant and would see the victim almost every day. Hazel testified that Mrs. Fogg referred to her as "mom," and noted that the victim's relationship with the defendant was more nurturing than the victim's relationship with her mother. She specifically stated that Mrs. Fogg would never hug the victim or show affection, though the defendant and the victim would hug "All the time." She testified that the victim never confided in her regarding any concerns about the defendant. Hazel further testified that the defendant had two previous marriages and other stepchildren, and noted that she never observed any harmful behavior between the defendant and the children. She recalled the police arriving at the defendant's residence on March 9, 2012, and stated that the defendant did not come to her house that day.

The defendant also testified during the trial. The defendant testified that he purchased a significant amount of stock with a company in the Philippines in 2005 and had been communicating with the victim's mother when the company invited him to visit in 2006. Consistent with Mrs. Fogg, the defendant testified that he married her because he loved her and had a relationship with her. When asked about the sleeping arrangements after the victim and her mother moved in with him in Slidell, the defendant indicated that he would alternate between his bed, the sofa, and the victim's bed. He stated that he would ask the victim to leave so he could sleep in her bed, and further noted that he would read her a story on some nights to help her fall asleep. Regarding his attire, he confirmed that he would wear a "long" T-shirt, boxer shorts, and socks. He stated that he did not feel that he was exposed and did not recall Mrs. Fogg asking him to change clothing habits. The defendant testified that he had a very

affectionate relationship with the victim, specifically noting "she was very affectionate; she did show her love for me. She hugged me all the time, kissed me on the cheek a lot." The defendant also testified that on occasion, he had to intervene between Mrs. Fogg and the victim because of physical abuse. The defendant recalled two instances of physical abuse: one, where Mrs. Fogg was hitting the victim with a belt, during which he intervened and pulled Mrs. Fogg away; and a second, where Mrs. Fogg hit the victim with a shoe and he intervened and told Mrs. Fogg to "get out of here." He further testified that Mrs. Fogg was not very attentive to the victim. Regarding the day in question, March 9, 2012, the defendant stated that he did not interact with the victim as he lounged on the sofa wearing his T-shirt, boxer shorts, and socks. He recalled briefly falling asleep while the victim was in the kitchen, and noted that when he woke up Mrs. Fogg was standing over him questioning him. The defendant denied ever asking the victim to touch his penis and further testified that he never exposed his penis to the victim. He reiterated that he never made the victim touch his penis, and stated that the victim lied about the allegations.

The defendant's friend, John Eric Moore, also testified as a defense witness. Moore indicated that he knew the defendant for forty to forty-five years, and that they met while in junior high school. He further testified that he had never known the defendant to lie about anything. The defendant's stepbrother, Glynne Jones, was the final witness, and he testified that he observed the defendant with his stepchildren and other children and never had any concerns about his care or interactions with them.

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**, 2002-2079, p. 8 (La. App. 1 Cir. 5/9/03), 849 So.2d 574, 581. Herein, the jury obviously found the victim's statements more credible than the defendant's testimony. The jury 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 jury'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, p. 6 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932. 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). No such hypothesis exists in the instant case.

In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. We note that while the victim's initial disclosure was made under stress and leading questions by her mother, the jury was able to listen to that line of questioning and the victim's subsequent interview at CAC and her trial testimony. The victim clearly and consistently described inappropriate acts by the defendant (her stepfather) that included forcing her to touch his penis on roughly three occasions and attempting to pressure her to do so on several other occasions. The evidence presented, including the victim's CAC interview and trial testimony, was clearly sufficient to support the verdict of guilty of aggravated incest. 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**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). We find that, in viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of aggravated incest proven beyond a reasonable doubt. We find no merit in the sole assignment of error.

CONVICTION AND SENTENCE AFFIRMED.