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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 KA 1116

STATE OF LOUISIANA

VERSUS

JERRY W. DUNCAN

Judgment Rendered: DEC 23 2015

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Appealed from the
22nd Judicial District Court
In and for the Parish of Washington, Louisiana
Trial Court Number 13 CR8 122605, Div. G

Honorable Scott C. Gardner, Judge

* * * * * * *

Warren Montgomery, D.A.
Covington, LA
and
Kathryn Landry
Special Appeals Counsel
Baton Rouge, LA

Attorney for Appellee
State of Louisiana

Prentice L. White
Louisiana Appellate Project
Baton Rouge, LA

Attorney for Appellant
Defendant – Jerry W. Duncan

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

WELCH, J.

The defendant, Jerry W. Duncan, was charged by bill of information with molestation of a juvenile (S.S.) (when the defendant has control or supervision over the juvenile), a violation of La. R.S. 14:81.2 (count 1); molestation of a juvenile (C.J.) (when the defendant has control or supervision over the juvenile), a violation of La. R.S. 14:81.2 (count 2); sexual battery (of A.G.), a violation of La. R.S. 14:43.1 (count 3); indecent behavior with a juvenile (B.C.), a violation of La. R.S. 14:81 (count 4). The defendant pled not guilty to all charges and, following a jury trial, was found guilty as charged on counts 1, 3, and 4. He was found not guilty on count 2. The defendant filed a motion for postverdict judgment of acquittal and a motion for new trial, which were denied. For the molestation of a juvenile conviction (S.S.), the defendant was sentenced to fifteen years imprisonment at hard labor; for the sexual battery conviction, he was sentenced to ten years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; for the indecent behavior with a juvenile conviction, he was sentenced to seven years imprisonment at hard labor. All the sentences were ordered to run concurrently. The defendant now appeals, designating one assignment of error. We affirm the convictions and sentences.

FACTS

In the 1970s, the defendant and his wife had a daughter, C.J.[1] When C.J. was four years old, her parents divorced, and she went to live with her mother. She saw the defendant every other weekend. In 1994, the defendant married Deborah Whitney. Deborah had also been married before and had two daughters from that marriage. Her younger daughter, B.T., lived with her and the defendant in a trailer on La. Hwy. 436 in Washington Parish. About seven years later, they moved the trailer to property containing about twenty-eight acres of land. In 2002, they built

a house on this property. The defendant's mother came to live with them. The defendant never worked during this period, but collected disability payments. Deborah was a mail carrier for the post office.

Deborah's first husband was Charles Thomas. Charles had three nieces, by blood, S.S. and S.S.'s two younger sisters. Thus, S.S. was Deborah's niece through marriage. Deborah was particularly close to S.S. and remained close to her even after she divorced Charles. S.S. (and her sisters) often visited Deborah, the defendant, and B.T., when they were living in the trailer.

B.T. began going to Pine High School (near Franklinton) a year or two after she and her family moved into the house in 2002. B.T. became good friends with B.C. and A.G., who were also students at Pine High School. B.C. and A.G. spent a lot of time at B.T.'s (the defendant's) house. They slept over often and rode horses the defendant had on his land.

In 2009, the defendant and Deborah separated, and in 2011, they were divorced. In 2013, accusations of sexual abuse by the defendant from the women who had spent time at his house as teenagers began to surface. C.J., who was thirty-nine years old at the time of trial, testified that she knew S.S., B.C., and A.G. C.J. stated she knew B.C. since she was a little girl and taught her "prevention classes." C.J. knew S.S. and A.G. from Pine High School, where C.J. taught as a substitute teacher. C.J. testified that the defendant began sexually abusing her (C.J.) when she was ten years old, and that the abuse continued until she was about fifteen years old. When C.J. was sixteen years old, she told her mother. The defendant denied the accusations. "OCS" (presently the Department of Children & Family Services) was called, but according to C.J., "nothing was ever done" by OCS.

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

S.S. testified that in the eighth or ninth grade, the defendant began touching her breasts and vagina. This was in the trailer, before the defendant moved to the house in 2002. S.S. also testified that when she was sixteen years old, the defendant had sex with her.

B.C. testified that in May of 2006, when she was sixteen years old, she was at B.T.'s (the defendant's) house. The defendant had given alcohol to B.C. and some of the other teenagers there. B.C. went riding with the defendant on a four-wheeler. They stopped at some point, and the defendant kissed B.C. and touched her breasts with his hand, both over and under her clothes.

A.G. testified that in April of 2007, when she was fifteen years old, she was in the bathroom at B.T.'s (the defendant's) house, getting ready for a wedding. The defendant approached her, put his hand up her skirt and under her panties, and touched her vagina.

The defendant testified at trial. He denied all of the allegations made against him. The defendant admitted that he had sex with S.S., but only when she was twenty-one years old. He insisted, however, that he never touched C.J., B.C., or A.G. The defendant said he did go four-wheeling with B.C., but he never kissed her or inappropriately touched her. The defendant stated that on the day A.G. was going to a wedding, she was leaning against the pool table. The defendant reached for the chalk and accidentally touched her. A.G. said "What the, --" and the defendant said he was sorry, that he was grabbing the chalk. The defendant testified that over the course of his marriage to Deborah, he was unemployed. In the divorce settlement, the defendant did not get any share of the house. According to the defendant, Deborah coaxed the victims into lodging false accusations of sexual abuse against him so that she could obtain full ownership of the house after their divorce.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the evidence was insufficient to support the three convictions. Specifically, the defendant contends that the three alleged victims were coached by Deborah Whitney to make false allegations against the defendant.

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 or not, 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, 573 (1979). See La. C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207 (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, 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 factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Each of the female victims, who testified at trial as adults, provided a detailed account of what the defendant had done to her when she was a teenager. In S.S.'s case, the sexual activity with the defendant continued into her adulthood. From 1994 to 1999, (the applicable time period concerning S.S.) La. R.S. 14:81.2(A) provided:

> Molestation of a juvenile is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either

> person, by the 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. Lack of knowledge of the juvenile's age shall not be a defense.

Thus, the prosecution had to prove each element of the crime, namely: (1) the defendant was over the age of seventeen and was more than two years older than S.S., who was under the age of 17; (2) the defendant committed a lewd or lascivious act upon, or in the presence of, S.S.; (3) the defendant had the specific intent to arouse or gratify either S.S.'s or his own sexual desires; and (4) the defendant 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 S.S. See **State v. Redfearn**, 44,709 (La. App. 2nd Cir. 9/23/09), 22 So.3d 1078, 1086-87, writ denied, 2009-2206 (La. 4/9/10), 31 So.3d 381.

S.S. testified that Deborah Whitney was her aunt through marriage and they had a close relationship. S.S. stated she was at their house (the defendant's, Deborah's, and B.T.'s house) "all the time" and that her "Aunt Debbie" was "like a second mother almost." S.S. was about twelve years old when she started spending a lot of time at the defendant's house. Initially, S.S. saw the defendant as a father figure:

> He was another uncle. He was like a -- he was somebody that I could talk to about the things that I was going through in my life at that point in time. He was another uncle, another dad. I was just like another one of the little kids, you know. That's how he treated me.

S.S. testified that when she was in junior high school, the defendant introduced her to pornography. He showed her pornographic videotapes and the "adult" movies that came on late night on Cinemax. The defendant told S.S. not to tell Debbie because she would get mad. S.S. testified she never told Debbie and when asked why she did not say anything, S.S. stated, "Jerry's home and Aunt Debbie's home was a safe place for me. During this time I was also facing and

dealing with other abuse inside of my own home so that was an escape."

S.S. testified that the defendant then taught her how to pleasure herself with a "vibrator," or back massager. On one occasion when S.S. was probably in the ninth grade, but not beyond the ninth grade, the defendant placed the back massager on her vagina (over her clothes) and stimulated her for a couple of minutes. On other occasions when S.S. was fourteen to sixteen years old, the defendant would approach S.S. and grab her breasts or place his hand between her legs. The defendant would also take S.S.'s hand and put it down the front of his pants. S.S. testified that when she was sixteen years old, the defendant started having sex with her. Their first sexual encounter was in the defendant's barn near his home; they had sex other times in the defendant's home.

S.S.'s testimony clearly established the elements of molestation of a juvenile by the use of influence by virtue of a position of control or supervision over the juvenile. There appear to have been many instances of the defendant molesting S.S., even prior to the sexual intercourse. S.S. looked up to the defendant, saw him as a father figure, and felt safe in his (and her Aunt Debbie's) home. The defendant used this influence he had over S.S. to exploit that trust and to manipulate her for his sexual indulgences.

In May of 2006 (the applicable time period concerning B.C.), La. R.S. 14:81(A) provided:

> Indecent behavior with juveniles is the commission of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person. Lack of knowledge of the child's age shall not be a defense.

B.C. testified at trial that in May of 2006, she went to her junior high school prom when she was sixteen years old. She and her date went with B.T. (Debbie's daughter and the defendant's step-daughter) and her date. After the prom, B.C.

(without her date) and B.T. and her date went back to B.T.'s (the defendant's) house. They ate crawfish and built a bonfire. The defendant gave the teenagers alcohol to drink and hung out with them by the bonfire. Debbie was asleep. Sometime during the night, the defendant and B.C. went riding on a four-wheeler, the defendant driving and B.C. on the back. At some point, the defendant stopped driving. He turned to face B.C. and began kissing her and touching her breast with his hand. The defendant did not have B.C.'s consent to kiss and touch her. B.C. testified that the defendant's tongue in the back of her mouth caused her to gag and vomit. The defendant then drove an ailing B.C. back to the house, and B.C. fell asleep on the rack on the back of the four-wheeler.

B.C.'s testimony clearly established the crime of indecent behavior with a juvenile. The defendant committed lewd or lascivious acts upon B.C., who was under seventeen years of age at the time. The defendant would have been fifty-two years old at the time.

In April of 2007 through April of 2008 (the applicable time period concerning A.G.), La. R.S. 14:43.1 provided in pertinent part:

> A. Sexual battery is the intentional engaging in any of the following acts with another person where the offender acts without the consent of the victim, or where the act is consensual but the other person, who is not the spouse of the offender, has not yet attained fifteen years of age and is at least three years younger than the offender:
>
> (1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender[.]

The bill of information initially indicated that the dates of offense for the crime of sexual battery were on or between April 1, 2007 and April 30, 2007. The State amended the dates of offense to on or between April 1, 2008 and April 30, 2008. A.G. testified at trial that on April 7, 2007, when she was fifteen years old, she was at the defendant's house getting ready for a wedding. She had on a white

top and a black skirt and was standing in front of the bathroom mirror. The defendant walked into the bathroom and A.G. turned to face him. He approached A.G., put his hand up her skirt and under her panties and touched her vagina. A.G. was scared. She stated that it was the sound of her ride pulling up to the house that made the defendant stop. A.G. testified that prior to this incident, the defendant always made comments to her, such as suggesting that if she felt lonely, she could come to his bedroom. He would also pinch her buttocks and breasts.

A.G.'s testimony clearly established the defendant committed a sexual battery upon her on April 1, 2007.

In his brief, the defendant does not contest the elements of the crimes for which he was found guilty; rather, he attacks the credibility of the victims. Testimony established that S.S. was close to Deborah Whitney, S.S.'s aunt by marriage and the defendant's wife during all of these incidents. B.C. and A.G. were close to B.T., who was Deborah's daughter and lived with her mother and the defendant. Deborah and the defendant separated in 2009, but both remained in the same house for about fifteen months. According to the defendant in brief, Deborah concocted the stories of molestation and sexual abuse in order to get the defendant evicted from their home. Further, with a criminal record, Deborah would be able to own the house outright. The defendant left the house in February of 2011, and the divorce was final in September of 2011. April and May of 2013 was the first time the three victims had informed the authorities about what the defendant had done to them when they were teenagers.

The defendant argues in brief that the three victims were "coached and solicited to come forward by Deborah Whitney." The defendant denied at trial that he ever did anything inappropriate with the three girls. He did admit that he had sex with S.S., but only when she was twenty-one years old. The defendant suggests in brief that the sexual battery (of A.G.) conviction should be reversed

because the jury improperly concluded that his admission to having sex with S.S. when she was an adult "meant that her testimony of being touched or groped by [the defendant] when she was a high school student was credible or true." It is not clear if the defendant is confusing the crimes that each victim testified to; in any event, despite S.S. having sex with the defendant when she was an adult, both S.S. and A.G. established through their testimony that the defendant sexually abused them when they were fifteen years old (and in S.S.'s case, for several years as a child).

The defendant asserts in brief that none of the claims of abuse ever happened. According to the defendant, Deborah and these women fabricated these various events at the defendant's (and Deborah's) house to convince the police that he (the defendant) had molested and sexually abused the women. These claims, the defendant contends, were false and made for the sole purpose of retaliating against him on Deborah's behalf. The defendant also points out that no one witnessed him abusing any of these woman.

All of these arguments raised by the defendant concern credibility issues. The defense theory that Deborah used these three women—S.S., B.C., and A.G.—to arrange the setup of the defendant so that she could become the sole owner of the family home was thoroughly laid out by defense counsel at trial, as well as by the testimony of the defendant, himself. The jury heard all of the testimony and chose to believe the accounts of the three victims. In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution

of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. 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 factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

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 which raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984). The jury's verdicts reflected the reasonable conclusion that, based on the testimony of S.S., B.C., and A.G., they were sexually abused by the defendant. In finding the defendant guilty, the jury clearly rejected the defendant's theory of innocence. See **Captville**, 448 So.2d at 680. The defendant suggests that there were no witnesses to the sexual abuse, but the testimony of the victim alone is sufficient to prove the elements of the offense. See **State v. Orgeron**, 512 So.2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So.2d 113 (La. 1988).

After a thorough review of the record, we find the evidence supports the jury's verdicts. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of molestation of a juvenile (S.S.), sexual

battery of A.G., and indecent behavior with a juvenile (B.C.). See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (*per curiam*). The assignment of error is without merit.

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.