NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 KJ 0971

STATE OF LOUISIANA

IN THE INTEREST OF C.M.

Judgment Rendered: DEC 2 3 2015

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On Appeal from the
Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
No. J-13229

The Honorable Blair D. Edwards, Judge Presiding

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BEFORE: GUIDRY, HOLDRIDGE AND CHUTZ, JJ.

HOLDRIDGE, J.

A seventeen-year-old child, identified herein as C.M.,[1] was alleged to be delinquent according to a petition filed by the State on June 30, 2014, pursuant to the Louisiana Children's Code.[2] The petition was based upon the alleged commission of sexual battery (count one) in violation of La. R.S. 14:43.1 and aggravated rape (count two) in violation of La. R.S. 14:42.[3] At an adjudication hearing on April 21, 2015, the juvenile court adjudicated C.M. a delinquent as alleged in count two of the petition and imposed a disposition of life imprisonment until C.M. reaches the age of twenty-one.[4] On appeal, C.M. argues that the juvenile court judge erred in failing to render a verdict on count one of the petition, that the evidence is insufficient on count two, and raises two claims of ineffective assistance of counsel. After a thorough review of the record and the errors assigned, we affirm the adjudication and the disposition on count two and remand for further proceedings as to count one.

STATEMENT OF FACTS

According to the victim, B.G., in 2011 or 2012, when the victim was nine or ten years old, C.M., began acting "weird" by repeatedly "blowing kisses" at the victim and "dry humping" after positioning his body behind the victim.[5] At the

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[1] The initials of the parties will be used to protect and maintain the privacy of the minor child involved in this proceeding. *See* Uniform Rules-Courts of Appeal, Rules 5-1(a) and 5-2.

[2] As stated in the petition, C.M.'s date of birth is January 20, 1997.

[3] Prior to amendment by 2015 La. Acts No. 184.

[4] Herein, the minutes simply state that C.M. admitted to the allegations but only indicate one disposition, juvenile life. The custody order indicates that C.M. was adjudicated delinquent as alleged on both counts and that the disposition was up to twenty-one years old on both counts. However, according to the transcript of the adjudication hearing, the juvenile court adjudicated C.M. delinquent as alleged on count two, but was silent as to count one. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983). The juvenile court's failure to dispose of the allegation on count one is at issue in the first assignment of error.

[5] The victim's date of birth is December 3, 2001.

time, C.M. was fourteen to fifteen years of age and was a friend of the victim's older brother. C.M. lived nearby and would visit the victim's home. The victim stated that on separate occasions, C.M. repeatedly attempted to touch the victim. The victim further stated that on one occasion, while his mother and brother were out on the porch, C.M. was able to place his hand under the victim's shorts and touch the victim's "privates" with his hand.

According to the victim, one night while he was sleeping in his bedroom, C.M. came into his bedroom, woke him up, and forced him to engage in penal anal sexual intercourse. The victim specifically stated that C.M. pressed his thumb against the victim's throat to prevent him from screaming for help. The victim tried to get off of the bed and C.M. pulled him back down and told him to stop moving. The victim was able to briefly break away after using his elbow to strike C.M., and at that point, the victim felt an unknown hard object strike the back of his head. The victim began to lose consciousness, specifically indicating that "everything started going black." The victim was lightheaded, and as he continued to go in and out of consciousness he saw C.M. removing their clothing just before experiencing "terrible pain." The victim further stated that the pain was in his "backside" and lower stomach. The victim added that C.M. was "inside me," specifying that his private part was in the victim's backside, and that C.M. was "moving back and forth" and "going in and out." The victim stated that he could not handle the pain and when he woke up the next day he was still experiencing pain on the back of his head where C.M. hit him with the unknown object, and his "back bottom" was also hurting.

The victim stated that C.M. repeatedly threatened to kill the victim and his family if he told anyone and also told the victim that no one would believe him if he tried to reveal what happened. The victim ultimately disclosed the incidents to

his mother and subsequently detailed the incidents during a video recorded interview with the Children's Advocacy Center (CAC) on April 29, 2014, and in a handwritten letter executed by the victim in the midst of the interview.

ASSIGNMENT OF ERROR NUMBER ONE

In assignment of error number one, C.M. notes that the juvenile court failed to render a verdict on count one of the petition. C.M. contends that the transcript of the adjudication hearing is devoid of a basis to support the disposition of count one contained in the custody order. Noting that the custody order is inconsistent with the judge's stated findings of fact, C.M. contends that a remand for disposition of count one of the petition, sexual battery, is appropriate.

In accordance with La. Ch. Code art. 104, the Louisiana Code of Criminal Procedure governs in matters which are not provided for in the Children's Code. Louisiana Code of Criminal Procedure Article 819 provides that, "If there is more than one count in an indictment, the jury must find a verdict as to each count, unless it cannot agree on a verdict as to a count." As noted above, the petition alleges that C.M. committed two separate offenses: sexual battery (count one) and aggravated rape (count two). At the adjudication proceedings, the juvenile court judge stated in pertinent part, "I find in favor of the State for aggravated rape." Before stating the disposition, the judge stated, "I don't think in an aggravated rape that a PDI is necessary, because I think that they are -- I mean, it's life in prison." The judge added, "So he'll be there -- he'll be in secure until he's 21." The juvenile court judge never made mention of the allegation on count one.

The remedy for failure of the juvenile court judge to dispose of the allegation on count one is remanding the case for a determination of a proper disposition of this charge. See **State v. Runnels**, 2012-167 (La. App. 3rd Cir. 11/7/12), 101 So.3d 1046, 1050, writ denied, 2013-0498 (La. 7/31/13), 118 So.3d

1121; **State v. Hypolite**, 2004-1658 (La. App. 3rd Cir. 6/1/05), 903 So.2d 1275, 1277-78, writ denied, 2006-0618 (La. 9/22/06), 937 So.2d 381. Thus, we find merit in the argument raised in the first assignment of error and agree that the case must be remanded either for an adjudication or a dismissal of the allegation charged as count one of the petition.

ASSIGNMENT OF ERROR NUMBER TWO

In assignment of error number two, C.M. argues that the State failed to prove beyond a reasonable doubt that he committed the offense of aggravated rape upon the victim "on or about January 1, 2012" as alleged in the petition. C.M. notes during the victim's testimony at the adjudication hearing, the victim indicated that the offense occurred between August of 2011 and October of 2011. While noting that the State did not amend the petition, C.M. contends that the issue is whether the State sufficiently proved the allegations asserted in the petition, not whether the petition was sufficient. C.M. points out that at the adjudication hearing, his mother testified that he lived in Texas from November 3, 2011 to February 28, 2012, and that after C.M. returned home, they stayed in the same neighborhood as the victim until they moved away on October 1, 2012. Asserting that the defense, therefore, presented an alibi for the date listed in the petition, C.M. argues that he was prejudiced because the State was permitted to present a time frame at the adjudication hearing that varied from the date of the offense indicated in the petition. C.M. argues that the time frame presented at the hearing, between August and October of 2011, is not reasonably near January 1, 2012, the date listed in the petition. C.M. further argues that the date of the offenses became essential when he presented an alibi for the time period reasonably near the date alleged in the petition. C.M. claims that he was not placed on notice that he needed to be prepared to offer an alibi for any other time frame and, therefore,

argues that the State should be limited to the date listed in the petition, or close thereto, in determining the sufficiency of the evidence. Citing **State v. Jackson**, 2011-1280 (La. App. 4th Cir. 8/22/12), 99 So.3d 1019, writs denied, 2012-2057 & 2012-2084 (La. 3/15/13), 109 So.3d 375, C.M. concludes that there was no evidence presented in this case that any illegal activity took place "on or about January 1, 2012" and that the adjudication of delinquency must be set aside as the State failed to prove the allegations beyond a reasonable doubt.

C.M. further argues that the victim's account of the allegations was internally inconsistent. C.M. claims that the victim indicated that he saw C.M. place his private parts in the victim's backside while also asserting that he could only see blackness at the time of the offense. C.M. notes that the victim at one point stated that C.M. attempted to touch him under his clothes while later stating that C.M. did touch him under his clothes. C.M. further notes that when he testified at the hearing, he denied all of the victim's claims. C.M. contends that the defense presented sufficient evidence to raise a reasonable doubt as to whether he committed an aggravated rape of the victim on or about January 1, 2012.

In a juvenile proceeding, the State's burden of proof is the same as in a criminal proceeding against an adult - to prove beyond a reasonable doubt every element of the offense alleged in the petition. See La. Ch. Code art. 883; **In Re Winship**, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); **State in the Interest of D.P.B.**, 2002-1742 (La. 5/20/03), 846 So.2d 753, 756-57. The standard established by La. Code Crim. P. art. 821(B) is whether, after 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, 99 S.Ct. 2781, 2783, 61 L.Ed.2d 560 (1979). However, in juvenile proceedings, the scope of review of this Court extends to both law and

facts. See La. Const. art. V, § 10(B); see also **State in Interest of D.M.**, 2011–2588 (La. 6/29/12), 91 So.3d 296, 298 (per curiam); **State in Interest of Batiste**, 367 So.2d 784, 788 (La. 1979); **State in Interest of L.C.**, 96-2511 (La. App. 1st Cir. 6/20/97), 696 So.2d 668, 669-70. A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV, § 1; La. Const. art. I, § 2. In conducting the review under **Jackson**, we also must be expressly mindful of Louisiana's circumstantial evidence test, i.e., "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438; see **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 & 2000-0895 (La. 11/17/00), 773 So.2d 732. 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); **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932.

Rape is defined as the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent. La. R.S. 14:41. Aggravated rape is a rape committed where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed, in pertinent part, when the victim is under the age of thirteen years. La. R.S. 14:42(A)(4).[6] The date of the offense is not an essential element of the crime of aggravated rape. **State v. Glover**, 304 So.2d 348, 350 (La. 1974); **State v. Frith**, 436 So.2d 623, 626 (La. App. 3rd Cir.), writ denied, 440 So.2d 731 (La.

[6] Pursuant to La. Acts 2015, No. 256, § 1, the statute is presently entitled "First degree" rather than "Aggravated" rape. This Court will apply the version in effect at the time of the offense. See **State v. Eaker**, 380 So.2d 19, 27 (La. 1980), cert. denied, 449 U.S. 847, 101 S.Ct. 133, 66 L.Ed.2d 57 (1980).

1983). Herein, as noted, the petition alleges that offenses were committed on or about January 1, 2012. During the CAC interview, the victim indicated that the offenses occurred when he was nine or ten years old, adding that he may have been nine and about to turn 10 years old. Further regarding the time of the offenses, the victim indicated that they happened while he was in fifth grade for the first time, noting that he had to repeat the fifth grade. The victim further stated that the offenses occurred before C.M. moved away in 2012, also stating that he was extremely happy when C.M. moved away. Within that time frame, the victim used phrases like "one day" in indicating that C.M. repeated the same type of behavior leading up to the ultimate rape which also occurred within the same time frame (when the victim was nine or ten and before C.M. moved away in 2012). At the adjudication hearing, during cross-examination, the victim was asked if he agreed with the date listed in the petition. After asking for clarification, the victim initially stated, "I don't recall the date." The defense attorney noted that during the CAC interview, the victim indicated that the offenses occurred during the school year. The victim was asked whether it was earlier or later in the school year, and the victim indicated that it was earlier in the school year, further narrowing the time frame to between August and October of 2011. The victim confirmed that he did not like C.M. but also confirmed, during redirect examination, that regardless of the fact that he did not like C.M., he did not lie or make any false statements about him.

As to the specific incident at issue, the aggravated rape offense, the victim indicated that he had left the door of their home unlocked on the night in question and that he was expecting his brother to return home soon. When he was awakened by the opening of his bedroom door, he initially thought it was his brother. During the recorded interview, questioning was paused to allow the

victim to handwrite the details of the incident due to his apparent hesitancy to verbally relay the incident. Upon resuming, the interviewer read the victim's letter out loud to verify the contents and further elicited consistent verbal details from the victim. According to the victim, when he noticed it was C.M., he questioned him as to why he was there and C.M. stated, "I have to do something." The victim noted that C.M.'s speech was slurred, that he kept "messing up his words," and that C.M. smelled weird. When specifically asked how he knew it was C.M. in the room with him, the victim stated he knew it was C.M. because he saw him. After writing the handwritten statement, the victim specifically stated that C.M. was "raping" him and forcing him to have sex, recalling the details that included C.M. hitting him in the head before putting his private part in the victim's backside and "moving back and forth" and "in and out." Describing his temporary loss of consciousness during the incident, the victim stated that he would "black out" and "wake up again." When asked about the position that he and C.M. were in when C.M. placed his private part in the victim's backside, the victim stated he was on his belly and that C.M. was behind him. The victim repeatedly stated that he was in extreme pain and ultimately could not handle the pain, apparently losing consciousness before waking up the next day, still in pain.

At the hearing, C.M.'s mother testified that C.M. lived with his grandmother in Texas from November 3, 2011 to February 28, of 2012, when he returned home. From that point, they remained in the same neighborhood as the victim until they moved on October 1, 2013. She also testified that C.M. liked girls and that when he was living with her in the earlier part of 2011, she had never known him to leave the house without her permission. When questioned by the juvenile court judge, she admitted that C.M. sometimes spent the night with friends and that she would not have known what he did on those occasions. During cross-examination,

C.M.'s mother confirmed that they were living across the street from the victim in August and September of 2011. C.M. also testified at the hearing and specifically denied all of the allegations, stating that he liked females and would only go to the victim's house to "hang out on the porch."

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. Further, the juvenile court's findings of fact in a juvenile case are subject to the manifest error standard of review. Accordingly, the appellate court should not disturb reasonable evaluations of credibility and reasonable inferences of fact absent manifest error. **State in the Interest of Wilkerson**, 542 So.2d 577, 581 (La. App. 1st Cir. 1989).

We note that the date listed in the petition, on or about January 1, 2012, was reasonably close to the time frame presented by the victim, though narrowed at the hearing. During the CAC interview, the victim indicated that the alleged incidents occurred when he was nine or ten years old or about to turn ten years old. The victim's date of birth is December 3, 2001, thus he would have turned ten years old on December 3, 2011, just prior to and within one month of the date of January 1, 2012 alleged in the petition.

In **Jackson**, relied on by C.M. on appeal, the defendant was charged with three counts of felony carnal knowledge of a juvenile based on allegations of repeated offenses of consensual sex with a minor at hotels. The defendant was found guilty as charged on counts one and three and was acquitted on count two. On appeal the court found evidentiary support for the offense charged on count one, specifically that the defendant had sexual intercourse with the victim at a

motel. However, the court found that there was insufficient evidence that any illegal activity occurred on or about the date alleged in count three of the bill of information. **Jackson**, 99 So.3d at 1025. In that case, the court found that the evidence was insufficient to show that the additional offense alleged in count three therein actually took place.

We find the **Jackson** case is factually distinguishable from the instant case. In this case, the victim alleged two distinct offenses that involved one incident of an inappropriate touch of the victim's private parts under his clothes and a separate highly detailed incident of a brutal rape, both occurring within a six month time frame of the "on or about" date presented in the petition. While the victim was asked on cross-examination if the incident occurred at the beginning or end of the school year at the hearing, and was thus able to narrow the time frame to between August 2011 and October 2011, this did not present an evidentiary issue for the State. The victim was clear that the second incident occurred and was committed by C.M. and described the incident in great detail. The jurisprudence has recognized that proof of an approximate time period for the commission of the crime of rape of a youthful victim similar to the time period proven in this case is not too general or too long. **State v. McKinnie**, 36,997 (La. App. 2nd Cir. 6/25/03), 850 So.2d 959, 963; **State v. Brauner**, 99-1954 (La. App. 4th Cir. 2/21/01), 782 So.2d 52, 73, writ denied, 2001-1260 (La. 3/22/02), 811 So.2d 920; **State v. Dixon**, 628 So.2d 1295, 1299 (La. App. 3rd Cir. 1993). Moreover, the State is not required to present evidence proving the date of an offense when it is not an essential element of the crime. The fact that the victim was unable to give a specific date is not critical to the charge and does not necessarily prove that the incidents did not occur. See **Jackson**, 99 So.3d at 1024.

Moreover, while C.M. now argues that the State was limited to the date alleged in the petition ("on or about January 1, 2012"), we note that this issue was not raised below. As noted, the date is not essential to the crime of aggravated rape; therefore, it need not be alleged in the indictment. When the date is not essential to an offense, the indictment shall not be held insufficient if it does not state a proper date. La. Code Crim. P. art. 468. Moreover, the State is not restricted in its evidence to the date set out in the indictment. **Glover**, 304 So.2d at 350. However, where there is a variance between the allegations of an indictment or bill of particulars and the evidence offered in support thereof, the court may order the indictment or bill of particulars amended in respect to the variance, and then admit the evidence. La. Code Crim. P. art. 488. Proof adduced at trial, without objection, which varies with the averment in the indictment as to the date on which the offense was committed, constitutes a waiver by defendant of any complaint on that score. **Glover**, 304 So.2d at 350.

Herein, the victim described the brutal incident detailing anal sexual intercourse when the victim was under the age of thirteen years. In adjudicating C.M. delinquent on count two, the juvenile court judge clearly rejected C.M.'s testimony at the adjudication hearing. Any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found proven beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, the essential elements of aggravated rape and C.M.'s identity as the perpetrator of that offense. Further, after undertaking our state's constitutionally mandated review of the law and facts in a juvenile proceeding, we find no manifest error by the juvenile court in its adjudication of delinquency based on the commission of aggravated rape. Considering the foregoing, we find that assignment of error number two lacks merit.

ASSIGNMENTS OF ERROR NUMBERS THREE AND FOUR

In assignments of error numbers three and four, C.M. raises two claims of ineffective assistance of counsel. Specifically, in assignment of error number three, C.M. claims that his counsel was ineffective in failing to object to the admission into evidence and the juvenile court's consideration of the CAC recording of the interview of the victim and the handwritten statement purportedly written by the victim in the midst of the CAC interview. C.M. argues that the items were not authenticated or properly admitted into evidence. C.M. contends that the victim was never asked specific questions regarding the video recording and whether it fairly depicted the interview. C.M. notes the interviewer was not called to authenticate the recording or provide information for a determination of whether the recording was properly admissible. C.M. further notes that the judge did not ask if there was any objection to the admission of the recording or letter and never actually stated that the items were being admitted into evidence. C.M. concludes that there was no foundation for the admission of the recording or the statement and that the judge never accepted them into evidence. In the case of a finding that the items were admitted into evidence, C.M. argues that the juvenile court erred in doing so, as the items were not identified or authenticated. Contending that the exhibits were the sole bases of the State's case, C.M. argues it was imperative for the State to authenticate the recording and prove its competency and admissibility. Further, C.M. argues that the State failed to prove that the videotape was authorized by La. R.S. 15:440.2. C.M. concludes that his counsel's performance fell below that guaranteed by the Sixth Amendment when he failed to object to the admissibility of the recording without any authentication of the recording or evidence that it was properly authorized and was accurate and depicted all that the victim stated in the interview.

In the fourth assignment, C.M. argues that his counsel was ineffective in failing to seek dismissal of the petition or the setting aside of the adjudication and disposition due to an untimely adjudication hearing. C.M. notes that La. Ch. C. art. 877 requires that the adjudication hearing shall commence within ninety days of the appearance to answer the petition if the child is not in custody. C.M. further notes that in this case the petition was answered on September 2, 2014, and, on that date, the adjudication hearing was set for November 5, 2014, before the ninety-day deadline of December 1, 2014. C.M. asserts that on October 28, 2014, the parties appeared and set the adjudication hearing for January 6, 2015, beyond the ninety-day period for a timely adjudication hearing. C.M. argues that the record does not indicate a good cause showing for the resetting of the matter from the originally scheduled date of November 5, 2014, warranting dismissal of the petition. C.M. notes that on January 6, 2015, the hearing was reset to February 24, 2015, and argues that there was no good cause to again continue the date to April 21, 2015, the ultimate date of the adjudication hearing. C.M. argues there is a reasonable probability that the petition would have been dismissed if the untimeliness of the adjudication hearing had been asserted by his counsel below. C.M. concludes that this Court should set aside the disposition and dismiss the petition, or alternatively, remand for a determination of whether he agreed to the resettings of the hearing.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief in the district court rather than by appeal. This rule has been applied in juvenile matters as well. **State in Interest of O.R.**, 96-890 (La. App. 5th Cir. 2/25/97), 690 So.2d 200, 203. This is because post-conviction relief creates the opportunity for a full evidentiary hearing pursuant to La. Code Crim. P. art. 930. See **State v. Barnes**, 365 So.2d 1282, 1285 (La. 1978); **State v. Williams**, 32,993 (La. App. 2nd Cir. 3/1/00), 754

So.2d 418, 422. However, if the record fully discloses the evidence necessary to decide the issue, it may be considered on direct appeal in the interest of judicial economy. See **State v. Ratcliff**, 416 So.2d 528, 530 (La. 1982).

Juvenile defendants, as well as adults, are entitled to effective assistance of counsel. **State in Interest of D. McK.**, 589 So.2d 1139, 1142 (La. App. 5th Cir. 1991); **State in Interest of Jones**, 372 So.2d 779, 780 (La. App. 4th Cir. 1979). **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets out a two-pronged test for proof of ineffective assistance of counsel: the defendant must show that his attorney's performance was deficient and that this deficiency prejudiced him so that the outcome would have been different absent counsel's ineffectiveness. An error is considered prejudicial if it was so serious as to deprive the defendant of a fair trial or "a trial whose result is reliable." **Strickland**, 466 U.S. at 687, 104 S.Ct. at 2064. A claim of ineffective assistance may be disposed of based upon a finding that either one of the two **Strickland** criteria have not been established. Counsel's performance is ineffective when it can be shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. **State in Interest of T.W.**, 2013-1564 (La. App. 4th Cir. 5/14/14), 141 So.3d 822, 828, writ denied, 2014-1215 (La. 6/30/14), 148 So.3d 183. To prove prejudice, the defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional conduct, the outcome of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068.

C.M. is correct in that his counsel did not object to the introduction of the CAC interview or the handwritten letter by the victim or raise the issue below regarding the timeliness of the adjudication hearing. Under La. Code Crim. P. art.

841, a contemporaneous objection is required to preserve an error for appellate review. The purpose of the contemporaneous objection rule is to allow the trial judge the opportunity to rule on the objection and thereby prevent or cure an error. **State v. Herrod**, 412 So.2d 564, 566 (La. 1982). Because C.M. has asserted that he did not receive effective assistance of counsel regarding these issues, this Court will consider the issues despite the lack of objection as it is necessary to do so as part of the analysis of the claim of ineffective assistance of counsel. See **State v. Bickham**, 98-1839 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 891-92.

Foundation for Demonstrative Evidence

Before it can be admitted at trial, demonstrative evidence must be properly identified. See La. Code Evid. art. 901. Authentication is a process whereby something is shown to be what it purports to be. **State v. Magee**, 2011-0574 (La. 9/28/12), 103 So.3d 285, 315, cert. denied, ___ U.S. ___, 134 S.Ct. 56, 187 L.Ed.2d 49 (2013). A sufficient foundation for the admission of evidence is established when the evidence as a whole shows it is more probable than not that the evidence is connected with the crime charged. The identification can be visual or through testimony. The evidence as to custody need not eliminate all possibilities that the evidence has been altered. It is sufficient if the evidence shows it is more probable than not that the evidence is connected with the case. Once a proper foundation has been laid with regard to a piece of evidence, a lack of positive identification or a defect in the chain of custody goes to the weight of the evidence rather than the admissibility. The weight to be given to evidence is a question for the trier of fact. **State v. Crucia**, 2015-0303 (La. App. 1st Cir. 9/18/15), ___ So.3d ___, ___.

In this case, the State initially acknowlwdged the presence of the CAC interviewer, Christine Roy, and the victim before requesting that the interview be

admitted into evidence. The parties agreed that the court would recess to allow the parties to view the recording. The recording was viewed by the parties in chambers. After the parties returned to the courtroom, the judge noted that the CAC interview had been viewed and asked the prosecutor if he wanted to admit the interview and the victim's letter. The prosecutor noted that the victim's letter was read by the interviewer during the recording, but obtained a copy from Roy.[7] The victim was then called to the stand. The State did not question the victim. He was, however, cross-examined. At the outset of cross-examination, the juvenile court interrupted and asked the victim in part, "You remember when they were taping you? You remember when you were talking to Ms. Christine, that lady right there?" During the cross-examination, regarding certain specific statements, the victim was asked if he made those statements during the interview, and he confirmed that he did so. In this case, the foundation for the evidentiary items at issue established that it is more probable than not that the items are connected with this case.

C.M. also asserts that the juvenile court erred in admitting the videotaped interview into evidence as the State failed to establish that the videotaped interview of the victim was authorized as required by La. R.S. 15:440.2, and thus, the victim was not one of the "protected persons" as intended under the statute. However, we find no merit to this argument. While La. R.S. 15:440.2 provides that a videotape of a statement of certain victims may be made on motion of several listed entities, the statute does not mandate that such a motion be made. **State v. Guidroz**, 498 So.2d 108, 110 (La. App. 5th Cir. 1986). There is no dispute that the victim in the instant case—as alleged, a crime victim under the age of 17 years of age—falls

[7] We further note that the recording continued as the victim can be viewed while writing the detailed letter before it was read out aloud by the interviewer.

within the definition of "protected person" set forth in La. R.S. 15:440.2(C). See also La. R.S. 15:283 & La. Ch. Code art. 323 (which define "protected person" in the same terms). We find that C.M. has failed to make a showing of deficiency or prejudice with regard to his counsel's lack of an objection to the admissibility of the CAC videotaped interview of the victim and the victim's note written and read during the recording. Thus, we now turn to C.M.'s second claim of ineffective assistance of counsel.

Adjudication Time Limitation

In accordance with La. Ch. Code art. 877(B), if the child is not continued in custody, the adjudication hearing shall commence within ninety days of the appearance to answer the petition. However, for good cause shown, the court may extend that time period. La. Ch. Code art. 877(D). While good cause is not defined in the Children's Code, the Louisiana Supreme Court has held that it may be demonstrated where "causes beyond the control of the [S]tate may impinge on its ability to prepare for the hearing." **State in the Interest of R.D.C., Jr.**, 93-1865, (La. 2/28/94), 632 So.2d 745, 749.

The petition in this case was filed on June 30, 2014, and C.M. denied the allegations on September 2, 2014. C.M. was not in continued custody, so the adjudication hearing should have been commenced within ninety days of that date. See La. Ch. Code art. 877(B). Applying the formula for computation of time set forth in La. Ch. Code art. 114, the adjudication hearing should have been commenced by December 1, 2014. On the date of the denial, motions were set for October 28, 2014, and the adjudication hearing was set for November 5, 2014. On October 28, the defense counsel stated for the record: "I think we're just here for a pre-trial today, your honor. And I had asked that it be set for pre-trial so that I could have time to meet with 'C.' Before we set it for an adjudication." The

defense attorney then indicated that he had met with C.M., that C.M. wanted to maintain his denial, and further stated, "So, I guess, we can go ahead and set it for an adjudication." The district attorney suggested January 6, and the juvenile court judge noted, "All right, we'll be here January the 6th." It was noted that C.M. lived and worked in Beaumont, Texas at the time. The parties agreed that he could return to work as long as he was present on January 6. On January 6, defense counsel was not present, and the matter was continued to February 24, 2015. On February 24, according to the minutes, C.M., his mother, the defense attorney, and the district attorney were present. However, the minutes do not indicate that the victim or his mother was present. The court ordered the matter recessed until April 21, 2015. On April 21, the date the hearing took place, in accordance with the minutes and transcript, all of the parties were present along with the victim and his mother and the CAC representative, Christine Roy.

On this specific record, we are unable to conclude that the delay in conducting the adjudication hearing beyond the ninety-day time period provided in Article 877(B) was solely attributable to the State. It appears that on October 28, the adjudication hearing was reset based on the court calendar, and January 6 was the next available date for the juvenile court, the prosecutor, defense counsel, and the child to appear in court for the adjudication hearing. We find that the parties' agreement to set the adjudication hearing date outside of the ninety-day period should be treated as an extension for good cause, considering that the hearing was initially delayed by the defense in order to communicate with C.M. and to prepare a defense. See **State in Interest of J.T.**, 2014-0762 (La. 11/14/14), 156 So.3d 1143 (per curiam); **State in the Interest of D.J.**, 2013-1111 (La. 1/10/14), 131 So.3d 35, 36 (per curiam). C.M. has failed to demonstrate a reasonable probability that an assertion of the untimeliness of the adjudication hearing by his counsel

below would not have been overruled based on a finding of good cause or the "functional equivalent" thereof. See **State in Interest of J.T.**, 156 So.3d at 1143. Thus, C.M. has not shown that his defense counsel's failure to file a motion to dismiss in this case fell below an objective standard of reasonableness, or resulted in any prejudice.

As discussed above, based upon the record before us, we conclude that the evidentiary items at issue were properly admitted, and that there is no reasonable probability that the petition would have been dismissed on the grounds asserted herein upon motion or objection by the defense. Considering the foregoing conclusions, C.M. has not met his burden of proof on his claims of ineffective assistance of counsel. We find no merit in assignments of error numbers three and four.

ADJUDICATION AND DISPOSITION ON COUNT TWO AFFIRMED; REMANDED FOR FURTHER PROCEEDINGS ON COUNT ONE.