STATE OF LOUISIANA	*	**NO. 2001-KA-0833**
VERSUS	*	**COURT OF APPEAL**
KENT A. FRAZIER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 404-535, SECTION "K"
HONORABLE ARTHUR HUNTER, JUDGE
* * * * * *
JAMES F. MCKAY, III
JUDGE
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay, III, Judge David S. Gorbaty)

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AFFIRMED IN PART, VACATED IN PART AND REMANDED

STATEMENT OF CASE

On January 29, 1999, Kent Frazier was charged by a two-count bill of information with aggravated crime against nature in violation of La. R.S. 14:89.1 and with molestation of a juvenile in violation of La. R.S. 14:81.2. The defendant pled not guilty to the charges at arraignment on February 22, 1999. Pretrial motions were heard on March 25, and March 31, 1999. On May 13, 1999, the court found probable cause. Kent Frazier was tried by a jury on August 23, 1999. The jury returned the following responsive verdicts: as to count one, attempted crime against nature and as to count two, indecent behavior with a juvenile.

On September 10, 1999, Kent Frazier was sentenced on each count to serve five years at hard labor in the custody of the Department of Corrections. The sentences were ordered to be served concurrently.

STATEMENT OF FACT

The victim, N.G., who was twelve years old at the time of trial, testified that on October 18, 1998 she was watching television in her mother's room and then dozed off. The defendant, her stepfather, entered the room, lay on the bed and began watching television. The victim testified

that subsequently Frazier slid her down to the bottom of the bed and stuck his hand and his tongue in her vagina. She stated that he "rolled" her "up and down" on top of him and that in doing so his penis hurt her. These actions by the defendant were repeated on October 20, and 23, 1998. N.G. testified that she first told her cousin, T.F., what had happened either that night or the next day while speaking on the telephone. N.G. testified further that when her grandfather took her to school a few days later, he told her that he did not think she should stay in the house with Kent Frazier by herself because he might try to do something. She told him "he already did," and told him what happened. N.G. stated that she delayed reporting what happened because she had begun to like the defendant. She also related that she waited to tell an adult because she was scared that the defendant would find out and do something to her.

N.G. testified that initially she did not have a good relationship with her stepfather, but that it improved after they moved. She stated that he began being nice to her and buying her things, and she began to like him. The victim stated that on the date in question, the defendant was supervising her.

T.F., who was fourteen years old at the time of trial, testified that N.G. telephoned her and told her that "Mr. Kent," as N.G. referred to the

defendant, was rolling on her and touching her in certain spots. When asked where N.G. had stated that "Mr. Kent" had touched her, T.F. stated, "Her vagina and all that kind of stuff. And was putting his fingers and tongue and his penis and all that kind of stuff, and he was doing stuff to her." T.F. related that N.G. told her about what had happened after the second incident. It was established that T.F. had previously testified that N.G. informed her of what happened after the first incident. T.F. related that her earlier recollection was probably more accurate.

S.G., N.G.'s grandfather, testified that he notified child protection services concerning the possible sexual abuse of his granddaughter after N.G. informed him of the abuse. S.G. testified that on the morning in question his granddaughter had called and asked him to drive her to school. He noticed that she did not look well and was very quiet. He stated that she looked at him like she wanted to say something, and so he asked her what was the matter, and she told him what had happened and the dates that it happened.

Dr. Scott Benton, an assistant professor of clinical pediatrics with the Louisiana State University School of Medicine, was admitted, over defense objection, as an expert in pediatric sexual abuse and pediatric forensic medicine. Dr. Benton met with the victim approximately two months after

the alleged incidents. He took her history and performed a physical examination, which was normal. Dr. Benton also gave expert testimony concerning pedophiles.

Detective Darryl Smith, assigned to the Child Abuse Division of the New Orleans Police Department, testified that he received the complaint from the victim's grandfather. After meeting with the victim and her cousin, as well as her mother and two younger brothers, Detective Smith obtained an arrest warrant for the defendant.

Kent Frazier testified that he was N.G.'s stepfather for three years. He stated that he only disciplined her on one occasion in which he struck her with a belt one time. Frazier denied ever treating N.G. specially, and stated that the only special favor he ever did for N.G. was to purchase her something from Taco Bell after she requested it. He denied ever being in bed alone with N.G., and he denied any form of sexual contact.

ERRORS PATENT

Although the defendant was charged in count one with a violation of La. R.S. 14:89.1, aggravated crime against nature, the jury returned a responsive verdict, attempted crime against nature pursuant to La. R.S. 14:89. The trial court sentenced the defendant to five years imprisonment for the attempted crime against nature charge, which carries a prison term of

not more than five years; however, the maximum sentence for this attempted violation is one-half of the longest term or two and one-half years. Although not pled by defendant, the sentencing error is error patent. Therefore, the sentence is vacated and the case remanded for resentencing.

ASSIGNMENT OF ERROR NUMBER 1

Defendant contends the trial court erred in allowing Dr. Scott Benton to testify on the subject of "grooming," a process Dr. Benton identified by which a pedophile conditions his victim to accept increasingly intimate sexual advances. The following exchange occurred during Dr. Benton's testimony:

> Q. Can you explain to the ladies and gentleman of the jury what exactly is meant by that term?
>
> A. Sure. Contrary to popular mythology, we want to believe that strangers are the people that abuse our children. In my clinic and in national experience, 90 to 95 – .

An objection as to relevance was entered. The trial court allowed the testimony. Dr. Benton continued his testimony stating:

> As I was saying, the reality [is] that 90 to 95 percent of all child sexual abuse is committed by a family member or a close family associate. Because of that, it allows a certain type of activity to take place over time because of the covert nature that doesn't normally occur. And what do I mean by that?
>
> In a case of a stranger assault, that person has limited amount of time to get to know the child and what they want, i.e., the sexual assault. So it generally implies a lot of force to get the person to do what they want. In a family setting,

though, you've got repetitive contact. That person is in --" .

At this point counsel interjected "Again my objection, your honor," whereupon the court stated, "Noted. You can continue Doctor." The defendant does not contend that Dr. Benton's testimony was not relevant, rather that the testimony was beyond the scope of his examination of the victim and his medical opinion regarding her physical condition and that it was prejudicial. Put simply, the defendant complains that the trial court should not have allowed Dr. Benton to offer expert testimony on the subject of grooming. However, the record reflects that the defendant did not object on the basis that the doctor was not qualified to offer his opinion, only that the testimony was not relevant. Defendant cannot raise a new basis for an objection for the first time on appeal. *State v. Johnson*, 94-1369, p. 13 (La.App. 4 Cir. 3/16/95), 652 So.2d 1069, 1077. Clearly, the testimony was relevant, and the original objection was properly denied.

It should be noted that the defendant's assignment is predicated on the defendant's erroneous assumption that Dr. Benton was not admitted as an expert. The record reflects that after eliciting Dr. Benton's qualifications as an expert in the field of pediatric sexual abuse and pediatric forensic medicine, the state moved that he be admitted as an expert, whereupon defense counsel conducted further voir dire. After the defense concluded its

questioning of Dr. Benton, the court ruled on the state's motion by stating, "The witness is allowed to testify." Although the court failed to specifically rule on the state's motion, the court's statement and the subsequent defense objection reflect that Dr. Benton was admitted as an expert.

The defendant contends further that the trial court committed reversible error when it allowed Dr. Benton to testify as to the ultimate issue of the defendant's guilt, which is prohibited because it improperly usurps the function of the jury. *State v. Johnson*, 2000-0056 (La.App. 4 Cir. 11/29/00), 780 So.2d 403.

During defense counsel's cross-examination of Dr. Benton the following exchange occurred:

> Q. Now you just gave us a recitation on grooming. Do you – in which a pedophile gets with and does things to child and prepares them for the ultimate particular act. Did you have an occasion to speak to the accused in the situation?
>
> A. No sir.
>
> Q. Were you able to ascertain whether or not he is, in fact, a pedophile?
>
> A. If I use N.G.'s history, by definition he would be.

As the complained of testimony came in response to defense questioning, and no motion to strike was entered, there is no basis to contend that the trial court committed error.

Furthermore, Art. 702 of the Louisiana Code of Evidence provides:

> If 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.

In addition, art. 704 of the Louisiana Code of Evidence provides:

> 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.

Dr. Benton clearly modified his statement with the proviso, "If I use [the victim's] history." In doing so, the doctor did not offer his opinion as to the ultimate issue to be decided by the jury, whether sexual abuse occurred, because it remained the jury's task to make a judgment regarding the veracity of the victim's testimony. The doctor did not say that in his expert opinion the victim was telling the truth or a non-truth. La. C.E. art. 704 permits an expert to offer an opinion, which "embraces" the ultimate issue, to be decided by the trier of fact. *State v. Johnson*, 94-1369, p. 9 (La. App. 4 Cir. 3/16/95), 652 So.2d 1069, 1075. The assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER 2

The defendant contends the trial court erred in allowing the state to propound leading questions during its examination of both the victim and

her cousin. Generally, the use of leading questions during the direct examination of a witness is improper unless authorized under the circumstances described in La. C.E. art. 611(C). "A leading question is one suggesting the answer that the witness is expected to give. However, a question calling for a 'yes' or 'no' response is not leading unless that question also suggests to the witness which of those responses to give." *State v. Clayton*, 570 So.2d 519, 527 (La. App. 5th Cir.1990). In *State v. Carthan*, 377 So.2d 308 (La.1979), the Louisiana Supreme Court recognized that the rule forbidding leading questions is not so rigid that it should not yield somewhat to the trial court's discretion in the examination of young or timid witnesses. See also *State v. Bolton*, 408 So.2d 250 (La.1981), wherein the Supreme Court further noted that notwithstanding the general rule against leading questions, the matter is largely within the discretion of the trial court and in the absence of palpable abuse of that discretion resulting in prejudice to the accused, a finding of reversible error is not warranted.

The record reflects that the trial court allowed the prosecutor a certain measure of leeway in the form of her questions that were propounded to the two witnesses. However the trial court sustained some of defense counsel's objections, or the question was rephrased. On other occasions, the trial court properly overruled objections to questions that were not leading. The

defendant does not identify any particular instances during either witness's testimony which he contends prejudiced him. Furthermore, the record does not reflect any instances wherein either witness acquiesced to suggestive questions.

The defendant's argument is simply that as a general matter the court abused its discretion in allowing the prosecutor to propound any leading questions to N.G. because she is not sufficiently young or timid and because her responses indicated that she was articulate and understood the proceedings, or to T.F. because she was a "14 year old teenager capable of answering proper questions." While both witnesses were clearly competent to testify in a court of law, the record reflects that they were not so mature as to be at all comfortable testifying concerning matters of such an intimate nature. The record reflects that both were quite nervous during their testimony. Furthermore, the determination of a particular witnesses' maturity and social and mental capabilities is clearly a matter best assessed by the trial court. Absent some specificity by the defendant as to particular instances of the court's abuse of discretion, or some specific showing of prejudice, this court should not entertain a blanket assignment of error concerning the trial court's inherent power over the course and conduct of trial. The assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER 3

The defendant contends the trial court erred in allowing hearsay testimony

by the victim's grandfather regarding what she had told him about the assaults by the defendant. Hearsay is not admissible except as otherwise provided by the Louisiana Code of Evidence or other legislation. La. C.E. art. 802. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." La. C.E. Art. 801(C). The record reflects that the grandfather was allowed to testify as to the specific dates on which the victim told him the assaults occurred over defense objection. Although the state argued to the court that the testimony was not hearsay, it is difficult to surmise how the testimony was relevant other than for the truth of the matter asserted. As a trial error, it must be shown beyond a reasonable doubt that the complained-of error did not contribute to the verdict, if this court is to find the error to be harmless. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967). The guilty verdict actually rendered in the trial must be unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078 (1993).

The defendant contends that because the referenced testimony was the

only testimony that corroborated the victim's testimony, the error was not harmless and the conviction should be reversed. Contrary to the defendant's assertion, the record reflects that the victim's testimony was corroborated by her cousin, whose testimony was admissible as substantive evidence. Furthermore, in as much as the grandfather's testimony regarding what his granddaughter had told him occurred was limited to the dates when the acts occurred and did not elicit any specific information concerning the molestation, the testimony did not contribute to the verdict and should not result in reversal.

The defendant further contends that the trial court erred in permitting inadmissible hearsay while Detective Darryl Smith was being questioned by the state. The record reflects that the Detective Smith was permitted to confirm that he learned from the grandfather that the victim was a "possible" victim of a sexual crime. The testimony that the victim was a "possible" victim of sexual abuse can hardly be seen as being offered for the truth of the matter asserted. Furthermore, a statement that explains why an officer began his investigation after receiving the information, as is the case here, is not hearsay. *State v. Smith*, 400 So.2d 587, 591 (La.1981); *State v. Calloway*, 324 So.2d 801, 809 (La.1975).

Finally, the defendant contends that the trial court erred in overruling

the defendant's objection as to hearsay in response to the following testimony:

> Q. At some point, Miss Frazier, did you receive information about some incidents that took place between your husband, Mr. Frazier, and your daughter, N.?
>
> A. Yes.
>
> Q. And who advised you of what had taken place?
>
> A. [N.]'s father.
>
> Q. In fact, where were you when you were first advised of this?
>
> A. At work.

The questions and answers simply established that the victim's mother learned of the alleged incidents and do not tend to suggest that the alleged incidents actually occurred. Furthermore, neither the questions nor the answers attempted to suggest the contents of the out-of-court statements. Accordingly, the objection was properly overruled. The assignment lacks merit.

CONCLUSION

Accordingly we affirm both convictions and the sentence for indecent behavior with a juvenile, vacate the sentence on defendant's conviction for attempted crime against nature on count one, and remand for resentencing.

AFFIRMED IN PART, VACATED IN PART AND

REMANDED