STATE OF LOUISIANA	*	**NO. 2004-KA-1346**
VERSUS	*	**COURT OF APPEAL**
RICKY P. CURRY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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NOT DESIGNATED FOR PUBLICATION

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 440-350, SECTION "L"
Honorable Terry Alarcon, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Terri F. Love, Judge David S. Gorbaty)

Eddie J. Jordan, Jr.
District Attorney
Battle Bell IV
Assistant District Attorney
619 South White Street
New Orleans, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

William R. Campbell, Jr.
LOUISIANA APPELLATE PROJECT
700 Camp Street
New Orleans, LA 701303702

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED AND REMANDED

The State filed a bill of information charging the defendant-appellant with one count of violating La. R.S. 14:78.1 relative to aggravated incest committed upon his biological daughter, T.E., age thirteen. The defendant was arraigned and entered a not guilty plea. A preliminary hearing was conducted, at which time the court found probable cause to sustain the charge. Upon commencement of the bench trial, the defendant waived his right to a jury trial. The court took the matter under advisement and rendered a verdict of guilty of attempted aggravated incest. The court then

ordered a presentence investigation report, and subsequently sentenced the defendant to eight years at hard labor. The defense filed a motion for an appeal and a motion to reconsider sentence. The motion for an appeal was granted and the court set a hearing on the motion to reconsider sentence. This appeals follows.

FACTS AND PROCEDURAL HISTORY

On April 17, 2003, the Thursday before Easter, T.E. rode the bus to her school, McDonough 28, from the home of her great-aunt, P.T., on London Avenue. T.E. and her mother, L.E., had been staying with P.T. for several days. When T.E. arrived at school she learned from a custodian that school was closed for the Easter holiday, a fact of which she was unaware because she had been absent from school for the preceding days of the week. The defendant, T.E.'s father, who had been released from Orleans Parish Prison early in the morning, was at the school when she arrived. He was sitting on the steps waiting for her. He directed her to come with him, and after stopping at the corner store, they went to their home. T.E. went into her room, but the defendant called her to come to his room several times, questioning her about why she and her mother were not home when he got out of jail. Later in the day, the defendant called T.E. into his room and told her to sit on the edge of the bed. He began to rub her breasts, then instructed

her to “suck” him. He grabbed her neck and forced her to place her mouth on his penis, ultimately forcing her to perform fellatio. When the defendant ejaculated, he released T.E., and she went to the bathroom to rinse her mouth. She then went into her room and cried. Shortly thereafter, T.E.’s mother arrived. While her parents were talking, T.E. left the house and went back to the home of P.T., her aunt. She told P.T. what her father had made her do, and P.T. called the police. However, the police took no action at the time, but came to P.T.’s house in response to a complaint from T.E.’s parents that she had run away from home.

Detective Gary Lewis testified at trial that he was assigned to the New Orleans Police Department Child Abuse Unit and responded to a call regarding sexual molestation. The call indicated that the victim was at the University Hospital Emergency Pediatric Unit. At the hospital, Detective Lewis interviewed the victim’s aunt who stated that the victim had informed her earlier that day that she had been forced to perform oral sex on her father. Detective Lewis then interviewed T.E. who recounted her arrival at school on the Thursday before Easter, returning to her home on Miro Street with her father, her father questioning her about her mother’s whereabouts, and her father forcing her to perform oral sex. T.E. stated that she complied with her father’s demands because she was frightened of him.

Detective Lewis stated that the victim's mother was with her at the hospital. However, he was not able to interview the mother because she was "not responsive." Detective Lewis was informed that the victim's mother had mental disabilities.

Detective Lewis arranged a forensic interview for T.E. at the Child Advocacy Center. The interview was conducted by Joan Williams a few days after Detective Lewis took the complaint. A videotape of the interview was made and played for the trial judge. At trial, Ms. Williams testified that T.E. described multiple instances of oral sexual abuse by her father.

P.T. testified that T.E. and her mother L.E. were staying with her on the night of April 16, 2003. During the early morning hours of the 17th, around 4:00 a.m., the defendant called and asked to speak with L.E. The next morning P.T. sent T.E. to school on the bus. Later that morning, P.T. called the school to tell T.E. to come straight back to P.T.'s house after school. P.T. was informed that there were no classes because of the Easter holiday. P.T. called T.E.'s home on Miro Street looking for her, but no one answered the phone. Finally P.T. told L.E. to go home and see if T.E. was there. Later that day, T.E. arrived at P.T.'s home. She told her aunt that her father had taken her from the school, locked her in the house, and made her perform oral sex on him.

On cross-examination, P.T. testified that she called the police to report T.E. had been abused by her father, while T.E.'s parents called the police to report that she had runaway. According to P.T., the police informed her that they could not take the complaint unless she called from the location where the abuse occurred. P.T. stated that she complied with this directive by going to the Miro Street residence and calling the police again. However, P.T. then became confused in her recollection of what occurred, stating that there had been an earlier incident and that she really could not remember. P.T. could not recall when she took T.E. to the hospital, stating that she told L.E. to take her, but later learned that L.E. had not done so. At some point, P.T., accompanied by L.E., took T.E. to the hospital because she had a sore throat. P.T. testified that T.E.'s mother, L.E., is mentally challenged and that she assisted her in caring for her daughter. In further testimony, P.T. stated that L.E. did take T.E. to the doctor, but perhaps the doctor did not know why she was there.

During cross-examination, defense counsel questioned P.T. about an earlier allegation by T.E. that her father had sexually abused her vaginally. P.T. stated that she called the police to report the molestation, and T.E. reported that the abuse had begun when she was eight years old. P.T. testified that T.E.'s mother took T.E. to a doctor who found no evidence of

the molestation. P.T. admitted that the Officer of Community Services started an investigation, but she did not pursue it and never heard from them. P.T. stated that, from the ages of eight to twelve, when T.E. reported the abuse, she was suicidal and misbehaving, including engaging in aggressive behavior. P.T. then testified that T.E. recanted her allegation that her father had been sexually abusing her.

T.E. admitted recanting her complaint that her father had been sexually abusing her from age eight through age ten. She stated that she did so because it was upsetting her mother who did not believe her.

The defendant testified on his own behalf. He denied engaging in any sexual activity with his daughter. He admitted to prior felony convictions for drugs and theft. He testified that he called L.E. from jail to let her know he would be getting out shortly. When he was released he walked from the jail to their home on Miro Street. L.E. and T.E. arrived approximately ten minutes apart in the morning. The defendant stated that he had learned from his landlord, who also was one of T.E.'s teachers, that she had been skipping school for a week. He apparently was going to confront her about it. At some point, T.E. disappeared from the house, and he located her that evening at P.T.'s house. He was informed that T.E. had made an allegation that he forced her to perform oral sex; he further stated that he called the police but

was not arrested. He stated that he had been the subject of an earlier complaint by T.E.; he had not been arrested in connection with that complaint because a medical exam revealed no evidence of abuse and she later recanted the allegations. The defendant also testified that in 2002 T.E. made a complaint to him that a boy named Matthew Dennis raped her. The defendant went to confront the boy; T.E. recanted her story, stating it did not happen, but instead Matthew had taken her Gameboy and would not give it back.

ERRORS PATENT

Upon review of errors patent, we find that there are none.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error the appellant avers that the trial court failed to properly explain the implications of waiving his right to a jury trial to him, and thus the court erred in accepting that waiver.

In *State v. Wilson*, 437 So. 2d 272 (La. 1983), the Louisiana Supreme Court considered whether a defendant voluntarily and knowingly waived his right to a trial by jury in circumstances similar to the instant case. In *Wilson*, before the trial began, the defendant's attorney advised the court that, contrary to the advice of counsel, the defendant wanted to waive his right to

a jury trial. The attorney then questioned the defendant concerning his understanding of the waiver, and the trial judge accepted the waiver. On review, the court in *Wilson* stated as follows regarding the better method for evidencing that the waiver of a jury trial was knowingly and intelligently made:

> In order to protect this valuable right, as well as to prevent post-conviction attacks on the waiver, the better practice is for the trial judge to advise the defendant personally on the record of his right to trial by jury and require the defendant to waive the right personally either in writing or by oral statement in open court on the record.

Id. at 275. In *Wilson* the defendant personally waived trial by jury with a statement in open court on the record. The Court then held that "[o]n the basis of the overall record, we conclude that defendant voluntarily and knowingly waived his right to trial by jury." *Id*. at 276.

This Court has considered what constitutes a knowing and intelligent waiver of the right to trial by jury in several cases and has made it clear that the preferred practice for obtaining a valid waiver of a defendant's right to trial by jury is "for the trial judge to advise the defendant personally on the record of his right to trial by jury and require the defendant to waive the right personally either in writing or by oral statement in open court on the record." *State v. Richardson,* 575 So. 2d 421, 424 (La. App. 4 Cir. 1991). *See also State v. Wolfe,* 98-0345 (La. App. 4 Cir. 4/21/99), 738 So. 2d 1093,

and *State v. Abbott*, 92-2731 (La. App. 4 Cir. 2/25/94), 634 So. 2d 911. However, this Court has also found that a knowing and intelligent waiver of a defendant's right to a jury trial can be made even if the preferred practice of obtaining such a waiver is not followed. See *State v. Santee*, 2002-0693 (La. App. 4 Cir. 12/04/02), 834 So. 2d 533, where this Court reiterated that "the Louisiana Supreme Court has refused to mandate this method as an absolute rule." *Id*. at p.3, 834 So. 2d at 535. Moreover, in both *Santee* and *Wolfe*, this Court held that the defendant's failure to object when his counsel informed the court that a judge trial had been chosen was to be construed against the defendant in determining the validity of the waiver made while he was present in court. The Court noted that each defendant had an opportunity to object, but failed to do so, and had previously been informed at arraignment of his right to a jury trial.

In the instant case, the minute entry of the defendant's arraignment reflects that the court informed the defendant of his right to a trial by judge or jury. When the case was called for trial, the defense counsel began by noting that there were preliminary matters involving documents and stipulations. The court then asked defense counsel if she would let the court "know that your client has elected a trial by a Judge, and that you have informed him of such, and that he stands up and concurs in that." Defense

counsel complied with this request, and the following colloquy ensued:

Ms. Renfroe: Your honor, I have conferred with my client, Mr. Ricky Curry, and Mr. Curry has indicated to me that he wishes to be tried in this matter by the Judge, by the Court. Is that correct, Mr. Curry?

Ms. [sic] Curry: Yes, ma'am.

Ms. Renfroe: And Mr. Curry, did I in any way influence you or force you to choose a Judge trial over a jury trial?

Mr. Curry: No, ma'am.

Ms. Renfroe: And that is your own choice voluntarily.

Mr. Curry: Yes, ma'am.

This colloquy reflects that, although the trial court did not personally inform the defendant of his right to jury trial again, defense counsel had discussed the issue with her client. The defendant was required to indicate on the record whether he made the choice to waive the jury, which he did. The record further shows the defendant testified that he had a felony criminal record, and thus presumably had familiarity with his right to a jury trial. Therefore, based on the overall record, the defendant's waiver of a jury trial was valid.

The appellant's first assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, the appellant avers that the trial

court erred when it allowed multiple hearsay statements, specifically hearsay testimony from Detective Lewis and Joan Williams, regarding the allegation made by the victim, rather than abiding by the limitation in La. CE. art. 801 (D)(1)(d). That article provides that a statement is not hearsay if the declarant testifies at trial, is subject to cross examination concerning the statement, and the statement is "[c]onsistent with the declarant's testimony and is one of initial complaint of sexually assaultive behavior." In the instant case, the victim made her initial complaint to her aunt, P.T., and therefore the statements she made to Detective Lewis and Ms. Williams do not fall under the "initial complaint" exception to the hearsay rule. However, in his brief, the appellant concedes that trial counsel did not make any objection to the allegedly inadmissible hearsay testimony, and thus any error was not preserved for appellate review. La C.Cr.P. art. 841; *State v. Bradford*, 2002-1452 (La. App. 4 Cir. 4/23/03), 846 So. 2d 880, *writ denied* 2003-1410 (La. 11/26/03), 860 So. 2d 1133. The appellant argues he should be granted a new trial because his trial counsel's failure to object was a serious error, which rendered her ineffective.

The general rule is "the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post conviction relief, filed in the trial court where a full evidentiary hearing can be conducted."

State v. Jones, 2002-2433, 3 (La. App. 4 Cir. 6/18/03), 850 So. 2d 782, 785, *writ denied* 2003-1987 (La. 1/16/04), 864 So. 2d 625. An exception is recognized when the record contains sufficient evidence to rule on the merits of the claim. In the latter context, the interests of judicial economy justify consideration of the issues on appeal. *Id.* (citing *State v. Seiss*, 428 So. 2d 444 (La. 1983); *State v. Ratcliff*, 416 So. 2d 528 (La. 1982); *State v. Garland*, 482 So. 2d 133 (La. App. 4 Cir.1986); *State v. Landry*, 499 So. 2d 1320 (La. App. 4 Cir.1986).

In *Jones*, pp. 4-5, 850 So. 2d at 785-86, this Court stated the criteria for reviewing a claim of ineffective assistance of counsel:

> The defendant's claim of ineffective assistance of counsel is to be assessed by the two part test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Fuller*, 454 So.2d 119 (La.1984). The defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. 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. *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. *State v. Sparrow*, 612 So.2d 191, 199 (La.App. 4th Cir.1992).

> This court has recognized that if an alleged error falls "within the ambit of trial strategy" it does not "establish ineffective assistance of counsel." *State v. Bienemy*, 483 So.2d 1105 (La.App. 4 Cir.1986). Moreover, as "opinions may differ on the advisability of a tactic, hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy is successful." *State v. Brooks*, 505 So.2d 714, 724 (La.1987), *cert. denied*, *Brooks v. Louisiana*, 484 U.S. 947, 108 S.Ct.337, 98 L.Ed.2d 363.

The appellant avers that there is no rational reason or strategic purpose which would explain why trial counsel failed to object to the hearsay testimony elicited from witnesses to whom the victim did not make the initial complaint of the sexual assault. However, trial counsel in this case appears to have focused the defense on the fact that T.E. had previously made complaints against the defendant and another person and then recanted the allegations. Counsel reviewed in detail with Detective Lewis inconsistencies in the allegations made by the victim as reflected in the police report, as well as the lack of forensic evidence. There was also a discrepancy regarding when T.E. told P.T. about the assault on April 17th, when it was reported to the police, and when she went to the hospital. Counsel appears to have been interested in eliciting all of these inconsistencies to support her argument that, when added to the victim's previous recantations of similar allegations, the victim was not worthy of belief. Such a tactic is clearly trial strategy, which should not be judged in

hindsight.

This assignment of error lacks merit.

CONCLUSION

The appellant's assignments of error lack merit. His conviction is affirmed, and the matter remanded for a ruling on the motion to reconsider sentence.

AFFIRMED AND REMANDED