NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2011-KA-0296**
VERSUS	*	
		COURT OF APPEAL
SIMS JACOBS	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 479-608, SECTION "F"
Honorable Robin D. Pittman, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *
(Court composed of Judge Dennis R. Bagneris, Sr., Judge Terri F. Love, Judge Rosemary Ledet)

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JANUARY 25, 2012

AFFIRMED

On July 22, 2008, the State charged the defendant with one count of aggravated incest upon his biological daughter, S.C[1]., a violation of La. R.S. 14:78.1. Following a two day jury trial, the defendant was convicted of attempted aggravated incest and was sentenced to fifteen years at hard labor, without benefit of probation, parole, or suspension of sentence. On October 14, 2010, the court vacated the defendant's original sentence, adjudicated him a fourth felony offender and sentenced him to twenty-five years, at hard labor, without benefit of probation, parole, or suspension of sentence, to run concurrently with any other sentences. For the following reasons, we hereby affirm.

FACTS

Ms. N. C., the victim's mother, testified that the defendant was her ex-husband and the victim's biological father. She stated that in November 2007, she met with the victim's school principal in Texas to discuss the victim's poor academic performance. The principal called the victim into her office to discuss the situation with her and her mother. The victim began to cry. Ms. N.C. asked

[1] Pursuant to Rules 5-1 and 5-2 of the Uniform Rules--Courts of Appeal, the initials of the juvenile, as well as her mother, will be used instead of their names.

her daughter what was wrong, but the victim refused to answer. The principal left the office so that the victim and her mother could speak in private. After a brief discussion between the two, the victim asked her mother, "Do you remember in New Orleans when I didn't want to go by my dad?" When Ms. N. C. said she remembered, the victim explained to her that she did not want to see her father because he touched her inappropriately. The victim elaborated on her disclosure explaining that she endured three instances of her father touching her improperly. In each incident, the defendant told the victim to remove her clothing/underpants so that he could examine her vaginal area for purposes of modeling pictures.

Ms. N. C. informed the school principal who in turn notified the school police, and an investigation was begun. The school police advised Ms. N. C. to notify the Houston authorities, who referred her to the child protection agency for further assistance. About a week later, Ms. N. C. and the victim reported to that agency.

During a visit to her mother's Desire Street home in New Orleans at the end of November 2007, Ms. N. C. reported the defendant's behavior to the NOPD. Detective Kurt Coulon took a report from Ms. N. C. and requested to speak with the victim alone. The detective gave Ms. N. C. an item number but advised her to take up the complaint with the Houston Police because the case was too weak to pursue in New Orleans.

Subsequent to her meeting with Detective Coulon, NOPD Lt. Lorenzo contacted Ms. N. C. As a result, both the Houston and New Orleans police departments were investigating the matter. Ms. N. C. also said that the defendant told her not to testify and offered to give money to her and her daughters.

Detective Kurt Coulon testified that he met with the thirteen year old victim and her mother on November 23, 2007, and prepared a report memorializing the allegations made by the victim. The detective performed no further investigation into the complaint.

On cross-examination, Detective Coulon stated that no charges were filed as a result of what the victim told him because he did not deem the allegations actionable under Louisiana law.

NOPD Lt. Joseph Lorenzo was assigned to the Child Abuse Section in November 2007. In December 2007, Lorenzo reviewed Detective Coulon's investigative report concerning the victim's allegations of molestation. Lorenzo concluded that the allegations did not amount to molestation, but that they did meet the criteria of a case of indecent behavior with a juvenile. Through further investigation, Lorenzo learned of a November 9, 2007 forensic interview of the victim performed by Sergeant McFarland of the Houston Police Department. Lorenzo viewed a video copy of that interview and learned that two of the three incidents complained of occurred in Texas and one in New Orleans, which he investigated in the summer of 2008. On May 16, 2009, Lorenzo obtained a warrant for the defendant's arrest on the charge of indecent behavior with the juvenile. The defendant was arrested on May 24, 2009.

The victim testified that she was born November 2, 1994, and that the defendant was her father. The victim related three instances of the defendant's improper behavior. The first incident occurred in New Orleans during the summer, at 1523 Desire Street, her aunt's house. The victim said she was sleeping in her aunt's bed when she awoke to the sound of the door creaking open. It was approximately 2:00 or 3:00 a.m., when the defendant came into the room and

spoke with the victim about modeling. He told the victim that he needed to check her vagina for shaving bumps because that is what people would have to do when she was a model. He then told the victim to take off her pants. The victim was hesitant, but the defendant told her it was okay because he was her father. The defendant then "opened up" the victim's legs and looked at the victim's vagina aided by the light of his mobile phone. The victim testified that she kept the incident to herself because she believed her father when he said there was nothing wrong with his behavior.

The second incident occurred at the defendant's mother's house in Texas. It was nighttime, and the victim was in bed with her grandmother in her grandmother's bedroom. The victim explained that her grandmother took a lot of medicines that put her into a very deep sleep. The defendant began the same way he had before – by discussing modeling and the need for the victim to shave her vaginal area – but, this time, after the defendant told her to take off her pants, he inserted his fingers into her vagina. When the victim complained of pain, the defendant removed his hand.

The third incident also took place at the defendant's mother's house. The victim recalled that it was October 15th, her mother's birthday, when the defendant again entered the room in which she was sleeping. The victim was downstairs with her siblings when the defendant told her to come upstairs with him. The defendant performed in the same manner as the first and second occurrences, and then he made the victim get on top of him. He spread her legs, pressed her body against his, and moved her back and forth. The victim said the defendant had his boxer shorts on. The victim's baby brother, who was sleeping in the room, woke up and started crying. The defendant got out of the bed and removed the baby from the

room. The victim left the bedroom and convinced her sisters to come sleep in another room with her by telling them that she was scared.

After the victim told her mother of the incidents, her mother took her to Houston's Children's Advocacy Center where the victim was interviewed.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment, the defendant argues the trial court erred in allowing the State to play portions of the videotaped interview of the victim which had been made in Texas. The defendant maintains that the videotaped interview was not admissible pursuant to La. R.S. 15:440.5, specifically because the person who conducted the interview was not present in court and available for cross-examination, thus violating the defendant's Sixth Amendment right to confront witnesses against him.

The Confrontation Clause of the Sixth Amendment provides that, "[in] all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him," and limits the admission of testimonial hearsay statements at criminal trials to situations when the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington,* 541 U.S. 36, 53-54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d 177 (2004).

The Sixth Amendment safeguards the defendant's right to confront his accusers and to subject their testimony to rigorous testing in an adversary proceeding before the trier of fact. *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *State v. Kennedy,* 2005-1981 (La. 5/22/07), *reversed*

on other grounds sub nom. Kennedy v. Louisiana, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008). See also La. Const. art. 1, § 16.

The Louisiana statutory provisions regarding the admissibility of videotaped recordings are found in La. R.S. 15:440.3- 15:440.5, which provide:

La. R.S. 15:440.3

440.3. Videotape; admissibility; exception to hearsay rule

The videotape authorized by this Subpart is hereby admissible in evidence as an exception to the hearsay rule.

La. R.S. 15:440.4.

Method of recording videotape; competency

A. A videotape of a protected person may be offered in evidence either for or against a defendant. To render such videotape competent evidence, it must be satisfactorily proved:

(1) That such electronic recording was voluntarily made by the protected person.

(2) That no relative of the protected person was present in the room where the recording was made.

(3) That such recording was not made of answers to interrogatories calculated to lead the protected person to make any particular statement.

(4) That the recording is accurate, has not been altered, and reflects what the protected person said.

(5) That the taking of the protected person's statement was supervised by a physician, a social worker, a law enforcement officer, a licensed psychologist, a licensed professional counselor, or an authorized representative of the Department of Social Services.

B. The department shall develop and promulgate regulations on or before September 12, 1984, regarding training requirements and certification for department personnel designated in Paragraph (A)(5) of this Section who supervise the taking of the protected person's statement.

La. R.S. 15:440.5.

Admissibility of videotaped statements; discovery by defendant

A. The videotape of an oral statement of the protected person made before the proceeding begins may be admissible into evidence if:

(1) No attorney for either party was present when the statement was made;

(2) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;
(3) The recording is accurate, has not been altered, and reflects what the witness or victim said;
(4) The statement was not made in response to questioning calculated to lead the protected person to make a particular statement;
(5) Every voice on the recording is identified;
(6) The person conducting or supervising the interview of the protected person in the recording is present at the proceeding and available to testify or be cross-examined by either party;
7) The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and
(8) The protected person is available to testify.

B. The admission into evidence of the videotape of a protected person as authorized herein shall not preclude the prosecution from calling the protected person as a witness or from taking the protected person's testimony outside of the courtroom as authorized in R.S. 15:283. Nothing in this Section shall be construed to prohibit the defendant's right of confrontation.

In *State v. Kennedy*, *supra*, an appeal from an aggravated rape conviction and death sentence in the Twenty-Fourth Judicial District Court in Jefferson Parish, the victim, who was eight years of age at the time of the offense, testified at trial. While the child was on the stand, the State played for the jury her videotaped interview taken at the Child Advocacy Center. The victim remained on the stand after the videotape was shown, and she underwent direct and cross-examination.

The defendant in *Kennedy* argued, as defendant argues here, that the tape recorded interview was testimonial hearsay under *Crawford*, and that its admission at trial was violative of his right of confrontation. The *Kennedy* court rejected the defendant's argument, finding no Confrontation Clause violation. Citing *Crawford*, the court reasoned that the Confrontation Clause places no constraints on the use of prior testimonial statements where the declarant is present at trial to defend and explain them. A testimonial videotaped statement is not, therefore, inadmissible if the declarant testifies and can be questioned regarding the statement. The *Kennedy* court further held that La. R.S. 15:440.5, which sets forth

the requirements for admissibility of a videotaped interview, is not facially unconstitutional "as it specifically requires as a condition of admissibility that 'the protected person is available to testify.' La. R.S. 15:440.5(8)."

The victim in this case underwent vigorous and thorough cross examination. She described in detail the three instances of inappropriate behavior – chronicling dates, times and locations. Further, the victim was able to recall who she told about the defendant's behavior and what she reported to her mother and the authorities. Because the victim in this case, the "declarant" in the videotaped interview at issue, testified at trial following the admission of the tape, and was subject to cross-examination, the tape's admission was not a violation of the Confrontation Clause. The fact that the person who conducted the interview was not present at trial is immaterial because the victim, who made the allegations, was present. Accordingly, this assignment has no merit.

ASSIGNMENT OF ERROR NUMBER 2

In a second assignment of error, the defendant complains the trial court erred in allowing Lt. Lorenzo to testify as to the allegations the victim made during the Texas interview and as to his conclusion that the victim's allegations met the criteria for a violation of indecent behavior with a juvenile. In support of this argument, the defense claims that trial counsel objected to the officer testifying about the contents of the video based upon the fact that no one from Texas was available for cross-examination. We find no merit in this assignment of error.

Lt. Lorenzo was allowed to testify that (1) the acts that the victim discussed in the video (which the officer did not describe) met the definition of indecent behavior with a juvenile; and (2) that the acts took place on Desire Street in New Orleans.

The foregoing testimony was cumulative to testimony previously given by Lt. Lorenzo and the victim's mother. The Louisiana Supreme Court has long held that the admission of hearsay testimony is harmless error where the effect is merely cumulative or corroborative of other testimony adduced at trial. *State v. Johnson*, 389 So.2d 1302 (La.1980). By the time the defense objected on confrontation grounds, Lt. Lorenzo had already testified that there were "three allegations of sexual assault made by the victim during the interview." This testimony was given without objection from the defense. Although the defense later objected to the witness discussing the two Texas incidents, that objection was not made on hearsay or confrontation grounds, but on the ground that the two incidents did not take place in Orleans Parish. The defendant cannot now assign as error the admission of this testimony because the basis for an objection may not be raised for the first time on appeal. La. C.Cr.P. art. 841(A); *State v. Sims*, 416 So.2d 148 (La. 1983).

As for the defendant's argument that the trial court erred in allowing Lt. Lorenzo to testify to his conclusion that the offense constituted indecent behavior with a juvenile, this testimony also passed without objection on several occasions. The first incident of his testimony was when Lt. Lorenzo stated that he had reviewed a police report and come to the conclusion that the facts of the case met the definition of carnal knowledge of a juvenile. The defense failed to object to this statement. Moreover, the statement clearly illustrates that Lt. Lorenzo's conclusion was not based upon the tape alone. The officer later testified that the description of the incidents in the video led him to obtain a warrant for the defendant's arrest for indecent behavior with a juvenile. This statement was made after the defense's geographical-based objection, referenced earlier, and also

passed without further objection. A final reference to the warrant for indecent behavior with a juvenile came at the end of direct examination.

At no point during direct examination did the defense object to Lt. Lorenzo's testimony on the grounds that he was stating a conclusion based upon his review of the evidence, nor did the defense timely object to his references to the forensic interview on hearsay or confrontation grounds. Consequently, any objection on the basis has been waived on appeal. *State v. Burdgess,* 434 So.2d 1062, 1067 (La, 1983) citing La. C.Cr.P. art. 841.

Nevertheless, even if the trial court erred in allowing Lt. Lorenzo's testimony, the error was harmless beyond a reasonable doubt. See La. C.Cr.P. art 921 (an error that "does not affect substantial rights of the accused" is not grounds for reversal); *Sullivan v. Louisiana,* 508 U.S. 275, 279, 113 S.Ct. 2078, 2081 (1993).

ASSIGNMENT OF ERROR NUMBER 3

In a final assignment of error, the defendant complains that the trial court erred in denying his Motion for New Trial. In the motion for new trial and on appeal, the defendant bases his claim upon information concerning a juror's alleged deception. Specifically, the defendant states:

> [The defendant] has only recently learned that a member of the jury, one Karl Marquez . . . was aware of the defendant's past criminal history during the trial and stated after the trial that the defendant should have taken the stand and testified in his own defense. . .

La. C.Cr.P. art. 851(4) provides:

> **Grounds for new trial**
>
> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the

> case the motion shall be denied, no matter upon what allegations it is grounded.
>
> The court, on motion of the defendant, shall grant a new trial whenever:
>
> * * *
>
> (4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment . . .

The decision on a motion for new trial rests within the sound discretion of the trial judge, and its ruling will not be disturbed on appeal absent a clear showing of abuse. *State v. Quimby*, 419 So.2d 951 (La.1982). The merits of such a motion must be viewed with extreme caution in the interest of preserving the finality of judgments. As a general rule, a motion for new trial will be denied unless injustice has been done. La. C.Cr.P. art. 851; *State v. Johnson*, 2008-1488 (La. App. 4 Cir. 2/10/10), 33 So.3d 328 citing *State v. Dickerson*, 579 So.2d 472 (La.App. 3 Cir. 4/17/91).

During the hearing on the motion for new trial, defense counsel informed the trial judge that after the trial, he spoke with Bonnell Glass and Troy Roscoe, who were acquaintances of the defendant, and who were present during trial. The defense maintained that Juror Marquez discussed the defendant's criminal history with Glass and Roscoe. Further, according to the defense, Marquez told Glass and Roscoe that the defendant should have testified in his own defense, and the fact that the defendant did not do so was held against him by Marquez. When the trial judge asked defense counsel if Marquez was present to testify at the hearing, defense counsel replied no, whereupon the court denied the motion.

There is no support in the record for defense counsel's arguments nor is there any indication the trial judge abused her discretion in denying the motion for new trial. The record contains no information as to who Bonnell Glass and Troy

Roscoe are, and how they know the facts alleged in the Motion for New Trial. Moreover, while the defendant states that defense counsel "provided the court with an affidavit in support of the motion," that affidavit was not located until after the trial judge rendered her ruling on the motion[2]. Nevertheless, the fact that a juror may have been privy to the "defendants [sic] past [sic] criminal history" is not, in and of itself, an adequate reason for granting a new trial, particularly in this case where other crimes evidence was part of the State's case-in-chief; and there is no allegation that the juror was asked this question during voir dire and gave a false answer. Further, it is not a violation of a juror's oath for him to comment that a defendant's case may have been better served had he taken the stand in his own defense. Accordingly, we find no merit in this assignment of error.

For these reasons, we hereby affirm defendant's conviction and sentence.

AFFIRMED

[2] We note that even though the trial judge acknowledged receiving an executed affidavit, albeit after ruling, the record does not contain the executed affidavit.