NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 1321

STATE OF LOUISIANA

VERSUS

AUSTIN BERNARD, III

Judgment Rendered: February 13, 2009

* * * * * * * * * *

On Appeal from the 21st Judicial District Court
In and For the Parish of Tangipahoa
Trial Court No. 502214, Div. "D"

Honorable M. Douglas Hughes, Judge Presiding

* * * * * * * * * *

Scott M. Perrilloux District Attorney Patricia Parker Assistant District Attorney Amite, LA	Counsel for Plaintiff/Appellee State of Louisiana
Margaret S. Sollars Louisiana Appellate Project Thibodaux, LA	Counsel for Defendant/Appellant Austin Bernard, III

* * * * * * * * * *

BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

J. P. PETTIGREW, J. Concurs

HUGHES, J.

The defendant, Austin Bernard, III, was charged by amended grand jury indictment #502214 with one count of aggravated rape of S.L.[1] between January 1, 2001 and December 31, 2001 (count I), and one count of aggravated rape of A.B. between January 1, 2001 and December 31, 2001 (count II), violations of LSA-R.S. 14:42, and pled not guilty on both counts. He was charged by grand jury indictment #503387 with one count of aggravated rape of A.B. between January 1, 2002 and December 31, 2002, a violation of LSA-R.S. 14:42, and pled not guilty. Following a jury trial on both indictments, he was found guilty as charged on all charges. On each count, he was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence, with the sentences to run consecutively with one another. In this case, he appeals his convictions under indictment #502214. In Appeal Number 2008-1322 (also decided this date), he appeals his conviction under indictment #503387. He designates the following three assignments of error in both appeals:

1. The law at the time of the alleged crimes should have been applied to the statements of S.L. and M.L. rather than a more recent law that allowed the statements to be used for their substantive value and without a proper foundation.

2. The videotape of A.B. should not have been allowed into evidence because A.B. was incompetent at the time of the alleged crime, thus rendering the tape unreliable.

3. The defendant requests a review for error under LSA-C.Cr.P. art. 920(2).

---

[1] We reference the victims only by their initials. See LSA-R.S. 46:1844(W).

For the following reasons, we affirm the convictions and sentences.

FACTS

At the time of the alleged offenses, Louis Lamonica was the pastor of Hosanna Church (formerly First Assembly of God Church) in Tangipahoa Parish. He was married to R.L. The defendant was the youth pastor at the church. He was married to N.B. Lamonica was the father of M.L., born July 27, 1986, and S.L., born April 10, 1990, and the defendant was the father of A.B., born December 21, 1999. From the time when A.B. was nine months old until she was two years old, the defendant stayed home with her, while N.B. worked.

In March of 2003, when A.B. was three and one-half years old, the defendant separated from N.B., and began living at the church with Lamonica who was also having marital problems. When A.B. was five years old, she disclosed to N.B. that Lamonica, the defendant, M.L., and S.L. were hurting her. After talking to R.L. about the allegations, N.B. believed that Lamonica and the defendant had been raping and molesting M.L., S.L., and A.B. On March 29, 2005, in interviews with Dr. Adrienne Atzemis, M.L. and S.L. alleged that Lamonica and the defendant had raped them and A.B. In April of 2005, in interviews with Jennifer Thomas of Hammond Child Advocacy Services, M.L. and S.L. again alleged that Lamonica and the defendant had raped them and A.B. M.L. and S.L. also drew pictures illustrating the abuse they had allegedly suffered and wrote about what had happened to them. At trial, however, M.L. and S.L. claimed that the abuse had never occurred and that they had made the allegations at the request of N.B. They conceded that, after making the allegations of abuse, they had been forced to move away from their friends and live with

their grandfather and were aware that any testimony that they gave at trial concerning the abuse could be used against their father.

According to N.B., when she confronted the defendant, he told her that he had raped A.B. everyday since the day she was born and had given her to Lamonica to rape when she was two weeks old. N.B. claimed that the defendant had told her that he and Lamonica had been lovers for over ten years, and he had given A.B. to Lamonica to rape because Lamonica had given M.L. and S.L. to him to rape. N.B. claimed the defendant told her that from the time A.B. was nine months old until she was three and one-half years old, he had put his penis in her mouth until she began throwing up, and had put his fingers and tongue, rather than his penis, into her vagina so that her vagina would not show evidence of injury. According to N.B., the defendant also gave details of how beginning in 1994, he had violently beaten and tortured M.L. and S.L. before raping them, while Lamonica watched.

Steven J. Brown met the defendant at the church in 2002. In late 2004, he lived at the church for approximately six months while Lamonica and the defendant were living there. According to Brown, when Lamonica and the defendant were angry with their wives, they would say that they had raped their children, but then immediately deny the rapes. Towards the end of the time he lived at the church, however, Lamonica and the defendant no longer denied raping their children, and in fact, began writing journals about the rapes.

On May 19, 2005, F.B.I. Agent Lisa Marie Freitas interviewed the defendant. According to Freitas, the defendant claimed he began a homosexual relationship with Lamonica in 1993. He claimed, as youth

pastor, he groomed children to be amenable to sexual behavior. He claimed he had participated in sexual acts with six children at the church under the age of eighteen. He claimed he was the first person to orally and vaginally penetrate A.B., and Lamonica was the second person. He claimed N.B. may also have been molesting A.B.

In May of 2005, Tangipahoa Parish Sheriff's Office Detective Mike DePhillips interviewed the defendant three times. The defendant claimed he had placed his penis in A.B.'s mouth and placed his mouth on her vagina.

On June 10, 2005, F.B.I. Agent Joseph Edwards interviewed the defendant. According to Edwards, the defendant claimed he had molested A.B. from the time she was one year old until she was three or four years old. He claimed he had put his penis in her mouth, had put his fingers in her vagina, and had also performed oral sex on her. The defendant listed nine teenagers, including M.L. and S.L., that he had molested. He later claimed that although he had the desire and the opportunity to molest M.L. and S.L., he was eighty percent sure he had not molested them. The defendant stated that in an attempt to get back with his wife, he had written a confession that had been circulated in the church, but some of it was "fantasy driven."

At trial, the defendant claimed in late 2004, he began writing false confessions after he became aware that M.L. and S.L. were accusing Lamonica of raping them, and Lamonica was telling people that he and the defendant were gay lovers. He claimed that once N.B. became aware of what he had written, she threatened to have him locked up if he did not write what she wanted him to write. He claimed his confessions to raping M.L., S.L., and A.B. were false.

RETROACTIVE APPLICATION OF 2004 AMENDMENT TO LOUISIANA CODE OF EVIDENCE ARTICLE 801

In his first assignment of error, the defendant argues the trial court erred in denying the defense motion in limine seeking to prohibit the use of the videotaped statements of M.L. and S.L. as substantive evidence at trial under LSA-C.E. art. 801, as amended in 2004.

Article I, § 10 of the United States Constitution forbids states from passing any ex post facto law.[2] Although the language of the federal constitution does not define the term, the seminal case of **Calder v. Bull**, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798) interpreted that term, and that holding has been applied ever since. The **Calder** Court outlined four categories of ex post facto laws: (1) a law making criminal, and subject to punishment, an activity which was innocent when originally done; (2) a law aggravating a crime or making it a greater crime than it was when originally committed; (3) a law aggravating a crime's punishment; and (4) a law altering the rules of evidence to require less or different testimony than was required at the time of the commission of the crime so as to make easier the conviction of the offender. **Id.** at 390. **State ex rel. Olivieri v. State**, 2000-0172, p. 11 (La. 2/21/01), 779 So.2d 735, 742, cert. denied, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730, cert. denied sub nom. **Hutchinson v. Louisiana**, 534 U.S. 892, 122 S.Ct. 208, 151 L.Ed.2d 148 (2001).

Calder's fourth category resonates harmoniously with one of the principal interests that the Ex Post Facto Clause was designed to serve, fundamental justice. **Carmell v. Texas**, 529 U.S. 513, 531, 120 S.Ct. 1620, 1632, 146 L.Ed.2d 577 (2000). A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively

[2] "No State shall ... pass any ... ex post facto Law[.]" U.S. Const. art. I, § 10.

eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof. In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end. All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life. **Carmell**, 529 U.S. at 532-33, 120 S.Ct. at 1632-33.

Louisiana Constitution Article I, § 23 also prohibits the enactment of any ex post facto law.[3] Louisiana's Ex Post Facto Clause is patterned after the federal law and prohibits ex post facto laws which alter the definition of criminal conduct or increase the penalty. **State ex rel. Olivieri**, 2000-0172, 2000-1767 at pp. 15-16, 779 So.2d at 744.

In **State v. Harper**, 2007-0299 at pp. 2-7 (La. App. 1 Cir. 9/5/07), 970 So.2d 592, 594-98, writ denied, 2007-1921 (La. 2/15/08), 976 So.2d 173, the defendant was convicted of kidnapping S.M. on January 22, 2005. Following the offense, the police obtained witness statement forms signed

[3] "No ... ex post facto law ... shall be enacted." LSA-Const. art. I, § 23.

by Jammie Smith and Toyomi Johnson indicating that the defendant entered a residence, put a knife to S.M.'s throat, and stated he would cut her fifteen times if she did not go with him. **Harper**, 2007-0299, at p. 7, 970 So.2d at 597-98. At trial, however, Smith and Johnson denied that the defendant had a knife on the evening in question. **Harper**, 2007-0299 at p. 9, 970 So.2d at 599. On appeal, this court found the statements of Smith and Johnson admissible under LSA-C.E. art. 607(D)(2) to attack their credibility and also "not hearsay" and admissible under LSA-C.E. art. 801(D)(1)(a) (as amended in 2004) as substantive proof of the offense. **Harper**, 2007-0299 at p. 13, 970 So.2d at 601.

Article 801(D)(1)(a) was rewritten by 2004 La. Acts No. 694, § 1. Under the former provision, a statement was "not hearsay" if the declarant testified at the trial or hearing, subject to cross-examination concerning the statement, the statement was inconsistent with his testimony, was given under oath subject to the penalty of perjury at the accused's prior trial, and the witness was subject to cross-examination by the accused. The amended article declared a statement "not hearsay" if the declarant testified at the trial or hearing, subject to cross-examination concerning the statement, if the statement was, in a criminal case, inconsistent with his testimony, provided that the proponent had first fairly directed the witness's attention to the statement and the witness has been given the opportunity to admit the fact and where there existed any additional evidence to corroborate the matter asserted by the prior inconsistent statement.

Prior to trial, the defense moved to prevent the State from introducing prior inconsistent statements from S.L. and M.L., arguing that the introduction of prior inconsistent statements after the witness has admitted

the fact of the prior inconsistent statements was contrary to law. At the hearing on the motion, the defense argued that the offenses were alleged to have occurred prior to the "substantive change" made by the 2004 amendment of Article 801(D)(1)(a), and thus, the old law should govern the admissibility of the prior inconsistent statements at issue. The defense further argued that the prior inconsistent statements were inadmissible under the old law because they had not been made in court with the witnesses subject to cross-examination by the defendant. The State argued, under **Harper**, prior inconsistent statements under Article 801(D)(1)(a) occupied the same position formerly occupied by statements made in a prior judicial proceeding. The defense argued **Harper** did not address what would occur if the witness's attention was called to the statement and the witness admitted making the inconsistent statement.

The court denied the motion in limine, and the defense objected to the court's ruling. The defendant applied to this court for supervisory relief concerning the trial court's ruling, but the writ application was denied. **State v. Bernard**, 2007 KW 2309 (La. App. 1 Cir. 11/20/07) (unpublished).

In this post-trial appeal, judicial efficiency demands that this court accord great deference to its pretrial decision on admissibility, unless it is apparent, in light of the subsequent trial record, that the determination was patently erroneous and produced an unjust result. **State v. Haynes**, 99-1973, p. 9 (La. App. 1 Cir. 6/23/00), 762 So.2d 1247, 1253, writ denied, 2000-2243 (La. 6/15/01), 793 So.2d 1236.

A thorough review of the record convinces us that our pretrial determination in this matter was not patently erroneous and did not produce an unjust result. Initially we note the offense in **Harper** occurred after the 2004

amendment to Article 801(D)(1)(a). Accordingly, the decision did not involve any issue concerning whether application of the new law violated the ex post facto clauses of the state and federal constitutions. In any event, the trial court properly denied the motion in limine. The amended version of Article 801(D)(1)(a) was applicable to this case. It does not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor does it alter the degree, or lessen the amount or measure, of the proof that was made necessary to convict when the crime was committed. Article 801(D)(1)(a) is a competency of the evidence rule, rather than a sufficiency of the evidence rule. It regulates the mode in which facts constituting guilt may be placed before the jury. It does not govern the sufficiency of those facts for meeting the burden of proof. See **Carmell**, 529 U.S. at 546-47, 120 S.Ct. at 1640 ("The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained. Prosecutors may satisfy all the requirements of any number of witness competency rules, but this says absolutely nothing about whether they have introduced a quantum of evidence sufficient to convict the offender. Sufficiency of the evidence rules (by definition) do just that - they inform us whether the evidence introduced is sufficient to convict as a matter of law (which is not to say the jury *must* convict, but only that, as a matter of law, the case may be submitted to the jury and the jury may convict)."). (Emphasis in original.)

This assignment of error is without merit.

ADMISSIBILITY OF THE VIDEOTAPE OF A.B.

In his second assignment of error, the defendant argues the trial court erred in allowing the videotape of A.B. to be presented to the jury because she was too young to remember the details of being raped, and thus, must have been coached.

Prior to trial, the defense moved that the State be prohibited from calling A.B. as a witness because she was not competent to testify regarding activity that allegedly occurred between her birth and her third birthday. Following a hearing, the motion was granted on the basis of the videotaped statement of A.B. The State applied to this court for supervisory relief, and this court vacated the granting of the motion in limine and remanded for a determination of competency based upon the witness's demeanor on the witness stand. **State v. Bernard**, 2007 KW 2343 (La. App. 1 Cir. 11/21/07) (unpublished). Following a hearing, the trial court found A.B. competent to testify.

At trial, the State played a March 16, 2005 videotaped statement of A.B. for the jury. A.B. indicated she was five years old, but discussed events that had allegedly occurred when she was one year old. She claimed she had shown her mother some "very, very, tricky, bad games." She claimed "Ms. Trish" was a witch and A.B. had ridden on her broom. She claimed, "Mr. Al, Mr. Cruz, Poppa Jake, Uncle Paul, daddy, Pastor Lewis, and [M.L. and S.L.]" had stuck needles in her. She indicated that needles had been placed in her eyes. She indicated that "daddy" had also put needles in her toes. She claimed her bottom had bled from the needles. She claimed a needle, fork, and a knife were placed in her. She claimed ghosts had come

out when she played puzzles. She indicated that Uncle Paul and Poppa Jake had made her drink something "yuckie" that came from their "weenies." She further claimed that Poppa Jake, Uncle Paul, Mr. Chris, and [M.L. and S.L.] had put their "weenies" in her mouth. She also claimed that "daddy," Mr. Chris, and Uncle Paul, had videotaped her talking when she did not have clothes on. She claimed [M.L. and S.L.] were ten years old, Mr. Chris was eleven years old, Uncle Paul was twelve years old, and Poppa Jake was two years old. When asked how she could remember events that occurred when she was so young, she indicated "they" told everyone.

Louisiana Revised Statute 15:440.5 provides that the videotape of an oral statement of the "protected person"[4] made before the proceeding may be admissible if certain criteria are met. The defense did not argue that the videotape of A.B. failed to meet any of the listed criteria and made no objection when the State offered the videotape into evidence. An irregularity or error cannot be availed of after verdict unless, at the time the ruling or order of the court was made or sought, the party made known to the court the action that he desired the court to take, or of his objections to the action of the court, and the grounds therefor. LSA-C.Cr.P. art. 841; LSA-C.E. art. 103(A)(1).

Moreover, the defense's attacks on the competency of A.B. to testify concerning the defendant's alleged offenses presents an issue of the weight to be given to her testimony rather than the admissibility of the videotape itself. The admissibility of the videotape is governed by LSA-R.S. 15:440.1 et seq.; the weight to be given to the content of the videotape is a matter for the trier of fact.

[4] The definition of a "protected person" includes a person who is the victim of a crime and who is under the age of seventeen years. LSA-R.S. 15:440.2(C)(1).

This assignment of error is without merit.

REVIEW FOR ERROR

In his third assignment of error, the defendant requests that this court examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, regardless of whether such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Price**, 2005-2514, pp. 18-22 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

PROTECTIVE ORDER

Louisiana Revised Statute 15:440.6 requires a videotape of a child's statement admitted under LSA-R.S. 15:440.5 be preserved under a protective order of the court to protect the privacy of the child. Accordingly, it is hereby ordered that the videotaped statements of the victims be placed under a protective order. See **State v. Ledet**, 96-0142, p. 19 (La. App. 1 Cir. 11/8/96), 694 So.2d 336, 347, writ denied, 96-3029 (La. 9/19/97), 701 So.2d 163.

CONVICTIONS AND SENTENCES AFFIRMED.