NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 0511

STATE OF LOUISIANA

VERSUS

BUDDY MARVIN HICKS

Judgment Rendered: SEP 19 2008

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of Washington, Louisiana
Trial Court Number 06-CR1-95315

Honorable William J. Burris, Judge

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Buddy Marvin Hicks

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

WELCH, J.

The defendant, Buddy Marvin Hicks, was charged by grand jury indictment with three counts of aggravated rape, violations of La. R.S. 14:42. The defendant entered pleas of not guilty and was tried before a jury. The jury determined the defendant was guilty on all counts. The trial court subsequently sentenced the defendant on each count to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The trial court further ordered all sentences to be served concurrently with each other.

The defendant appeals citing the following assignments of error:

1. The trial court erred in allowing the juvenile in this case to testify at all much less in a separate room from the man she was accusing.

2. The trial court erred in allowing evidence of other crimes.

We affirm the defendant's convictions and sentences.

FACTS

In the latter part of 2005, Robert and Michelle D. and their three minor children, including five-year-old S.D., moved into a trailer park located off La. Highway 436 in Franklinton, Louisiana. The defendant was also a resident of this trailer park and had been a friend of the victim's family for a number of years. Oftentimes the three minor children would visit the defendant at his trailer without their parents.

Brenda F., another resident of the trailer park and close friend of the victim's family, observed S.D. "playing with herself" with her pants down. Brenda reported this incident to Michelle, S.D.'s mother. Brenda is also the mother of Angela D., the ex-wife of Frank D. (Robert's brother).

Angela testified that her mother told her what she saw S.D. doing and Angela questioned S.D. regarding where she learned such behavior. Although S.D. initially was reluctant to tell Angela because she feared she would "get in

trouble," she eventually indicated the defendant was the one who showed her such behavior. S.D. went on to tell Angela that the defendant had touched her vaginal area and made certain tongue gestures.

Angela had known the defendant for twenty-five years. When she was eleven years old, she had an incident with the defendant where he touched her buttocks and propositioned her. At trial, Angela stated that she had told Michelle that she did not trust the defendant being around children.

Detective Justin Brown of the Washington Parish Sheriff's Office investigated the allegations that were reported in this matter in the summer of 2006. Detective Brown arranged for S.D. to be interviewed at the Children's Advocacy Center (CAC). Detective Brown observed S.D.'s interview via closed-circuit television. Based on S.D.'s interview, Detective Brown obtained an arrest warrant for the defendant.

On July 5, 2006, Detective Brown arrived at the defendant's residence with the arrest warrant and placed him under arrest. After being taken to the investigator's office, the defendant was advised of and waived his **Miranda** rights and provided a statement wherein he admitted placing his mouth on S.D.'s vagina on three to four occasions beginning in November 2005. The defendant stated these incidents occurred while S.D. was at his residence, usually in the bathroom. The defendant admitted that his penis contacted S.D.'s anus on one occasion. The defendant further stated S.D. would not perform oral sex on him. The defendant added that he hoped he did not do any damage to S.D. and that he stopped his actions with her because he feared he would permanently damage her.

Bethany Case was accepted by the trial court as an expert in the fields of social work and forensic interviewing. Case conducted S.D.'s interview at the CAC. Case noted that when she attempted to address difficult topics regarding the allegations against the defendant, S.D. would change the subject and have to be

redirected. Case testified that during the interview, S.D. demonstrated knowledge of sexual acts. During this interview, S.D. stated that while at the defendant's residence, the defendant entered the bathroom, took off his clothing, told her to take off hers, and stuck his tongue in her. In response to Case's questions regarding what occurred in the bathroom, S.D. used the anatomical dolls and demonstrated apparent sexual intercourse. The video recording of S.D.'s interview was played for the jury.

S.D., who was seven years old at the time of trial, testified that the defendant had touched her vagina and placed his penis in her vagina when she lived in the trailer park. Later, under cross-examination by the defense counsel, S.D. denied that the defendant did anything to her. On rebuttal examination by the State, S.D. stated she told Case the truth about the defendant.

The defendant did not testify.

TESTIMONY OF VICTIM BY CLOSED-CIRCUIT TELEVISION

In his first assignment of error, the defendant contends that the trial court erred in allowing the victim in this case, a juvenile, to testify at all, much less in a separate room from the man she was accusing.[1] Specifically, the defendant argues that there was no testimony elicited at the motion hearing that specified his presence would cause specific trauma to S.D. The defendant asserts that the evidence adduced at this hearing reflected that the courtroom environment itself would be the source of the trauma.

On November 9, 2007, the State filed a motion to take S.D.'s testimony outside the courtroom, pursuant to La. Ch.C. art. 329. In support of its motion, the State contended that S.D. was seven years old; was very frightened of the defendant; would suffer serious emotional trauma if forced to face the defendant;

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[1] Despite the wording of the defendant's assignment of error, there is no argument taking issue with the trial court's determination that S.D. was competent to testify.

and without the special statutory procedure, would not be able to reasonably communicate with the court.

At the hearing on the motion, Debra Elaine Thomas, a social worker at Bogalusa Mental Health Clinic, testified on behalf of the State. Thomas was accepted as an expert in the field of social work. Thomas testified that S.D. was one of her patients and she had been seeing S.D. every three to four weeks since January 2006.[2] According to Thomas, S.D. never mentioned the defendant to her, nor had they discussed the allegations S.D. made against the defendant.

Based on her sessions with S.D., Thomas opined that S.D. would be traumatized by testifying in open court. According to Thomas, the least little change, such as putting S.D. in a setting such a large, open room like a courtroom with extra people, would cause S.D. to either not say anything, or exaggerate what occurred. Thomas stated that her opinion was based on her observations of S.D. and the way S.D. behaves in different environments. However, Thomas admitted that S.D. never expressed any fear of the defendant and had never mentioned the defendant to her.

Thomas stated that the letter from S.D.'s treating psychiatrist, Dr. David Sauls, indicated that he felt it would be very detrimental to S.D.'s mental health to be in open court. Thomas testified that she was aware S.D. had previously been diagnosed with bipolar disorder.

On its own motion, the trial court called Case, the forensic interviewer with the CAC who interviewed S.D. with regard to these allegations. Case's only contact with S.D. was the single interview at CAC. However, Case testified that during this interview, S.D. was easily distracted and that she attempted to avoid questions concerning the complaint against defendant. Case further testified that S.D.'s behavior, statements, and emotions during the CAC interview were

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[2] According to S.D.'s mother, Michelle, S.D. has epilepsy, ADHD, and bipolar disorder.

consistent with other victims of sexual abuse.

The trial court granted the State's motion under La. R.S. 15:283.[3] In granting the State's motion, the trial court specifically found that S.D. would be likely to suffer serious emotional distress if forced to give testimony in open court, and without such simultaneous televised testimony, S.D. would be unable to reasonably communicate her testimony in court. The trial court found that S.D. was under the age of fourteen and was a protected person within the meaning of La. R.S. 15:283.[4]

Louisiana Revised Statutes 15:283 provides in pertinent part:

> A. On its own motion or on the motion of the attorney for any party, a court may order that the testimony of a protected person who may have been a witness to or victim of a crime be taken in a room other than the courtroom and be simultaneously televised by closed circuit television to the court and jury, when the court makes a specific finding of necessity based upon both of the following:
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> (1) Expert testimony that the protected person would be likely to suffer serious emotional distress if forced to give testimony in open court.
>
> (2) Expert testimony that, without such simultaneous televised testimony, the protected person cannot reasonably communicate his testimony to the court or jury.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. This right provides two types of protections for a criminal defendant: the right to physically face those who testify against him and the right to conduct cross-examination. **Coy v. Iowa**, 487 U.S. 1012, 1017, 108 S.Ct. 2798, 2801, 101 L.Ed.2d 857 (1988). However, public policy considerations and necessities may take precedence over "face-to-face" confrontation. **Maryland v. Craig**, 497 U.S. 836, 849, 110 S.Ct. 3157,

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[3] The State filed its motion under La. Ch.C. art. 329; however, the language of La. R.S. 15:283 contains similar language regarding the requirements for allowing a protected person to testify via closed-circuit television.

[4] This statute was amended in 2007 and now applies to witnesses under the age of seventeen.

3165, 111 L.Ed.2d 666 (1990).

In **Maryland v. Craig**, the Supreme Court addressed the issue of whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside of the defendant's physical presence, by one-way closed-circuit television. Quite similar to the statutory scheme in place in Louisiana, Maryland had a statutory procedure allowing a judge to receive, by one-way closed-circuit television, the testimony of a child who is alleged to be a victim of child abuse. To invoke that statutory procedure, the trial judge must first determine that the testimony of the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate. See Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii)(1989).

In **Maryland v. Craig**, the United States Supreme Court found an exception for child witnesses in child abuse cases:

> Accordingly, we hold that, if the State makes an adequate showing of necessity, the [S]tate interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Maryland v. Craig, 497 U.S. at 855, 110 S.Ct. at 3169.

The Supreme Court went on to state that this finding of necessity must be a case-specific one. The trial court must hear evidence and determine whether the special procedure is necessary to protect the child witness from trauma **caused by the presence of the defendant**. It is not sufficient for the trial court to find that the witness needs protection from courtroom trauma generally. In addition, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than a mere nervousness or excitement or some reluctance to testify. **Maryland v. Craig**, 497

U.S. at 856, 110 S.Ct. at 3169.

In the present case, the witness called by the State, Thomas, testified that she had never discussed S.D.'s allegations against the defendant with S.D. Moreover, Thomas stated that S.D. had "never mentioned" the defendant to her. Thomas explained that she had previously discussed the detrimental effects of testifying in open court with S.D.'s psychiatrist, Dr. David Sauls.

The only other witness who provided testimony on this issue was Case, who interviewed S.D. at the CAC regarding the allegations. While Case testified that S.D. exhibited emotions and behavior consistent with other victims of sexual abuse, her testimony did not address what would be the effect of S.D. testifying in open court in the presence of the defendant. However, Case emphasized that during the CAC interview, S.D. avoided questions addressing the allegations against the defendant and had to be continually redirected to address that subject matter.[5]

Based on our review, we cannot say there was any case-specific evidence to prove the necessity of protecting S.D. from the trauma of testifying in the presence of defendant, as required by the right to confrontation guaranteed by the Sixth Amendment as interpreted in **Maryland v. Craig**. Thomas's testimony only addressed the prospect of S.D. testifying in any courtroom setting, and Case only met with S.D. once, in order to interview her for the CAC. Neither Thomas nor Case could provide direct testimony regarding any trauma they felt S.D. would experience by testifying in the presence of defendant. Accordingly, we find defendant's right to confrontation was violated by the failure of any of the evidence to address what effect, if any, the presence of defendant would have on S.D.

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[5] In the video of S.D.'s CAC interview, she describes the defendant as "mean."

The violation of a defendant's right to confrontation may be harmless error, and is to be analyzed by assuming that the damaging potential of "face-to-face" confrontation was fully realized, then asking whether the reviewing court may conclude that the error was nevertheless harmless beyond a reasonable doubt. The importance of the testimony of the witness in the State's case, whether it is cumulative, the presence or absence of evidence corroborating or contradicting the testimony, the extent of the cross-examination permitted, and the overall strength of the State's case are factors to be considered in determining whether the error was harmless. **State v. Welch**, 99-1283, pp. 6-7 (La. 4/11/00), 760 So.2d 317, 321-322.

In the present case, the evidence, other than the victim's testimony, consisted of testimony by Brenda, who stated she had seen S.D. "playing with herself" with her pants down. Angela also witnessed S.D. touching her genitals and when she asked S.D. where she learned that from, S.D. identified defendant as the person from whom she learned that behavior. Most importantly, the jury heard a tape of defendant's July 5, 2006 statement to the police wherein he admitted he attempted to persuade S.D. to perform sexual acts and placing his mouth on S.D.'s vagina three or four times while S.D. was at his residence, and that his penis contacted S.D.'s anus on at least one occasion.

Given the fact the jury heard defendant's admission to engaging in sexual activity with S.D., including oral sexual intercourse and allowing his penis to touch her anus, we conclude that the violation of his right to confrontation was harmless beyond a reasonable doubt. La. C.Cr.P. art. 921.

This assignment of error is without merit.

OTHER CRIMES EVIDENCE

In his second assignment of error, the defendant argues Angela's testimony regarding her prior experience with the defendant should have been excluded

because it was highly suspect and not really of a sexual nature.[6]

Louisiana Code of Evidence article 412.2 provides:

> A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.
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> B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.
>
> C. This Article shall not be construed to limit the admission or consideration of evidence under any other rule.

Louisiana Code of Evidence article 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

Angela testified that some twenty-five years earlier, when she was eleven years old, she was at the defendant's residence. According to Angela, her family was close with the defendant and his wife and the defendant was watching her, but his wife was not home. At her bedtime, Angela went into the defendant's stepdaughter's bedroom and laid down on a mattress on the floor to go to sleep. A short time later, the defendant entered the room and laid beside her. Angela was lying on her side, and the defendant was behind her. The defendant patted Angela on her buttocks. Angela asked, "Uncle Buddy, what do you want?" According to Angela, the defendant responded, "You know what I want. And it doesn't matter that you are on your monthly." Angela stated she began to cry and screamed out for the defendant's stepson who was also in the residence. When the stepson

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[6] Although the defendant argues the trial court should have granted a continuance so the defense counsel could prepare for this revelation, the defendant fails to appeal the denial of his oral request for a continuance.

entered the room, the defendant left.

The trial court held that the evidence was admissible on the basis that it reflected an act indicative of a lustful disposition toward children. However, the defendant contends that Angela came forward with this information a few days prior to trial and he had no time to prepare.

We agree with the trial court's finding that Angela's testimony illustrates a lustful disposition toward children on the part of the defendant. Clearly, the defendant's act of touching Angela's buttocks and making a reference to her menstrual cycle indicate a sexual motive. Regarding the timing of Angela's disclosure of this event to the prosecution, we note the defense counsel had ample opportunity to cross-examine Angela regarding her credibility at trial, and that such matters concern the weight of the evidence, as opposed to the admissibility of the evidence. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. See **State v. Verret**, 2006-1337, p. 6 (La. App. 1st Cir. 3/23/07), 960 So.2d 208, 214, writ denied, 2007-0830 (La. 11/16/07), 967 So.2d 520.

This assignment of error is without merit.

REVIEW FOR ERROR

The defendant asks this court to examine the record for any error under La. C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under La. C.Cr.P. art. 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. 1st Cir. 12/28/06), 952 So.2d 112, 123-125 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONCLUSION

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.