NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0972

STATE OF LOUISIANA

VERSUS

C.L.J.

Judgment Rendered: DEC 2 9 2011

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On Appeal from the Sixteenth Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
Docket No. 2008-176475

Honorable Lori A. Landry, Judge Presiding

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J. Phil Haney
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C.L.J.

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Pettigrew J. concurs.
Welch J. dissents and assigns reasons.

McCLENDON, J.

The defendant, C.L.J.,[1] was indicted for aggravated incest, in violation of LSA-R.S. 14:78.1. A jury convicted him for aggravated incest, and after the denial of posttrial motions, the defendant was sentenced to serve thirty-five years at hard labor, with twenty-five years of the sentence to be served without benefit of probation, parole, or suspension of sentence.[2] He appealed, arguing in five assignments of error that the trial court erred in denying posttrial motions, by limiting voir dire to only an hour per panel, and by finding that the state established race-neutral reasons for the exclusion of several prospective jurors. Finding no merit to the defendant's claims, we affirm the conviction and sentence.

The victim of this offense is the defendant's daughter, who was seven years old at the time of the defendant's arrest. The investigation began after the victim's mother noticed the victim had blood in her panties. This discovery was made on February 8, 2008, a Friday evening, and the victim's mother and grandmother took the victim to a pediatric clinic for evaluation early the next morning. The treating physician referred the victim to the emergency room of a local hospital for further examination and laboratory work.

While the victim, her mother, and grandmother waited at the hospital, the victim's aunt, her mother's sister, called to speak to the child. Until this time, the victim had repeatedly refused to explain what had happened. During the telephone conversation with her aunt, the victim disclosed that her father had touched her inappropriately. The police were promptly notified of the allegations of sexual abuse. An officer spoke to the victim at the hospital and referred her

[1] We reference the defendant only by initials in order to protect the identity of the victim. See LSA-R.S. 46:1844(W).

[2] The state filed a habitual offender petition on May 20, 2010, but this record does not indicate whether those proceedings have concluded. The state filed a motion to dismiss this appeal pending the adjudication and sentence, contending that since the judgment was not final, the trial court should not have granted an appeal, and further claiming this court's jurisdiction was questionable because of the ongoing habitual offender proceedings. Although the trial court was divested of jurisdiction once the order of appeal was entered, the code specifically provides that the court may impose a habitual offender sentence after an appeal is granted without affecting the jurisdiction of the court of appeal. LSA-C.Cr.P. art. 916(8). Accordingly, the state's motion was denied.

to child protection services for further questioning. In a videotaped interview with a child protection examiner, the victim disclosed that her father had been touching her "private" under her clothing since she was about six years old, sometimes using lotion, and that recently she was scratched by his fingernail and bled.

The victim testified on the state's behalf at trial, as did the investigating officer, the doctor who examined the victim in the emergency room, several family members, and the child protection interviewer. In her testimony at trial, the victim described how her father had touched her "in [her] private" which she identified as her genital area, while they were under the covers of his bed, and this conduct had occurred numerous times and at several locations. The taped interview by the child protection interviewer also was played for the jury. Finally, the state presented the testimony of the defendant's niece, now an adult, who testified that the defendant sexually molested her for several years, ending only after an act of sexual intercourse when she was sixteen years old resulted in her completely avoiding him. The defendant was charged with an additional count of incest involving this victim, but that charge was dismissed after the defendant was convicted of the acts involving his daughter. The defense presented no witnesses at trial.

DENIAL OF POSTTRIAL MOTIONS

In his first assignment of error, the defendant claims the trial court abused its discretion by denying his posttrial motions without a hearing. In his second assignment of error, the defendant claims the court erred by denying his posttrial motions because his "un-refuted" proffer established he was denied his right to testify in his own defense. These issues were briefed together in an argument in which the defendant claims he was deprived of his right to testify in his own defense and deprived of his right to present a defense because his attorney rested without calling him or his witnesses. The defendant's trial attorney withdrew after sentencing, and the defendant was represented by new counsel during the posttrial motions and on appeal.

The defendant's motion for new trial is based on LSA-C.Cr.P. art. 851(5), a claim that justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right. The question of whether the trial court abused its discretion in granting or refusing a new trial on the ground of serving the ends of justice presents a question of law, which should not be disturbed on review unless the trial court abused its great discretion. **State v. Guillory**, 10-1231 (La. 10/8/10), 45 So.3d 612, 615 (per curiam).

The standard for evaluating the court's discretion was explained in **Guillory** as follows:

> In deciding whether the trial court in the matter before us abused its great discretion in granting a new trial solely on La. Code Crim. Proc. art. 851(5), we keep in mind two precepts. One, in this provision the trial court is vested with almost unlimited discretion and its decision should not be interfered with unless there has been a palpable abuse of that discretion. State v. Bolivar, 224 La. 1037, 71 So.2d 559, 560 (1954). Two, "[t]he 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." (Citations omitted.)

Guillory, 45 So.3d at 615.

The defendant has a constitutionally protected right to testify on his own behalf. See **State v. James**, 05-2512 (La. 9/29/06), 938 So.2d 691 (per curiam). In **State v. Hampton**, 00-0522 (La. 3/22/02), 818 So.2d 720, 729-30, the Louisiana Supreme Court considered the defendant's claim that his express desire to testify had been abridged. Therein, testimony by trial counsel at a hearing conducted on the defendant's application for postconviction relief established that the defendant had asserted his desire to testify from the beginning of his relationship with counsel, and counsel acknowledged that he erroneously told the defendant that the determination of whether the defendant would testify was a decision that counsel should make. After finding merit in the defendant's claim that his right to testify had been abridged and concluding that the abridgment was not harmless error, the court developed standards to assist future courts in determining whether a defendant had waived his right to testify

or had chosen not to testify for strategic purposes. Adopting a framework first developed in the federal court system, the court established the following criteria:

> In determining whether a defendant's right to testify was violated or waived by his silence during trial, we can look to *Passos-Paternina v. United States,* 12 F.Supp.2d 231 (D.P.R.1998), for guidance. As a guideline, the *Passos-Paternina* court held:
>
> (1) absent extraordinary circumstances that should alert the trial court to a conflict between attorney and client, the court should not inquire into a criminal defendant's right to testify. The court should assume, that a criminal defendant, by not 'attempting to take the stand,' has knowingly and voluntarily waived his right;
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> (2) the court must consider whether the petitioner has waived his right to testify.... [The defendant can only] rebut that presumption ... by showing that his attorney caused him to forego his right to testify [(a) by alleging specific facts, including an affidavit by the defendant's trial counsel] from which the court could reasonably find that trial counsel 'told [the defendant] that he was legally forbidden to testify or in some similar way compelled him to remain silent ... '[(b) by demonstrating from the record] that those 'specific factual allegations would be credible ...'

Hampton, 818 So.2d at 729-30 (quoting **Passos-Paternina v. United States**, 12 F.Supp.2d at 239-40). "The criteria adopted in **Hampton** and derived from **Passos-Paternina** are therefore guidelines not only for prevailing on the merits of the claim but also for making the claim with sufficient particularity to withstand summary denial on the pleadings without further evidentiary proceedings." **James**, 938 So.2d at 691.

Herein, there was no indication to the trial court that the defendant and his counsel were in conflict over this issue, nor has the defendant presented an affidavit by trial counsel to that effect. The defendant submitted only the proffered testimony of his brother and father, who claimed the defendant wanted to testify, and his own affidavit in which he claimed that he had notified his attorney that he wanted to testify and swore to facts that disputed the other crimes testimony of his niece. However, without the affidavit by counsel required by **Hampton**, these items are not sufficient to rebut the presumption that the defendant voluntarily waived his right to testify.

The motion for new trial also alleged the defendant was denied the opportunity to present witnesses on his behalf because counsel refused to call

them. Initially, we note that defendant's allegations in this case essentially contend that counsel was ineffective and are not appropriate to review in this posture but are more appropriately raised on postconviction relief.[3] Generally, decisions relating to investigation, preparation, and strategy can not be reviewed on appeal, because the record contains insufficient information. See **State v. Bishop**, 10-1840 (La. App. 1 Cir. 6/10/11), 68 So.3d 1197, 1207-08. However, to the extent the defendant claims the court abused its discretion by denying his motion for new trial, we find no merit in his argument.

The proffered testimony of the defendant's father and brother claims the family was aware of a doctor who had reviewed the medical records and would have testified that there was no evidence of sexual assault. The defendant's father proffered testimony that the defendant's niece, who testified the defendant had molested her as a child, had been out of the country most of the time of the alleged molestation and she was not allowed to stay overnight at the defendant's house. Although it is not clear whether the victim's mother was present at the hearing where the testimony of the defendant's relatives was proffered, defense counsel stated that the victim's mother would have testified on the defendant's behalf that the child was never alone with the defendant during that time frame, especially around the time of the discovery of the blood. The victim's mother also would have testified that her mother and the defendant did not get along together and that her mother wanted custody of the victim.

We find no merit in the defendant's claim that the trial court abused its discretion by denying his motion for new trial. Neither of the family members, who claimed there was an expert witness who would testify there was no medical evidence of molestation, could identify the doctor whose testimony was sought. Moreover, the examining physician already had testified that a doctor would not conclusively diagnose sexual assault, but could only relate specific facts found during an examination. The bare claim that some unnamed doctor

[3] The defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924, et seq., in order to receive such a hearing.

would have testified that there was no physical evidence of abuse presents nothing for review.

Regarding the witness whose testimony was offered to impeach the credibility of the defendant's niece regarding her testimony that the defendant also had molested her, we note the niece was thoroughly cross-examined about her living situation during the time period in question. Finally, regarding the victim's mother's purported testimony that the defendant was never alone in the house with the victim, we note the victim's testimony placed her mother and siblings in the house at the time, although not in the bedroom with the defendant. Accordingly, we find no abuse of the "almost unlimited" discretion of the trial court in denying the defendant's motion for new trial without a hearing. See **Guillory**, 45 So.3d at 615.

In the defendant's second assignment of error, he claims the trial court erred by denying his motion for postverdict judgment of acquittal, arrest of judgment, and new trial because he proved he had been deprived of his right to testify and to present a defense.

The denial of the defendant's motion for a new trial claiming he was denied the right to testify and present witnesses has been previously addressed. For the same reason, we find no merit in the denial of his motion in arrest of judgment urging the same grounds.

A motion for postverdict judgment of acquittal tests the sufficiency of the evidence supporting the conviction. See LSA-C.Cr.P. art. 821. The defendant filed a motion alleging that the evidence was insufficient because the state had initially alleged that he attempted to engage in sexual intercourse with the victim but the medical testimony failed to prove those allegations. Although we do not believe this bare allegation actually raises a challenge to the sufficiency of the evidence, we note the state charged the defendant with aggravated incest, which is not necessarily a crime of penetration. The victim testified that her father repeatedly rubbed her "private", underneath her clothes. To the extent the defendant claims the evidence is insufficient because the state did not prove

he attempted to engage in sexual intercourse with the victim, this claim is wholly without merit.

In his third assignment of error, the defendant claims the trial court erred by denying his motion in arrest of judgment because the indictment was defective. Louisiana Code of Criminal Procedure article 859 provides the grounds for arrest of judgment, including the claim that the indictment is "substantially defective, in that an essential averment is omitted." The defendant's motion in arrest of judgment claims the bill of information was deficient because it did not allege that the victim was under the age of 13 and the defendant was over the age of 17. He further claims the bill was defective because it does not identify an alleged victim, the relationship of the victim to the defendant, does not identify the ages of the victim or the defendant, and does not allege which prohibited acts the defendant is alleged to have committed.

The time for testing the sufficiency of an indictment or bill of information is before trial by way of a motion to quash or an application for a bill of particulars. **State v. Campbell**, 06-0286 (La. 5/21/08), 983 So.2d 810, cert. denied, ___ U.S. ___, 129 S.Ct. 607, 172 L.Ed.2d 471 (2008). A defendant may not complain of technical insufficiency in an indictment for the first time after conviction, when the indictment fairly informed the accused of the charge against him and the defendant is not prejudiced by the defect. **State v. Templet**, 05-2623 (La. App. 1 Cir. 8/16/06), 943 So.2d 412, 420, writ denied, 06-2203 (La. 4/20/07), 954 So.2d 158. After the verdict a defendant ordinarily cannot complain of the insufficiency of an indictment "unless it is so defective that it does not set forth an identifiable offense against the laws of this state, and inform the defendant of the statutory basis of the offense." **State v. Robicheaux**, 412 So.2d 1313, 1321 (La. 1982); **State v. Templet**, 943 So.2d at 420.

Herein, the defendant did not file either a request for a bill of particulars or a motion to quash the indictment. Although the original bill of information did not identify the victim, the bill was amended in May 2008, to identify the victim

by the initials "A.J." and with a date of birth of November 6, 2000. Thereafter, in December 2008, the state obtained a grand jury indictment. Although the superseding indictment again does not identify the victim, her identity already had been revealed to the defendant through the amended bill of information.

The defendant claims the short-form indictment is not permitted for aggravated incest because it does not identify which of the numerous prohibited acts the defendant is alleged to have committed. The defendant's posttrial attack on the indictment does not claim he was unaware of the elements and statutory basis of the charge or of the victim's identity. Aggravated incest is not unique because it can be committed in more than one manner. The defendant's remedy was a request for a bill of particulars, and we find no merit in the denial of his motion in arrest of judgment.

LIMITATION OF VOIR DIRE

In his fourth assignment of error, the defendant claims the trial court erred by limiting voir dire to one hour per panel of prospective jurors. He claims this arbitrary limit deprived him of a full voir dire.

The purpose of voir dire examination is to determine qualifications of prospective jurors by testing their competency and impartiality. It is designed to discover bases for challenges for cause and to secure information for an intelligent exercise of peremptory challenges. **State v. Hall**, 616 So.2d 664, 668 (La. 1993). The scope of voir dire examination is within the sound discretion of the trial judge, and his ruling will not be disturbed on appeal in the absence of a clear abuse of discretion. However, although the trial judge is vested with discretion to limit the voir dire examination, he must afford wide latitude to counsel in the conduct of the examination to effectuate the accused's right to full voir dire of prospective jurors embodied in La. Const. art. 1, § 17 (A). **Hall**, 616 So.2d at 668-69.

The trial judge undertook the initial questioning of the jury panels, obtaining extensive information about the prospective jurors, their families, and their employment, as well as any history as a crime victim or relationship to the

state, defense, or witnesses. Thereafter, the defense and the state were each allowed one hour per panel of eighteen jurors to fully explore any areas for concern uncovered by the trial court's questioning or through additional questioning by counsel.

In **State v. Jones**, 596 So.2d 1360, 1367, (La. App. 1 Cir.), writ denied, 598 So.2d 373 (La. 1992), we warned against the imposition of arbitrary time limits on the grounds of the deprivation of the defendant's constitutional right to a full voir dire. Thereafter, in **State v. Strange**, 619 So.2d 817 (La. App. 1 Cir. 1993), we reversed the defendant's conviction after finding that a ten-minute time limitation for counsel coupled with limited questioning by the trial court, effectively denied the defendant his constitutional right to full voir dire.

In this case, the trial court extensively questioned the jurors before the attorneys' voir dire. Although counsel objected to the limit, the transcript of the voir dire does not reflect that counsel felt hurried or unable to effectively ascertain bases for challenges. Defendant lists two instances that he believes indicate trial counsel felt limited by the time restraints, but in both instances it appears counsel was merely checking to determine how much time remained, and on one of those occasions even commented that she had only a few more questions but wanted to know how much time was left. In discussing a limit of thirty minutes to question a smaller group for the last few jurors, the court noted that neither attorney had gone over the hour limit for questioning on the previous day, nor had the attorneys indicated more time was needed. Counsel clearly had a sufficient scope of questioning to allow her to exercise both peremptory challenges and challenges for cause. Accordingly, we find no merit to this assignment of error.

BATSON CHALLENGE

In his fifth assignment of error, the defendant argues the trial court erred in denying the **Batson** challenge to the state's use of a peremptory challenge to strike prospective juror Calvin Polidore.

In **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69

(1986), the supreme court adopted a three-step analysis to determine whether the constitutional rights of a defendant or prospective jurors had been infringed by impermissible discriminatory practices. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. **State v. Handon,** 06-0131 (La. App. 1 Cir. 12/28/06), 952 So.2d 53, 56.

To establish a prima facie case, the defendant must show: (1) the prosecutor's challenge was directed at a member of a cognizable group; (2) the challenge was peremptory rather than for cause; and (3) relevant circumstances sufficient to raise an inference that the prosecutor struck the venireperson on account of his being a member of that cognizable group. **Batson**, 476 U.S. at 96, 106 S.Ct. at 1723. Without an inference that the prospective jurors were stricken because they are members of the targeted group, the defendant is unable to make a *prima facie* case of purposeful discrimination and his **Batson** challenge expires at the threshold. **State v. Sparks**, 88-0017 (La. 5/11/11), 68 So.3d 435, 468-69.

After the state's seventh peremptory challenge, defense counsel urged a **Batson** challenge, noting that her client was a black male and that six of the state's seven challenges were for black venirepersons. The court noted the basis for the **Batson** challenge was "slight" but instructed the state to offer race-neutral reasons for the exclusion of the nonwhite jurors.

Although the defendant contends the state's reasons for the exclusion of six potential jurors were not race neutral, the defense brief mentions only Mr. Polidore by name in arguing this claim. Nevertheless, we note the state did offer race-neutral reasons for all of the prospective jurors removed by peremptory challenge. Both the state and the court indicated their records reflected that one of the jurors for whom the defense requested an explanation was actually a

white male. The state noted one of the challenged venirepersons indicated her brother had been convicted of armed robbery and she believed he had been mistreated. The state claimed two of the venirepersons had been excused because of their youth and degree of attentiveness, and the court noted that defense counsel herself had questioned at the time whether one of the challenged jurors was intoxicated. One of the venirepersons was challenged because the state felt she was inarticulate, and the assistant district attorney additionally noted that she believed she attended church with the prospective juror. In explaining why it challenged Mr. Polidore, counsel explained that she simply did not believe he would make a good juror. Although the court found the state's reasons sufficiently race neutral, defense counsel argues that Mr. Polidore should have been returned to the jury.

The state, in presenting race-neutral reasons for its excusal of prospective jurors, need not present an explanation that is persuasive, or even plausible; unless a discriminatory intent is inherent in the state's explanation after review of the entire record, the reason offered will be deemed race neutral. A reviewing court owes the trial court's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. **Handon**, 952 So.2d at 58.

During questioning, Mr. Polidore stated his belief that if a child were nervous, the child would lie not to get into trouble. In a case where a child's testimony is crucial, we find no inherent discriminatory intent in challenging a juror who could have discounted the victim's testimony because of his personal beliefs. The trial court did not err in denying the defendant's **Batson** challenge. We find no merit in this assignment of error.

For the foregoing reasons, we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

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STATE OF LOUISIANA

VERSUS

C.L.J.

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WELCH, J., dissents and assigns reasons.

I respectfully dissent. I believe denying defendant's post-trial motions without a hearing was error and I would remand the case for a hearing on the motions, particularly defendant's motion wherein he claims that he was denied his right to testify at trial.