**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 1588

STATE OF LOUISIANA

VERSUS

DERRICK GARRETT

**Judgment Rendered:** MAR 2 3 2007

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On appeal from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 393935

Honorable Patricia T. Hedges, Presiding

* * * * * *

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* * * * * *

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

**GUIDRY, J.**

The defendant, Derrick Garrett, was charged by grand jury indictment with aggravated rape, a violation of La. R.S. 14:42. The defendant pled not guilty. Following a jury trial, the defendant was found guilty as charged. The defendant filed motions for a postverdict judgment of acquittal and a new trial, which were denied. At sentencing, the defendant moved for a "JNOV"[1] which was denied. The defendant was sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. The defendant now appeals designating eight assignments of error.[2] We affirm the conviction, amend the sentence, and affirm as amended.

## FACTS

J.F., the victim, was an 82-year-old resident of Southerland Place, an assisted-living facility for the elderly in Mandeville, St. Tammany Parish. J.F. lived in the veranda, which was the Alzheimer's unit. There was also an assisted-living area, where the residents could, to some extent, care for themselves. Dr. Gregory Ciaccio, an expert in psychiatry, testified at trial that J.F.'s Alzheimer's disease was the cause of her dementia. Following a global assessment of her functioning, Dr. Ciaccio determined that J.F. had severe cognitive deficits. He testified that she was not capable of rational thoughts or of making rational decisions. He further testified that she did not have the ability to appreciate sexual acts and that she was not capable of consenting to sex.

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[1] The term "JNOV' is used with reference to a judgment notwithstanding the verdict. See La.C.Cr.P. art. 1811. The term is associated with civil proceedings and as far as this court is concerned, is not applicable to criminal proceedings.

[2] An original brief setting forth one assignment of error was filed on behalf of the defendant, and then a supplemental brief setting forth eight assignments of error was filed. The original assignment of error was duplicated in the first assignment of error in the supplemental brief.

On October 11, 2004, caregivers Tabitha May and Georgette Taylor were working in the Alzheimer's unit of Southerland Place when they noticed that J.F. was missing. Taylor searched the 100 hall of the unit, while May searched the 200 hall. As May passed room 200, she saw the defendant, a licensed practical nurse working that night, coming out of the bathroom of that room, zipping up his pants with a book under one arm.[3] When the defendant saw May, he said "when I got to go, I got to go." Resident Janet Fortier was the person who lived in room 200. As May and the defendant walked up the 200 hall, May asked him about J.F., whom the defendant said he had seen a few minutes ago. May testified that the defendant was nervous and "babbling about other stuff." She stated that the things he was saying about the hurricane, when they had to evacuate, were they paid right was out of character. Normally when a resident was missing, the nurse on duty would ask about the resident, but the defendant did not ask about J.F. As they walked, May looked in each room calling out J.F.'s name. When they got to room 210, the defendant continued in the same direction, likely back to the assisted-living area, while May turned around and went back down the hall alone toward Mr. Bob's room.[4] She checked Mr. Bob's room and found him sleeping on the couch. No one else was in his room.

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[3] Employees used the located bathroom on the 100 hall, not the 200 hall. The 100 hall had a bathroom for employees only.

[4] According to the trial testimony of the Southerland Place care manager, Deshone Cook, at some point, the supervisor, Angela Manders, told Cook to wash out J.F.'s mouth because she caught J.F. performing oral sex on Mr. Bob, a resident who was constantly trying to have relations with J.F. When asked how many occasions Cook had "heard anything like this before in reference to [J.F.]," Cook responded, "Many occasions." Cook testified that she had seen Mr. Bob touch J.F.'s breast, but J.F. did not seem to have any indication she knew what was going on. Regarding the habits of Mr. Bob and his sexual advances toward J.F., Cook testified:

> Q. Mr. Bob has a room on the veranda, doesn't he?
> A. Yes, he does.
> Q. When Mr. Bob would try and do things with [J.F.], where would he try and go?
> A. To his room.
> Q. Did Mr. Bob ever try and take [J.F.] to any other room?

As May went back up the hall, May heard Taylor scream her name. May found Taylor standing outside the door of room 200. May went inside the room and saw J.F. by the bathroom door fixing her clothes and pulling up her pants, which were down below her leg. May called her supervisor, who told May to call the director. May testified that the time from when she saw the defendant come out of room 200 to the time she saw J.F. in room 200 was less than five minutes. She further testified that when she was going up and down the hall, she saw no other residents.

Taylor testified that she found J.F. in the bathroom of room 200 struggling to pull up her pants and her briefs. According to Taylor, J.F. had never gone in room 200 before. Taylor stated that when she found J.F., J.F. looked scared. J.F. was holding herself around her lower stomach toward the vaginal area. J.F. was not able to tell Taylor anything. After May came into the room, Taylor and May took J.F. to her (J.F.'s) room. The defendant came by J.F.'s room, and when J.F. heard the defendant's voice, J.F. jumped. Taylor stated that she had never seen J.F. react that way or scared like that before. While Taylor was helping J.F. get undressed, Taylor noticed some blood in J.F.'s briefs.

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A. No, he hadn't.
Q. Did you ever know Mr. Bob to go into any other room to be with a woman?
A. No, I haven't.
Q. So the only place where Mr. Bob tried to do anything was in his own room?
A. Yes.
Q. Was Mr. Bob somebody who would wander into other people's rooms?
A. No, he wasn't.
Q. So would it in fact be unusual for Mr. Bob to have taken [J.F.] into, say, Ms. -- Room 200 on October 11 of 2004?
A. No, he wouldn't have took (sic) her into Room 200.
Q. If Mr. Bob would have taken her somewhere, where would he have gone?
A. He would have gone to his room, which was 203.
Q. From your observations, what sort of, I think Mr. Nunnery (defense counsel) used the term sexual favors, was Mr. Bob looking for?
A. Oral sex.
Q. But never any vaginal?
A. Never any vaginal.

By the time officers from the Mandeville Police Department arrived at Southerland Place, the defendant had clocked out and left. Officer Marco Nuzzolillo with the Mandeville Police Department testified that Southerland Place staff contacted the defendant requesting that he immediately return. The defendant was at a McDonald's restaurant about seven miles away from Southerland Place. The defendant indicated that he would return, but when he left the parking lot, he headed in a direction away from Southerland Place. Officer Perry Otillio with the Mandeville Police Department and deputies from the St. Tammany Parish Sheriff's Office stopped the defendant.

On that same evening, J.F. was brought to the hospital where Dr. Kevin Erwin, an emergency room physician, did a rape kit of J.F. He also examined J.F. to determine if she had been sexual assaulted. During his examination Dr. Erwin found a small vaginal tear. According to Dr. Erwin, the tear was not linear. Rather, it was the kind of tear that one would see with dilation of the entrance of the vagina. The tear was recent because the blood in the area was bright red, not dark, coagulated blood. On direct examination, Dr. Erwin was asked, "So basically she was spread too much and her skin tore?" He responded, "Yes." On cross-examination, Dr. Erwin testified that there were other possibilities other than penile penetration that could have caused the vaginal tear, such as fingers, an instrument, or a sex toy. Dr. Erwin indicated that he had heard that J.F.'s swabs, including vaginal, taken from the rape kit did not contain the defendant's DNA. Dr. Erwin stated it was possible that, following a rape, DNA would not be present if the victim did not scratch the assailant, if the assailant used a condom, or if there was no penile penetration. However, despite these possibilities, Dr. Erwin indicated that it was more probable that all of these

tests performed via a rape kit would yield a DNA profile. Dr. Erwin also testified under cross-examination that J.F.'s medical history indicated she had endometrial hyperplasia, a symptom of which is vaginal bleeding. On redirect examination, Dr. Erwin indicated that a reasonable explanation for why no ejaculate would be found in a rape victim would be if the perpetrator withdrew his penis before ejaculating. Dr. Erwin responded affirmatively when asked if it was possible that if someone placed his penis into a vagina and withdrew it, cells from the vagina would end up on the penis.

Joanie Wilson, a Louisiana State Police Crime Lab DNA analyst, testified that she obtained DNA samples from the defendant's underwear and from paper tissues obtained from the scene,[5] both of which contained the defendant's seminal fluid. On three separate stains on the defendant's underwear, Wilson performed a DNA extraction. Through a separation technique, she obtained a top, lighter layer known as an epithelial fraction. On this epithelial layer, Wilson found a mixture of J.F.'s and the defendant's DNA. In other words, J.F.'s DNA was present in the stains found on the defendant's underwear. In reading from her report in reference to a particular stain, Wilson stated that the "DNA profile from the epithelial fraction from the cutting of stain S-3 from the underwear was 3.22 billion times more likely to be a mixture of DNA from [J.F.] and Derrick Garrett than a mixture of DNA from Derrick Garrett and a randomly selected individual." Wilson further testified that the mixture came from only two people and that she found no evidence of a third person. When asked what result she would expect if a penis inserted into a vagina were withdrawn and then swabbed, Wilson stated she would expect to get the female profile mixed in with the male profile. On the piece of tissue tested, Wilson stated

[5] The paper tissue was found in the trash can in the bathroom of room 200.

that the probability of finding the same DNA coming from a randomly selected individual other than the defendant was approximately one in 1.75 trillion.

The defendant did not testify.

**ASSIGNMENT OF ERROR NO. 1**

In his first assignment of error, the defendant argues that the evidence was not sufficient to support the verdict of aggravated rape. Specifically, the defendant contends that the State presented no credible evidence of penetration or sexual assault of J.F. since neither his semen nor DNA was found in J.F.'s vaginal area. Further, Dr. Ronald Acton, a University of Alabama professor teaching in several departments, including the departments of microbiology and genetics, who was accepted as an expert in the field of forensic science and DNA analysis, testified on behalf of the defense and excluded J.F. as a donor of the mixture extracted from the defendant's underwear.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this Court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. C.Cr.P. art. 821(B); State v. Mussall, 523 So.2d 1305, 1308-1309 (La. 1988). The *Jackson* standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that, in order to convict, the factfinder

must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. State v. Patorno, 2001-2585, p. 5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statute. 14:42 provides in pertinent part:

> A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> * * * *
>
> (6) When the victim is prevented from resisting the act because the victim suffers from a physical or mental infirmity preventing such resistance.
>
> * * * *
>
> C. For purposes of this Section, the following words have the following meanings:
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> * * * *
>
> (2) "Mental infirmity" means a person with an intelligence quotient of seventy or lower.[6] [Footnote added.]

Louisiana Revised Statute 14:41 provides in pertinent part:

> A. Rape is the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent.
>
> B. Emission is not necessary, and any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime.

Aggravated rape is a general intent crime. State v. McDaniel, 515 So.2d 572, 575 (La. App. 1st Cir. 1987), writ denied, 533 So.2d 10 (La. 1988). General criminal intent is present whenever there is also specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure

[6] The State's expert witness, Dr. Raphael Salcedo, a forensic psychologist, testified that J.F. had an IQ of 54.

to act. La. R.S. 14:10(2). The trier of fact is to determine the requisite intent in a criminal case. State v. Crawford, 619 So.2d 828, 831 (La. App. 1st Cir.), writ denied, 625 So.2d 1032 (La. 1993).

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. State v. Taylor, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932.

When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. State v. Moten, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). The defendant's hypothesis of innocence was based on the theory that J.F. engaged in sexual activity with Mr. Bob and that Mr. Bob attempted to insert his fingers into J.F.'s vagina. Following this, J.F. wandered into room 200 by mistake shortly after the defendant had used the bathroom in that room.

Dr. Acton reviewed the scientific analysis report prepared by Wilson, and testified that he disagreed with the interpretation of the DNA evidence extracted from the S-2 stain from the defendant's underwear. Whereas Wilson determined that J.F. could not be excluded as one of the donors of the DNA in the mixture obtained from the epithelial fraction, Dr. Acton found that J.F.'s DNA was not consistent with what was found in the

mixture. In other words, based on a lack of alleles[7] consistent with the genetic makeup of J.F.'s DNA profile in the mixture, there is a lack of evidence that J.F. contributed to that stain. Further, Dr. Acton stated that, while the defendant was a possible contributor to the mixture, he was not the only possible contributor. There were many other possibilities of individuals who could have contributed to that DNA mixture. Dr. Acton's conclusions were that, since alleles were missing, either J.F. was not one of the contributors or the test was faulty.

The State recalled Wilson as a rebuttal witness. Wilson noted that in the S-2 stain used and discussed by Dr. Acton, there were alleles that were not there. The sample was a low sample, so some of the peaks were below her detectable threshold. However, the alleles that were present were not inconsistent with either the defendant or J.F. Also, nothing in the alleles that were present indicated a third party. Wilson reiterated her previous testimony that on the epithelial fraction of the S-3 stain, all of the alleles were present from both the defendant and J.F. After going through all thirteen locations matching the alleles, Wilson stated that the DNA profile of the S-3 stain was 3.22 billion times more likely to be a mixture of DNA from J.F. and the defendant than a mixture of DNA from the defendant and a randomly selected individual.[8]

The testimony elicited at trial established that shortly after the defendant was seen coming out of the bathroom in room 200 zipping up his pants, J.F. was found in that bathroom struggling to pull up her pants. According to May, the defendant was acting nervous and out of character.

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[7] According to Dr. Acton, there were at least four loci where either one or both alleles possessed by J.F. were not in the evidence.

[8] The S-3 stain information was discussed via a chart exhibit labeled Exhibit 9D-E. The chart that the defense used was Exhibit 9C-E, wherein some of the alleles were below the detectable threshold. Exhibit 9C-E referenced the S-2 stain.

According to Taylor, when she found J.F., J.F. looked scared and was holding herself around her lower stomach toward the vaginal area. While Taylor was helping J.F. get undressed, Taylor noticed some blood in J.F.'s briefs. Shortly thereafter, J.F. was taken to the hospital where, following a physical examination, it was determined that she had a small vaginal tear. Paper tissue found in the trash can of the bathroom in room 200 and the defendant's underwear were taken into evidence and submitted for DNA testing. The tissue and the underwear both contained seminal fluid from the defendant. The DNA found in the underwear contained a mixture of both the defendant's DNA and J.F.'s DNA.

In finding the defendant guilty, it is clear the jury rejected the defendant's hypothesis of innocence that Mr. Bob had sexual relations with J.F. Shortly before J.F. was found in the bathroom, Mr. Bob was found in his room sleeping on the couch. The only other person seen during the search for J.F. was the defendant. The guilty verdict reflects the jury's reasonable conclusion that J.F.'s physical condition upon being found, i.e., scared and in pain with a vaginal tear, coupled with the scientific evidence introduced at trial, was sufficient to establish the elements of aggravated rape, specifically the element of penetration. Louisiana Revised Statute 14:41(B) provides that "[e]mission is not necessary" and that "any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime." See State v. Rives, 407 So.2d 1195, 1197 (La. 1981). That the jury chose to believe one expert witness over another is an issue of credibility.[9] In the absence of internal

[9] There is also the possibility that the testimony of the two expert witnesses on the DNA evidence was not necessarily in conflict. The focus of Dr. Acton's testimony was on the sample from the S-2 stain. Dr. Acton suggested that the S-2 stain was missing alleles and that the test was inconclusive. Wilson concurred with the finding of the missing alleles on the S-2 stain. However, Wilson's testimony in both the State's case-in-chief and rebuttal addressed her findings regarding the S-3 stain.

contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. State v. Thomas, 2005-2210, p. 8 (La. App. 1st Cir. 6/9/06), 938 So.2d 168, 174.

The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. State v. Quinn, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See State v. Mitchell, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83.

After a thorough review of the record, we find that the evidence supports the jury's verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of aggravated rape.

This assignment of error is without merit.

**ASSIGNMENT OF ERROR NO. 2**

In his second assignment of error, the defendant argues that his due process and fair trial rights were violated when he was not permitted to testify at trial on his own behalf.

Following his conviction, the defendant addressed the trial court at sentencing. In pertinent part, the defendant stated, "When I got to that unit and I walked on the unit -- and, believe me, I wanted to testify, because I wanted to correct every lie that they told." At no time during the trial did the defendant object or complain about his right to testify. There is nothing in the entire trial record to suggest that the defendant's alleged desire to testify was rebuffed by his counsel or the trial court. The defendant's

postconviction conclusory allegation is insufficient to rebut the presumption arising from his silence at trial that he waived his right to testify. If the defendant is suggesting that he was forbidden to testify or in some way compelled to remain silent, he must allege specific facts and point to record evidence to support his claim. See State v. James, 2005-2512 (La. 9/29/06), 938 So.2d 691 (per curiam). Having failed to do this, the defendant has made no showing that his right to testify was violated.

Accordingly, this assignment of error is without merit.

**ASSIGNMENT OF ERROR NO. 3**

In his third assignment of error, the defendant argues that his due process and fair trial rights were violated. Specifically, the defendant contends that his court cases were improperly combined and consolidated and that the record is not complete.

The defendant was allegedly originally charged with attempted aggravated rape, which was docketed as case number 389636.[10] Following the grand jury's indictment for aggravated rape, the case was docketed as case number 393935.

Under La. Const. art. I, § 19, no person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based on a complete record of all evidence on which judgment is

[10] Both the State and the defendant in their respective supplemental briefs state that the defendant's initial charge was attempted aggravated rape. While it is clear from the record that the defendant was charged with a crime and not arraigned prior to the filing of the grand jury indictment, it is not clear that the charge was attempted aggravated rape. The grand jury indictment for aggravated rape was filed March 16, 2005. Prior to this date on October 22, 2004, the defendant filed several motions, including a motion for preliminary examination and a motion for discovery, both of which indicate the defendant had been charged with aggravated rape. Neither of these motions had a docket number. Above the space where a docket number would normally be found were the typed-in words "No Bill Filed." It appears, thus, that prior to the filing of the grand jury indictment, the defendant was charged with aggravated rape. We also note that on the motion to set bail, also filed on October 22, 2004, the docket number appears to be 32679. On January 3, 2005, the defendant filed a motion to compel. The original docket number appearing on this motion - 389636 - appears to be scratched through, and the new docket number - 393935 - had been written in.

based. The defendant alleges that there is nothing in the record relative to case number 389636, thereby making it impossible to know what motions were filed and argued therein and whether they are relevant to the instant matter. The defendant further alleges that there is no transcript from the July 28, 2005 motions hearing, although the minute entry from that date references both case numbers. Accordingly, the defendant is unaware of what information may be contained in the first court record and whether any of those documents are exculpatory to the instant matter.

Initially, we note that the defendant failed to lodge any objection at trial regarding this issue. See La. C.Cr.P. art. 841(A). If the defendant had concerns about prior motions being incorporated into the instant matter, he had the opportunity to object. Instead, when counsel discussed on the record with the trial court certain discovery issues, the prosecutor asked if he was correct that all of the motions and discovery in the prior proceeding would apply to the new file in the current proceeding. Defense counsel responded, "No problem," and the trial court so ordered.

Further, we have found that the record before us contains various motions presumedly filed in the first proceeding, or, at the very least, not filed subsequent to the new proceeding. This is evident because, as discussed in footnote 8, these motions were filed on October 22, 2004, which was prior to the filing of the grand jury indictment in the instant matter. Aside from these motions, it is unclear what pretrial motions, if any, the defendant is referring to. Regardless, there has been no showing that any pretrial proceedings that are not transcribed included rulings on evidence ultimately presented at trial. As an appellate court, we have no authority to receive or review evidence not contained in the record. If defendant is seeking to prove the State failed to provide him with exculpatory

information, or that he had ineffective assistance of counsel,[11] his proper remedy is by post-conviction relief, wherein an evidentiary hearing could be conducted if necessary.[12] See State v. Dilosa, 2001-0024, pp. 18-20 (La. App. 1st Cir. 5/9/03), 849 So.2d 657, 672-673, writ denied, 2003-1601 (La. 12/12/03), 860 So.2d 1153.

**ASSIGNMENT OF ERROR NO. 4**

In his fourth assignment of error, the defendant argues he was denied his right to effective assistance of counsel. Specifically, the defendant contends that defense counsel was ineffective for the following: failure to object to arraignment after the jury was sworn; failure to prepare for trial and jury selection; and for lack of knowledge of criminal defense and procedure.

In Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the "inquiry must be whether counsel's assistance was reasonable considering all the circumstances." State v. Morgan, 472 So.2d 934, 937 (La. App. 1st Cir.

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[11] In his brief, the defendant states, "Defense counsel also had a duty to ensure that the records in these two matters, if reliant upon one another, were combined into an adequate record." It appears, thus, that the defendant is suggesting that there was ineffective assistance of counsel regarding this issue.

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

1985) (quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. State v. Robinson, 471 So.2d 1035, 1038-1039 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

A claim of ineffective assistance of counsel is more properly raised by an application for postconviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. State v. Carter, 96-0337, p. 10 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438. The record is sufficient regarding the defendant's allegation that defense counsel failed to object to improper arraignment procedure. We address this issue only.

At the start of the trial, prior to the first witness being called, the defendant was arraigned and pled not guilty. The trial court informed the defendant that he was entitled to a 30-day delay before trial following arraignment. The defendant informed the court that he was waiving any delays he may be entitled to and that they were ready to proceed to trial.

The defendant expressly waived his delays. Moreover, he made no objection at trial that his arraignment was untimely. Any irregularity in the arraignment is waived if the defendant pleads to the indictment without objecting thereto. La. C.Cr.P. art. 555. If there was a defect in the arraignment, the defendant failed to show that any prejudice resulted. His claim, therefore, of ineffective assistance of counsel as to this issue must fall.

All other allegations of ineffective assistance of counsel raised in the defendant's brief cannot be sufficiently investigated from an inspection of

the record alone. Defense counsel's decision to file certain motions, how he examined witnesses including questions he asked and did not ask, and his selection of jury members could all have involved matters of trial preparation and/or strategy.[13] Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond what is contained in the instant record, could these allegations be sufficiently investigated.[14] Accordingly, these allegations are not subject to appellate review. See State v. Albert, 96-1991, p. 11 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1363-1364.

**ASSIGNMENT OF ERROR NO. 5**

In his fifth assignment of error, the defendant argues that his due process and fair trial rights were violated when he was denied the right to confront his accuser.

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[13] The defendant's alleged instances of ineffective assistance of counsel are extensive. Under the portion of his supplemental brief entitled "Trial counsel failed to adequately prepare for trial," the defendant lists eight instances of ineffective assistance, including filing a motion for *Oyer*, which has not been used in criminal practice for several years; indicating at several points throughout trial that he wanted to "move this along," potentially waiving important argument by the defense; declining to view evidence directly relevant to witness credibility, namely personnel records from the Mandeville Police Department concerning the sheriff's deputies; and failing to follow up on his motion to determine the competency of the victim. Under the portion of his supplemental brief entitled "Trial counsel failed to prepare for voir dire selection," the defendant contends defense counsel asked no questions of any relevance to the jurors who ultimately served, nor did he attempt to determine their ability to be fair and unbiased. The defendant then lists each juror, followed by the alleged pertinent details. For example, "Juror Carriere watches Law & Order on television, and only reads the Bible and Biblical books"; "Juror Fuzette stated that her first cousin was a Sheriff's Deputy and that she went to high school with Sheriff Jack Strain. She worked as a science educator for programs for kids"; and "Juror Swan has a close aunt with Alzheimer's. She is a teacher and reads Bible stories. Her husband was in security at his place of employment, and her mother recently was put in a nursing home for rehabilitation. Her sister-in-law is a nurse." Under the portion of his supplemental brief entitled "Trial counsel displayed his clear lack of criminal law and procedure throughout trial," the defendant lists four instances of ineffective assistance, including asking a series of inappropriate questions to each state witness concerning the "smell of sex"; and complimenting the Mandeville Police Department on their chain of custody. Under the final portion of his supplemental brief regarding this assignment of error, the defendant asserts that defense counsel filed a motion for speedy trial when he clearly was not ready to proceed to trial.

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

The defendant asserts in his brief that the entire trial process was completed and he was convicted without a determination of the alleged victim's competency and without her being called to testify. This assertion is erroneous. At trial, on cross-examination, Dr. Ciaccio testified that J.F. was incapable of testifying at trial, and defense counsel concurred:

> Q. Participating in this trial. Are you saying she's 100 percent incapable of testifying or in any way participating in this trial?
>
> A. I would say yes.
>
> Q. And we concur with you. We do. We concur with you. We think she's incapable too. I've gone through a stack of your medical records. I referred to a physician myself and we have no problems with that. She's completely incapable of participating in this trial.

Later during trial, the defendant stipulated that J.F. was incompetent to testify and specifically waived his right to confront his accuser. Following is the relevant portion of the colloquy between defense counsel and the trial court:

> Mr. Nunnery [defense counsel]: I never said the need for the jury to see [her]. In fact I've been stipulating here all day that she's 100 percent incompetent. We have no problem with that. We don't need to confront her. And we can't confront her anyway if she's incompetent.
>
> By the Court: So is it my understanding that at this point you are -- everybody may sit down -- that you are stipulating that if [J.F.] were to be brought into the courtroom, that Mr. Garrett's right to confront would be useless since she is incompetent and would not be able to answer any questions anyway; therefore, he is not raising any objection to her not being brought to the courtroom and is not raising the issue of violating his right to confront his accuser?
>
> By Mr. Nunnery: Absolutely, Your Honor. We'll go on record with that, exactly as you have stated it. And the only other -- there would be no probative value outside of that to bring her in here.

The defendant did not object to the finding of the State's expert witness that J.F. was incompetent to testify. Moreover, the defendant

stipulated to J.F.'s incompetence and waived his right to confront her. Accordingly, this assignment of error is without merit.

**ASSIGNMENT OF ERROR NO. 6**

In his sixth assignment of error, the defendant argues that his due process and fair trial rights were violated. Specifically, the defendant contends that the trial court committed reversible error when it provided erroneous jury instructions at the close of trial.

The defendant asserts three errors: the trial court's definition of stipulations[15] removed the role of fact finder from the jury; the trial court failed to "emphasize" the responsive verdict of "not guilty";[16] and the trial court read the entire aggravated rape statute, improperly reducing the State's burden of proof.[17]

The defendant failed to object to the jury instructions. Accordingly, any such claim on appeal is waived. See La. C.Cr.P. arts. 801(C) and 841(A); see State v. Parker, 98-0256 (La. 5/8/98), 711 So.2d 694, 695 (per curiam).[18]

This assignment of error is without merit.

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[15] "Stipulations and agreed facts: When the district attorney and the attorney for the defendant stipulate or agree to the existence of a certain fact or facts, you must accept such stipulated or agreed fact or facts as conclusively proved." The defendant asserts that the trial court's instruction to accept that fact as "conclusively proven" removes the role of fact finder from the jury, alleviating the burden of the State.

[16] The trial court listed all of the responsive verdicts, including "not guilty." It further stated, "If the State has failed to prove beyond a reasonable doubt that the defendant is guilty of the offense charged or of any of the lesser included offenses, the form of your verdict should be: We, the jury, find the defendant not guilty."

[17] Both the prosecutor and defense counsel agreed to the trial court's reading of La. R.S. 14:42 in its entirety.

[18] The failure to object notwithstanding, we find nothing erroneous with these jury instructions.

## ASSIGNMENT OF ERROR NO. 7

In his seventh assignment of error, the defendant argues that his right to due process was violated when the State committed prosecutorial misconduct by misrepresenting facts to the jury.

The defendant asserts two instances of misconduct in the prosecutor's opening statement. In the first instance, the prosecutor stated, "Dr. Erwin also used what's called a Woods lamp which is an alternate light source to look for possible evidence of biological specimens. The Woods lamp indicated that there was some sort of biological substance in that area."

The defendant contends that the results of the DNA did not support this statement, and the prosecutor misrepresented the facts to make a stronger point to the jury. Although the misstatement is later "somewhat clarified," according to the defendant, the State improperly quoted test results to sway the jury.

In the second instance, the prosecutor stated:

> What I believe you're going to hear from Ms. Wilson is that when she did an additional examination of the samples from Mr. Garrett's underwear, she determined that there was a greater percentage of female DNA to male DNA, and that that would increase the likelihood of penile oral or vaginal contact between [J.F.] and Mr. Garrett.

The defendant contends that while the statement by Ms. Wilson is an unsupported conclusion, the State presented the information as if it conclusively matched J.F.'s DNA to female DNA found in the defendant's underwear. Although not supported by DNA, the defendant maintains, the State argued that because female DNA not linked to J.F. was found in the defendant's underwear, it was more likely that penetration actually occurred.

The prosecutor's opening statement is not evidence and has no probative force. The defendant has not shown, nor does the record indicate, that he suffered any clear and substantial prejudice from the remarks. In

addition, there is no indication of prosecutorial bad faith, as the State made every effort to admit evidence at trial relative to the allegedly objectionable portions of its opening statement. See State v. Maillian, 464 So.2d 1071, 1075 (La. App. 1st Cir.), writ denied, 469 So.2d 982 (La. 1985).

This assignment of error is without merit.

**ASSIGNMENT OF ERROR NO. 8**

Under this assignment of error, the defendant asks that this Court examine the record for patent error. This Court routinely reviews the record for 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 error review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. See State v. Allen, 94-1941, p. 11 (La. App. 1st Cir. 11/9/95), 664 So.2d 1264, 1273, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. Our review of the record reveals one error.

Generally whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. La. R.S. 14:42 (D)(1). In sentencing the defendant, the trial court failed to provide that the sentence is to be served at hard labor. Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the proceedings without inspection of the evidence, La. C.Cr.P. art. 920(2) authorizes consideration of such an error on appeal. Further, La. C.Cr.P. art. 882(A) authorizes correction by the appellate court.[19] We find that correction of this illegal sentence does not involve the exercise of sentencing discretion and, as such, there is no reason why this Court should not simply amend the sentence. Accordingly, since a

[19] "An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review." La. C.Cr. P. art. 882(A).

sentence at hard labor was the only sentence that could be imposed, we correct the sentence by providing that it be served at hard labor.

**CONVICTION AFFIRMED; SENTENCE AMENDED, AND AS AMENDED AFFIRMED.**