NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 2183

STATE OF LOUISIANA

VERSUS

DINO JAY SCHWERTZ

Judgment Rendered: MAY - 7 2010

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 449563

Honorable William J. Crain, Judge Presiding

* * * * * *

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* * * * * *

BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

Downing J. D. concurs

McCLENDON, J.

Defendant, Dino Jay Schwertz, was charged by grand jury indictment with three counts of aggravated rape (counts 1-3), in violation of LSA-R.S. 14:42, and one count of molestation of a juvenile (count 4), in violation of LSA-R.S. 14:81.2. He pleaded not guilty. Prior to trial, counts 1 and 4 of the indictment were severed from the remaining charges. Defendant was tried by a jury on counts 1 and 4 and was convicted as charged. Defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on count 1 and twenty years on count 4. The trial court ordered that the sentences be served consecutively. The state filed a multiple offender bill of information seeking to have defendant adjudicated and sentenced as a habitual offender. The trial court found defendant to be a second-felony habitual offender and resentenced him to twenty years imprisonment at hard labor on count 4. The court again ordered that the sentence be served consecutive to the life sentence imposed on count 1.

Defendant now appeals urging the following five assignments in a counseled brief:

1. The trial court erred in denying defendant's challenges for cause of jurors Ms. Primeaux and Mr. Mosbey, forcing the defense to use a peremptory challenge on Ms. Primeaux and in the case of Mr. Mosbey, forcing the defense to have him on the jury.

2. The trial court erred in failing to find that the state violated the discovery rules and in allowing the state to repeatedly use a tape recorded statement of the alleged victim that they had not provided to the defense nor made the defense specifically aware of prior to trial.

3. The trial court erred in denying the motion to recuse and the motion for change of venue.

4. The evidence was insufficient to sustain the jury's verdicts.

5. The trial court imposed excessive, consecutive sentences.

In a separate pro se brief, defendant again challenges the sufficiency of the state's evidence in support of the convictions. Finding no merit in the assigned errors, we affirm defendant's convictions, habitual offender adjudication and sentences.

FACTS

In March 2008, N.C.[1], an eight-year-old third grader at Abney Elementary School (Abney) in Slidell, Louisiana, advised his mother that the janitor at his school touched him inappropriately in the school bathroom. N.C.'s mother immediately reported the matter to the police. In an interview with Bethany Case of the Children's Advocacy Center, N.C. stated defendant touched his penis and his buttocks with his hand.

In March 2008, another incident of sexual abuse by the janitor at Abney Elementary School was reported. J.B., a special-education student, told his father that the janitor touched him inappropriately inside the school restroom. J.B.'s father tape-recorded the verbal disclosure and immediately contacted the police to report the matter. J.B. later told Jobeth Rickles, a forensic interviewer at the Children's Advocacy Center, that the janitor anally raped him inside the school restroom on more than one occasion.

Defendant worked as a janitor at Abney Elementary School. In connection with the police investigation of the sexual abuse allegations, both N.C. and J.B. identified defendant, from a photographic lineup, as the janitor who sexually abused them. Defendant was arrested and charged with the aggravated rape of J.B. and molestation of N.C.

DENIAL OF CHALLENGES FOR CAUSE

In his first assignment of error, defendant contends that the trial court abused its discretion in denying the defense challenges for cause on prospective juror Linda Primeaux and juror Brian Mosbey. He argues that the trial court's erroneous denial of his cause challenges, causing him to expend a peremptory challenge to exclude Ms. Primeaux and to accept Mr. Mosbey as a juror on the case, warrants reversal of his convictions and sentences.

Both the federal and state constitutions provide a criminal defendant the right to be tried by an impartial jury of his peers. U.S. Const. amend. VI; LSA-

[1] In accordance with LSA-R.S. 46:1844W, the victims herein are referenced only by their initials.

Const. art. 1, § 16. Louisiana Code of Criminal Procedure article 797 provides the grounds for challenges for cause. The article states, in pertinent part:

> The state or the defendant may challenge a juror for cause on the ground that:
>
> * * * *
>
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;
>
> * * * *
>
> (4) The juror will not accept the law as given to him by the court[.]

When a defendant exhausts all of his peremptory challenges, a trial court's ruling that erroneously denies a defendant's challenge for cause deprives said defendant of his constitutional and statutory rights and therefore requires reversal. See **State v. Jacobs**, 99-1659, p. 5 (La. 6/29/01), 789 So.2d 1280, 1284; **State v. Robertson**, 92-2660, p. 3 (La. 1/14/94), 630 So.2d 1278, 1280-81. To prove that there has been error warranting the reversal of the convictions and sentences, defendant need only show (1) the erroneous denial of a challenge for cause; and (2) the use of all of his peremptory challenges. See **State v. Lutcher**, 96-2378, p. 5 (La.App. 1 Cir. 9/19/97), 700 So.2d 961, 966, writ denied, 97-2537 (La. 2/6/98), 709 So.2d 731.

A refusal by a trial court to excuse a prospective juror on the ground that he is not impartial is not an abuse of discretion where, after further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. **State v. Copeland**, 530 So.2d 526, 534 (La. 1988), cert. denied, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989). However, the trial court should sustain a challenge for cause despite a prospective juror's professed impartiality if his answers reveal facts from which bias, prejudice or inability to follow the law may be reasonably implied. **State v. Robertson**, 92-2660 at p. 3, 630 So.2d at 1281. A trial court is vested with broad discretion in ruling on challenges for cause, and its ruling

will be reversed only when a review of the entire voir dire reveals the court abused its discretion. **State v. Jacobs**, 99-1659 at p. 5, 789 So.2d at 1284; see also **State v. Parfait**, 96-1814, p. 4 (La.App. 1 Cir. 5/9/97), 693 So.2d 1232, 1236, writ denied, 97-1347 (La. 10/31/97), 703 So.2d 20.

The record before us reflects that defendant used all twelve of his peremptory challenges in selecting the jury. Thus, the central issue in this assignment is whether the trial judge's refusal to remove the jurors at issue was an abuse of discretion.

Linda Primeaux

Defendant contends that Ms. Primeaux should have been excluded for cause because her voir dire responses indicated that she would have difficulty affording defendant the presumption of innocence based on information she learned from the pretrial publicity surrounding the case. Defendant argues that although the trial court attempted to rehabilitate Ms. Primeaux, based upon her voir dire responses as a whole, Ms. Primeaux should have been excluded for cause.

During the voir dire of the first panel of prospective jurors, the trial court asked if the jurors had heard anything about the case. In response, Ms. Primeaux admitted she had heard some general information regarding the case. However, she indicated that her knowledge of the case was very limited. She had only heard that the perpetrator was a janitor at the school where the incidents occurred. When the trial court asked if Ms. Primeaux had already formed an opinion regarding defendant's guilt or innocence, she replied, "[n]ot really. But whenever you hear things like that, there is a reason why someone is accused, even though I know they are supposed to be innocent until proven guilty." On appeal, defendant takes issue with this particular response. He argues that the response showed that Ms. Primeaux would not apply the appropriate burden of proof and she would have difficulty affording defendant the presumption of innocence. He notes that, in response to the trial court's

rehabilitation efforts, Ms. Primeaux "only managed a weak 'I think so'" regarding her willingness to afford defendant the presumption of innocence.

The record before us reflects that, after her initial response regarding the reason why individuals are accused of crimes, the trial court asked Ms. Primeaux if she believed that innocent persons are sometimes charged with crimes. She responded, "[o]h, yes." The court then asked the prospective juror if she believed that a person charged with a crime should be considered innocent until proven guilty. She again responded affirmatively. The court went on to ask Ms. Primeaux if she could set aside anything she heard about the case and decide the matter on the evidence presented. She stated, "I think I could." Later, when defense counsel questioned Ms. Primeaux regarding whether it was going to be difficult for her to afford defendant the presumption of innocence, she stated "maybe so." In her subsequent voir dire responses, Ms. Primeaux suggested that, in deciding the case, she would require proof of guilt from the state or proof of innocence from the defense. At this point, the trial court thoroughly explained the state's burden of proof and presumption of innocence to Ms. Primeaux. The following exchange occurred:

> THE COURT:
>
> And I need to make sure you understand when you say that they would have to prove that he's not guilty. The State bears the burden, and I will instruct the jury as to the burden of proof that the State bears the burden to prove each and every element of the crime against this defendant beyond a reasonable doubt.
>
> If the State proved each and every element beyond a reasonable doubt, then the law says that, that they are guilty, if they do not prove each and every element beyond a reasonable doubt, do you as a juror, feel that you could find the defendant not guilty?"
>
> MS. PRIMEAUX:
>
> Yes.
>
> THE COURT:
>
> Okay. So you understand that it is the State's responsibility to convince you beyond a reasonable doubt that he is guilty?
>
> MS. PRIMEAUX:

Right.

THE COURT:

Okay. And if they don't do that, would you still hold the defense to some burden at that point, if the State does not convince you?

MS. PRIMEAUX:

No, because they haven't convinced me yet.

In reviewing all of Ms. Primeaux's voir dire responses, particularly the aforementioned exchange, we note that, although she initially indicated that she would expect defendant to prove his innocence, after being instructed on the appropriate burden of proof and the presumption of innocence, Ms. Primeaux indicated that she would not require any proof from defendant if the state failed to meet is burden of proving all of the elements of the offense beyond a reasonable doubt. Therefore, despite defendant's contention to the contrary, we do not find that Ms. Primeaux's voir dire responses indicate that she would not afford defendant the presumption of innocence. Therefore, we find no abuse of discretion in the trial court's ruling denying the challenge for cause of Ms. Primeaux.

Brian Mosbey

Defendant further asserts that juror Brian Mosbey should also have been excluded for cause because he revealed that he had been exposed to pretrial publicity about the case and admitted it would be "hard" and "difficult" for him to remain fair and impartial. Specifically, defendant points to the portion of the voir dire where, in response to the court's inquiry regarding whether he formed any opinions regarding defendant's guilt or innocence, Mr. Mosbey stated, "I have two young children, so I definitely probably do the guilty thing before innocent. And I apologize for that." Defendant claims this response clearly illustrates prejudice and partiality from which Mr. Mosbey was never successfully rehabilitated.

Our review of the record reveals that during the voir dire, defense counsel challenged Mr. Mosbey for cause based upon the fact that his wife is a teacher

and because he indicated it would be an "extra burden" for him. In denying the cause challenge, the trial court noted:

> Most of them expressed some feelings about their sensitivity to it because of their own children, and I don't think that disqualifies them. I do recall Mr. Mosbey. I think he is the one that lives next door to Mr. Fontenot.
>
> * * * *
>
> But I do remember specifically several times him saying that if he was selected as a juror, that he knew that it was his duty to be fair and impartial and that he could set those feelings aside.

Upon reviewing the entire voir dire transcript, we find that, although Mr. Mosbey initially showed partiality in his responses, he was successfully rehabilitated. When the trial court asked Mr. Mosbey if he believed that defendant was guilty, he replied, "I can't say that, sir. That's prejudging." Mr. Mosbey admitted that the case was "more sensitive" to him because he has two young daughters in the public school system, but he indicated that he could sit as a fair and impartial juror if chosen to do so. Mr. Mosbey explained that although his familial situation would make remaining impartial difficult, it would not render it impossible. Mr. Mosbey demonstrated an understanding of what is required of a juror and indicated he was willing to follow the law if selected. Throughout his voir dire responses, Mr. Mosbey acknowledged that defendant has rights and is presumed innocent, while the state carries the burden of proving their case beyond a reasonable doubt. Mr. Mosbey indicated, "without hesitation," that he would set aside all of his personal feelings and decide the case based on the state's evidence. He would afford defendant the presumption of innocence and hold the state to its burden of proof. Considering the foregoing, we find no error or abuse of discretion in the trial court's denial of this challenge for cause.

This assignment of error lacks merit.

DISCOVERY VIOLATION

In this assignment of error, defendant asserts the state violated the rules of discovery by not specifically informing the defense of the statement made by

J.B. and tape-recorded by his father when the abuse was initially disclosed, and in failing to provide the defense with a copy of said statement prior to trial. He argues that, as a result of the state's failure to comply with the rules of discovery, the statement in question should have been deemed inadmissible at the trial. Although he notes that the state provided open-file discovery, defendant argues that open-file discovery, alone, does not absolve the state of its duty to "inform the defense of the evidence against the defendant." In response, the state notes that, in compliance with defendant's discovery request, the state copied its current file materials and provided the copies to the defense. According to the state, the recording in question was referenced in the copies of the file materials provided to defense counsel. The state further advised the defense that "all physical evidence was available upon request for inspection." Thus, the state contends that defense counsel's failure to inspect the evidence in question does not constitute a discovery violation and it does not render the evidence inadmissible.

The purpose of pretrial discovery procedures is to eliminate unwarranted prejudice to a defendant that could arise from surprise testimony. **State v. Mitchell**, 412 So.2d 1042, 1044 (La. 1982). Discovery procedures enable a defendant to properly assess the strength of the state's case against him in order to prepare his defense. **State v. Roy**, 496 So.2d 583, 590 (La.App. 1 Cir. 1986), writ denied, 501 So.2d 228 (La. 1987). If a defendant is lulled into a misapprehension of the strength of the state's case by the failure to fully disclose, such a prejudice may constitute reversible error. **State v. Ray**, 423 So.2d 1116, 1118 (La. 1982).

On appeal, defendant does not deny that the statement in question, which was introduced at the trial in connection with J.B.'s testimony, was mentioned in the discovery response provided by the state. Instead, he complains that the statement in question was mentioned "only once or twice in the 700-1000 pages provided to the defense." He argues that "[h]iding the reference among that

documentation is ineffective notice of the statement" and that providing notice of the statement in this manner was "token compliance only."

In denying defendant's discovery violation claim, the trial court reasoned:

> The objection was to the use of the apparent microcassette tape recording that was taken of [J.B.]. His statement, the tape was recorded by his father at the time that the alleged incident was disclosed to his father at his home.
>
> That microcassette, according to the discovery that was produced, was delivered over to the Slidell Police Department, specifically to Detective Mistretta, on March 10th of 2008. There are several references to the delivery of the microcassette tape to the Slidell Police Department.
>
> I understand that discovery was requested of the State under Code of Criminal Procedure Article 718, that in response to that discovery request that the State produced some 700-plus documents in their file and it also advised that they were making open file discovery available to the defendant.
>
> I find that the tape was sufficiently identified in the response to discovery and find that the State complied to the extent requested ... and I'm not going to exclude it based on that fact.

Upon reviewing the record and evidence, we find no error by the trial court in its ruling on the discovery objection by the defense. The record reflects that, in response to defendant's initial discovery motion, the state agreed to provide open-file discovery and provided a voluminous discovery response package. Thus, defendant was provided access to any and all evidence in the state's file. As the trial court noted, the statement was referenced several times in the documents provided by the state. A Case Resume document in the state's discovery response clearly refers to the statement in question and notes that it was turned over to the police by J.B.'s father. An evidence receipt included in the discovery response also lists the microcassette tape as evidence collected in connection with the case. Therefore, it is clear that the state fulfilled its obligation of notifying defendant of the existence of the taped statement. It was then incumbent on defendant to request access to the tape for review in preparation for trial.

Furthermore, even if a discovery violation occurred, it would not constitute reversible error without actual prejudice to the defendant's case. See **State v.**

Francis, 00-2800, pp. 5-6 (La.App. 1 Cir. 9/28/01), 809 So.2d 1029, 1033. Defendant has failed to demonstrate any prejudice to his case. In J.B.'s interview at the Children's Advocacy Center, he stated that his father recorded the initial disclosure of the abuse. The Case Resume document provided with the state's discovery response also provides details regarding the content of the statement. It is noted that in his initial disclosure J.B. only claimed that the janitor fondled his genitals and anus. Thus, it is clear that even without a copy of the actual taped recording, defendant was not lulled into a misapprehension of the strength of the state's case.

This assignment of error lacks merit.

DENIAL OF MOTION TO RECUSE AND MOTION FOR CHANGE OF VENUE

In this assignment of error, defendant asserts the trial court erred in denying his motion for a change of venue.[2] Specifically, defendant contends that the pretrial publicity surrounding the crime in the local media made it impossible for him to receive a fair trial in southeast Louisiana.

Louisiana Code of Criminal Procedure article 622 provides:

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.
>
> In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial.

A defendant is guaranteed an impartial jury and a fair trial. LSA-Const. art. I, § 16. Accordingly, a defendant is entitled to a change of venue when he can establish inability to obtain an impartial jury or a fair trial in the original venue. **State v. Morris**, 99-3075, pp. 7-8 (La.App. 1 Cir. 11/3/00), 770 So.2d 908, 915, writ denied, 00-3293 (La. 10/12/01), 799 So.2d 496, cert denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002). Absent the unusual

[2] Although this assignment of error specifies motion to recuse and motion for change of venue, defendant's brief is devoid of any argument regarding any recusal motion(s).

circumstance where the trial atmosphere has been entirely corrupted by press coverage or is lacking in the solemnity and sobriety to which a defendant is entitled, see **State v. David**, 425 So.2d 1241, 1246 (La. 1983), the burden is on the defendant to show actual prejudice. **State v. Morris**, 99-3075 at p. 8, 770 So.2d at 915. See also **State v. Goodson**, 412 So.2d 1077, 1080 (La. 1982). Extensive knowledge in the community of either the crimes or the defendant is not sufficient by itself to render a trial unconstitutionally unfair. **State v. Hart**, 96-0697, p. 6 (La. 3/7/97), 691 So.2d 651, 655. The defendant "must prove more than mere public knowledge of facts surrounding the offense to be entitled to have his trial moved to another parish." **State v. Comeaux**, 514 So.2d 84, 90 (La. 1987). A defendant is not entitled to a jury that is entirely ignorant of his case, and he cannot meet his burden of proof on a motion for change of venue by merely showing a general level of public awareness of the case. **State v. Thompson**, 516 So.2d 349, 352 (La. 1987), cert. denied, 488 U.S. 871, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). Whether the defendant has made the requisite showing of actual prejudice is a question addressed to the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an affirmative showing of error and abuse of discretion. **Morris**, 99-3075 at p. 8, 770 So.2d at 915; **State v. Hoffman**, 98-3118, p. 5 (La. 4/11/00), 768 So.2d 542, 552, cert. denied, 531 U.S. 946, 121 S.Ct. 345, 148 L.Ed.2d 277 (2000).

Factors to consider in determining whether actual prejudice exists, warranting a change of venue, include: (1) the nature of the pretrial publicity and the particular degree to which it has circulated in the community; (2) the connection of governmental officials with the release of the publicity; (3) the length of time between the dissemination of the publicity and the trial; (4) the severity and notoriety of the offense; (5) the area from which the jury is to be drawn; (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant; and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire. **State v. Bell**, 315 So.2d 307, 311 (La. 1975).

In the instant case, defendant presented a motion for change of venue on the first day of trial. When the court asked if the defense wanted to be heard on the motion, counsel for defendant replied, "No, Your Honor, we would expect that – we would try to pick a jury. We just have that in case we can't. Or if we run into problems, we may point our motion out to the court." The court noted that the motion would remain "a pending motion that you can assert if and when it is appropriate to do so."

The trial court, prosecutors, and defense counsel conducted an extensive, thorough voir dire of two panels of 20 prospective jurors. Each juror was asked by the trial court whether they had heard or read anything about the case. Several of the prospective jurors indicated a vague familiarity with the case. Eventually a jury of twelve, with two alternates, was picked from the two panels. The change of venue motion was not mentioned during the voir dire. At the conclusion of the jury selection, the trial court asked if the defense intended to assert the venue motion and counsel noted that the jury had already been picked but, in an abundance of caution, counsel requested that the court rule on the motion since it was still pending. The court ruled:

> The defense filed a motion to change venue in this matter, based on pretrial publicity. I deferred ruling on that motion until after we made an attempt to pick a jury. And, in fact, we selected a jury of twelve, and two alternates, fourteen people, out of two panels of twenty; so I'm going to deny the motion for change of venue.

There was no further discussion of the change of venue motion.

We have thoroughly reviewed the change of venue motion and the entire jury selection transcript. There was no argument or evidence introduced in connection with the venue motion. The record reveals that defendant failed to prove that a change of venue was necessary in this case. While the voir dire responses showed that there was general knowledge within the community about the case, defendant failed to present sufficient evidence of an overriding prejudice within the community's collective mind that prevented him from receiving a fair trial. As such, the trial court did not err or abuse its discretion in

denying the motion for change of venue. See **State v. Huls**, 95-0541, pp. 15-16 (La.App. 1 Cir. 5/29/96), 676 So.2d 160, 171-72, writ denied, 96-1734 (La. 1/6/97), 685 So.2d 126. This assignment of error lacks merit.

SUFFICIENCY OF THE EVIDENCE

In his fourth counseled assignment of error and his pro se brief, defendant argues that the evidence presented by the state is insufficient to support the convictions because the only evidence of the alleged offenses came in the form of testimony of the two minor victims, whose versions of the events varied each time they were told. Defendant argues that the testimony of both victims was unbelievable and insufficient to meet the state's burden of proving his guilt beyond a reasonable doubt. In response, the state asserts there was ample evidence presented at defendant's trial to support the convictions.

The standard for reviewing the sufficiency of evidence is set forth in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), see also LSA-C.Cr.P. art. 821. Under **Jackson**, the standard for testing the sufficiency of evidence requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. **Jackson**, 443 U.S. at 319, 99 S.Ct. at 2789; **State v. James**, 02-2079, p. 3 (La.App. 1 Cir. 5/9/03), 849 So.2d 574, 579.

This standard of review, in particular the requirement that the evidence be viewed in the light most favorable to the prosecution, obliges the reviewing court to defer to the actual trier of fact's rational credibility calls, evidence weighing, and inference drawing. See **State v. Mussall**, 523 So.2d 1305, 1308-11 (La. 1988). Thus, the reviewing court is not permitted to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. See **State v. Burge**, 515 So.2d 494, 505 (La.App. 1 Cir. 1987), writ denied, 532 So.2d 112 (La. 1988).

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. **State v. Woods**, 00-2147, p. 5 (La.App. 1 Cir. 5/11/01), 787 So.2d 1083, 1088, writ denied, 01-2389 (La. 6/14/02), 817 So.2d 1153. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. See **State v. Johnson**, 99-0385, p. 9 (La.App. 1 Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 00-0829 (La. 11/13/00), 774 So.2d 971. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Marshall**, 99-2884, p. 5 (La.App. 1. Cir. 11/8/00), 808 So.2d 376, 380.

The crime of aggravated rape is defined in LSA-R.S. 14:42, which provides, in part, as follows:

> A. Aggravated rape is a rape committed ... 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:
>
> * * * *
>
> (4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.

"Rape is the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent." LSA-R.S. 14:41A. "Emission is not necessary, and any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime." LSA-R.S. 14:41B.

Louisiana Revised Statutes 14:81.2A defines molestation of a juvenile as:

> Molestation of a juvenile is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person, by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile. Lack of knowledge of the juvenile's age shall not be a defense.

At the trial of this matter, M.C., N.C.'s mother, testified she was at home looking at an article on the internet about defendant when N.C. walked in the

room. Upon seeing defendant's picture on the computer screen, N.C. started trembling and became very terrified. N.C. told his mother that defendant was the "bad man" at school who hurt him. N.C. told his mother defendant touched him on his genitals and anus.

N.C. testified that one day he was using the second-grade restroom when defendant entered and fondled his genitals inside the school restroom. According to N.C., his pants were still down a little and defendant used his hands to touch N.C. on his bare skin. N.C. stated he pulled away from defendant and ran out of the restroom. N.C. claimed he returned to his classroom and did not report the incident because defendant told him not to tell. N.C. eventually disclosed defendant's inappropriate behavior to his mother and he was taken to the Children's Advocacy Center to be interviewed. The videotaped interview was played for the jury at trial. In the interview, N.C. told Bethany Case, the forensic interviewer, that defendant touched his penis and anus several times. N.C. demonstrated where defendant had touched him using an anatomical drawing. He claimed defendant touched him on top of his clothing. Later, when questioned regarding the inconsistencies in his reports of the abuse, N.C. admitted that he initially told Ms. Case that defendant touched him on top of his clothing because he was embarrassed.

N.C. identified defendant in open court as the school janitor who fondled him. He also testified that he previously identified defendant in a photographic lineup provided by the investigating officers.

J.B. testified and provided details regarding several incidents of abuse by defendant. J.B. claimed that on at least two separate occasions defendant approached him in the restroom, forced him into a stall and pulled his pants down. According to J.B., defendant inserted his penis into his rectum and started "going in and out." On both occasions, defendant threatened to kill J.B. if he told anyone. J.B. explained that he never told anyone about the rapes because he was afraid that defendant would kill him.

J.B. explained that he finally told his father about the abuse after the school sent home a note advising parents to speak with their children regarding possible sexual abuse at school. He explained that he did not tell his father everything at first. The tape-recorded statement, which was played at the trial, revealed that J.B. initially claimed that defendant only fondled his genitals. He did not report any sexual penetration or rape. J.B. explained that he was afraid to provide full details of the abuse because he believed defendant would come and kill him.

In his initial interview at the Children's Advocacy Center, J.B. told JoBeth Rickles that defendant forced him into a stall inside the restroom and touched him under his clothing in "personal places." He claimed that defendant used only his hand. At this time, J.B. indicated that the abuse occurred only once and no one else was present.

In a subsequent interview, J.B. told Ms. Rickles he came back to talk to her because he had more to tell. He advised that in addition to the initial incident, there were two other incidents wherein defendant put his penis inside J.B.'s anus. After each of the anal rapes, defendant threatened to kill J.B. if he ever told anyone. J.B.'s trial testimony was consistent with this report of two anal rapes.

It is well settled that if found to be credible, the testimony of the victim of a sex offense alone is sufficient to establish the elements of the offense, even where the state does not introduce medical, scientific, or physical evidence to prove the commission of the offense by the defendant. See **State v. Hampton**, 97-2096, p. 3 (La.App. 1 Cir. 6/29/98), 716 So.2d 417, 418. Therefore, the victims' testimony, which the jury obviously found credible, was sufficient to prove all elements of aggravated rape and molestation of a juvenile.

Defendant presented testimony from Kathleen Katsorchis, the principal of Abney Elementary. She testified that defendant worked as a long-term sub-custodian at Abney Elementary. According to Katsorchis, the school practice is to use the "buddy system" or teacher-escort system in allowing students to use

restroom facilities. She further testified that it is school policy that all restroom doors are to remain open. It is also school policy that janitors are not to remain in the restroom if a student enters. If the janitor is in the restroom, he is to place a sign or cleaning cone outside the restroom to indicate that it is being cleaned. Katsorchis testified that, when defendant first started working at Abney, she received a report indicating that defendant failed to follow policy and leave the restroom when a student was present. She explained that she addressed the situation with defendant and had no further problems of this sort. Katsorchis testified that she did not receive any complaints from students regarding defendant in the 2008 school year.

According to Katsorchis, because there is a classroom that shares a wall with the restroom where the sexual abuse allegedly occurred, and since the policy mandates that the doors remain opened, any noise inside the restroom is usually heard by a teacher or other faculty member.

Lisa Nanias, another custodian at Abney Elementary, testified on behalf of the defense. She explained that the school policy mandated that the restroom doors remain opened. She also testified that the janitors were aware that they were not to be in the restrooms when students were present. She claimed she never observed defendant violate the policy nor did she know of any student complaints regarding defendant. Nanias further testified regarding the structure of the school building. She explained that the building is a modular type, with thin walls. She believed that if a child was to scream or yell, there was no reason the sound would not be heard.

Defendant did not testify at the trial.

In the present case the jury obviously chose to believe the testimony of the young victims regarding defendant's actions. Although there were some inconsistencies between the young victims' trial testimony and the pretrial statements to their parents, the police, and the Children's Advocacy Center interviewers, the jury determined that the victims progressively disclosed the incidents of abuse and that the incidents described in their trial testimony are

what actually occurred. Simply because the defense witness suggested the incidents could not have happened the way the children claimed (children are not typically alone in the restroom), this does not automatically render the testimony provided by the child victims incredible. The jury was required to make a credibility determination. The jury obviously chose to believe the victims. The fact that the record contains evidence that conflicts with testimony accepted by the trier of fact does not render the evidence accepted by the trier of fact insufficient. See **State v. Busch**, 515 So.2d 605, 609 (La.App. 1 Cir. 1987).

Therefore, after carefully reviewing the record in this case, we find that any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have concluded that the state proved beyond a reasonable doubt that defendant committed the aggravated rape of J.B. and molestation of N.C., a juvenile. This assignment of error lacks merit.

EXCESSIVE SENTENCE

In his final assignment of error, defendant argues that the trial court erred in ordering that his sentences be served consecutively versus concurrently. Defendant claims that the consecutive sentences are unconstitutionally excessive and amount to "dog piling" the punishments. The state argues that the trial court properly exercised its discretion under LSA-C.Cr.P. art. 883 in ordering consecutive sentences under the circumstances presented in this case.

We note that defendant's excessive sentence assignment of error does not appear to contest the length of either individual sentence as excessive. Instead, defendant's argument on excessiveness focuses on the consecutive, rather than concurrent, nature of these sentences.

The imposition of consecutive sentences is governed by LSA-C.Cr.P. art. 883, which provides, in pertinent part:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be

served consecutively unless the court expressly directs that some or all of them be served concurrently.

Here, the crimes consisted of two separate offenses; they affected different victims at different times and at different locations. The two incidents did not arise out of a single transaction, nor were they part of a common scheme or plan. Therefore, under LSA-C.Cr.P. art. 883, defendant's sentences were to be served consecutively unless the court expressly directed that some or all of them be served concurrently. We find no abuse of discretion in the trial court's order that the sentences are to be served consecutively. Defendant, an adult figure, sexually abused these young boys at their elementary school. Under these circumstances, the consecutive sentences are neither grossly disproportionate to the severity of the offenses committed nor shocking to the sense of justice.

The assigned error lacks merit.

REVIEW FOR ERROR

In his brief, defendant asks that this court examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such error, whether or not such a request is made by a defendant. Under LSA-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 a patent sentencing error. At the pertinent time herein, LSA-R.S.14:81.2E provided that "[w]hoever commits the crime of molestation of a juvenile when the victim is under the age of thirteen years shall be imprisoned at hard labor for not less than twenty-five years nor more than life imprisonment. At least twenty-five years of the sentence imposed shall be served without benefit of probation, parole, or suspension of sentence." Under the habitual offender law, LSA-R.S. 15:529.1A(1)(a) provides that "[i]f the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a

determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction." Therefore, defendant's twenty-year sentence, as a second-felony habitual offender, for the molestation of N.C., a child under thirteen years old, is illegally lenient. However, since the sentence is not inherently prejudicial to defendant, and neither the state nor defendant has raised this sentencing issue on appeal, we decline to correct this error.[3] See **State v. Price**, 05-2514, p. 22 (La.App. 1 Cir. 12/28/06), 952 So.2d 112, 124-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

For the foregoing reasons, we affirm defendant's convictions, habitual offender adjudication, and sentences.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.

[3] We further note that defendant's sentence on count 1 is life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence, and remanding this matter to correct the illegally lenient sentence on count 4, would serve little purpose other than expending judicial resources.