NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0456

STATE OF LOUISIANA

VERSUS

DONALD WILLIAMS

Judgment Rendered: September 14, 2007

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On Appeal from the 22nd Judicial District Court
In and For the Parish of Washington
Trial Court No. 98-CR2-74203, Div. "D"

Honorable Peter J. Garcia, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

The defendant, Donald Williams, was charged by grand jury indictment with attempted aggravated rape, a violation of LSA-R.S. 14:42 and 14:27. He pled not guilty. Following a jury trial, the defendant was convicted as charged. Prior to sentencing, counsel for the defendant moved for the appointment of a sanity commission to determine the defendant's mental condition. The trial court appointed Dr. Thompson and Dr. Salcedo to examine the defendant. After reviewing the reports filed by the doctors, the trial court found the defendant competent to proceed. The defendant filed a motion for a new trial, which the trial court denied. The defendant was sentenced to imprisonment at hard labor for thirty years without the benefit of probation, parole, or suspension of sentence. The defendant now appeals urging two assignments of error as follows:

> 1. The district court committed manifest error when it decided to proceed with the trial in [the defendant's] absence even though it knew that the jury would assume that [the defendant] was not present in court because he was trying to avoid punishment.
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> 2. The district court committed reversible error in accepting the jury's guilty verdict because the record clearly indicates that the alleged victim was a habitual liar who made multiple false statements to the police regarding the identity of the individual who attempted to rape her over seven years ago.

Finding no merit in the assigned errors, we affirm the defendant's conviction and sentence.

FACTS

In 1998, Washington Parish Sheriff's Detective Lorenzo Raiford received a report from Wilma Hartfield indicating that her daughter, C.C.,[1] had been sexually abused. Detective David Pittman, a juvenile detective, was subsequently assigned to investigate the complaint. Detective Pittman

[1] In accordance with LSA-R.S. 46:1844(W), the victim herein is referenced only by her initials.

sought the assistance of Monica Jordan, a social worker with the Department of Child Protection in Bogalusa, Louisiana. On August 10, 1998, in connection with the investigation, the nine-year-old child was taken to the Children's Advocacy Center where she was interviewed by forensic interviewer, Julia Maloney. The entire interview was videotaped.

In the interview, C.C. stated that the defendant, a family friend, rubbed her vaginal area with his fingers and placed his penis in her buttocks one night when she visited his home in 1998. C.C. claimed that the defendant also did the same thing to his daughter that same night. During the interview, C.C. also disclosed that an individual named "Jerry" and one named "Kevin Blackwell" had sexually abused her in the past. C.C. was taken into state custody and the defendant subsequently was arrested.

At trial (over six years after the initial report), sixteen-year-old C.C. again described the sexual abuse inflicted upon her by the defendant when she was nine years old. C.C. explained that the defendant got on top of her and placed his penis between the "cheeks" of her buttocks. She explained that the defendant rubbed her rectum with his penis but "[i]t didn't go in." The defendant then threatened to kill C.C. and her family if she ever told anyone of the abuse. Later, during cross-examination regarding her allegation of sexual abuse by "Jerry," C.C. stated this was not true. Throughout her testimony, however, C.C. repeatedly stated that her claim that "Kevin Blackwell" abused her was true. She explained that this abuse occurred when she was five years old and was separate from the abuse by the instant defendant.

ASSIGNMENT OF ERROR NUMBER ONE
ABSENCE OF DEFENDANT DURING TRIAL PROCEEDINGS

In his first assignment of error, the defendant contends the trial court violated his constitutional rights in conducting his trial outside of his presence.

The record before us reflects that the defendant was physically present when the trial began. After the selection of the jury, but prior to the presentation of evidence, the trial court held a hearing to determine the admissibility of evidence of prior acts by the defendant against other children.

The defendant's adult daughter, C.T., and his probation officer, Angela Loving, testified at this hearing. In her testimony, C.T. described how the defendant repeatedly sexually abused her from a very young age. She explained that the defendant performed vaginal intercourse and/or oral sex upon her approximately "every other day." Loving testified regarding the defendant's prior guilty plea (21st Judicial District Court docket #66296) to indecent behavior with a juvenile, L.A.M.

At the conclusion of this testimonial evidence, the trial court went into recess before issuing a ruling. When the court reconvened after the recess, the defendant was not present. The defendant's attorney notified the court that he did not know the whereabouts of his client. Upon finding that the defendant voluntarily absented himself after the trial had already commenced, the trial court proceeded without the defendant. The defendant was not present throughout the remainder of the trial.

As a general rule, a defendant charged with a felony has a right to be present and must be present at every important stage of the trial. Paragraphs (A)(3) through (6) of LSA-C.Cr.P. art. 831 provide that a defendant charged

with a felony shall be present at the calling, examination, challenging, impanelling, and swearing of the jury; at all times during the trial when the trial court is determining and ruling on the admissibility of evidence; in jury trials, at all proceedings when the jury is present; in bench trials, at all times when evidence is being adduced; and at the rendition of the verdict or judgment. However, the provisions of LSA-C.Cr.P. art. 831 are not absolute. As provided in LSA-C.Cr.P. art. 832(A)(1), a defendant who is initially present for the commencement of trial shall not prevent the further progress of the trial and shall be considered to have waived his right to be present if his counsel is present or if the right to counsel has been waived, and he voluntarily absents himself after the trial has commenced. A jury trial commences when the first prospective juror is called for examination. LSA-C.Cr.P. art. 761. If a defendant voluntarily absents himself but his attorney is present, the attorney's presence is sufficient to satisfy the due-process requirements of LSA-C.Cr.P. arts. 831 and 832. See **State v. Bolton**, 408 So.2d 250, 257-58 (La. 1981); **State v. Landrum**, 35,053, p. 5 (La. App. 2 Cir. 9/26/01), 796 So.2d 94, 98, writ denied, 2003-0493 (La. 2/20/04), 866 So.2d 823.

Our review of the record reveals that the defendant was present for the commencement of the trial. Thereafter, the defendant chose to absent himself from the proceedings. Under the facts and circumstances of this case, the defendant's unexplained failure to return to the courtroom for his trial, which he knew was already in progress, can only be considered as a voluntary absence. Contrary to the defendant's assertions on appeal, there is nothing in the record before us to indicate that the defendant's absence was in any way involuntary. On appeal, the defendant contends his mental condition rendered his absence involuntary. However, as the state correctly

points out, no reason was ever provided for the defendant's absence in the trial court. Thus, by voluntarily absenting himself, the defendant waived his constitutional right to be present during the trial. Furthermore, we note the defendant's attorney was present in the courtroom throughout the trial. The defendant's constitutional rights were not violated as his counsel's presence satisfies the due-process requirements. Insofar as the defendant claims the trial court should have allowed defense counsel to conduct a hearing to explain the defendant's absence, we note, and the state correctly points out, no such hearing was ever requested in this case. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO
SUFFICIENCY OF THE EVIDENCE

In his second assignment of error, the defendant challenges the sufficiency of the state's evidence. Specifically, he asserts C.C. is a "habitual liar" and her testimony should have been discredited. The defendant claims the identity of the alleged perpetrator of the 1998 sexual abuse of C.C. is at issue because C.C. accused two other men of the "same act that she was now alleging against [the defendant]."

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 LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-9 (La. 1988).

As previously discussed, the defendant was convicted of attempted aggravated rape of then nine-year-old C.C. The crime of aggravated rape is

defined in LSA-R.S. 14:42, which provided (prior to amendment by 2001 La. Acts, No. 301, § 1, and 2003 La. Acts, No. 795, § 1), in part, as follows:

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

Rape is the act of anal or vaginal sexual intercourse with a male or female person committed without the person's lawful consent. Emission is not necessary and any sexual penetration, vaginal or anal, however slight is sufficient to complete the crime. LSA-R.S. 14:41(A) and (B) (prior to amendment by 2001 La. Acts, No. 301, § 1). Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. LSA-C.Cr.P. art. 14:27(A).

Specific intent is defined as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." LSA-R.S. 14:10(1). Specific intent may be proved by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. The trier of fact is to determine the requisite intent in a criminal case. **State v. Crawford**, 619 So.2d 828, 831 (La. App. 1 Cir.), writ denied, 625 So.2d 1032 (La. 1993).

At the trial of this matter, Wilma Hartfield testified that the defendant was a family friend. Ms. Hartfield explained that, once in 1998, she allowed C.C. to spend the night at the defendant's house. She explained she had known the defendant for years and his daughter wanted C.C. to spend the night.

C.C. consistently testified that while at the defendant's house, the defendant pulled off her panties and attempted to insert his penis into her rectum. C.C.'s previous interview with the Children's Advocacy Center was played for the jury. C.C. testified that some portions of the interview were untrue. Particularly, C.C. stated that she did not remember being molested by an individual named "Jerry." She maintained, however, that "Kevin Blackwell" had inappropriately touched her when she was five years old.

Dr. Anthony Palazzo, a pediatrician, testified that C.C. was nine years old when she told his nurse, "Donald put his thing in me." Dr. Palazzo performed a physical examination on C.C. No signs of trauma were noted to C.C.'s vaginal or rectal areas. There were no clinical signs of sexual abuse.

C.T., the defendant's daughter, testified that the defendant molested her most of her life. C.T. explained the defendant began having sexual intercourse with her when she was four or five. The defendant also performed oral sex on C.T. C.T. explained that the abuse took place every other day and continued until she left home at fourteen or fifteen years old. C.T. claimed the defendant also sexually abused her sister, D.T. C.T. explained that she never told anyone about the sexual abuse because she was afraid. However, when her grandmother, Vivian Williams, continuously harassed her to testify on the defendant's behalf in the instant case, she decided she had to speak up. C.T. told her grandmother that the defendant was a child molester and that she would not testify on his behalf.

C.T. denied any personal knowledge of the defendant molesting C.C. C.T. did not specifically recall C.C. spending the night, but she remembered bringing the child home. C.T. testified that she is estranged from her family because they are upset that she would not testify for the defendant.

Vivian Williams, who is also the defendant's mother, testified for the defense. She testified that C.T. never indicated to her that the defendant sexually abused her. Ms. Williams explained that C.T. was possibly motivated to fabricate the allegations of abuse against the defendant out of anger towards her. On cross-examination, Ms. Williams admitted that the defendant had previously pled guilty to indecent behavior with a juvenile. The victim in that case was L.A.M., another of Ms. Williams' granddaughters.

Initially, we note that the testimony of the victim alone, if believed, is sufficient to prove the elements of an offense. **State v. Orgeron**, 512 So.2d 467, 469 (La. App. 1 Cir. 1987), writ denied, 519 So.2d 113 (La. 1988). Furthermore, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witness, the matter is one of the weight of the evidence, not its sufficiency. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1 Cir. 1984). As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d at 38.

Notwithstanding any assertion by the defendant that the victim falsely accused him and lacked credibility based on her alleged propensity for falsely accusing others of the "same acts" of sexual misconduct, the record reflects that, while she very candidly admitted that some portions of her prior statement were untrue, C.C. unequivocally testified that the defendant sexually abused her at his home. C.C. never wavered in her description of the abuse inflicted by the defendant and/or her identification of the

defendant as the perpetrator of the sexual abuse in 1998. Contrary to the defendant's assertions, C.C. did not accuse anyone other than the defendant of this particular abuse. The fact that the jury found the defendant guilty indicates that, despite C.C.'s troubled past and her admission that she fabricated separate allegations of previous abuse by "Jerry," the jury accepted the victim's testimony regarding the defendant's actions against her and rejected the defendant's claim that he did not commit the offense.

The credibility of the witness's testimony is a matter of the weight of the evidence. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Creel**, 540 So.2d 511, 514 (La. App. 1 Cir.), writ denied, 546 So.2d 169 (La. 1989). This assignment of error lacks merit.

CONCLUSION

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

Accordingly, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.