NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 2319

STATE OF LOUISIANA

VERSUS

GEORGE SPEARS

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 7-04-733, Section VII
Honorable Todd Hernandez, Judge Presiding

Doug Moreau
District Attorney
Jeanne Rougeau
Assistant District Attorney
Baton Rouge, LA

Attorneys for
State of Louisiana

Mark D. Plaisance
Baker, LA

Attorney for
Defendant-Appellant
George Spears

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Judgment rendered OCT 2 4 2008

PARRO, J.

The defendant, George Spears, was charged by grand jury indictment with aggravated crime against nature (count one) and molestation of a juvenile (count two), violations of LSA-R.S. 14:89.1 and LSA-R.S. 14:81.2. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found not guilty as to count one, and guilty of the responsive offense of indecent behavior with a juvenile, a violation of LSA-R.S. 14:81, as to count two. The defendant filed a motion for new trial and a motion for post-verdict judgment of acquittal. The state then filed a bill of information to establish serial sex offender status, which was followed by the defendant's motion to quash. After a hearing, the trial court denied the defendant's motion for new trial and motion for post-verdict judgment of acquittal and found the defendant to be a serial sex offender. Pursuant to LSA-R.S. 15:537(B), the defendant was sentenced to life imprisonment without the benefit of probation, parole, or suspension of sentence.[1] The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, raising the following assignments of error:

1. Because the state failed to prove certain elements as outlined in LSA-R.S. 15:529.1, the trial court erred in sentencing the defendant to life imprisonment under LSA-R.S. 15:537(B).

2. Because the state failed to disclose prior inconsistent statements by the victim and her uncle, the trial court erred in denying the defendant's motion for a mistrial.

3. The trial court erred by instructing the jury to consider the defendant's previous sex convictions as evidence of lustful disposition.

4. The trial court erred in denying the defendant's motion to inform the jury of the mandatory life sentence.

5. The trial court erred by failing to consider whether a life sentence under LSA-R.S. 15:537(B) was tailored to the gravity of the offense, the culpability of the defendant, and the circumstances of the case.

---

[1] The trial court failed to wait twenty-four hours to sentence the defendant after ruling on the motion for post-verdict judgment of acquittal and motion for new trial, and no waiver was given. See LSA-C.Cr.P. art. 873. However, since the defendant was sentenced to the mandatory sentence of life imprisonment, the failure to wait twenty-four hours after the denial of the motion for post-verdict judgment of acquittal and motion for new trial was harmless error. See **State v. Seals**, 95-0305 (La. 11/25/96), 684 So.2d 368, 380, cert. denied, 520 U.S. 1199, 117 S.Ct. 1558, 137 L.Ed.2d 705 (1997); **State v. Price**, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

6. Because the evidence was insufficient to convict the defendant of molestation of a juvenile, the jury erred by finding him guilty of the responsive verdict of indecent behavior with a juvenile.

For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

The victim, T.J.,[2] had several residential relocations among family members following the September 14, 2002 murder of her mother. The defendant was the minister of the church that the victim and other family members attended, and he performed the funeral service for the victim's mother. The defendant formed a relationship with the victim after her mother's death. Sometime before May 19, 2003, the relationship became sexual. According to the victim's testimony, she and the defendant engaged in "sex" and "oral sex" on more than one occasion. The victim further testified that the sexual encounters took place on separate occasions in the defendant's living quarters at the church and in the defendant's vehicle. The victim specified that the sexual encounter in the defendant's vehicle took place around February or March of 2003.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant argues that the trial court erred in sentencing him to life imprisonment under LSA-R.S. 15:537(B), as the state failed to comply with LSA-R.S. 15:529.1. The defendant argues that the record demonstrates an inadequate habitual offender hearing. The defendant specifically notes that the trial court failed to inform him of his rights to a hearing and to remain silent. The defendant further contends that his prior offenses arose out of the same course of conduct with the same person and that the trial court failed to determine if the defendant's prior convictions should count as one or two convictions. The defendant also argues that the state failed to prove that ten years had not elapsed between the defendant's release from custody for

[2] We reference this victim only by her initials or "the victim." See LSA-R.S. 46:1844(W).

his prior offenses and the instant offense.

As conceded by the defendant, there is no jurisprudence to support his argument that compliance with LSA-R.S. 15:529.1 is required when the defendant is sentenced pursuant to LSA-R.S. 15:537(B). The defendant was not sentenced pursuant to LSA-R.S. 15:529.1 and the language of that statute; therefore, it should not be used in determining the propriety of the defendant's sentence. Nonetheless, the record reflects that the defendant had a hearing on March 9, 2007, on the state's "information to establish serial sex offender status" pursuant to LSA-R.S. 15:537. Therefore, the defendant was afforded the right to a hearing. Moreover, as the defendant did not testify during the hearing, any failure to inform the defendant of the right to remain silent would be harmless. See **State v. Bush**, 31,710 (La. App. 2nd Cir. 2/24/99), 733 So.2d 49, 58, writ denied, 99-1010 (La. 9/3/99), 747 So.2d 536. The state presented evidence to show that the defendant pled guilty on November 8, 1991, to felony carnal knowledge of a juvenile, a violation of LSA-R.S. 14:80, an offense that took place between November 1, 1990, and January 16, 1991. Further, the state presented evidence to show that the defendant again pled guilty on February 18, 1992, to felony carnal knowledge of a juvenile, an offense that took place on or about February 21, 1991. We find that the trial court did not err in imposing the sentence pursuant to LSA-R.S. 15:537(B). This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant contends that the state failed to disclose prior inconsistent statements of the victim and her uncle, Pharoah Johnson. The defendant notes that the state's case rested solely upon the victim's credibility and argues that the evidence in question could have created significant reasonable doubt. The defendant argues that the verdict demonstrates the jury's doubts as to the victim's veracity. The defendant contends that prior knowledge of the statements would have

allowed him to mount an attack on the victim's credibility, specifically noting that the statements could have been included in the opening argument.

The United States Supreme Court has held that the Fourteenth Amendment mandates that the prosecution must disclose to the defense evidence which is favorable to the defendant if such evidence is material to his guilt or punishment. **Brady v. Maryland**, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). The prosecution also must disclose such evidence for the impeachment of a witness whose testimony (and credibility) may be determinative of the defendant's innocence or guilt. See **Giglio v. United States**, 405 U.S. 150, 154-55, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972).

Although there is no duty to provide defense counsel with unlimited discovery of the prosecutor's case, if the subject matter of a request for evidence is material or if a substantial basis for claiming materiality exists, the prosecutor who receives a specific and relevant request must respond by either furnishing the information to the defense counsel or by submitting it to the judge for an in camera inspection. See **United States v. Agurs**, 427 U.S. 97, 106, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976); U.S. Const. amends. V and XIV. 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. 1st 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). Mistrial is only one of the remedies available to the trial court in redressing a discovery violation, and it is warranted only when an error results in substantial prejudice to the defendant. **State v. Harris**, 00-3459 (La. 2/26/02), 812 So.2d 612, 617.

During cross-examination, the following colloquy took place when Johnson testified regarding his initial questioning of the victim about her relationship with the defendant:

> Q. Okay. And you actually confronted her. You must have because you said she denied it. You actually confronted her and said I believe you're having a relationship with this man, didn't you?
>
> A. No. I asked her -- I asked her what -- what was going on with the two of them.
>
> Q. And she said nothing.
>
> A. Yeah. Pretty much.
>
> Q. Well, how many times did she say nothing was going on?
>
> A. Well, maybe once or twice. And I told her, I said, [T.J.], I'm here for you. You don't have to lie to me about anything.
>
> Q. So once or twice she told you nothing.
>
> A. She said she didn't really know what I was talking about.

After the redirect examination of Johnson, the defendant moved for a mistrial, arguing that the victim stated more than once that she did not have any relationship with the defendant and that the defendant should have been informed of these statements before the trial pursuant to numerous **Brady** requests. In response, the state reiterated that Johnson actually testified that when he asked the victim what was going on, she stated that she did not know what he was talking about. The state further noted that during prior questioning by the state, Johnson never claimed that the victim had outright denied any sexual relationship with the defendant. The state's attorney added that she did not think the evidence was **Brady** information, and reiterated that Johnson "never told me that before." The trial court noted that the motion for a mistrial was based on Johnson's testimony, whereby he classified his interaction with the victim as consisting of denials, and denied the motion.

During cross-examination of the victim, she testified that she informed Johnson more than once that she was not having a relationship with the defendant. The victim responded positively when asked whether, in any of her pre-trial conversations with the

prosecutor, she informed the prosecutor of prior denials made to her uncle. However, during redirect examination, the victim responded positively when asked whether she actually told the state that she did not want to discuss the relationship with her uncle. The defendant again moved for a mistrial on the same grounds. The prosecutor claimed that when she talked to the victim, she (the victim) stated that she would not talk to Johnson. The state noted that the defense attorney prompted the classification of the victim's response to her uncle as a denial. The trial court concluded that the state did not have any knowledge that the victim had outright denied the allegations against the defendant to anyone and denied the motion for a mistrial.

We note that the record is inconsistent as to whether the victim refused to respond or disclose any information, or specifically stated nothing happened in response to her uncle's questioning. The state claimed that they did not know of the victim supposedly stating that nothing happened, and the trial court believed the state. We note that the victim initially did not respond when Sergeant John Attuso of the Baton Rouge Police Department questioned her regarding the allegations. Under LSA-C.Cr.P. art. 729.3, the state has the ongoing duty to disclose additional evidence which it discovers or decides to use at trial, when such evidence is subject to discovery or inspection. However, the state does not have a duty to disclose information which it does not possess. **State v. Williams**, 448 So.2d 659, 664 (La. 1984). Further, we do not find that a nondisclosure resulted in substantial prejudice to the defendant. The defense extensively cross-examined Johnson and the victim as to the victim's initial denials of the allegations against the defendant. Thus, the jury was fully aware of the fact that the victim did not initially disclose any impropriety by the defendant. We find no abuse of discretion in the denial of the motion for mistrial. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In the third assignment of error, the defendant argues that the evidence of his prior sex offenses was not relevant to show lustful disposition and that the trial court,

therefore, erred in instructing the jury to consider the defendant's prior convictions as evidence of lustful disposition. The defendant argues that lustful disposition is not an element of molestation of a juvenile or aggravated crime against nature.

Louisiana Code of Evidence article 404 provides, in part:

> **B. Other crimes, wrongs, or acts.** (1) Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Louisiana Code of Evidence article 412.2 provides:

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

Indecent behavior with a juvenile is defined in LSA-R.S. 14:81, in part, as:

> A. Indecent behavior with juveniles is the commission of any of the following acts with the intention of arousing or gratifying the sexual desires of either person:
>
> (1) 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. Lack of knowledge of the child's age shall not be a defense ... .

Like molestation of a juvenile, indecent behavior with a juvenile is a specific intent crime where the state must prove the offender's intent to arouse or gratify his sexual desires or

those of the child by his actions with a child. See **State v. Jackson**, 625 So.2d 146, 149-50 (La. 1993).

We note that in his appeal brief, the defendant relies in part on **State v. Kennedy**, 00-1554 (La. 4/3/01), 803 So.2d 916, 924 (wherein the Louisiana Supreme Court stated, in part, "A history of unnatural sexual interest in young girls is too general an allegation to show that the defendant had a motive particular to this victim and the circumstances of the crime.") However, LSA-C.E. art. 412.2 was enacted following **Kennedy** and allows admission of evidence of other similar crimes when the victim in the case at issue is a child under the age of seventeen. In discussing whether evidence of other acts of sexual misconduct with juveniles who were not the victims of the charged crimes was admissible under LSA-C.E. art. 404(B)(1), the Louisiana Supreme Court in **Jackson** simply held that because specific intent was an element of the crime of molestation of a juvenile, the evidence of prior acts was admissible to show the defendant's "lustful disposition" and would "be useful in proving that the defendant did not act innocently, and [would] negate any defense that he acted without intent or that the acts were accidental." **Jackson**, 625 So.2d at 150. Whether or not the victims of the other crimes were related to the defendant was not a factor. The defendant in **Jackson** was charged with molesting his juvenile granddaughters. The state sought to introduce evidence of previous molestation through the testimony of the defendant's three adult daughters. The Louisiana Supreme Court ruled the evidence admissible on the grounds that the crime of molestation of a juvenile was a specific intent crime which required the state to prove that defendant had the intention of arousing or gratifying either the sexual desire of himself or the victims. Citing **State v. Cupit**, 189 La. 509, 179 So. 837, 839 (1938), the court "recognized the principle that where the element of intent is regarded as an essential ingredient of the crime charged, it is proper to admit proof of similar but disconnected crimes to show the intent with which the act charged was committed." **Jackson**, 625 So.2d at 150.

The defendant's intent to gratify his sexual desires by his conduct with the victim was an important element of the state's case. We disagree with the defendant's contention that such intent was not at issue. Thus, the defendant's similar prior conduct with a female child of a similar age was highly probative of the requisite intent for the crime. Also, in this case, the probative value of the evidence strongly outweighs the prejudicial effect. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER FOUR

In the fourth assignment of error, the defendant notes that he was subject to a mandatory life sentence pursuant to LSA-R.S. 15:537 and contends that the trial court erred in denying his motion to inform the jury of the sentence. The defendant cites LSA-C.Cr.P. art. 807 and contends that if a defendant requests a written charge and the sentence is mandatory, the trial court must inform the jury of the sentence.

Louisiana Code of Criminal Procedure article 807 requires the trial judge to give a special charge only "if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent." If the instruction is not wholly correct, it need not be given. When the penalty imposed by statute is mandatory, the trial court must inform the jury of the penalty if the defendant properly requests a special written charge in accordance with Article 807 of the Code of Criminal Procedure. **State v. Washington**, 367 So.2d 4 (La. 1978); **State v. Thames**, 95-2105 (La. App. 1st Cir. 9/27/96), 681 So.2d 480, 488, writ denied, 96-2563 (La. 3/21/97), 691 So.2d 80.

In denying the defendant's motion, the trial court noted that the charges to which the defendant stood accused did not carry a mandatory life sentence. The defendant notes that while LSA-R.S. 14:81.2 and LSA-R.S. 14:89.1 give the trial court sentencing discretion, there is a mandatory minimum sentence for each offense. The defendant further notes that he faced a mandatory life sentence upon enhancement. In instances other than when a mandatory legislative penalty with no judicial discretion as to its imposition is required following verdict, the decision to permit or deny an instruction or

argument on an offense's penalty is within the discretion of the trial judge. **State v. Williams**, 420 So.2d 1116, 1122 (La. 1982). A possible adjudication as a habitual offender is a separate proceeding that punishes one for his status as a recidivist, not for the most recent conviction. Since a multiple offender bill of information is not mandatory, but at the discretion of the prosecutor, the possibility that a defendant may later be subject to sentence enhancement as a recidivist is tentative. We find no abuse of the trial court's discretion in refusing to give this jury charge. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER FIVE

In the fifth assignment of error, the defendant contends that the trial court erred in failing to consider whether a life sentence under LSA-R.S. 15:537(B) is tailored to the gravity of the offense, the culpability of the defendant, and the totality of the circumstances. The defendant notes that several letters were written by members of his congregation and that the presentence investigation (PSI) recommended seven years imprisonment. The defendant further contends that the jury settled on the responsive verdict. Finally, the defendant notes that more than ten years elapsed between his prior offenses and the instant offense.

Article I, section 20 of the Louisiana Constitution explicitly prohibits excessive punishment. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. In reviewing a sentence for excessiveness, the appellate court must consider the punishment and the crime in light of the harm to society and gauge whether the penalty is so disproportionate as to shock its sense of justice or that the sentence makes no reasonable contribution to acceptable penal goals and, therefore, is nothing more than the needless imposition of pain and suffering. See **State v. Guzman**, 99-1528, 99-1753 (La. 5/16/00), 769 So.2d 1158, 1167. The trial court has wide discretion in imposing a sentence within the statutory limits and such a sentence will not be set aside as excessive in the absence of

manifest abuse of discretion. **State v. Loston**, 03-0977 (La. App. 1st Cir. 2/23/04), 874 So.2d 197, 210, writ denied, 04-0792 (La. 9/24/04), 882 So.2d 1167.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. **State v. Leblanc**, 04-1032 (La. App. 1st Cir. 12/17/04), 897 So.2d 736, 743, writ denied, 05-0150 (La. 4/29/05), 901 So.2d 1063, cert. denied, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005); **State v. Faul**, 03-1423 (La. App. 1st Cir. 2/23/04), 873 So.2d 690, 692.

Under LSA-R.S. 15:537(B), a person who on two or more occasions was previously convicted of enumerated sex offenses, including felony carnal knowledge of a juvenile and indecent behavior with a juvenile, shall be sentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence. Courts are charged with applying a statutorily mandated punishment unless it is unconstitutional. **State v. Dorthey**, 623 So.2d 1276, 1278 (La. 1993). Indeed, it is incumbent on the defendant to rebut the presumption that a mandatory minimum sentence is constitutional by "clearly and convincingly" showing that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

State v. Johnson, 97-1906 (La. 3/4/98), 709 So.2d 672, 676.

In imposing sentence, the trial court considered the presentence investigation report and the numerous letters submitted in support of the defendant. The trial court noted the mandatory nature of the sentence, finding compliance with LSA-R.S. 15:537(B). The defendant's sentence of life imprisonment is the mandatory minimum under the statute and, thus, is presumed constitutional. It is, therefore, incumbent upon the defendant to rebut this presumption. Based upon our review of the record in

this case, we do not find that the defendant has clearly and convincingly shown that he is exceptional. The defendant made no showing of exceptional circumstances to justify a lesser sentence. We find that the record in this case adequately supports the life sentence. Thus, the defendant failed to clearly and convincingly show that, because of unusual circumstances, he was a victim of the legislature's failure to assign a sentence that was meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. See **State v. Henderson**, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 761, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER SIX

In the final assignment of error, the defendant contends the jury erred in finding him guilty of indecent behavior with a juvenile, as the evidence of molestation of a juvenile was insufficient. The defendant argues that for the jury to return a compromise verdict, the evidence must be sufficient to sustain a conviction for the charged offense. The defendant specifically argues that the state did not prove that the victim was under the age of seventeen at the time of the offense, that the defendant was over seventeen years old at the time of the offense, or that a two-year difference existed between the defendant's and the victim's ages. The defendant further notes that the state relied on the credibility of the victim without corroboration or medical evidence. The defendant notes testimony that the victim initially denied any sexual contact with the defendant, could not recall specifics, and ultimately wrote a letter saying that her complaint was untrue. Finally, the defendant notes that he was a pastor at the church attended by the victim, but argues that the state failed to show that he used force, influence, or control over the victim.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

That standard of appellate review, adopted by the legislature in enacting LSA-C.Cr.P. art. 821, is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince any rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. **State v. Brown**, 03-0897 (La. 4/12/05), 907 So.2d 1, 18.

Louisiana Revised Statute 14:81(A) (prior to the 2006 amendment) defined indecent behavior with a juvenile as:

> Indecent behavior with juveniles is the commission 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. Lack of knowledge of the child's age shall not be a defense.

The legislature did not provide the offense of molestation of a juvenile with a list of responsive verdicts in LSA-C.Cr.P. art. 814. Pursuant to LSA-C.Cr.P. art. 815, the correct verdicts on count two in the present case were: (1) guilty as charged; (2) guilty of a lesser-included offense; or (3) not guilty. Lesser and included grades of a charged offense are those in which all of the essential elements of the lesser offense are also essential elements of the greater offense charged, and, thus, evidence sufficient to support conviction of the greater offense will necessarily support conviction of the lesser and included offense. **State v. Johnson**, 01-0006 (La. 5/31/02), 823 So.2d 917, 920 (per curiam). The elements of indecent behavior with a juvenile are essential elements of the offense of molestation of a juvenile. See LSA-R.S. 14:81 and 81.2. It is well settled that a jury may return a "compromise" verdict for whatever reason they deem fair, so long as the evidence is sufficient to sustain a conviction for the charged offense. **State v. Odom**, 03-1772 (La. App. 1st Cir. 4/2/04), 878 So.2d 582, 588, writ denied, 04-1105 (La. 10/8/04), 883 So.2d 1026. Nonetheless, on appeal, this court is not required to find sufficient evidence of only the charged offense and will uphold the conviction if the record supports the charged offense or the responsive verdict rendered

by the jury.

The pertinent trial testimony took place on September 25, 2006. As to the defendant's age, the state presented testimony to show that the defendant was twenty-eight or twenty-nine at the time of a 1991 arrest for a prior offense. The transcription of the victim's testimony regarding her year of birth is inconsistent with the other evidence in the record regarding the victim's date of birth. The record indicates that the victim responded October 3, 1984, when asked her date of birth during direct examination. However, when the victim was asked whether she would be twenty on her upcoming birthday, the victim responded positively. Thus, if the transcript has no error in this regard, this verbal representation of the victim's age is conflicting. Moreover, prior to the trial, the victim handwrote a note dated May 19, 2003, wherein she described the instant allegation, noted her date of birth as October 3, 1986, and noted her age as sixteen. During her trial testimony, the note was presented to the victim and she confirmed its content of her date of birth. Further, the victim specifically testified that she was sixteen years of age when she wrote the note.

After the September 14, 2002 murder of the victim's mother, the victim initially remained in the home of her stepfather, Marlon Reed. After presiding over the funeral for the victim's mother, the defendant baptized Reed. The victim became more active in the church and joined the church dance team. According to his trial testimony, Reed expressed his concerns regarding the death of the victim's mother and asked the defendant to counsel the victim. According to Reed, the victim began spending more time outside of the home when she turned sixteen years old and would specifically seek out the defendant. The victim briefly visited her aunt, Ethel James, before expressing her desire to reside with her uncle, Pharoah Johnson. During the visit with James, near Mother's Day of 2003, James observed the defendant as he rode his motorcycle past her home at approximately 10:30 p.m. About thirty minutes later, the victim was absent from the home. According to caller identification equipment, the defendant's

cellular telephone number was the last incoming call. James called the defendant twice before the victim answered on the third try. James told the victim to return to James's residence immediately and the defendant brought her back to the residence at approximately 11:30 p.m. At that point, Johnson (James's brother) picked up the victim and she began to live with him.

Johnson was immediately concerned about the victim's welfare and began recording all of the telephone conversations that took place in his home. On or near May 17, 2003, Johnson listened to a recorded conversation between the victim and the defendant. Concluding that the recording indicated an improper relationship, Johnson talked to his wife, his mother, Reed, and the victim. After the victim was reluctant to discuss or disclose any impropriety to Johnson, Johnson instructed the victim to create the written document describing their relationship. The document and the recording were given to the police.

During her trial testimony, the victim recalled that her mother died when she was fifteen years old. According to the victim, she was on the porch of their home with her mother when she was murdered. Referring to him as "Bishop," the victim noted that the defendant presided over her mother's funeral and also baptized the victim. The victim stated that the practices for the church dance team, which she joined after her mother's death, took place in the church. During the fall season of 2002, the defendant spoke to the victim when he saw her at a football game. According to the victim, the defendant gave her his telephone number and told her to call him sometimes. She began frequently conversing with the defendant, and the defendant ultimately asked her how she would feel about having a relationship with an older man. The defendant told the victim that he would help her get emancipated and marry her. Around Christmas time, the defendant and the victim engaged in sexual intercourse and oral sex in the defendant's suite in the church. According to the victim, she and the defendant had sex on several occasions. The victim confirmed that the defendant

picked her up from Ethel James's home during her brief stay there.

The recorded conversation of the defendant and the victim was played during the victim's testimony. She confirmed that her voice and the defendant's voice were on the tape. Among other questionable commentary, the defendant told the victim that he took care of her, questioned the victim concerning her sexual relationship with other males, and asked her if he was the only one. The defendant referred to the victim as cute, fine, and sexy.

The victim stated that she did not want to disclose the nature of her relationship with the defendant, initially, because she wanted to protect him. When Sergeant Attuso initially questioned her, she cried and did not make any disclosures. The victim ultimately, during a second interview, disclosed the nature of her relationship with the defendant. During her testimony, the victim was also questioned regarding her criminal background, including convictions for shoplifting. The victim had contact with the defendant after his arrest and the defendant asked her to write a letter denying the allegations. The victim wrote the letter because she "didn't want nothing to happen to him."

We find that the evidence more than sufficiently shows that the defendant committed lewd or lascivious acts upon the victim when she was under the age of seventeen, where there was an age difference of greater than two years between the defendant and the victim, with the intention of arousing or gratifying the sexual desires of either person. Arguably, the evidence also supports a finding that the acts were committed by use of influence by virtue of the defendant's position of control or supervision of the victim (which is the element that distinguishes the crime of molestation of a juvenile from the crime of indecent behavior with a juvenile). See LSA-R.S. 14:81.2. The defendant presided over the victim's church and counseled the victim at the request of her stepfather. The victim was often entrusted in the defendant's care.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). 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 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. 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. Mullins**, 464 So.2d 459, 463 (La. App. 1st Cir. 1985). Viewing the evidence in the light most favorable to the prosecution, we find that the evidence in the record was sufficient to convince a rational trier of fact that all of the elements of indecent behavior with a juvenile had been proven beyond a reasonable doubt. For the above reasons, this assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.