NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1026

STATE OF LOUISIANA

VERSUS

JOHN M. BALLARD

On Appeal from the 21st Judicial District Court
Parish of Livingston, Louisiana
Docket No. 21072, Division "H"
Honorable Zorraine M. Waguespack, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered FEB 14 2011

PARRO, J.

The defendant, John M. Ballard, was charged by grand jury indictment with aggravated rape, a violation of LSA-R.S. 14:42. He pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed motions for new trial, post-verdict judgment of acquittal, and in arrest of judgment, which were denied. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating four assignments of error. We affirm the conviction and sentence.

FACTS

Cheryl Frederick lived with her husband and four children in Walker. One of Cheryl's daughters was K.W. The defendant, his wife, Cindy Ballard, and children lived in nearby Livingston. The families were good friends. On August 11, 2006, when K.W. was five years old, K.W. spent the night at the defendant's house. The next day on August 12, K.W. went with the Ballards to a rodeo. After the rodeo, K.W. went back to the Ballards's house. At about 2:00 p.m. that day, Cindy drove K.W. home.

The following day on Sunday, K.W. told her mother that the defendant had made her uncomfortable. Cheryl testified at trial that K.W. told her the defendant had a "weenie-thing" with a button on it and he put it in her "private." K.W. told Cheryl that her vaginal area hurt. Shortly thereafter, Cheryl took K.W. to the emergency room at Our Lady of the Lake Hospital in Baton Rouge. Dr. Catherine Loe treated K.W. Dr. Loe testified at trial that, according to her notes, K.W. told her that the defendant had a silver thing that he touched to the front of her private parts and it started to move when he pushed a switch. The defendant told K.W. that if she told Cindy, he would spank her. Upon a physical examination of K.W., Dr. Loe observed areas of redness and superficial abrasions to the labia minora folds, the inside folds at the vaginal opening.

Detective Ben Bourgeois, with the Livingston Parish Sheriff's Office, was called to the hospital. Detective Bourgeois testified at trial that K.W. told him that when Cindy

went outside to talk to someone, the defendant called K.W. into the bedroom and placed her on the bed. He then took her shorts and panties off, and placed a silver thing inside of her private area. Detective Bourgeois contacted Detective Calvin Bowden, with the Livingston Parish Sheriff's Office, who took over the case.

Detective Bowden testified at trial that he set up a Children's Advocacy Center (CAC) interview for K.W. Detective Bowden attended the CAC interview and, based on the information he obtained from the interview, he arrested the defendant at his house. Detective Bowden confirmed the information he had learned from the CAC interview, namely, that the defendant had in his bedroom a chest of drawers with a television on top. Detective Bowden asked Cindy if there were any dildos in the top drawer. Cindy responded in the affirmative and removed two dildos from that drawer. The sexual device that matched K.W.'s description was a silver "Love Rocket" dildo, which was in packaging that could be opened and closed. Detective Bowden further testified that when he was transporting the defendant to jail, the defendant told Detective Bowden that he had been alone with K.W., but he denied the allegations made by K.W.

Dr. Scott Benton, who in 2006 worked at Children's Hospital, testified at trial that he examined K.W. about two weeks after the incident. Dr. Benton did not find anything significant that suggested sexual abuse. Dr. Benton further testified that very young children can be vaginally raped and yet no sign of physical injury will be present.

Jennifer Thomas, the CAC forensic interviewer who spoke with K.W. in Livingston Parish, testified at trial that her interview of K.W. was videotaped. In the interview, K.W. told Jennifer the defendant had "violated" her. When asked on cross-examination about the use of the phrase "he violated me," Jennifer testified that the use of such verbiage was not very common. In the interview, K.W. said the defendant's penis looked like an "old junk yard." Regarding this description of a penis, Jennifer stated on cross-examination, "That's probably the first that I've heard that." On redirect examination, Jennifer stated the "old junk yard" description did not indicate that K.W. was being untruthful.

In the CAC interview, K.W. indicated that the defendant penetrated her vagina with a silver sexual device that vibrated, which she referred to as a "wiener thing." K.W. further stated that the defendant put his "wiener" inside her body.

In the defendant's case-in-chief, Cindy testified that she had the dildos for a while, but they were still in the packaging and had never been used. She also testified that the defendant could not have raped K.W. because, after the rodeo, it was raining and they all had come home and stayed inside the house. The bedroom door was wide open. Cindy and her son's girlfriend were in the kitchen, so they could see the bedroom. On cross-examination, Cindy stated that the morning before they went to the rodeo, K.W. was asleep in their bedroom[1] and the defendant and she were outside. Cindy walked to a neighbor's house to get cigarettes.

Tiffany Sullivan, who was engaged to the defendant's son, Josh, and lived with the Ballards, testified at trial that after the rodeo, they were in the kitchen, which is next to the defendant's bedroom. Tiffany saw K.W. walk to the bedroom doorway and ask for some M&Ms. Tiffany also testified that she never saw child pornographic magazines or images on the computer at the defendant's house. She testified on cross-examination that the defendant was not alone with K.W. at any time that weekend. She stated that she was around the defendant and K.W. the entire time, including Friday night and all day Saturday, except during the time Tiffany was in her bedroom Saturday morning before the rodeo.

John Ballard, the defendant's son, testified at trial that he never found child pornography on the computer. John stated he was around the defendant and K.W. the entire time, and the defendant was never alone with K.W. Regarding any time when the defendant and K.W. were in the defendant's bedroom together, John testified that K.W. was in the bedroom when the defendant walked in for "maybe 3.5 seconds to grab a dog" and then left.

The defendant testified at trial that the only time he was alone with K.W. was

[1] K.W. slept on an air mattress on the floor.

the morning before the rodeo. Cindy went across the street to the neighbor's house to get cigarettes. The defendant's dog was barking in his bedroom. The defendant entered his bedroom, where K.W. was asleep on the air mattress, picked up his barking dog, and took the dog outside. The defendant then went to a neighbor's house. He stated that he was alone with K.W. for forty-five seconds at the most. The defendant denied all allegations by K.W. against him. He also stated that K.W. was lying and that she was coached about what to say.

Several of the defendant's neighbors testified at trial. They testified that their families had get-togethers with the Ballards, and they never saw pornography at the defendant's house.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the trial court erred in denying his motion for continuance. Specifically, the defendant contends that he went to trial without his only expert witness, who was crucial to his defense.

Several months prior to trial, defense counsel filed a motion to have an expert view K.W.'s CAC interview, which the trial court granted. Dr. Alicia Pellegrin, who, according to defense counsel's motion, is a child psychologist who specializes in sexual abuse, viewed the videotape of the CAC interview and provided defense counsel with a short letter summarizing her findings.[2] Dr. Pellegrin noted in her letter that numerous inconsistencies in K.W.'s sequence were of concern to her. She further felt several of K.W.'s statements suggested that K.W. might have been coached. Dr. Pellegrin also found K.W.'s description of a penis implausible, which called into question whether K.W. had ever seen one.

Three weeks prior to trial, defense counsel filed a motion for continuance on the grounds that Dr. Pellegrin would be out of town during trial and would be unable to testify. Two weeks prior to trial, the state filed a motion in limine asking the trial court to suppress any and all evidence or testimony by Dr. Pellegrin, since such evidence or

[2] Dr. Pellegrin's letterhead indicates she is a clinical psychologist with a Ph.D.

testimony would only relate to the credibility of the victim, which is improper under the law. At a pretrial hearing, the trial court heard argument on both motions.

Regarding the state's motion in limine, which was taken up first, the prosecutor argued that under LSA-C.E. art. 702 and **State v. Foret**, 628 So.2d 1116 (La. 1993), Dr. Pellegrin would not be allowed to offer her opinion at trial about K.W.'s credibility. The prosecutor further stated that what Dr. Pellegrin's "report" showed was that Dr. Pellegrin "is not coming in to explain or testify to any theories, et cetera." Instead, "[s]he is coming in to testify what she believes the credibility of the child is, which I think is clearly inadmissible." Following this argument was the relevant exchange between defense counsel, the prosecutor, and the trial court:

> [Defense counsel]: Your Honor . . . while she cannot testify as to the credibility of the witness, she can as a child psychologist testify as to the vocabulary of the child at that age.
>
> [Prosecutor]: She cannot.
>
> [Defense counsel]: She can testify as to -- I believe she can testify as to what her vocabulary can be. She is deemed a child psychologist. I believe she is an expert in child psychology.
>
> * * *
>
> [Defense counsel]: Well I mean, I believe there are several other things that she can -- she can tell if there has [sic] been signs of coaching. And I believe that she --
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> The Court: All of that goes to the truth. That all goes to whether or not the child is reporting what happened to her truthfully.
>
> [Defense counsel]: She can't give an opinion as to whether the child was[,] but I think she can give her report.
>
> The Court: Okay.
>
> [Prosecutor]: Judge, again, I think she is correct in saying that she can state -- she has made an opinion of whether a child has been coached and the child's vocabulary and all those things. But yet, that is absolutely key on the child's credibility and whether or not the child is telling the truth and that is a question for the jury to answer and not for Dr. Pellegrin to answer. . . .
>
> * * *
>
> The Court: All right. . . . Dr. Pellegrin i[s] an expert. I've used her -- she has been in court with me many times. But she cannot testify about the child's veracity. Whether or not the child is telling the truth is a

> matter of fact. And the fact is up to the jurors to decide and they use their collective common sense to make those determinations. I don't judge that. She doesn't judge that. The jury judges that. It's a matter for the jury. So I am going to grant your motion [in limine] on this one.

Louisiana Code of Evidence article 702 addresses the admissibility of expert testimony and provides, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Notably, the supreme court has placed limitations on this codal provision in that, "[e]xpert testimony, while not limited to matters of science, art or skill, cannot invade the field of common knowledge, experience and education of men." **State v. Young**, 09-1177 (La. 4/5/10), 35 So.3d 1042, 1046-47, cert. denied, ___ U.S. ___, 131 S.Ct. 597, 178 L.Ed.2d 434 (2010).

Testimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact. However, in a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused. LSA-C.E. art. 704.

The trial court properly granted the state's motion in limine. Defense counsel sought to establish through Dr. Pellegrin's testimony that K.W. was coached about things she said at the CAC interview. Such testimony would go to the veracity of K.W., which would, in effect, amount to an opinion of the defendant's guilt or innocence. Credibility determinations are made by the trier of fact. See **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. Allowing Dr. Pellegrin to testify about whether K.W. was being truthful would have, as noted by the trial court, invaded the province of the jurors as fact finders. See **Young**, 35 So.3d at 1048.

Following the granting of the state's motion in limine at the pretrial hearing, the court took up defense counsel's motion for a continuance. In finding that Dr. Pellegrin would not be allowed to give her assessment of K.W.'s veracity at the CAC interview and finding further there were no other issues requiring Dr. Pellegrin's expert opinion, the trial court denied the motion.

The decision whether to grant or refuse a motion for a continuance rests within the sound discretion of the trial judge, and a reviewing court will not disturb such a determination absent a clear abuse of discretion. **State v. Strickland**, 94-0025 (La. 11/1/96), 683 So.2d 218, 229; see LSA-C.Cr.P. art. 712. The defendant has not shown that the trial court abused its discretion in denying the motion for continuance. It was clear from the outset that given Dr. Pellegrin's minimal participation in this matter, namely, she reviewed the videotape of the CAC interview, her role as an expert witness would be limited. When Dr. Pellegrin's letter to defense counsel made clear that she had concerns with K.W.'s veracity, *i.e.,* that K.W. was coached, the trial court correctly ruled that any and all such testimony by Dr. Pellegrin regarding K.W.'s veracity would not be allowed.

Accordingly, unless there was another viable issue, not evidenced by Dr. Pellegrin's letter, which required her expertise at trial, the trial court would have had no compelling reason to grant the motion for continuance. A motion for a continuance based upon the absence of a witness must state facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial. LSA-C.Cr.P. art. 709(A)(1). At the hearing on the motion for continuance, defense counsel failed to show the materiality of Dr. Pellegrin's testimony, as well as the necessity of Dr. Pellegrin's presence at trial. Instead, defense counsel simply made assertions that Dr. Pellegrin "may be able to testify to other things and I will be talking to her about that," and "I believe she is crucial to our case." Defense counsel did indicate to the trial court that she could have Dr. Pellegrin testify as to the normal vocabulary of a five or six-year-old child without referencing the words said in the CAC interview. However, the trial court asked, "Why do you need [an] expert for that?" We agree with the trial court. The determination of what is "normal" speech for a child is the function of the jury. Expert testimony cannot invade the field of common knowledge, experience, and education of men. **Young**, 35 So.3d at 1046-47.

We also note that the defendant in his brief makes similar unfounded assertions regarding why Dr. Pellegrin should have testified. For example, the defendant states, "Just because the court had ruled that it would not allow her to testify as to the veracity of the child, did not mean that there were not other matters of significance to the defense that she could have testified to." The defendant does not indicate what those matters of significance might have been. The defendant further asserts, without support, that the denial of the motion for continuance was an abuse of discretion "since this was the defense's only expert witness, [the defendant] was on trial for a serious crime, with a penalty of life in prison if convicted, and the defense felt that their expert's testimony was crucial to their defense."

The defendant has made no showing that Dr. Pellegrin's presence at trial was a necessity, or "crucial" to his defense. See LSA-C.Cr.P. art. 709(A)(1). Accordingly, the trial court did not abuse its discretion in denying the motion for continuance. This assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 2, 3, and 4

In these related assignments of error, the defendant argues that the evidence was insufficient to support a conviction for aggravated rape. Specifically, in his second assignment of error, the defendant contends that K.W.'s later statement, which suggested penile penetration, was internally inconsistent with her prior statements, in which she made no allegations of penile penetration. In his third assignment of error, the defendant argues that the trial court erred in denying his motions for new trial and in arrest of judgment, because the evidence was insufficient to support the conviction. In his fourth assignment of error, the defendant argues that the trial court erred in denying the post-verdict judgment of acquittal without modifying the verdict since the evidence was insufficient to convict him of aggravated rape.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, 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 LSA-C.Cr.P. art. 821(B); **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that, in order to convict, the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 01-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

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

> A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> * * * *
>
> (4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.

Louisiana Revised Statute 14:41 provides, in pertinent part:

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

Aggravated rape is a general intent crime. **State v. McDaniel**, 515 So.2d 572, 575 (La. App. 1st Cir. 1987), writ denied, 533 So.2d 10 (La. 1988). General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. LSA-R.S. 14:10(2). The trier of fact is to determine the requisite intent in a criminal case. **State v. Crawford**, 619 So.2d 828, 831 (La. App.

1st Cir.), writ denied, 625 So.2d 1032 (La. 1993).

The defendant states in his brief that K.W. told several people about the defendant inserting a sexual device (a dildo) into her vagina, and the defendant further states that K.W. never mentioned penetration of herself by the defendant's penis. However, the defendant points out that, at the CAC interview, K.W. mentioned for the first time that the defendant inserted his "wiener" inside her vagina. The defendant suggests that K.W.'s actual language used at the interview to describe what the defendant did to her was "ambiguous and unclear." The defendant contends that, according to her mother, K.W. had previously referred to the silver sexual device as a "weenie-thing." The defendant suggests that the statement by K.W. at the CAC interview was inconsistent with all prior statements by K.W. regarding the incident. Accordingly, the defendant argues that it is more reasonable to conclude that K.W., at the CAC interview, was still being consistent with her prior statements and was simply once again referring to the "wiener thing" when she made the statement about the defendant inserting his penis.

Our review of the evidence reveals that at the CAC interview, when K.W. discussed the sexual device, she said the defendant used a "wiener thing" that was silver with a white button on it, and that when the defendant turned it on, it "shaked." She also said the defendant stuck a "wiener thing" in her "private part" and turned it on.[3] When Jennifer Thomas asked K.W. if the defendant made her do anything to him, K.W. stated that the defendant made her look at his wiener and that it looked nasty. When asked what it looked like, K.W. said "like an old junkyard" and "it was white." When asked whether the defendant's wiener was on the inside of her body or the outside of her body, K.W. responded that it was on the "inside." When asked what that felt like, K.W. said it felt like she was "dying."

Based on our review of the evidence, it appears that K.W. clearly drew a distinction between the sexual device and the defendant's penis. Further, it appears

[3] On a diagram of a naked girl, K.W. indicated the vagina was the "private part."

she referred to the sexual device as the "wiener thing," whereas she referred to the defendant's penis as "his wiener."

Various reasons could account for K.W.'s alleged delayed disclosure of penile penetration. At trial, the witnesses to whom K.W. reported the incident before she did the CAC interview may not have asked K.W. directly if the defendant inserted his penis in her. A review of the direct examination of these witnesses at trial indicates the prosecutor asked the witnesses what K.W. told him or her, but did not ask the witnesses if the defendant had done anything else to her, aside from assaulting her with a sexual device. For example, when K.W.'s mother, Cheryl, was asked on direct examination if she spoke to the doctor at the hospital, Cheryl testified, "They brought her in the back. And when they [doctors] would ask a question, you know, I would ask for them to please ask [K.W.] because I hadn't really talked to her very much." Later during the direct examination of Cheryl, the following exchange took place:

> Q. Okay. Now, prior to [K.W.'s] interview with the Child Advocacy Center and other than when she initially told you what happened, did you discuss what had happened with her?
>
> A. No, ma'am. I -- I don't -- I didn't know how to handle that. I was just in complete shock. I didn't want to question her. I didn't want to put her on the spot. I didn't feel like I had the right questions or anything to ask her. I just brought her straight to the hospital and let them ask her.

On the cross-examination of Cheryl, the following exchange took place:

> Q. Okay. And so after she told you that he had touched her private, you --
>
> A. Yes, ma'am.
>
> Q. -- didn't talk anymore about it?
>
> A. I told her -- I said, are you -- I wanted to make sure that she wasn't being tickled, or he wasn't dressing her, or he wasn't -- somehow it was [sic] a misunderstanding type thing. So, after I talked with [defendant's wife], I said, well, [K.W.], how did he touch your "private?" Was he dressing you? Was he tickling you? Were y'all playing? Because they did play a lot. And she said, no. And that's when she told me that he put something in her private. And so I did -- no, I did not question her at that point. I said, okay, well, we're going to go -- just the first thought was we're going to go to the doctor, because my first thought was I just want to make sure she's okay, you know.

Q. Okay. So, you didn't discuss this with her at all?

A. No, ma'am. We took her to the hospital.

Q. You didn't try -- did you try to find out what it was that he had allegedly put in her?

A. I figured that they could find that out at the hospital. I just -- I -- she told me that and I said, let's go to the hospital, and we went there.

Thus, five-year-old K.W. spoke briefly about the incident to her mother, Dr. Loe, and Detective Bourgeois all on the same day, in fairly quick succession. It was merely one day later at the CAC interview when, upon discussing the incident at length with a trained forensic interviewer, K.W. spoke of the defendant putting his penis in her vagina.

In any event, the jury heard all of the testimony, viewed all of the evidence presented to it at trial, and, notwithstanding any alleged inconsistencies, found the defendant guilty. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **Taylor**, 721 So.2d at 932.

In finding the defendant guilty, it is clear that the jury believed what K.W. told Jennifer Thomas about the defendant's actions and rejected the defendant's theory of innocence of aggravated rape. The jury's verdict reflected the reasonable conclusion that, based on the trial testimony of Cheryl, Dr. Loe, Detective Bourgeois, Jennifer Thomas, and the CAC interview of K.W., the defendant vaginally raped K.W., who was five years old at the time. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not

render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

Dr. Loe, who examined K.W. the day after the incident, testified that she saw areas of redness and superficial abrasions around the labia. Dr. Loe further noted that redness in the genitalia is not common at all. Dr. Benton testified that the redness and abrasions are not findings specific to just the sex act, but they could be consistent with it. Dr. Benton further testified that it is possible to rape or penetrate a child and cause no injury or leave no physical evidence. Thus, while there was little physical evidence to prove the rape had occurred, it is not necessary that there be physical evidence to prove the defendant committed aggravated rape. The testimony of the victim alone is sufficient to prove the elements of the offense. **State v. Orgeron**, 512 So.2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So.2d 113 (La. 1988). The testimonial evidence was sufficient to establish the elements of aggravated rape, including the element of penetration. Louisiana Revised Statute 14:41(B) provides that "[e]mission is not necessary" and that "any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime." See **State v. Rives,** 407 So.2d 1195, 1197 (La. 1981).

After a thorough review of the record, we are convinced that viewing the evidence in the light most favorable to the state, a rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the aggravated rape of K.W. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

Regarding his third assignment of error, the defendant's motions for new trial and in arrest of judgment were based on the claim that the conviction was contrary to the law and the evidence. The defendant states in his brief that a new trial should have been granted because there was not enough evidence to prove that aggravated rape had occurred. Initially, we note that a motion in arrest of judgment on the ground that the conviction was "contrary to the law and the evidence" is an improper ground for the

motion. Under LSA-C.Cr.P. art. 859, the grounds for arrest of judgment are exclusive, and "contrary to the law and the evidence" is not one of the enumerated grounds. Regarding the motion for new trial, the court shall grant a new trial when the verdict is contrary to the law and the evidence. See LSA-C.Cr.P. art. 851(1). The trial court in this case denied the motion for new trial based on these grounds. Such a ruling by the trial court regarding the evidence, according to a recent pronouncement by our supreme court, is not reviewable because an appellate court may not review facts in a criminal case. See **State v. Guillory**, 10-1231 (La. 10/8/10), 45 So.3d 612, 615. To the extent the defendant is arguing sufficiency of evidence in this assignment of error, that issue has been addressed in our earlier discussion of this subject.

Furthermore, modification of the verdict is unwarranted in light of our conclusion that the evidence was sufficient to support a conviction of aggravated rape. Accordingly, the trial court did not err in denying the motion for post-verdict judgment of acquittal.

These assignments of error are without merit.

CONVICTION AND SENTENCE AFFIRMED.