NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 1415

STATE OF LOUISIANA

VERSUS

RAYMOND JACKSON

Judgment Rendered: March 25, 2011

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket Number 701066

Honorable Brenda Bedsole Ricks, Presiding

* * * * * *

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* * * * * *

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

GUIDRY, J.

The defendant, Raymond Jackson, was charged by grand jury indictment with aggravated rape, a violation of La. R.S. 14:42. He pled not guilty. Following a jury trial, the defendant was convicted as charged. The defendant filed motions for post-verdict judgment of acquittal, arrest of judgment, and a new trial. The trial court denied the motions. The defendant was subsequently sentenced to life imprisonment without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, urging three assignments of error, as follows:

1. The [trial court] wrongfully denied the defendant's motion to quash and allowed the State to amend the indictment without the issue of age clearly determined by the Grand Jury.
2. [The defendant's] conviction under Article 782 of the Code of Criminal Procedure was a denial of his U.S. Constitutional rights.
3. The evidence was insufficient to support [the defendant's] conviction for aggravated rape when the State failed to prove beyond a reasonable doubt that J.W. was under the age of 13 when the alleged crimes occurred.

For the reasons set forth below, we affirm the defendant's conviction and sentence.

FACTS

On March 7, 2007, J.W.[1], a fifteen-year-old student at Ponchatoula High School, requested a meeting with the school's principal, Cynthia Foster.[2] During the meeting, J.W. initially told Ms. Foster that her stepfather, the defendant, was sexually molesting her. Ms. Foster asked J.W if she had advised her mother of alleged abuse, and the child indicated that she had not because she was afraid to do so. Ms. Foster immediately contacted J.W.'s mother, S.W., and requested that she

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[1] In accordance with La. R.S. 46:1844(W), the victim herein is referred to only by her initials. To further protect the identity of the victim, her mother is also referenced by initials.

[2] At the time of trial, the principal testified that she has since married and now uses the name Cynthia Foster Evans.

come to the school to discuss an important matter. Shortly thereafter, S.W. arrived at the school accompanied by the defendant.

In a private meeting, outside of the defendant's presence, Ms. Foster advised S.W. of J.W.'s allegations of sexual abuse. Shocked by this information, S.W. asked to see J.W., who had been in another room. S.W. hugged her child and assured her that everything would be okay. Ms. Foster then brought the defendant into the office and advised him of J.W.'s claims that he had been molesting her. The defendant vehemently denied ever abusing J.W. Ms. Foster informed S.W. and the defendant that she was required to report the allegations of abuse to the appropriate authorities. S.W. told Ms. Foster that she planned to personally report the matter to the Ponchatoula Police Department. Ms. Foster agreed to allow S.W. time to report the matter. However, Ms. Foster told S.W. that if she had not reported the matter to the police by eight o'clock the following morning, she was going to take the necessary steps in reporting the matter. Ms. Foster allowed J.W. to leave with her mother and the defendant (without making a report), because she felt like S.W. believed J.W., and she did not believe the child was in any danger.

S.W., the defendant, and J.W. went home together. Later that same day, S.W. and J.W. left the residence, and S.W. reported the matter to the Ponchatoula Police Department. In a taped statement provided in connection with the police investigation of the matter, J.W. told Lieutenant Jerry McDowell that the defendant started sexually abusing her when she was seven years old. J.W. also stated that on the night before she disclosed the abuse to Ms. Foster, the defendant had anal sexual intercourse with her in her bedroom while her mother was asleep.

Lieutenant McDowell secured a warrant for the defendant's arrest for aggravated incest. Lieutenant McDowell also contacted the defendant's place of employment and requested that the defendant report to the police station for questioning. The defendant complied. The defendant initially denied ever

sexually abusing J.W., but later admitted to engaging in anal sexual intercourse with the child. The defendant stated he had sex with J.W. four times when she was between the ages of 13 and 15. He denied ever threatening J.W. The defendant claimed he simply asked J.W. to have sex and she complied. The defendant also denied ever engaging in vaginal sexual intercourse with J.W. The defendant was arrested and charged with aggravated incest. He was later indicted for aggravated rape.

DENIAL OF MOTION TO QUASH

In his first assignment of error, the defendant contends the trial court erred in denying his motion to quash the indictment and in allowing the state to amend the indictment to provide that the alleged offense occurred between "the years 1998 through March 5, 2007," without the issue of age of the victim, an essential element of the crime charged, being clearly determined by the grand jury. He argues that there is no way to be certain which of the circumstances provided for in La. R.S. 14:42 makes this offense aggravated rape based on the indictment as written.

When a trial court rules on a motion to quash, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion. See State v. Odom, 02-2698, p. 6 (La. App. 1st Cir. 6/27/03), 861 So. 2d 187, 191, writ denied, 03-2142 (La. 10/17/03), 855 So. 2d 765. However, a trial court's legal findings are subject to a de novo standard of review. See State v. Smith, 99-0606, p. 3 (La. 7/6/00), 766 So.2d 501, 504.

In this case, the trial court's ruling on the motion to quash is based on a legal finding and is, therefore, subject to de novo review. An accused shall be informed of the nature and cause of the accusation against him. La. Const. art. I, § 13. That requirement is implemented by La. C. Cr. P. art. 464, which provides:

> The indictment shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It

> shall state for each count the official or customary citation of the statute which the defendant is alleged to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Louisiana Code of Criminal Procedure article 465 authorizes the use of specific short-form indictments in charging certain offenses, including aggravated rape. The constitutionality of short-form indictments has been consistently upheld in capital and mandatory life sentence cases. See State v. Liner, 373 So. 2d 121, 122 (La. 1979) (per curiam); see also State v. Baylis, 388 So. 2d 713, 718-19 (La. 1980). When those forms are used, it is intended that a defendant may procure details as to the statutory method by which he committed the offense through a bill of particulars. Baylis, 388 So. 2d at 719; State v. Johnson, 365 So. 2d 1267, 1270 (La. 1978); La. C. Cr. P. art. 465, Official Revision Comment (b).

The original indictment charging the defendant with aggravated rape listed the date of the offense as March 5, 2007. Prior to trial, the defendant moved to quash the indictment asserting that the indictment failed to comply with La. R.S. 14:42(A)(4), which provides that the victim must be under the age of thirteen when the offense occurred. At the hearing on the motion to quash, the defendant argued that since the status of the victim being under the age of thirteen is an essential element of the crime charged, the error in the indictment was one of substance that could not be cured by amendment. The state argued that the indictment, as written, satisfied the minimal language provided for a short-form indictment under La. C. Cr. P. art. 465(A)(39). Thus, the state argued, the date of the alleged offense is not an essential element of the crime charged and any error regarding the date is immaterial and does not warrant quashing the indictment. The trial court denied the motion to quash and allowed the state to amend the indictment. The indictment was amended to provide that the alleged offense occurred between "the years 1998 through March 5, 2007."

Louisiana Code of Criminal Procedure article 487(A) provides:

> An indictment that charges an offense in accordance with the provisions of this Title shall not be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, misspelling, or improper English, or because of the use of any sign, symbol, figure, or abbreviation, or because any similar defect, imperfection, omission, or uncertainty exists therein. The court may at any time cause the indictment to be amended in respect to any such formal defect, imperfection, omission, or uncertainty.
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> Before the trial begins[,] the court may order an indictment amended with respect to a defect of substance. After the trial begins[,] a mistrial shall be ordered on the ground of a defect of substance.

"A 'defect of substance' as contemplated by Article 487 of the Code of Criminal Procedure is intended to mean a defect which will work to the prejudice of the party accused." City of Baton Rouge v. Norman, 290 So. 2d 865, 870 (La. 1974); see also State v. Harris, 478 So. 2d 229, 231 (La. App. 3d Cir. 1985), writ denied, 481 So. 2d 1331 (La. 1986). The purpose of requiring the state to file an amendment to the indictment before trial is to provide the defendant with adequate notice of the charge so that he may properly prepare his defense. When the indictment against him provides sufficient notice of the crime with which he is charged, a defendant suffers no prejudice. See State v. Young, 615 So. 2d 948, 951 (La. App. 1st Cir.), writ denied, 620 So. 2d 873 (La. 1993).

The actual date the offense is alleged to have occurred is not an essential element of the offense of aggravated rape. See La. R.S. 14:42. When the date is not an essential element of the offense charged, a mistake respecting the date on which the offense occurred is only a defect as to form. Under the provisions of La. C. Cr. P. art. 487, the court may cause an indictment to be amended at any time with respect to a defect of form. State v. Favors, 09-413, p. 3 (La. App. 5th Cir. 11/10/09), 28 So. 3d 433, 436; see also State v. Booker, 02-1269, pp. 13-14 (La. App. 1st Cir. 2/14/03), 839 So. 2d 455, 464-65, writ denied, 03-1145 (La. 10/31/03), 857 So. 2d 476.

The indictment in this case follows the specific indictment form for aggravated rape provided by La. C. Cr. P. art. 465(A)(39). Thus, the indictment was sufficient. See State v. Straughter, 97-1161, p. 8 (La. App. 4th Cir. 2/10/99), 727 So. 2d 1283, 1288, writ denied, 99-0704 (La. 7/2/99), 747 So. 2d 14. As previously noted, if the state merely filed a short-form indictment charging aggravated rape under La. C. Cr. P. art. 465, an accused could obtain further information about the nature and cause of the charge by filing a motion for a bill of particulars. See La. C. Cr. P. art. 484.

Our review of the record in this case reflects that the amendment to the indictment was merely to clarify the date of the offense charged. While the amendment changed the date, it did not charge a new offense. Furthermore, the record reflects that the defendant was obviously aware that he was to be tried for aggravated rape, and not aggravated incest. The language used by the defendant in the motion to quash clearly reflects that there was no uncertainty as to the charge against the defendant. The transcript of the hearing on the motion to quash also shows that defense counsel was aware that the prosecution was based on incidents alleged to have occurred when the victim was under the age of thirteen. Thus, we find that the indictment complies with the constitutional requirement that the defendant be informed of the nature and cause of the accusation against him. La. Const. art. I, §13.

Moreover, in accordance with La. C. Cr. P. art. 487, the court has complete authority to cause the indictment to be amended, both as to form and substance, at any time before trial. The indictment in this case was amended on May 13, 2008, well in advance of the defendant's January 2010 trial. As the defendant was properly informed of the charge, pretrial amendment of the indictment was not prejudicial to him. We find no error in the trial court's denial of the defendant's motion to quash the indictment. This assignment of error lacks merit.

NON-UNANIMOUS JURY VERDICT

In his second assignment of error, the defendant argues the ten-to-two verdict is in violation of the United States and Louisiana Constitutions. While defendant concedes that the verdict is in conformity with the present state of the law, defendant maintains that in light of recent jurisprudence, La. C. Cr. P. art. 782(A) and La. Const. art. I, §17(A)(providing for jury verdicts of ten to two in cases in which punishment is necessarily confinement at hard labor) violate the Sixth and Fourteenth Amendments of the United States Constitution.

The punishment for aggravated rape is confinement for life at hard labor. La. R.S. 14:42. As we have previously held in State v. Smith, 06-0820, p. 24 (La. App. 1st Cir. 12/28/06), 952 So. 2d 1, 16, writ denied, 07-0211 (La. 9/28/07), 964 So. 2d 352:

> Louisiana Constitution article I, § 17(A) and La. Code Crim. P. art. 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); State v. Belgard, 410 So.2d 720, 726 (La.1982); State v. Shanks, 97-1885, pp. 15-16 (La. App. 1st Cir.6/29/98), 715 So.2d 157, 164-65.
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> The defendant's reliance on Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) is misplaced. These Supreme Court decisions do not address the issue of the constitutionality of a non-unanimous jury verdict; rather, they address the issue of whether the assessment of facts in determining an increased penalty of a crime beyond the prescribed statutory maximum is within the province of the jury or the trial judge, sitting alone. Nothing in these decisions suggests that the jury's verdict must be unanimous for a defendant's conviction to be constitutional. Accordingly, La. Const. art. I, § 17(A) and La.Code Crim. P. art. 782(A) are not unconstitutional and, hence, not violative of the defendant's Sixth Amendment right to trial by jury.

Our supreme court has also affirmed the constitutionality of Article 782. See State v. Bertrand, 08-2215 (La. 3/17/09), 6 So. 3d 738. The Bertrand court specifically found that a non-unanimous, 12-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments. Bertrand, 08-2215 at p. 8, 6 So. 3d at 743.

For these same reasons, we find this assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE

In his final assignment of error, the defendant contends the state failed to present sufficient evidence to support the aggravated rape conviction. Specifically, he argues that the state failed to prove beyond a reasonable doubt that J.W. was under the age of thirteen when the alleged incidents occurred. The defendant points to various alleged inconsistencies in the victim's recollection of the events and argues that she should not be deemed credible. He notes that, aside from J.W.'s allegations (which he claims were inconsistent and full of fabrications) and his "perhaps coerced" confession, the state had no other proof that the alleged incidents of sexual abuse occurred.

In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. C. Cr. P. art. 821; State v. Mussall, 523 So. 2d 1305, 1308-09 (La. 1988).

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 Mussall, 523 So. 2d at 1308-11. 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. 1st Cir. 1987), writ denied, 532 So. 2d 112 (La. 1988).

In the present case, the indictment charges that the incidents occurred between 1998 and March 5, 2007. Louisiana Revised Statute 14:42, prior to amendment by 2001 La. Acts, No. 301, §1, provided, in pertinent part:

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

During the time period in which these incidents were committed, 2001 La. Acts, No. 301, §1 amended the definition of rape in La. R.S. 14:41(C) to include oral sexual intercourse committed without the person's lawful consent. Oral sexual intercourse was defined therein as:

> (1) The touching of the anus or genitals of the victim by the offender using the mouth or tongue of the offender.
>
> (2) The touching of the anus or genitals of the offender by the victim using the mouth or tongue of the victim.

By 2001 La. Acts, No. 301, §1, La. R.S. 14:42(A) was also amended to include oral sexual intercourse. In 2003, the age element of La. R.S. 14:42(A)(4) was increased to thirteen years of age by 2003 La. Acts, No. 795, §1.[3]

In the counseled assignment of error, the defendant in this case does not argue, as he did below, that he never engaged in sexual activity with J.W. The thrust of the defendant's argument on appeal is that the evidence failed to prove that J.W. was under the age of thirteen when he had sex with her. He argues that

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[3] 2006 La. Acts, No. 178, §1 amended La. R.S. 14:42(D)(2) to change the penalty provision relative to the age of the victim to conform to the definition of the crime and to provide the penalties to be imposed when the victim is under the age of thirteen years.

the evidence presented supports only a conviction of aggravated incest, the offense for which he was originally arrested.

We have reviewed the record, and contrary to the defendant's assertions, we find that there is sufficient evidence to support the conviction. At the trial of this matter, J.W., who was then eighteen years old, testified that the defendant, her stepfather, sexually abused her on a regular basis for a period of over eight years. According to J.W., the abuse typically occurred when her mother was away from home at work. J.W. explained that the first incident of sexual contact by the defendant occurred when she was seven years old. She recalled that her family was living in a home in Happy Woods in Hammond, Louisiana. J.W. explained she was in the bathtub when the defendant entered the bathroom, removed his penis, and told her to touch it. The defendant then told J.W. that his penis was a lollipop and instructed her to open her mouth. When the child complied, the defendant put his penis in her mouth. The defendant then followed J.W. into her bedroom where he then inserted his penis into her anus. She testified that it was "very painful" and caused her to bleed. After he ejaculated on her, the defendant told J.W. to go clean herself up and threatened to kill her if she ever told anyone. J.W. testified that she did not disclose the abuse because she believed the defendant would carry out his threats and kill her.

J.W. testified that the next sexual encounter occurred after the family moved to a small "yellow house" in Ponchatoula. J.W. testified that she was eight years old when her family moved to the yellow house. They lived there until she was either eleven or twelve years old. J.W. explained that the defendant had anal intercourse with her "plenty of times" while they lived in the yellow house. The defendant would force J.W. to kneel down on the couch with her chest down and he would penetrate her anus with his penis until he ejaculated. The sexual encounters occurred "once a week or sometimes once every two weeks."

According to J.W., the family moved to a trailer when she was twelve. At the trailer, the defendant continued to force J.W. to engage in anal sexual intercourse. The defendant also started doing more touching during the sexual episodes. J.W. explained that he would touch her breasts and vaginal area more. J.W. explained that the day before she reported the abuse to her high school principal, the defendant attempted to have sex with her while her mother was away at work. The attempt was interrupted when they heard her mother's vehicle arrive outside the residence. According to J.W., later, when her mother went to sleep, the defendant returned to her bedroom and performed anal intercourse on her until he ejaculated.

S.W. testified that J.W. was approximately eight, going on nine, years old when she and the defendant moved their family into the yellow house. The family lived in the yellow house approximately three or four years.

The state also presented testimony from Dr. Yameika Head, a child-abuse pediatrician at Children's Hospital in New Orleans. Dr. Head testified that she examined J.W. on March 7, 2007. J.W. reported a history of anal, vaginal, and oral sexual abuse over a period of about eight or nine years. Based upon the information provided by J.W., Dr. Head conducted a physical examination and performed various tests for sexually-transmitted diseases. The tests all yielded negative results. Dr. Head further testified that no signs of physical trauma were found. Dr. Head explained that lack of physical findings does not negate allegations of sexual abuse, especially in cases of delayed reporting.

Lieutenant McDowell, of the Ponchatoula Police Department, testified that the defendant provided a tape-recorded statement wherein he admitted engaging in anal sexual intercourse with J.W. The defendant denied any vaginal and/or oral penetration. He admitted that he touched J.W.'s vagina, but he never penetrated her vaginally. The defendant also denied engaging in oral sexual intercourse. He

further claimed that the instance of anal intercourse occurred when J.W. was between the ages of 13-15. The defendant's taped statement was introduced into evidence and played for the jury at trial.

The defendant testified on his own behalf at trial. He denied ever engaging in any type of sexual intercourse with J.W. He claimed his confession was a result of the investigating officer providing him with the information to recite during the recorded statement. The defendant explained that the investigating officer "had a piece of paper sitting in front of him that had everything that [J.W.] stated, and he was telling me if I cooperate with him, and tell him exactly what was on this paper by reading it for him, that everything would be all right."

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. 1st 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. State v. Johnson, 99-0385, p. 9 (La. App. 1st 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. 1st. Cir. 11/8/00), 808 So. 2d 376, 380.

Contrary to the defendant's assertion in his brief, the victim's testimony showed that on numerous occasions, beginning when she was only seven years old, the defendant repeatedly penetrated her anus with his penis. The victim's testimony also showed that she was seven years old when the defendant started forcing her to perform oral sex on him by placing his penis in her mouth. It is well settled that the testimony of the victim alone is sufficient to prove the elements of the offense. State v. Forbes, 97-1839, p. 5 (La. App. 1st Cir. 6/29/98), 716 So. 2d

424, 427. Although the defendant argues the victim's account of the events was inconsistent, fabricated, and should be discredited, the jury obviously found the victim credible and gave credence to her recollection of the events. The jury apparently found the defendant's claim that he never had sexual intercourse with the victim and that he was coerced into confessing to the police to be incredible. These credibility determinations will not be disturbed on appeal.

When viewing the evidence presented at trial in this case in the light most favorable to the prosecution, we are convinced that any rational trier of fact could have concluded beyond a reasonable doubt that all of the elements of the crime of aggravated rape were sufficiently proven. The evidence clearly established that J.W. was only seven years old when the defendant began having anal intercourse with her. Viewing all of this evidence, together with the defendant's statements to the investigating detectives wherein he admitted that he engaged in anal intercourse with J.W. on more than one occasion, any rational trier of fact could have concluded beyond a reasonable doubt that the defendant was guilty of the crime of aggravated rape. Moreover, based upon the defendant's trial testimony wherein he denied ever engaging in sexual intercourse with J.W., despite having admitted such during the police investigation of the offense, it would not have been unreasonable for the jury to find that he was not credible. We find that the evidence presented at the trial of this matter clearly supports a finding that the defendant committed the offense of aggravated rape. This assignment of error lacks merit.

CONCLUSION

For all of the reasons set forth above, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.