

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2006 KA 1750**

**STATE OF LOUISIANA**

**VERSUS**

**TROY ROBERT FREITAG-SHAW**

**Judgment Rendered: March 23, 2007**

**Appealed from the  
Twenty-Second Judicial District Court  
in and for the Parish of St. Tammany, State of Louisiana  
Trial Court Number 397316**

**Honorable Peter J. Garcia, Judge Presiding**

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**Walter P. Reed  
Covington, LA**

**Attorneys for Appellee,  
State of Louisiana**

**Kathryn W. Landry  
Baton Rouge, LA**

**Michael S. Fawer  
Covington, LA**

**Attorney for Defendant/Appellant,  
Troy Robert Freitag-shaw**

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**BEFORE: CARTER, C. J., WHIPPLE AND McDONALD, JJ.**

**WHIPPLE, J.**

Defendant, Troy Freitag-Shaw, was charged by bill of information with one count of molestation of a juvenile, a violation of LSA-R.S. 14:81.2. Defendant pled not guilty and was tried by a jury. The jury determined defendant was guilty of the lesser-included offense of indecent behavior with a juvenile, a violation of LSA-R.S. 14:81. The trial court sentenced defendant to seven years imprisonment, with two years of the sentence suspended.

Defendant appeals. We affirm the conviction and sentence.

**FACTS**

On December 31, 2004, A.M., the eleven-year-old victim, was spending the evening at the family home of defendant in Abita Springs, as a guest of his daughter, A.F. A.M. had previously spent the night on at least seven occasions.

A.M. arrived at defendant's home around 5:30 p.m., having been picked up by defendant's wife, Sheila, on her way home from work. Defendant had cooked a holiday meal and was visiting with his brother and sister-in-law, Edward and Margo Freitag. Edward and Margo Freitag left around 7:00 p.m., after dinner. Another friend of defendant's, Dalton Fetters, arrived later with his twelve year-old son, Drew, and stepdaughter Tiersa.

A casual get-together ensued, culminating in a midnight fireworks display by defendant. Following the fireworks, Fetters and his children left. The remaining people, i.e., defendant, his wife, A.F., C.F. (defendant's nine-year-old son) and A.M. all retired to the trailer to get ready for bed.

According to A.M., she had gotten ready for bed and went into A.F.'s room. She and A.F. were watching television, with A.F. lying on her bed, and A.M. resting on a pallet of blankets and pillows next to A.F.'s bed. A.F.'s mother, Sheila, entered the bedroom to kiss A.F. goodnight. After Sheila left, defendant

entered A.F.'s room, stepped over the pallet where A.M. lay, and hugged and kissed A.F. goodnight.

A.M. testified that defendant was only wearing a pair of white boxers. According to A.M., after the defendant stepped over the side of the pallet, he went down on one knee, took his penis out and began rubbing it on A.M.'s shirt. A.M. testified that she had sat up shortly after defendant entered the room, tried to scoot back from defendant, but was blocked by a bookcase. A.M. told defendant to stop and he left.

Sometime later, defendant quietly returned to A.F.'s bedroom. A.F. was asleep, and A.M.'s attempts to wake her were unsuccessful. Defendant approached A.M. and reached under the covers, pulled A.M.'s pants and underwear down and began rubbing her buttocks. The victim kept trying to pull away and scoot towards the bed in an effort to get under it.

The victim kept telling defendant to stop and defendant told her to be quiet and kept covering her mouth. The victim eventually told defendant to stop in a loud voice. At that point, Sheila walked by the bedroom. Defendant tried to be quiet and stopped moving. According to the victim, Sheila screamed at defendant and he left the room.

After defendant left the room, the victim was not able to get to sleep. Feeling sick, the victim walked across the hall, into the bathroom and threw up. The victim then went to A.F.'s parents' bedroom and told Sheila she was sick and wanted to go home. Sheila told the victim to go lay down and to put a pillow next to her.

The next morning, the victim woke up around 6:00 a.m. Because A.F. was still asleep, the victim went into C.F.'s room and asked him to get up because she was scared. The victim and C.F. then played video games for a while. The victim

then called her mother, Anthonia Miller Catoire, and asked her to come and get her.

Anthonia Catoire testified that when her daughter called her, she asked what was going on and her daughter responded that defendant had touched her butt. Catoire immediately left to get her daughter and phoned the police.

The victim waited outside the trailer for her mother to arrive. Once Catoire picked up her daughter, she drove to a nearby convenience store and spoke with James Winther, a road deputy with the St. Tammany Parish Sheriff's Office.

Winther testified that Catoire told him that the victim had spent the night at a friend's house and had been molested. According to Winther, "It wasn't really clear to me what was going on." According to Winther, the victim was seated in her mother's vehicle, shaking and crying. Winther admitted that he did not have a lot of experience with sexually abused children, but he could see fear in the victim's eyes. The victim was extremely reluctant to talk and appeared terrified of Winther. Winther described his attempts to obtain information from the victim as "like pulling teeth."

The victim told Winther that her friend's daddy had touched her then pointed to her crotch area. Winther asked the victim if she was touched on her vagina and the victim shook her head yes. Winther contacted his supervisor, who told him to take the victim to the police station where a juvenile investigator would meet them.

Detective Barry Sicard, an officer of the St. Tammany Parish Sheriff's Office Juvenile Investigations Division, was assigned to investigate the complaint made by the victim. On January 1, 2005, Sicard met the victim and her mother at the Covington Law Enforcement Complex. Sicard found the victim to be shy, reserved, and afraid.

Sicard testified that the victim told him that she was at defendant's house, and after shooting fireworks, she and A.F. were in A.F.'s bedroom just before going to sleep. While they were in the bedroom, defendant came in and kissed A.F. goodnight, then kneeled down beside A.M., pulled out his penis and rubbed it on her shirt. Defendant stopped and left the room. A brief time later, defendant returned to the room, knelt down beside the victim, placed his hands down her pants, under her panties and began squeezing her buttocks area. The victim told defendant to stop and he left the room. The victim told Sicard that defendant entered the room a third time and again placed his hand down her pants, under her panties and began squeezing her buttocks. Defendant placed his other hand on top of the victim's stomach and moved it in a circular motion. Defendant stopped and left the room.

Sicard interviewed defendant on January 1, after the police went to his trailer and brought him to the police station. In defendant's initial interview, he stated that he never inappropriately touched the victim. Defendant told Sicard that he entered A.F.'s bedroom to kiss his daughter good night. Defendant stated that because the pallet on which the victim was lying was next to his daughter's bed, he had to straddle over the victim to give his daughter a goodnight kiss.

Defendant gave a second statement to Sicard on January 5. In this second interview, defendant claimed the events of the evening were "very hazy" to him because he had been consuming an alcoholic beverage with his wife. Defendant then said it was possible he may have inappropriately touched the victim in the buttocks region during the fireworks display when the victim jumped into his arms. Defendant also stated that he and his wife had engaged in their traditional New Year's sexual encounter that evening, after which he had passed out in the bed.

Sicard interviewed Sheila Freitag-Shaw. In Sheila's first interview, she claimed that following the fireworks display, everyone went back inside the trailer.

Sheila said she kissed the children goodnight, and that she and the defendant then engaged in their traditional New Year's sexual encounter. Sheila told Sicard that she was moaning rather loudly during this episode and that the victim may have heard her voice. Sheila told Sicard that after she and defendant finished having sex, the victim knocked on their bedroom door and told her she was sick. Sheila stated that she tried to assist the victim and helped her back to bed, while defendant was passed out.

Sicard interviewed Sheila a second time. During this interview, Sheila's account of the evening changed in that she stated that following her sexual encounter with defendant, defendant was awake and cleaning himself when the victim knocked on their door. While she left the bedroom to assist the victim, defendant dressed in his boxers and went outside to smoke a cigarette. When she finished assisting the victim, she met defendant outside for a cigarette before they returned to bed together.

Sheila told Sicard that the victim never reported anything to her and that she did not see the victim the next morning before the police arrived. Sicard testified that following his second interview with Sheila, she phoned him to add that after she and defendant had tucked A.F. in, she told defendant to "watch himself" whenever wearing boxers because he could possibly expose himself to someone.

Following these interviews, Sicard obtained an arrest warrant for defendant.

At trial, Dr. Monica Weiner was accepted by the court as an expert in forensic pediatrics. Dr. Weiner conducted a complete medical exam of the victim following her referral in conjunction with this case. During the exam, the victim told Dr. Weiner that defendant had entered the bedroom on two occasions, once to kiss A.F. goodnight when he proceeded to rub his penis on A.M.'s shirt, and a second time when A.F. was asleep, when he pulled the victim's pants down and squeezed her buttocks.

In her interview with Dr. Weiner, the victim indicated that defendant had been drinking and there was a big gallon bottle of some type of drink, which the adults had tried to consume in its entirety. During the examination, the victim denied that defendant had touched her genitals, but stated that he had rubbed his penis on her shirt and rubbed her buttocks.

A.F. also testified. Her account of what occurred after she and the victim were in her bedroom ready for sleep indicated that defendant came in to give her a goodnight hug and kiss and turned off the television. A.F. testified that her father stepped over the victim and left. A.F. stated that her father may have ruffled the victim's head on his way out of the room to acknowledge her. A.F. stated that her father was wearing a pair of boxer shorts. A.F. stated that she never saw her father expose himself in any manner, nor did he return to her room that evening. A.F. testified that ten minutes after defendant left her room, the victim stated that, "I think your dad just tried to rape me." A.F. testified that she ignored the victim's comment, and then fell asleep.

C.F., the defendant's nine-year-old son, also testified at trial. According to C.F., the morning after the fireworks, the victim woke him up and told him she was scared of defendant and that something had happened in his sister's room. The victim asked C.F. to play a video game, and after a while she called her mother to come and get her.

Sheila Freitag-Shaw testified on behalf of her husband. According to Sheila's trial testimony, the victim always acted very clingy towards her husband. Sheila acknowledged she and defendant both drank "Seagram's and seven" on New Year's Eve, but denied they were intoxicated. According to Sheila's trial testimony, everyone went inside the trailer after the fireworks display. The victim had asked to sleep on the sofa in the den, but was told no. A.F. and A.M. both went to A.F.'s room in preparation for going to sleep. Meanwhile, defendant had

changed into just a pair of boxers and was sitting in the living room watching television while she cleaned the kitchen. Sheila testified that she showered and afterward convinced the defendant, who was dozing on the sofa, to come to bed. According to Sheila, she walked ahead of defendant to their bedroom and made up the bed and lit some candles, while defendant stopped off at his daughter's bedroom to kiss her goodnight. According to Sheila, she and defendant were planning to have sex. Before defendant entered A.F.'s bedroom, Sheila told him to be careful how he leaned over because of his boxers. Sheila stated she never saw anything inappropriate occur between her husband and the victim.

Sheila testified that the defendant arrived in their bedroom about five minutes after she did and they engaged in sexual relations for about thirty-five to forty-five minutes. About five minutes after they were finished, there was a knock at the door, which was the victim. The victim was complaining that she was sick and wanted to leave. Sheila said she walked her back to where she was sleeping in A.F.'s room and told her to lay on her side with a pillow next to her stomach.

Sheila testified that in the meantime, defendant had gone outside to smoke a cigarette. She went outside to join him and they returned to bed after smoking a cigarette. Sometime in the morning she woke up to use the bathroom and C.F. came in to tell her that the victim had left with her mother. Sheila said she went back to sleep and woke up again when the police arrived looking for defendant.

Defendant also testified on his behalf. His account of what occurred following the fireworks was consistent with the testimony of his wife. Defendant acknowledged drinking alcohol, but stated he did not consider himself to be drunk, although he conceded he probably would not have been able to drive. Defendant denied that he exposed himself to the victim, rubbed his penis on the victim's shirt or touched her buttocks.



## SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, defendant argues the evidence was insufficient to support a conviction for indecent behavior with a juvenile. Defendant specifically argues that the victim's testimony was so internally inconsistent as to essential elements of the crime charged that her testimony is insufficient as a matter of law to warrant the conviction.

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 a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. State v. Brown, 2003-0897, p. 22 (La. 4/12/05), 907 So. 2d 1, 18.

Louisiana Revised Statute article 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.

Defendant argues that A.M. gave contradictory statements as to the means by which defendant affected this indecent behavior. Defendant points out that the victim initially told Winther that defendant touched her vagina, yet she denied that statement on the stand. Defendant further argues that in subsequent interviews with Sicard and the videotaped interview given at the child advocacy center, A.M. did not indicate any vaginal contact, but instead stated that defendant touched her

buttocks and rubbed his penis on her shirt. Thus, defendant argues, the state produced two inconsistent accounts of what contact actually occurred.

We disagree. As the state points out, a review of Winther's testimony compared to each recitation of the events given by the victim indicates the victim always maintained that the defendant rubbed his penis on her shirt and reached under the covers, pulled down her pants and underwear and rubbed her buttocks.

Winther testified that he was panicking during his initial contact with the victim because it was such a "sad situation" given A.M.'s fear and not wanting to tell him anything. Winther testified that he found it hard to speak with the eleven-year-old victim and admitted to "fighting" over the terminology to be used. Winther stated that A.M. did not use the word "vagina," and that he supplied that particular word when he questioned her because she pointed downward when he questioned where defendant had touched her; nor did A.M. use the term "fingers" in describing what occurred, but that he supplied such a description.

Neither the victim nor any other witness testified that her account of the incident included the defendant touching her vagina in any manner. Accordingly, given the explanation of the circumstances surrounding Winther's description of the incident and the actual information he was able to glean from the victim, when considered under the Jackson standard of review, his testimony does not indicate the victim provided inconsistent or conflicting accounts of the incident.

Defendant further argues that other inconsistencies in A.M.'s testimony regarding what time she consumed some Tylenol; whether she was lying down during the entirety of the incident; how many times defendant entered the room; and whether A.F. observed the incident make the entirety of her testimony unbelievable.

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. Robins, 2004-1953, p. 6 (La. App. 1<sup>st</sup> Cir. 5/6/05), 915 So. 2d 896, 899. It is not the function of the appellate court to assess credibility or reweigh the evidence. Appellate review for minimal constitutional sufficiency of evidence is a limited one restricted by the standard developed in Jackson. State v. Rosiere, 488 So. 2d 965, 968 (La. 1986).

Viewing the evidence in the light most favorable to the prosecution, it is evident that the jury accepted A.M.'s testimony regarding what occurred. Clearly, the jury regarded the inconsistencies defendant now points out as irrelevant to the ultimate issue of defendant's guilt. Moreover, the jury's acceptance of the victim's testimony regarding the incident reflects a credibility determination that we cannot reweigh on appeal. Accordingly, we find there was sufficient evidence to support defendant's conviction for indecent behavior with a juvenile.

This assignment of error is without merit.

### **JUROR CONFUSION**

In his second assignment of error, defendant argues that the jury's verdict finding defendant guilty of the lesser-included offense of indecent behavior with a juvenile indicates juror confusion. In support of this argument, defendant cites the only difference between the offenses of molestation of a juvenile and indecent behavior with a juvenile is the element of control used to affect the sexual contact, an element not raised at trial and never contested by either side.

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. Thus, the correct verdicts in the present case were: (1) guilty as charged; (2) guilty of a lesser-included offense, and (3) not guilty. LSA-C.Cr.P. art. 815. 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, 2001-0006, p. 4 (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 & 81.2. A trial judge in Louisiana must charge the jury with respect to responsive verdicts, LSA-C.Cr.P. art. 803. As stated by the Louisiana Supreme Court, our system of responsive verdicts is a distinct aspect of state law. See State v. Porter, 93-1106, p. 4 (La. 7/5/94), 639 So. 2d 1137, 1140. Such a system provides a jury the opportunity to reach a “compromise” verdict. 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, 2003-1772, p. 7 (La. App. 1<sup>st</sup> Cir. 4/2/04), 878 So. 2d 582, 588, writ denied, 2004-1105 (La. 10/8/04), 883 So. 2d 1026.

As noted above, we find that the evidence in the record sufficiently supports the conviction for indecent behavior with a juvenile. The fact that the element of control used to accomplish the sexual contact (which element distinguishes the crime of molestation of a juvenile from the crime of indecent behavior of a juvenile) was not at issue does not establish or reflect confusion by the jury in returning its verdict. Rather, we find the jury’s verdict precisely conforms to the evidence presented.

This assignment of error also lacks merit.

### **JURY INSTRUCTIONS**

In defendant’s third assignment of error, he argues that the jury should not have been charged with the lesser-included offense of indecent behavior with a juvenile.

Defense counsel admits that he did not object to the inclusion of the offense of indecent behavior with a juvenile in the jury charges.

Erroneous instructions or failure to give jury instructions are not errors under LSA-C.Cr.P. art. 920(2), and absent an objection during the trial, a defendant may not complain on appeal of an allegedly erroneous jury charge or the failure to give a jury instruction. See LSA-C.Cr.P. arts. 801(C), 841 & 920(2); State v. Tipton, 95-2483, p. 7 (La. App. 1<sup>st</sup> Cir. 12/29/97), 705 So. 2d 1142, 1147. In the present case, the record does not reflect that defendant made a contemporaneous objection to the jury charges on the basis of the alleged errors now asserted in this assignment of error. Accordingly, the issue raised in this assignment of error is not properly preserved for appellate review.

### **EXCESSIVE SENTENCE**

In his final assignment of error, defendant contends the trial court erred by imposing an excessive sentence.

Article 1, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. State v. Albarado, 2003-2504, p.3 (La. App. 1<sup>st</sup> Cir. 6/25/04), 878 So. 2d 849, 850-851, writ denied, 2004-2231 (La. 1/28/05), 893 So. 2d 70.

Whoever commits the crime of indecent behavior with juveniles shall be fined not more than five thousand dollars, or imprisoned with or without hard labor

for not more than seven years, or both, provided that the defendant shall not be eligible to have his conviction set aside or his prosecution dismissed in accordance with the provisions of LSA-C.Cr.P. art. 893. LSA-R.S. 14:81(C) (prior to 2006 amendment). In the present case, defendant was sentenced to seven years in prison, with two years of the sentence suspended and he was ordered to complete all sex offender notifications and registrations upon his release from prison.

In sentencing defendant, the trial court indicated that it had considered the Presentence Investigation (PSI) and the provisions of LSA-C.Cr.P. art. 894.1. The trial court agreed with the PSI's recommendation that defendant be sentenced to the maximum term of seven years. The trial court suspended two of those years. The trial court ordered defendant to be placed on probation for five years after serving his five-year sentence.

In arriving at this sentence, the trial court noted that any lesser sentence would deprecate the seriousness of the crime. The trial court further noted defendant's lack of remorse in continually claiming his innocence after the jury's verdict. Further considerations by the trial court included that the defendant knew or should have known that the victim of the offense was particularly vulnerable to or incapable of resistance due to her extreme youth. The trial court commented that this was a situation that persisted because of the relative ages of the parties and the fact that the victim was a friend of the defendant's daughter.

The trial court noted that the defendant had used his position to facilitate the commission of the offense and that this offense has resulted in significant permanent injury to the victim. Letters provided to the trial court indicated that the victim was going to suffer for this crime far into the future.

Considering the record before us, we cannot say that the trial court abused its discretion. Defendant used his position and his daughter's relationship with the victim to facilitate the crime. Moreover, the evidence indicates that defendant

made repeated acts toward the victim on the night in question and acted solely to gratify his sexual desires.

This assignment is without merit.

**CONVICTION AND SENTENCE AFFIRMED.**