

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 0432

STATE OF LOUISIANA

VERSUS

KEVIN HARRINGTON



Judgment Rendered: September 15, 2006

**Appealed from the
17th Judicial District Court
In and for the Parish of Lafourche, Louisiana
Case No. 396530**

The Honorable John E. LeBlanc, Judge Presiding

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

GAIDRY, J.

The defendant, Kevin Harrington, was charged by amended bill of information with two counts of molestation of a juvenile (counts I and II), violations of La. R.S. 14:81.2. He pled not guilty on both counts. Harrington waived his right to a jury trial and, following a bench trial, was found not guilty on count I and guilty as charged on count II. On count II, he was sentenced to five years at hard labor, and the court stated that under La. R.S. 15:537(A), he was not eligible for diminution of sentence for good behavior. He moved for reconsideration of sentence, but the motion was denied. He now appeals, asserting that the evidence presented at trial was insufficient to support his conviction. We affirm the conviction and sentence.

FACTS

The defendant and Mina Gray divorced in 1996. They had joint custody of the victim, B.H.,¹ with Gray as the domiciliary parent. On December 18, 2000, the defendant and Gray entered into a provisional custody by mandate agreement, whereby the victim would live with the defendant so that she could finish seventh grade at St. Genevieve School and then attend E.D. White Catholic High School. Count II is based upon allegations of improper conduct by the defendant toward the victim while she lived with the defendant.

On June 11, 2003, the victim was involved in a serious automobile accident, along with the defendant's present wife, Cacy C. Harrington (Cacy), and Cacy's son, James Dennis, III. The victim suffered a severe head injury in the accident. Count I concerned allegations of improper conduct by the

¹ The victim is referenced herein only by her initials. See La. R.S. 46:1844(W).

defendant toward the victim while she was in ICU and rehabilitation at Thibodaux Regional Hospital.

The victim testified at trial. Her date of birth was June 8, 1988. She indicated she was taking the prescription drugs: Yasmin,² Trileptal,³ Seroquel,⁴ Lamictal, and Tri-Cyclen. She claimed while her short-term memory was affected by the head injury she suffered in the car accident, her long-term memory was not affected.

In December of 2000, when the victim was in the seventh grade, she went to live with the defendant at an apartment in Houma so that she could continue to attend St. Genevieve School and could attend E.D. White Catholic High School the following year. Cacy and James were also living with the defendant in the apartment.

According to the victim, in July of 2001, the defendant and the victim moved into an apartment in Thibodaux. The defendant told the victim not to lock the bathroom doors in case “something happened” and “he had to get in there[,]” or in case he needed something from the bathroom.

According to the victim, sometime between September and November of 2001, following a cross-country meet in which she ran, she became ill and the defendant took her and her friend back to the Thibodaux apartment. While the victim showered, the defendant entered the bathroom and touched the victim’s breasts and vagina.⁵ The defendant told the victim not to tell anyone what he had done. The victim claimed she did not tell her friend about the defendant’s actions in the shower because she did not want to get the defendant into trouble. Thereafter, between one and four times per week, the

² This drug is used for birth control and for difficulties with the menstruation period.

³ Trileptal is a mood stabilizer.

⁴ Seroquel is an antipsychotic medication and dopamine blocker.

⁵ At trial, the victim demonstrated how the defendant touched her.

defendant touched the victim's breasts and vagina when she showered and when she bathed. Additionally, the defendant would also sleep with the victim at night and would touch the victim's breasts and vagina. The victim did not know whether the touching in the bed was intentional or accidental.

According to the victim, in January of 2002, the defendant and the victim moved back to the Houma apartment and lived there with Cacy and James. The defendant did not touch the victim inappropriately at the Houma apartment.

According to the victim, approximately six months later, the defendant, Cacy, James, and the victim moved into a house in Houma. The defendant again touched the victim's breasts and vagina when she showered or bathed just as he had done at the Thibodaux apartment.

Additionally, the victim claimed that at least once at the Thibodaux apartment and at least once at the Houma house, the defendant shaved her legs while she was naked and bathing. She also claimed he would make sure her bras properly fitted her when she went shopping for bras. The victim stated that she was afraid of the defendant because she had seen him grab her mother by the neck and hit her and had seen him pull her sister down the hall by the hair.

The victim conceded that she told her psychiatrist, Dr. Maria Braud, in a July 22, 2003 interview, that the defendant had not done anything inappropriate to her; however, she claimed that she did this to keep the defendant from getting into trouble. The victim testified that she did disclose the defendant's actions in her July 31, 2003 interview with Dr. Braud because "my conscience was kind of saying that I needed to tell her because I don't want that to happen to anybody else and for anybody else to be put in the situation I was in."

Dr. Maria Braud⁶ testified at trial as an expert in psychiatry. Dr. Braud first met the victim while she was still hospitalized on July 7, 2003. The victim showed signs of brain injury from the automobile accident. Dr. Braud interviewed the victim on July 22, 2003. The victim's affect was flat and bizarre. She answered questions with one or two words. She denied being sexually abused in the past. Dr. Braud indicated, however, that it was not uncommon for child victims of sexual abuse to deny the sexual abuse to a doctor on a first encounter because the victims were often filled with a sense of responsibility toward the perpetrator. Dr. Braud again interviewed the victim on July 31, 2003. The victim had a brighter affect, her emotion was not as flat, and she was more spontaneous in her speech. She told Dr. Braud that the defendant had touched her breasts and vagina approximately once a week for two years at night in her bedroom. On August 11, 2003, Dr. Braud again interviewed the victim. The victim reported that she felt good, and she denied depression. She had an elevated affect, her emotion was more euphoric and more elated. She had mildly pressured speech. She presented Dr. Braud with a written list of complaints. The victim complained the defendant made her do chores, wash clothes, put dishes in the dishwasher, fold clothes, clean the bathroom, and make the bed. She also complained:

He makes me nervous that people will know what he did. He will hurt me. I don't want him anywhere around school or games. If he knows that I told someone what he did to me, he will hurt me more than he already has done. He has all my money from Houston and won't give it back. I pray all the time to stay living with my mom and Mr. David. Worried that he is everywhere I am. Don't want to see him at all. Everywhere we go I am worried he is there. Touched my boobs and vagina. Shaved my legs. Buys bras and drawers. Bras, try them on for him. Mr. David would never do those things to me. Buys me tampons. Tell him to go away. He doesn't. Takes me to buy bras and drawers. Comes in the bathroom while I am taking a shower. Sleeping in bed with me. Computer . . . pretends it's

⁶ The trial transcript also references Dr. Braud as "Maria M. Broad."

me. So mean to James. So much better with my mom and Mr. David. He tells everyone about buying me tampons. He is always on AOL instant message as me. We used to not go to church at my dad's house.

According to Dr. Braud, based upon her examination of the victim, she was not concerned that the victim might be suggestible. Additionally, based on the victim's presentation and evaluations, Dr. Braud did not see any indications that the victim was having trouble with her long-term memory.

Mina Gray also testified at trial. On July 11, 2003, the victim was released from the hospital and moved into the home of Gray and her husband. According to Gray, one morning after the victim was living with her, the victim came into the kitchen and told her that the defendant had touched her breasts and vagina.

James Dennis, III, also testified at trial. He claimed that, while the victim lived in the Houma house during 2002 and 2003, he never saw the defendant go into the bathroom while the victim was taking a bath or a shower. He conceded that in September of 2003, he told Terrebonne Parish Sheriff's Department Detective Sheila Guidry that the defendant had gone into the bathroom thirty times while the victim was in the bathroom, but claimed he made that statement after Rhonda Dennis, his stepmother, promised him two weeks off from school for making the statement. He also denied seeing the defendant go to sleep with the victim in her bed. He claimed not to remember telling Doyle Dennis, his father, in August of 2003, that he had seen the defendant go into the bathroom while the victim was taking a shower. He denied telling Doyle Dennis that he had seen the defendant go to sleep with the victim in her bed.

James claimed that approximately one day after the defendant and the victim moved to the Thibodaux apartment, he and his mother also moved to

the apartment. He claimed the victim became sick after a cross-country meet, and he, Cacy, the defendant, and the victim went back to the Thibodaux apartment. The victim took a shower, but according to James, the defendant did not go into the bathroom while she showered. He also claimed the defendant played chess with him while the victim showered that day. He denied seeing the defendant ever walk into the bathroom while the victim was in the bathroom or taking a shower at the Houma apartment, the Thibodaux apartment, or the Houma house. He also denied seeing the defendant lying down with the victim in her bed at the Houma apartment, the Thibodaux apartment, or the Houma house.

Doyle Dennis also testified at trial. He claimed that in 2003, his son James told him that he had seen the defendant go into the bathroom with the victim several times. The victim told the defendant to get out, but the defendant did not leave. According to Doyle Dennis, James also claimed that the defendant would go into the bedroom with the victim. He also testified that James told him that he never lived with the defendant and the victim in the Thibodaux apartment.

The State and the defense stipulated that if Rhonda Dennis were called to the stand, she would deny promising James Dennis, III, two weeks off from school in exchange for his incriminating statement against the defendant.

Dr. Marsha House Redden, an expert in clinical psychology and clinical neuropsychology, also testified at trial. In August and September of 2003, Dr. Redden evaluated the victim, the defendant, and Gray in connection with custody litigation. The victim told Dr. Redden that the defendant touched her on the breast and the pubic area beginning in December of 2000. The victim also reported that the defendant would touch her in bed at night and bought her sanitary products and bras. Dr. Redden administered a diagnostic test, the

MMPI-A, designed to distinguish a psychiatric from a non-psychiatric population. The victim's responses to the test did not permit Dr. Redden to validly interpret the clinical scales, but indicated that the victim wanted everyone to think she was fine. The victim was obsessive about not wanting to go back to the defendant and threatened to commit suicide if forced to do so. In addition to the claimed sexual abuse, Dr. Redden felt the victim did not want to go back to the defendant because he was very strict and had a lot of rules.

Additionally, Dr. Redden indicated that in a head injury case, it was not unusual for the injured person to agree to suggestions so as not to appear to have memory problems. On the basis of working with the victim for three sessions, Dr. Redden felt that the victim was suggestible.

Cacy also testified at trial. She denied seeing the defendant ever walk into the bathroom while the victim was in the bathroom at the Houma apartment, the Thibodaux apartment, or the Houma house. She also denied seeing the defendant lying down with the victim in her bed at the Houma apartment, the Thibodaux apartment, or the Houma house. Cacy claimed that, with the exception of perhaps two nights, she and James also stayed with the defendant and the victim at the Thibodaux apartment. Cacy denied that the defendant ever went with the victim to buy bras and panties.

According to Cacy, following a track meet in September, the victim became ill and the defendant brought her, Cacy, and James back to the Thibodaux apartment. Cacy claimed she took the victim's clothes from her while she showered. Cacy also claimed the defendant and James were downstairs playing chess while the victim showered. She indicated that Gray blamed her for the breakup of the marriage between Gray and the defendant.

The victim's friend who had attended the track meet where the victim became ill also testified at trial. After the track meet, the defendant drove the friend and the victim back to the Thibodaux apartment, and both girls took showers. The friend was unaware of the location of the defendant when the victim was taking her shower. Additionally, the friend stated that she visited the victim once or twice per month at the Thibodaux apartment, and that Cacy and James did not live at the apartment with the defendant and the victim.

Glenda Ordoyne, a Latter and Blum property manager, also testified at trial. She had managed the Thibodaux apartments for two and one-half years. She identified State Exhibit # 12 as a rental application completed by the defendant on July 5, 2001. In the application process, potential tenants were asked to state who would live in the apartment with them and were instructed to notify the property manager of any changes. The defendant listed himself as the only leaseholder and listed the victim as the only additional occupant. According to Ordoyne, the defendant moved into the Thibodaux apartment on July 16, 2001.

Angelica Bimah also testified at trial. From May of 2001 to November of 2002, she was the assistant manager of the apartments where the Thibodaux apartment was located. She testified that a criminal background check was required on every person in the household over eighteen years of age. When the defendant completed the application for the Thibodaux apartment on July 5, 2001, he told Bimah that two people, himself and the victim, would be living in the apartment. Bimah told the defendant that if anything changed regarding his application or anyone else should move into the apartment, the apartment management would have to be notified and a criminal background check on the new occupant would be required.

The defendant also testified at trial. His date of birth was December 19, 1968. He claimed he only spent a couple of nights alone with the victim at the Thibodaux apartment in July of 2001. He denied ever grabbing the victim's breasts or touching her vagina. He specifically denied walking into the bathroom and grabbing her breasts and vagina when the victim was showering after the track meet. He denied taking the victim to buy bras at Victoria's Secret. He did not deny taking the victim to buy feminine products, but claimed the victim would select the product and either Cacy or he would purchase it for her.

The defendant claimed that following the automobile accident, he had a heated argument with Gray in regard to where the victim would live upon her release from the hospital. He claimed that he told Gray that for three years she had basically been living her life without worrying about the victim, without doing anything for the victim, and while leaving the care of the victim to him, and now, because of the accident, she wanted to come and play "good mom" because she felt guilty.

The defendant conceded that he had pled no contest to simple battery of Gray. He claimed that incident involved Gray's failure to abide by their agreement to remain on the porch while he picked up the victim for visitation. He conceded he grabbed Gray by the neck and pushed her back, but claimed he did so only to prevent her from reaching Cacy. He also conceded he shaved the victim's legs on two occasions. The first occasion was after the victim purchased a new kind of razor with Cacy and they were trying to attach the razor attachment to the handle portion. The defendant claimed he attached the razor attachment to the handle and shaved a small portion of the victim's ankle to check whether or not he had attached the pieces correctly. The second occasion was while the victim was in the hospital after the automobile

accident. The defendant claimed the victim's legs needed to be shaved so he shaved them up to an area approximately six inches above her knees while she was wearing shorts.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, the defendant argues he was convicted on the unreliable testimony of a brain-injured teenager whose injuries made her susceptible to outside influence and who was under the influence of a vindictive mother in a custody dispute.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. *State v. Wright*, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 and 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. *Wright*, 98-0601 at p. 3, 730 So.2d at 487.

Molestation of a juvenile is the commission by anyone over the age of seventeen 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, by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile. Lack of knowledge of the juvenile's age is not a defense. La. R.S. 14:81.2(A).

Thus, in order to commit molestation of a juvenile, the offender must possess the specific intent of arousing or gratifying the sexual desires of himself or the child upon whose person he committed a lewd or lascivious act or in whose presence he committed such an act. However, specific intent need not be proven as a fact. It may be inferred from the circumstances of the transaction and the actions of the defendant. *State v. Babin*, 93-1361, p. 4 (La. App. 1st Cir. 5/20/94), 637 So.2d 814, 817-18, writ denied, 94-1563 (La. 10/28/94), 644 So.2d 649, abrogated on other grounds, *State ex rel. Olivieri v. State*, 2000-0172 (La. 2/21/01), 779 So.2d 735, cert. denied, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. *State v. Buchanon*, 95-0625, p. 4 (La. App. 1st Cir. 5/10/96), 673 So.2d 663, 665, writ denied, 96-1411 (La. 12/6/96), 684 So.2d 923.

After a thorough review of the record, we are convinced that the evidence presented herein, viewed in the light most favorable to the State, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of molestation of a juvenile and the defendant's identity as the perpetrator of that offense. The trial court

found the defendant committed lewd and lascivious conduct toward the victim in the Thibodaux apartment and rejected the testimony to the contrary from the defendant and other witnesses. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. The credibility of the testimony of a witness is a matter of the weight of the evidence. A determination of the weight to be given evidence is a question of fact for the trier of fact, not subject to appellate review. On appeal, this Court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. *State v. Wallace*, 98-2450, pp. 6-7 (La. App. 1st Cir. 9/24/99), 754 So.2d 991, 996.

This assignment of error is without merit.

DECREE

The defendant's conviction and sentence on count II are affirmed.

CONVICTION AND SENTENCE ON COUNT II AFFIRMED.