NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 0974

STATE OF LOUISIANA

EJG

VERSUS

PIERRE CLINE BONIN

Judgment Rendered: December 28, 2006

* * * * * * * *

Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 367200

The Honorable Martin E. Coady, Judge Presiding

* * * * * * * *

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* * * * * * * *

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Welch Jr. concurs in result

GAIDRY, J.

The defendant, Pierre Cline Bonin, was charged by grand jury indictment with aggravated rape of S.T., a violation of La. R.S. 14:42 (count one), and with molestation of a juvenile of A.T., a violation of La. R.S. 14:81.2 (count two). With counsel present, defendant pleaded not guilty to both charges. Following a jury trial, defendant was found guilty of the responsive offense of attempted aggravated rape on count one, and guilty as charged on count two. Defendant filed motions for a new trial and postverdict judgment of acquittal, which were denied. He was sentenced to 20 years imprisonment without benefit of probation, parole, or suspension of sentence for the conviction on count one, and to 15 years imprisonment at hard labor without benefit of probation, parole, or suspension of sentence for the conviction on count two. The sentences were ordered to run concurrently. Defendant filed a motion to reconsider sentence, which was denied. He now appeals, asserting two assignments of error. We affirm the convictions, amend the molestation of a juvenile sentence (count two) and affirm that sentence as amended, and we vacate the attempted aggravated rape sentence (count one), remanding for resentencing.

FACTS

In 2003, Connie and Phillip were the married parents of two minor daughters, A.T. (born May 12, 1988) and S.T. (born October 7, 1996). The family was then temporarily living with Phillip's stepfather, defendant, who was born August 22, 1933.

Connie testified at trial that in April 2003 she learned through the mother of one of S.T.'s friends that defendant had apparently done something to S.T. of a sexual nature. In response to this information, Connie took S.T. to a physician to be examined and subsequently moved the family

out of defendant's house. Connie further testified that prior to the report involving S.T., her older daughter, A.T., had complained about defendant doing something to her (A.T.) of a sexual nature.

Detective Jamie Seymour of the St. Tammany Parish Sheriff's Office testified that in 2003, she was assigned to its Juvenile Division. She was contacted by Arianna Hines of the Office of Community Services (OCS) to conduct a joint investigation of the reported incidents involving A.T. and S.T. After interviewing Connie and Phillip, Detective Seymour scheduled interviews of A.T. and S.T by the Children's Advocacy Center (CAC). Following the CAC interviews of the children, defendant was arrested and informed of his rights under *Miranda* by Detective Seymour. Detective Seymour testified that while defendant was being transported to jail, he stated that on one occasion, S.T. had asked him to make love to her, and she requested that he show her his penis. He claimed he denied the request, but admitted that he tried to teach the children as much as he could about sex. Videotapes of the CAC interviews of A.T. and S.T. were played at trial and admitted into evidence without objection.

A.T. testified at trial that in the mid-1990s, when she was five or six years old, she told her mother defendant "messed" with her. She stated that on one occasion she was going swimming and needed someone to adjust the top of her bathing suit, which was twisted. Defendant fixed her suit but then rubbed her vaginal area with his hand inside her bathing suit for about two to five minutes. On other occasions, defendant rubbed and kissed her breast area. She stated that when she told defendant that she was going to tell what he had been doing, defendant responded that she would never see her mother and father again. A.T. also stated that she saw defendant's penis on three occasions.

S.T. testified at trial that on two occasions when she was about six years old, defendant touched her inappropriately. On both occasions, defendant removed her clothes and his own. They then laid down naked on the bed, and defendant touched S.T.'s "private part" with his "private part."

Dr. Scott Benton, the Director of the Audrey Hepburn Children At Risk Evaluation Center at Children's Hospital of New Orleans, was accepted by the trial court as an expert in the study of pediatric sexual abuse. Dr. Benton did not examine S.T. personally, but reviewed her file and photographs. Dr. Benton testified that S.T.'s hymen appeared normal in the photographs. He also testified that nothing in the photographs indicated any acute injuries to the vaginal area. When asked if he would expect to see injuries following vaginal penetration, Dr. Benton responded in the negative. He explained that most sexual abuse of children involving penetration is not meant to be injurious as it is usually committed by a family member. In such cases, the victim is usually compliant and the involved adult does not mean to injure the victim. Dr. Benton further explained that even if there are injuries, they heal. He stated that most of the large national studies on injury healing patterns in child sex abuse victims have concluded that about 90 percent of the victims, despite being injured, will heal completely, so that examiners would not detect any injuries the victims might have experienced.

Defendant called several witnesses at trial. Felicia Frederick, defendant's stepdaughter, testified that defendant raised her since she was six years old. She stated that he taught her about sex. When she was asked to explain what he taught her, she stated defendant taught her that she was not allowed to pull her pants down in front of anyone, that she was to go to the bathroom by herself, and that, if she needed help, it had to be given by her mother. She further testified that S.T. "lives in a fantasy world," Connie

was a liar, and A.T. "follows behind her mother." She claimed that A.T. and S.T., at the prompting of their mother, could have made the accusations against defendant in retaliation for not allowing them (the victims' family) to remain in his house.

Adam Bonin, defendant's son, testified that he was living with his father when Connie, Phillip, and their children also resided with him. He stated that it was his father's intention to give his house to Connie and Phillip, but that he (Adam) was opposed to that. He explained that once Connie and Phillip became aware that defendant considered giving them the house, they became disrespectful of defendant and treated the house as their own. Adam advised his father of his opposition to the intended donation. Following Adam's intervention, arguments ensued and problems escalated. Shortly thereafter, according to Adam, S.T.'s accusations against defendant surfaced. Adam further testified that Connie has a reputation in the community as a habitual liar and that S.T.'s imagination is almost reality to her.

Tracy Wallace, defendant's niece by marriage, testified that she has known him all of her life. She stated that as children, she and her sisters were alone with defendant on many occasions and that he never abused any of them. She also stated that Connie, A.T. and S.T. lied a lot.

James Wallace, Jr., defendant's brother-in-law, testified that he had on occasion left three of his young daughters with defendant to baby-sit. He stated that despite being aware of the charges against defendant, he would not hesitate to leave his children with defendant in the future. He stated that the reputation of Connie and her daughters in that community was that they lied a lot.

Defendant did not testify in his own behalf.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, defendant argues that the evidence was not sufficient to support the verdict of attempted aggravated rape. Specifically, defendant contends that S.T.'s trial testimony, which was inconsistent with her videotaped statements when she was six years old, does not support the attempted aggravated rape conviction.

A conviction based on insufficient evidence cannot stand, as it violates due process. *See* U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this court must consider "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(B); *State v. Mussall*, 523 So.2d 1305, 1308-1309 (La. 1988). The *Jackson v. Virginia* 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, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. *State v. Patorno*, 01-2585, p. 5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

At the time of the instant offense, La. R.S. 14:42 provided 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 twelve years. Lack of knowledge of the victim's age shall not be a defense.

Louisiana Revised Statutes 14:41 provided 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.

Louisiana Revised Statutes 14:27(A) in turn provided:

> A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

Specific intent is defined as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). Specific intent may be proved by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. 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 thrust of defendant's argument is that the evidence was insufficient to support the conviction of attempted aggravated rape because S.T's trial testimony contradicted the earlier statements she made in the CAC interview. Defendant emphasizes that while S.T.'s statements in the CAC interview indicated there was sexual penetration, S.T. repeatedly denied any penetration at trial.

At the CAC interview, S.T. was six years old. She stated that when she was five years old, on two occasions, there was a "bad touch" by the defendant on her private parts. She stated that defendant touched her

"private part" with his "private part." She further stated that the second incident took place in her bedroom and that defendant's private part was "inside" her private part.

By the time of trial, S.T. was nine years old. She testified that defendant touched her "private part" with "his private part." The prosecutor asked S.T., "Did your Paw-Paw put his private in your private? Did it go inside?" S.T. responded by shaking her head negatively. Later, however, when the prosecutor asked S.T. if what she said during the CAC interview was true, S.T. responded in the affirmative.

On cross-examination, the following exchange took place:

> Q. The first incident that you talked about with the inappropriate touching between you and your Paw-Paw, okay, what happened the first time? Like where were you?
>
> A. In his room.
>
> Q. You were in his room. Okay. And it was just you and him?
>
> A. (Nods head affirmatively.)
>
> Q. And what did he do? Did he ask you to take your clothes off?
>
> A. (Shakes head negatively.)
>
> Q. Okay. What had happened?
>
> A. He took them off me.
>
> Q. Okay. Did he take your clothes off first?
>
> A. (Nods head affirmatively.)
>
> Q. Or his clothes off first?
>
> A. Mine.
>
> Q. And then next, he took his clothes off?
>
> A. (Nods head affirmatively.)
>
> Q. And you were, as you testified earlier, lying on the bed; is that correct?

A. (Nods head affirmatively.)

Q. And he was lying on the bed with you; is that right?

A. (Nods head affirmatively.) Yes, ma'am.

. . .

Q. The Assistant District Attorney, Mr. Oubre, had asked you the question of whether or not his private part, and we will refer to it as his compass, had touched your private part, your tooter, and you had answered the question earlier, yes; is that right?

A. Yes, ma'am.

Q. And then you were asked whether his private part went inside your private part --

A. Yes, ma'am.

Q. -- and you had answered no?

A. Yes, ma'am.

Q. Is that correct?

A. Yes, ma'am.

Q. And you understand you are under oath today, and that is your testimony?

A. (Nods head affirmatively.)

Q. That his private part did not go inside your private part?

A. (Nods head affirmatively.)

Q. Is that accurate? Is that correct?

A. Yes, ma'am.

Q. Now, let's go back to the tape, okay, which was taken six years ago, right?

A. Three.

. . .

Q. Ms. Jo Beth had asked . . . when Paw-Paw touched your private part with his private part, she asked you whether it was inside or outside.

A. Yes, ma'am.

Q. And I understood the tape, that you said inside.

A. Yes, ma'am.

Q. Now, do you understand that what you're testifying to today and what you testified to three years ago aren't the same thing?

A. (Nods head affirmatively.)

Q. Do you understand that?

A. Yes, ma'am.

Q. Now, the second incident that had occurred, it's my understanding that it was in your bedroom; is that right?

A. (Nods head affirmatively.)

. . .

Q. And as far at the touching of the private parts, was it inside? Outside?

A. Outside.

Q. So again, it was outside your private part?

A. (Nods head affirmatively.)

On redirect examination, the following exchange took place:

Q. You're nine years old, right, today?

A. Yes, sir.

Q. Do you know what sex is?

A. Yes, sir.

Q. Have you done that with anybody else in your life?

A. No, sir.

Q. Well, what you said happened with Paw-Paw, is that a lie?

A. No, sir.

Q. Is that the truth?

A. Yes, sir.

Q. Did you have sex with Paw-Paw?

A. No, sir.

Q. No?

A. No.

Q. What do you think sex is?

A. (Witness shrugging shoulders.)

Q. You talked on the tape about Paw-Paw touching you, and you talked today about Paw-Paw touching you. Which one of those are true?

A. Both of them.

Q. Paw-Paw touched your privates with his privates?

A. (Nods head affirmatively.)

Q. Are you trying to forget this?

A. Yes, sir.

Q. Is it hard?

A. Yes, sir.

In his brief, defendant contends that S.T.'s trial testimony does not support the conviction for attempted aggravated rape because her testimony was "abundantly clear that there was no penetration." We find, however, that S.T.'s testimony at trial regarding defendant's touching her genitals with his penis was sufficient to establish that defendant committed attempted 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).

Specific intent can be formed in an instant. *See State v. Robinson*, 610 So.2d 1041, 1045 (La. App. 3d Cir. 1992). Despite S.T's negative response at trial to the question of whether defendant's "private part" penetrated her "private part," given her actual description of defendant's acts, a rational

factfinder could conclude beyond a reasonable doubt that defendant's actions constituted an act in furtherance of penetration. *See Robinson*, 610 So.2d at 1045.

We further find meritless defendant's argument that S.T.'s prior inconsistent statements at the CAC interview were insufficient to support his conviction for attempted aggravated rape. While there were some discrepancies between S.T.'s CAC statements and her trial testimony, it is clear from the guilty verdict that the jury found S.T.'s trial testimony to be credible and perhaps more reliable than her statements made in the CAC interview.[1] 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 factfinder's determination of guilt. *State v. Taylor*, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932.

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, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a

[1] Moreover, S.T's CAC statements regarding the issue of penetration are not necessarily irreconcilable with her trial testimony. S.T. was only six years old during the CAC interview. The jury could have concluded that a six-year-old could not legitimately distinguish whether defendant's penis was "inside" of her or merely in contact with her "private part." Thus, the jury's verdict of attempted aggravated rape, rather than aggravated rape, could have reflected its belief that the nine-year-old S.T. was clearer in her testimony and, perhaps more knowledgeable, about the notion of penetration than the six-year-old S.T. In short, S.T.'s trial testimony can be reconciled with her CAC interview statements regarding the sexual contact without having to conclude that the earlier statements were fabrications, distortions, or the products of imagination.

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).

After a thorough review of the record, viewing the evidence in the light most favorable to the State, we are convinced that any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that defendant was guilty of attempted aggravated rape.

This assignment of error is without merit.

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, defendant argues that his 15-year sentence for the molestation of a juvenile conviction is illegally excessive. Specifically, defendant contends that the trial court's sentence under La. R.S. 14:81.2(D) was improper because the indictment did not contain the "more than one year" recurring acts element, an essential element of the offense of molestation of a juvenile under Subsection D. *See State v. LeCompte*, 98-1159, p. 9 (La. App. 1st Cir. 4/1/99), 734 So.2d 83, 88.

While the trial court made no reference to Subsection D when it sentenced defendant, defendant presumes the trial court relied on Subsection D because the sentence was without benefit of parole, probation, or suspension of sentence.[2] Defendant's presumption is incorrect.

Count two of the indictment against defendant states:

> And further between the 15th day of June, 1993 and the 12th day of May, 1995 did violate: R.S. 14:81.2 MOLESTATION

[2] At the time the offense of molestation of a juvenile was committed (between June 15, 1993 and May 12, 1995), La. R.S. 14:81.2(D)(1) stated, in pertinent part:

> Whoever commits the crime of molestation of a juvenile when the incidents of molestation recur during a period of more than one year shall, on first conviction, be fined not more than ten thousand dollars or imprisoned, with or without hard labor, for not less than five nor more than fifteen years, or both. At least five years of the sentence imposed shall be without benefit of parole, probation, or suspension of sentence.

> OF JUVENILE, by the commission of a lewd and lascivious act with and upon a minor child under the age 17, to wit: A.T. DOB 5/12/88, there being an age difference of greater than 2 years between the defendant and the juvenile, with the intent of arousing the sexual desire of either party by the use of influence by virtue of defendant's care, custody, control and supervision of the juvenile.

Count two references the control or supervision element, which is found only in La. R.S. 14:81.2(C). At the time of the offense, Subsection C of the statute stated, in pertinent part:

> Whoever commits the crime of molestation of a juvenile when the offender has control or supervision over the juvenile shall be fined not more than ten thousand dollars, or imprisoned, with or without hard labor, for not less than one nor more than fifteen years, or both[.]

Subsection C contains no parole prohibition. Thus, the trial court correctly sentenced defendant under Subsection C. However, the denial of parole eligibility on defendant's sentence is unlawful. For this particular sentencing error, resentencing is not required. Because the trial court sentenced defendant to the maximum possible period of imprisonment, it is not necessary for us to remand for resentencing after removing the parole prohibition. Accordingly, we amend defendant's sentence to delete that portion providing that the sentence be served without benefit of parole. *See State v. Benedict*, 607 So.2d 817, 823 (La. App. 1st Cir. 1992).

This assignment of error is without merit.

REVIEW FOR ERRORS

In reviewing the record for error pursuant to La. C.Cr.P. art. 920(2), we have discovered that the trial court did not wait the required twenty-four hours before imposing sentence following the denial of defendant's motion for new trial.[3] *See* La. C.Cr.P. art. 873. However, prior to the trial court's

[3] In the instant matter, the trial court sentenced defendant before ruling on his motion for new trial.

imposing sentence, defense counsel stated, "We are ready for sentencing." Defense counsel then called two witnesses to testify on defendant's behalf. At the conclusion of the testimony of these two witnesses, defense counsel again stated, "We're ready for sentencing, Your Honor." By calling witnesses for a sentencing hearing and twice informing the trial court that he was ready for sentencing, defendant implicitly, if not explicitly, waived the waiting period. Moreover, we find no indication that defendant was prejudiced in that regard. Thus, any error which occurred is not reversible error. *See State v. Steward*, 95-1693, p. 23 (La. App. 1st Cir. 9/27/96), 681 So.2d 1007, 1019. *See also State v. Lindsey*, 583 So.2d 1200, 1205-1206 (La. App. 1st Cir. 1991), *writ denied*, 590 So.2d 588 (La. 1992) and *State v. Starks*, 549 So.2d 409, 413-414 (La. App. 5th Cir. 1989).

We have also discovered an error regarding defendant's sentence for the attempted aggravated rape conviction. For the attempted aggravated rape of S.T., the trial court sentenced defendant to "20 years without benefit of probation, parole, or suspension of sentence." If the offense attempted is punishable by death or life imprisonment,[4] the defendant shall be imprisoned at hard labor for not less than ten nor more than fifty years without benefit of parole, probation, or suspension of sentence. *See* La. R.S. 14:27(D)(1). Thus, the trial judge erred in not including the mandatory provision that the sentence of imprisonment is to be served at hard labor.

Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the proceedings without inspection of the evidence, La. C.Cr.P. art. 920(2) authorizes consideration of such an error on appeal. Further, La.

[4] Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. La. R.S. 14:42(D)(1).

C.Cr.P. art. 882(A) authorizes correction by the appellate court.[5] We conclude that correction of this illegal sentence does not involve the exercise of sentencing discretion and, such being so, there is no reason why this court should not simply amend the sentence. *See State v. Fraser*, 484 So.2d 122, 124 (La. 1986). Accordingly, since a sentence at hard labor was the only sentence which could have been imposed for the attempted aggravated rape conviction, we hereby amend the sentence to provide that it be served at hard labor.

CONVICTIONS AFFIRMED; SENTENCE FOR MOLESTATION OF A JUVENILE SENTENCE (COUNT TWO) AMENDED TO DELETE THAT PORTION PROVIDING THE SENTENCE BE SERVED WITHOUT BENEFIT OF PAROLE, AND AFFIRMED AS AMENDED; SENTENCE FOR ATTEMPTED AGGRAVATED RAPE SENTENCE (COUNT ONE) AMENDED TO PROVIDE IT BE SERVED AT HARD LABOR, AND AFFIRMED AS AMENDED.

[5] An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. La. C.Cr.P. art. 882(A).