NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1338

STATE OF LOUISIANA

VS.

GERALD DUGAS

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JUDGMENT RENDERED: MARCH 23, 2007

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ON APPEAL FROM THE
TWENTY-SECOND JUDICIAL DISTRICT COURT
DOCKET NUMBER 381-449, DIVISION F
PARISH OF ST. TAMMANY, STATE OF LOUISIANA

HONORABLE MARTIN E. COADY, JUDGE

****

KATHRYN LANDRY
BATON ROUGE, LA

ATTORNEY FOR APPELLEE
STATE OF LOUISIANA

KEITH COUTURE
MANDEVILLE, LA

ATTORNEY FOR DEFENDANT/APPELLANT
GERALD DUGAS

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

MCDONALD, J.

Gerald Dugas, defendant, was charged by bill of information with one count of molestation of a juvenile, a violation of La. R.S. 14:81.2 D.[1] Defendant entered a plea of not guilty and was tried before a jury. The jury determined defendant was guilty as charged. The trial court sentenced defendant to a term of seven years at hard labor, with the first five years to be served without benefit of probation, parole, or suspension of sentence.

We affirm defendant's conviction and sentence.

FACTS

Following his divorce in 1994, Keith Dugas moved in with his parents, defendant and Charlene Dugas, at their house located at 238 Evella Drive in Slidell, Louisiana. Keith Dugas's two daughters, J.D. and T.D., soon followed their father and moved into defendant's home.

J.D. testified that over the course of the following five to six years, defendant embarked on a pattern of conduct that included touching J.D.'s vagina and breasts through her clothing, telling J.D. dirty jokes, showing her pornographic videos, giving J.D. a vibrator, showing J.D. a picture of a man's genitalia, and frequently winking at her and moving his tongue in a sexually suggestive manner. J.D. stated that defendant's behavior started when she was approximately seven years old.

Charlene Dugas, the wife of defendant and J.D.'s grandmother, testified that when J.D. was eight years old, she told her that defendant made her touch his penis. According to Charlene Dugas, J.D.'s accusation was discussed amongst the family, but no one believed it.

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[1] The bill of information indicates the dates of the offense occurred between May 11, 1994 and April 12, 2002. The jury charges and verdict sheet also include the element that the molestation recurred over a period of more than one year.

According to J.D.'s father, Keith Dugas, sometime after they moved in with his parents, J.D. claimed that defendant had flashed her while walking through the hallway of the home. Keith Dugas testified that he discussed this allegation with his family and they all figured that it was an accident because defendant always wore a robe.

Keith Dugas and his two daughters moved out of his parents' home sometime in 1999. Following this move, he became aware of more allegations when he received a card in the mail from a social service worker. More allegations were revealed by J.D. following a talk with a school counselor who reported the matter to the police.

At trial of this matter, two friends of J.D., R.R. and C.C., each testified that J.D. had told them defendant had done things to her that were sexual in nature. R.R. testified consistent with an account given by J.D. regarding seeing defendant waiting in his truck outside of the apartment J.D. had moved into with her sister and father. R.R. testified that during this encounter, defendant gave J.D. some batteries.[2] J.D. threw them away after defendant drove away, and the encounter made J.D. very angry.

C.C. testified that she saw the vibrator that J.D. said defendant had given her. C.C. also stated that defendant made a sexually suggestive comment to J.D. in front of her while defendant drove them to the doctor to obtain physicals for school.

Defendant's wife, Charlene, testified on his behalf. According to Charlene Dugas, J.D. would get angry when she and defendant corrected J.D. and tell them that she hated them. Charlene further testified that she never saw defendant act inappropriately towards J.D.

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[2] J.D. testified that sometime after defendant gave her the vibrator, he met her and R.R. after they got off the school bus. Defendant told R.R. he needed to see J.D. alone and then he gave her some batteries, that were presumably for the operation of the vibrator.

Defendant testified on his own behalf. Defendant stated that he was sixty-five years old and was a retired law enforcement officer from the City of New Orleans, after which he became a commercial shrimper to supplement his income. Defendant denied he ever touched J.D. at any time. Defendant admitted he possessed a pornographic videotape, but denied he ever showed it to J.D. Defendant further denied he ever gave J.D. a vibrator.

Defendant claimed he remembered the encounter between he and J.D. where he drove up in his truck to give her batteries. This was apparently the same encounter to which R.R. provided testimony. Defendant claimed that he always supplied his grandchildren with batteries for whatever electronic devices they had. Defendant also claimed that he remembered driving J.D. and C.C. to the doctor's office for their physicals, but denied he made a sexually suggestive comment. Rather, defendant said J.D. complained about getting hit with the gearshift in the truck, since she had to ride in the middle of the seat.

Defendant testified that J.D. exhibited disdain for authority and that his son, Keith, was too busy working during the time he and his daughters lived at defendant's home. Defendant continued by stating that his son did not seem to be the responsible type and that he forced Keith and his family to move out about a year and a half prior to the present charges being filed.

The jury found defendant guilty of molestation of a juvenile with the incidents recurring over a period of more than one year.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, defendant argues that the jury erred in finding him guilty based on the insufficiency of evidence. In support of this argument, defendant eschews any factual basis, but instead states, "The lack of any eyewitnesses, and the hearsay allowed leads no reasonable fact finder

to the conclusion that [defendant] committed the crime of Molestation of a Juvenile."

The standard of review for the 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 beyond a reasonable doubt. La. Code Crim. P. art. 821(B); **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

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 shall not be a defense. La. R.S. 14:81.2(A). In the present case, the state also had to prove that the incidents of molestation recurred during a period of more than one year. La. R.S. 14:81.2 D(1).

Viewing the evidence in the light most favorable to the state, the victim's testimony established that defendant, who was more than two years older than the victim, exposed himself, touched the victim's breasts and vagina while she was clothed, made sexual comments and innuendos, and even provided the victim with a vibrator, over the course of at least seven years.

The testimony of the victim alone, if believed, is sufficient to establish the elements of the offense. See **State v. Creel**, 540 So.2d 511, 514 (La.

App. 1st Cir.), writ denied, 546 So.2d 169 (La. 1989). Thus, contrary to the defendant's assertions, even without any supporting physical evidence, the testimonial evidence, which was accepted by the jury as true, provided sufficient proof of the elements of the crime. 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. Polkey**, 529 So.2d 474, 475 (La. App. 1st Cir. 1988), writ denied, 536 So.2d 1233 (La. 1989). Therefore, we find the evidence sufficient to support defendant's conviction.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his second assignment of error, defendant argues that the failure of his trial counsel to challenge and attempt to suppress the prosecution's evidence; to object to the introduction of a taped interview; and to file post conviction pleadings denied him effective assistance of counsel.

In **Strickland v. Washington**, 466 U.S. 668, 686-88, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the Supreme Court established a two-fold test to evaluate claims of ineffective assistance of counsel. First, the defendant must show that counsel committed errors so serious that he or she was not functioning as the "counsel" guaranteed a defendant by the Sixth Amendment. Second, the defendant must show that the errors were so serious as to deprive him of a fair trial, one with a reliable result. Defendant must make both showings in order to prove that counsel was so ineffective as to require reversal of the conviction.

A claim of ineffective assistance of counsel is more properly raised by an application for post conviction relief where a full evidentiary hearing may be conducted. Only where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, may it be addressed in the interest of judicial

economy. **State v. Lockhart**, 629 So.2d 1195, 1207 (La. App. 1st Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132. We do not find that this record is sufficient to decide the issue. If defendant chooses to assert a claim of ineffective assistance of counsel, it will have to be raised in an application for post conviction relief.

CONVICTION AND SENTENCE AFFIRMED.