

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1824

STATE OF LOUISIANA

VS.

JOE MITCHELL, JR.

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JUDGMENT RENDERED: MARCH 23, 2007

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ON APPEAL FROM THE  
TWENTY-SECOND JUDICIAL DISTRICT COURT  
DOCKET NUMBER 398369, DIVISION F  
PARISH OF ST. TAMMANY, STATE OF LOUISIANA

HONORABLE MARTIN E. COADY, JUDGE

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JOE MITCHELL, JR.

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

## **MCDONALD, J.**

Joe Mitchell, Jr., defendant, was charged with carnal knowledge of a juvenile, a violation of La. R.S. 14:80. Defendant entered a plea of not guilty and was tried before a jury. The jury found defendant guilty as charged. The trial court sentenced defendant to ten years at hard labor.

We affirm defendant's conviction and sentence.

### **FACTS**

During the summer of 2002, L.B.,<sup>1</sup> the fifteen-year-old victim, was living with her family in Slidell. Sometime between July 15 and August 15, 2002, L.B.'s uncle, defendant, arrived unexpectedly at her family home in Slidell. Defendant is the brother of L.B.'s mother, J.B.

According to J.B., her husband, P.B. Sr., called her while she was away from home and relayed that the children had called him to let him know that defendant was at the back door of their house. Defendant was not immediately allowed inside the home. According to J.B.'s oldest son, P.B., who was seventeen at the time, no one was allowed in their home when their parents were away.

Later that morning, defendant was allowed to enter the garage. P.B. Sr. had arranged to get defendant a job at Deano's Marine Reconstruction Company doing concrete work. Defendant's job was supposed to begin the next day.

P.B. testified that he grew uncomfortable with the way defendant acted toward his sister, L.B. L.B. testified that upon defendant's arrival, he

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<sup>1</sup> In accordance with La. R.S. 46:1844(W), the victim herein is referenced only by her initials. We have also referenced the minor victim's immediate family members by initials to protect her privacy.

immediately began making statements toward L.B. concerning what she was wearing when she went to get the mail; how L.B. turned him on while dancing with her brothers; and the fact that defendant made references to knowing that L.B. had been raped two months earlier. Defendant told L.B. explicit details about the sexual relationship between he and his wife. Defendant also told L.B. that he had “messed with” a sixteen-year-old girl some years earlier and wound up beating the girl.

According to L.B., defendant’s statements made her afraid because she was under the impression that if defendant did not get what he wanted, he would do the same thing to her. L.B. testified that defendant shadowed her around wherever she went. Defendant later told L.B. that there was a way to have sex without anyone finding out. Defendant also told L.B. that he’d rather have someone in her family teach her how to be rubbed and touched than someone from the street do it.

Sometime after defendant’s first day in Slidell, J.B. returned from her trip. According to L.B., her mother was not pleased to see defendant. Later that evening, J.B. went into her first floor bathroom to take a shower. At the time, L.B. was in her room, adjacent to her mother’s bathroom. While her mother was in the shower, defendant called L.B. into the kitchen and asked her if she was ready. L.B. knew defendant was asking her to have sex with him. L.B. and defendant went upstairs to the bedroom that her brothers were not using. Defendant told L.B. to take her clothes off. L.B. complied and then lay down on the bed. At that point, defendant began having sex with L.B. L.B. specifically testified that defendant inserted his penis into her vagina. L.B. began crying and then heard her mother calling for her. L.B. got up, and defendant began grabbing her chest, but she moved his hand, dressed, and went downstairs.

According to J.B., she was calling for L.B. so they could watch a movie together. J.B. had looked for L.B. throughout the first floor of the residence but could not locate her. Because of the way the house was laid out with all the boys' bedrooms upstairs and L.B.'s bedroom downstairs, it was extremely uncommon for L.B. to be upstairs. J.B. testified that when her daughter appeared on the staircase, she was walking funny, holding onto the wall, and appeared very upset. As L.B. got closer to her mother, she appeared to be shaking, her voice was trembling, and her eyes were very red.

When her mother asked L.B. what she was doing upstairs, L.B. responded that she was called upstairs to bring some towels to the boys' bathroom. Her mother did not believe this and continued to question L.B. After some time, defendant appeared on the stairs. L.B. later explained at trial that she did not tell her mother what occurred because she knew her mother would become upset and that her mother could not defend herself against defendant.

J.B. called her oldest son, P.B., to come home from his job during the confrontation with defendant. According to J.B., defendant was restricted to certain areas of the house and was not allowed upstairs. L.B. testified that her mother had her back toward defendant as she spoke to them both and that defendant kept his finger over his mouth while shaking his head "no." Although L.B. kept telling her mother that nothing happened, J.B. made defendant leave their house that night.

Approximately a year later, L.B. told her mother what happened after allowing a friend to read her journal that contained a poem about the incident. L.B.'s friend had told her that she would tell L.B.'s mother of the incident if she did not, so L.B. woke her mother at 3:00 a.m. one morning in November 2003 and told her everything.

Charlie Craddock, a detective with the St. Tammany Parish Sheriff's Office, made contact with L.B. and her mother following the initial report of this incident. Detective Craddock testified that his initial impression after speaking with L.B. was that she had been sexually abused. J.B. testified that between the summer of 2002 and the time the incident was reported to her, that L.B. had become withdrawn and her grades declined.

Defendant testified at trial. Defendant denied having sex with L.B., denied flirting with L.B., and denied telling her that he previously had sex with another sixteen-year-old girl. Defendant claimed his brother-in-law had told him that he could get him a job working for the railroad and that he knew defendant was coming. Defendant said that his sister, Sonya, had purchased a bus ticket for him to travel from Pensacola to Slidell, but when he arrived, he could not get in touch with anyone at the B. family residence. Defendant testified that while staying at the B. family home, L.B. revealed that she had not been previously raped but was allowing her parents to believe she had.

Defendant admitted to his lengthy criminal history, estimating that he had spent seventeen of his forty years in prison. Defendant acknowledged prior convictions for armed robbery, theft, burglary, and DWI.

### **SUFFICIENCY OF THE EVIDENCE**

In his sole assignment of error, defendant argues the evidence was insufficient to support the verdict because the only evidence was the "unbelievable" testimony of the victim.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the state proved the essential elements of the crime beyond a reasonable doubt. La. C.Cr.P.

art. 821; **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

Defendant was charged with felony carnal knowledge of a juvenile, which at the time of the offense was defined by La. R.S. 14:80 in pertinent part as:<sup>2</sup>

A (1) A person who is nineteen years of age or older has sexual intercourse, with consent, with a person who is twelve years of age or older but less than seventeen years of age, when the victim is not the spouse of the offender; or

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B. As used in this Section, “sexual intercourse” means anal, oral, or vaginal sexual intercourse.

C. Lack of knowledge of the juvenile’s age shall not be a defense. Emission is not necessary, and penetration, however slight, is sufficient to complete the crime.

We note that the testimony of a victim is sufficient to establish sexual penetration. **State v. Robinson**, 471 So.2d 1035, 1040 (La. App. 1<sup>st</sup> Cir.), writ denied, 476 So.2d 350 (La. 1985). As the trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. Furthermore, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witness, the matter is one of the weight of the evidence, not its sufficiency. **State v. Probst**, 623 So.2d 79, 83 (La. App. 1<sup>st</sup> Cir.), writ denied, 629 So.2d 1167 (La. 1993).

Defendant argues that each of the state’s witnesses had a different version of what occurred during the day of the alleged incident and the ensuing confrontation. Defendant points to the evidence that L.B. denied anything occurred when questioned by her mother while defendant was present. Defendant also points to the discrepancy of whom J.B. called on

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<sup>2</sup> By Acts 2006, No. 81 § 1, La. R.S. 14:80 was amended to substitute “thirteen” for “twelve.”

the phone during the confrontation with defendant and L.B, whether it was L.B.'s father or L.B.'s cousin. Finally, defendant points out that while J.B. and her son, P.B., testified that defendant was ordered out of the house immediately following the confrontation, L.B. testified that defendant did not leave the house until 8:00 a.m. the next day.

In the present case, the sole issue was whether sexual intercourse occurred between L.B. and defendant. L.B. testified that it occurred without her consent, and defendant testified that it never occurred. The jury's determination that defendant was guilty of felony carnal knowledge of a juvenile indicates that it found L.B.'s testimony more credible than defendant's testimony. The jury obviously found the discrepancies in testimony that defendant now raises to be irrelevant to the issue of defendant's guilt.

Viewing the evidence in the light most favorable to the prosecution, we find the prosecution sufficiently established that defendant, who was thirty-seven years old, engaged in sexual intercourse with L.B. when she was fifteen years old.

Accordingly, this assignment of error is without merit.

**CONVICTION AND SENTENCE AFFIRMED.**