NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 2120

STATE OF LOUISIANA

VERSUS

TERRY JOSEPH KRAEMER, JR.

Judgment Rendered: May 4, 2007

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Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne, Louisiana
Trial Court Number 443,787

Honorable David W. Arceneaux, Judge

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

The defendant, Terry Joseph Kraemer, Jr., was charged by grand jury indictment with aggravated rape, a violation of La. R.S. 14:42. The defendant entered a plea of not guilty.[1] After a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motion for new trial and motion for post-verdict judgment of acquittal. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence.[2] The defendant now appeals, raising the following assignments of error:

1. The trial court erred in failing to grant the motion for new trial or motion for post verdict judgment of acquittal based on the fact that the evidence was insufficient to sustain the jury's verdict.

2. The trial court erred in imposing an excessive sentence.

For the forthcoming reasons, we affirm the conviction and sentence.

FACTS

In or around May of 2004, the defendant brought K.M. (the female victim herein) and J.R. (the female victim in 2006 KA 2121) to a room in the Holiday Motel in Houma, Louisiana.[3] The girls' families were closely acquainted. On the date in question, the girls' parents entrusted the girls in the defendant's care. According to K.M., the defendant instructed her to remove her clothing. When she did not comply, the defendant lowered K.M.'s shorts and underwear below her knees. The defendant had vaginal, anal, and oral sex with K.M. J.R. witnessed the

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[1] This case (district court number 443,787) was consolidated for trial with 2006 KA 2121 (district court number 448,808), in which the defendant was charged with the aggravated rape of another minor child.

[2] The defendant was also found guilty of the aggravated rape offense charged in 2006 KA 2121 and was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The sentences are to be served consecutively.

[3] K.M. and J.R. were ten years of age at the time of the instant offense. K.M.'s date of birth is August 6, 1994 and J.R.'s date of birth is September 22, 1994. The victims are identified herein only by their initials. See La. R.S. 46:1844(W).

incident. K.M. testified that the defendant "licked [her] private part, . . .sticked (sic) his private part in [her] private," and told her to "suck his private part."

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant argues that the trial court erred in denying his motion for post verdict judgment of acquittal and motion for new trial on the basis that the evidence was insufficient to support the verdict. The defendant argues that the verdict was solely based on the testimony of the victims, which he argues was incredible. The defendant contends that the victims were more likely recalling prior incidents of abuse by J.R.'s biological father instead of any abuse by the defendant. The defendant contends that the victims' separate accounts of the alleged incidents of abuse by the defendant were inconsistent, and that the victims' testimonies were inconsistent with their prior statements. Finally, defendant contends that both victims had faulty memories.

The constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), and adopted by the Legislature in enacting La. C.Cr.P. art. 821, requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. The **Jackson** standard of review 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 trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492, p. 5 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis, which raises a reasonable doubt. **State**

v. Captville, 448 So.2d 676, 680 (La. 1984).

In order to support a conviction of aggravated rape, the State was required to prove beyond a reasonable doubt that defendant had oral, vaginal, or anal sexual intercourse with a victim who was under thirteen years of age. La. R.S. 14:42(A)(4). "[A]ny sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime." La. R.S. 14:41(B). Any penetration, however slight, of the aperture of the female genitalia, even its external features, is sufficient sexual penetration. **State v. Ross**, 2003-0564, p. 11 (La. App. 3rd Cir. 12/17/03), 861 So.2d 888, 895, writ denied, 2004-0376 (La. 6/25/04), 876 So.2d 829 (quoting **State v. Bertrand**, 461 So.2d 1159, 1161 (La. App. 3rd Cir. 1984), writ denied, 464 So.2d 314 (La. 1985)). 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).

The trial began on December 5, 2005. According to the lead investigator of the case, Terrebonne Parish Sheriff's Detective Sheila Guidry, the complaint regarding the instant offense was initially reported by K.M.'s maternal grandmother, Patricia. During her trial testimony, Patricia indicated that K.M. was in special-education classes. K.M. initially told her sister about the incident and K.M.'s sister told Patricia. Patricia confronted K.M., and K.M. gave her specific details of the incident. Patricia was aware of prior abuse of K.M. by J.R.'s father; however, she stated that K.M. never discussed the details of that incident with her. When questioned as to whether K.M. could have been confusing the two incidents, Patricia responded negatively and explained that K.M. specifically named and described the defendant as the perpetrator of the more recent incident and that she "was not confused one bit." Patricia estimated that the abuse of K.M. by J.R's father took place when K.M. was between 3 1/2 to six years old, while the instant offense took place when K.M. was ten years old.

State witness Detective Dawn Buquet, a forensic interviewer and investigator at the Children's Advocacy Center, conducted videotaped interviews of K.M. and J.R. The interview of K.M. took place on September 21, 2004. During the videotaped interview of K.M., she described the defendant as a friend of J.R.'s mother, Angel. K.M. stated that on the date in question, the defendant took her and J.R. to the Holiday Motel. K.M. stated that the incident occurred in the summer (in or near that May), just after she completed the third grade. According to K.M., they arrived at the motel room at around 7:00 p.m. K.M. specified that the defendant told her to bend over, pushed her body down, and "put his thing in [her] front and back." The defendant was positioned behind K.M. as she held on to the bed. She further stated that the defendant told her to "suck" his private part and that the defendant "licked me." She specified that the defendant instructed her to open her mouth and then he "slid it in" her mouth. She stated that the defendant referred to his "private" as a "bird." K.M. stated that the defendant "made" her participate in these acts and told her not to tell anyone. K.M. did not see the defendant touch J.R. during this incident and stated that J.R. watched as these acts took place. She stated that the defendant took J.R. with him into the bathroom at some point and the door was closed. She could provide no details as to what happened when the defendant took J.R. to the bathroom. According to K.M., they left the motel room around 10:00 p.m. K.M. stated that she initially did not tell anyone about the incident because the defendant was a friend of her mother, Shawn, but later she told her grandmother and her sister. K.M. described the defendant as bald, with no tattoos, and as having scars on his face (specifying, "I think by his nose and the back of his head"). She also stated that the defendant wore a silver watch.

During her trial testimony, K.M. stated that her date of birth was August 6, 1994. K.M. was eleven years old at the time of the trial. K.M. was in the fourth grade at the time of the trial, but had previously failed the first and fourth grades.

According to K.M., just prior to the offense she was at the shopping mall where her mother, Shawn, was working. At Shawn's request, the defendant picked K.M. up from the mall. K.M. testified that the defendant told her to sit on his lap and "[h]e wanted us to try to kiss him with the tongue, but I didn't want to." K.M.'s testimony further consisted of a factual account of the sexual acts that took place during the incident in question that was consistent with the account provided during her interview with Detective Buquet. She responded positively when asked whether it hurt when the defendant "sticked his private part in [her] private."

K.M. was questioned regarding any prior abuse. She confirmed that J.R.'s father had abused her. K.M. could not remember how old she was when the incident took place, but responded positively when asked whether it occurred years before the trial. K.M. testified that J.R.'s father touched her private part with "[j]ust his hands." She responded negatively when specifically asked whether he ever put his private part in her private part.

During cross-examination, K.M. stated that she delayed telling someone about the incident because she was "scared." She stated that she did not know why she didn't scream during the incident. According to K.M.'s testimony, she had never met the defendant before the incident in question. She stated that she went bowling with the defendant and J.R. "[a] few days" after the incident. She testified that she did not have any contact with the defendant after the bowling event.

During the videotaped interview of J.R., she stated that her mother, Angel, had rented the motel room for the defendant. She said that when they first arrived at the room they played for a while, and "then, something happened to [K.M.]." The defendant told K. M. to take her clothes off and she "had to put her mouth on his penis." She stated that both K.M. and the defendant were on their knees. She further stated that the defendant sat on the bed as K.M. kneeled on the bed. The defendant instructed J.R. to position herself behind the defendant, put her hands

around his upper body and pinch his chest. She stated that the defendant kissed K.M. on the mouth. The defendant then told K.M. to lie on the bed. As K.M. lay on the bed with her legs dangling, the defendant "got on his knees and put his mouth on [K.M.'s] front middle spot and was licking." According to J.R., the defendant did not commit any other sexual acts with her on the date in question. She stated that she was afraid to tell anyone what happened to K.M. and she also believed that it was her fault that it happened.

J.R. testified that the defendant lived with her family at some point. She recalled that K.M. and her family also lived with her family while the defendant lived there. J.R. could not remember how old she was when she first met the defendant. She merely specified that the defendant came to live in her household "[l]ike when I was little." She stated that the defendant lived in her household for an unknown period of time, left for an unknown period of time ("probably two or three months"), and then came back. She testified that her father "put his penis in [her] vagina" when she was younger. J.R. met the defendant after her father was incarcerated. Someone that she referred to only as "Peanut" also abused J.R. J.R. specifically stated that Peanut, "touched [her] in another kind of way with his hands." When asked whether anyone else ever touched her in a sexual way, she responded, "Terry Kraemer did." She recounted several incidents of sexual abuse by the defendant. J.R.'s trial testimony regarding the instant offense was essentially the same as the factual account presented during the videotaped interview conducted by Detective Buquet.

On October 19, 2004, Dr. Ellie Wetsman, an expert in the filed of pediatric medicine, examined K.M. Before conducting a full physical examination, Dr. Wetsman interviewed K.M. K.M. informed Dr. Wetsman, "I got raped from somebody." She detailed the incident and named the defendant, "Terry," as the person who took her to "his hotel, a Holiday Inn." She stated that the defendant

was trying to make her remember his name. She stated that "[h]e put his thing in the front and back. My front private part and my butt." When asked whether there was anything the defendant made her do, she stated, "[h]e made me suck it." When asked whether it hurt she said, "[f]rom his thing." Dr. Wetsman asked K.M. questions regarding what the defendant did with his hand, and she said, "[h]e touched me down there." K.M. further informed Dr. Wetsman that J.R. witnessed the acts. K.M. stated that after the incident, it burned when she urinated and she had some irritation in her genital area. K.M. also informed Dr. Wetsman of a previous incident with a different perpetrator.

During the physical examination, K.M.'s genital and anal areas were examined with an instrument called a colposcope. The results were normal. The physical examination did not confirm or dispel the possibility of penetration. Dr. Wetsman noted that K.M.'s hymen had the effects of hormone estrogen.[4] She explained, that once a little girl has gone through puberty, her ovaries secrete the hormone estrogen that thickens and causes her hymen to increase in elasticity. Dr. Wetsman stated that the hymen does not necessarily change after penetration. She added that it was "virtually impossible" to tell whether a girl has been penetrated or not. She stated that physical findings are rare and injuries to the hymen heal quickly. On cross-examination, Dr. Wetsman confirmed that the first instance of sexual intercourse does not always cause pain or bleeding. On re-direct examination, Dr. Wetsman confirmed that physical findings are more likely to exist when the examination is conducted in close proximity to the incident of abuse and even then are more often not found.

Dana Davis, a clinical social worker and psychotherapist who counseled K.M. and J.R., testified as an expert in the field of counseling and clinical therapy. Davis stated that the two girls had never been counseled together and diligent steps

[4] Dr. Wetsman defined hymen as "a portion of tissue that separates the vagina from the outside."

had been taken to keep the girls separate. Davis testified that children commonly delay discussing traumatic events for a number of reasons including fear of the perpetrator or that they will be blamed for the incident. Other reasons for "delayed disclosure" include embarrassment or to protect someone. She confirmed that children often feel affectionate toward perpetrators of abuse, noting that perpetrators often spend a long time building a relationship with the children and making them feel special. Davis also explained that children have a limited ability to understand time and space, noting that they may say "a long time ago" to describe something that happened a week before such description. She also stated that children sometimes minimize the seriousness of trauma.

Davis's first session with K.M. took place on September 28, 2004, and the last visit before the trial took place December 1, 2005. Davis described K.M. as shy and withdrawn and noted that she had been diagnosed with post-traumatic stress disorder (PTSD).[5] During cross-examination, Davis confirmed that the symptoms noted in K.M.'s behavior and affect were associated with the PTSD diagnosis.

Defense witnesses, Robert Billiot, Jr. (the defendant's cousin), Terry Kraemer, Sr. (the defendant's father), Stacy Verdin (the defendant's friend), and the defendant's two minor sons testified that they never observed any inappropriate behavior by the defendant regarding children.

Robert Billiot had a seven-year-old daughter at the time of the trial. The defendant lived with Billiot for about six months and would occasionally take care of his daughter. Billiot's daughter was about six months old at the time. Billiot stated that he would still trust the defendant to take care of his daughter.

Stacy Verdin met the defendant at a local club. They exchanged telephone

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[5] K.M.'s symptoms included depression, anxiety, disorganized behavior in thinking, blunting of affect or flattening of affect or emotion, hyper-vigilance (being over concerned about environmental occurrences), sleep disruption, and diminished performance in school.

numbers and became friends. Verdin had two children at the time of the trial, a daughter and a son. She testified that her daughter was two years old when she met the defendant. She further testified that, although her daughter would rarely feel comfortable with outsiders, "for some reason she just took up with him. She really looked up to him." Verdin stated that she still trusts the defendant with her kids.

Defense witness Tiffany Burnett, the defendant's girlfriend, met the defendant in February of 2004, one night when she was out with friends. She was present and recalled a bowling event with the defendant, K.M., and J.R. Tiffany testified that K.M. did not appear to be afraid of the defendant and that the group joked and laughed. Angel eventually joined them. When they left the bowling alley, the girls chose to ride home with the defendant and Tiffany. Tiffany testified that she and the defendant have never had sexual intercourse. Although they had tried several times, the defendant was never able to obtain a full erection, so they ultimately stopped trying to have intercourse. Tiffany had observed the defendant around children on several occasions and never saw him do anything inappropriate with the children.

Tiffany rented a room at the Holiday Motel for the defendant several times. She stated that the rooms were often registered in her name. She stated that the first time she rented a room for him, he was looking for a job and did not have money to rent a room. Tiffany lived with her mother in Thibodaux. She and the defendant would often rent a room when they would "go out" and "drink" in Houma. The Holiday Motel was across the street from an establishment that they frequented. She confirmed that the defendant would often baby-sit J.R. and J.R.'s brother, D.R. During cross-examination she confirmed that the defendant was alone with J.R. in the motel room on occasion.

Defense witness, Angel, had two children at the time of the trial, J.R. and D.R. Angel testified that her children's father, her ex-husband, "raped" J.R. and

K.M. J.R. informed Angel that her father began abusing her when she started dancing at about two years of age. The abuse was discovered when J.R. was approximately five years of age. J.R. did not provide her mother with details regarding the abuse. Angel stated that she had a conversation with K.M. at some point wherein K.M. stated what J.R.'s father did to her "what he did to [J.R.]," adding "[h]e put his privates in hers." According to Angel, J.R.'s father was sentenced to forty years imprisonment.

Angel met the defendant in a barroom around September of 2000, and they developed a friendship. The defendant moved in with Angel around October of 2000. Angel stated that their relationship was not romantic although they "slept together" once prior to the defendant moving in with her. The defendant lived with Angel and her children until January of 2001. In October of 2000, the defendant, Shawn, and her ex-husband lived with Angel and her children in their trailer. Shawn's children, including K.M., stayed in the trailer on weekends. Shawn's children stayed with their grandmother, Patricia, during the week. Shawn lived with Angel for several weeks. Thus, K.M. had common living arrangements with the defendant for several weekends in the year 2000. Angel never saw the defendant do anything inappropriate with K.M. or J.R.

In January of 2001, during a counseling session, J.R. made an allegation of sexual abuse by the defendant, but later recanted. Angel reported the allegation to the police. Detective Gary Tullis of the Lafourche Parish Sheriff's Office investigated the complaint.[6] According to Detective Tullis, J.R. did not disclose anything to the police, but also did not deny that something happened. The case was closed for lack of probable cause. The defendant moved out and Angel did not see him again until December of 2003, when she saw him one night at a bar. Angel and the defendant decided that they needed to talk to each other and left the bar.

[6] Detective Tullis also investigated the complaint against J.R.'s father. J.R.'s father was charged with the aggravated rape of J.R. and pled guilty to forcible rape.

That same evening, J.R. was awake when Angel arrived home. Angel asked J.R. if anyone had been touching her and J.R. responded negatively. She stated, "[a]nd for some reason she brought Terry up that night. She said that [defendant] hadn't done her anything; that Peanut had tried to touch her." The next day Angel asked J.R. if she was certain about the statements she made the night before. J.R. responded positively. Angel informed J.R. that she saw the defendant, and J.R. stated that she also wanted to see the defendant. The family rekindled their relationship with the defendant. She testified that she and the defendant became the "best of friends." She stated that she and her children could depend on the defendant and that he would baby-sit for her at times. The defendant stayed at the Holiday Motel in 2003 near the week of Christmas and continued to stay there periodically. The defendant often kept J.R. and D.R. at his motel room during the time period from December of 2003 to September of 2004. Angel would sometimes pay for the room.

Angel remembered the incident in question, that is, when the defendant also brought K.M., along with J.R., to his room. She estimated that the incident took place in May of 2004. That day, the defendant had dropped Angel off at her place of employment and took her children to his motel room. D.R. asked if he could go to work with Angel, and she allowed the defendant to bring him to her workplace. Shawn called Angel as the defendant and J.R. were on their way back to the motel. Shawn needed someone to watch K.M. and Angel suggested she call the defendant. The defendant picked up K.M. and brought both girls to his motel room. According to Angel, she spoke with the defendant numerous times while he was at the motel. She stated that she could hear the girls in the background and they sounded like they were having fun. She heard the girls complaining about leaving when the defendant told them that it was time to go. She stated that both girls seemed happy later that night. K.M. did not appear to be afraid of the defendant or in pain. Angel testified that the allegations against defendant made by K.M. and

J.R. as to the day in question were similar to their allegations against J.R.'s father. She stated that just after J.R.'s father went to prison, K.M. told her that he had sex with her in J.R.'s room on J.R.'s bed and that J.R. watched. J.R.'s father then went into the bathroom with J.R.

During cross-examination, Angel confirmed that the defendant had a bad temper and that she was afraid of him at times. She also stated that J.R. might have also been afraid of the defendant at times.[7]

Consistent with Angel's testimony, the defendant testified that he met Angel in 2000 at a nightclub and they had a "one night stand." The defendant began staying in a motel room when he was working offshore on Torch barges for ABC Welders. The defendant had nowhere to go in between work shifts. The defendant confirmed that he stayed with Angel at the end of 2000 and the beginning of 2001, along with K.M.'s parents (with K.M. and her siblings staying with them on the weekends). After getting injured on the job, the defendant would stay with Angel's children while she worked. During the approximate three-month period between late 2000 and early 2001, the defendant saw K.M. during four to six visits. The defendant became aware of J.R.'s prior abuse by her father after he witnessed an inappropriate incident with J.R. and K.M.'s brother. According to the defendant, the two children were bouncing on the bed and the defendant left the room. When he returned, J.R. was under a blanket. The defendant pulled back the blanket and discovered that J.R.'s outer clothing had been removed. The defendant discussed the incident with Angel and she informed the defendant of J.R.'s history of abuse.

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[7] While it was not specified as to what incidents the charges stemmed from, Angel was charged with principal to aggravated rape and criminal obstruction. The aggravated rape charge was dropped while the other charge was pending at the time of the trial. The record is unclear as to whether the criminal obstruction charge is related to the instant case. Angel's credibility was impeached during cross-examination after she was questioned regarding her purchase of a vibrator for J.R. According to Angel, she purchased the vibrator for J.R. as a last resort when J.R. was acting out sexually in ways that included masturbating with a toy. Angel did not want J.R. to hurt herself. In a statement to Detective Buquet, Angel stated that she had gotten rid of vibrators that she had purchased for herself and for J.R. However, the vibrators were later confiscated from Angel's mother's house.

The police questioned the defendant in January of 2001, as to whether he had any sexual contact with J.R. The defendant denied any sexual contact with J.R. and stopped answering questions when they became repetitive. The defendant temporarily moved to Sulphur, Louisiana, to work with his father. He informed the police of his forwarding address.

After the defendant and Angel resumed their friendship, the defendant had Angel's children with him "on a regular basis on weekends." Regarding the incident in question, the defendant confirmed that he brought K.M. and J.R. to his motel room in early May of 2004. The defendant stated that he was alone with the girls in his room for approximately thirty to forty-five minutes. The defendant stated that he never touched either girl inappropriately. The defendant did not wear a watch, but did have two scars on his face below his eyes.

During cross-examination, the defendant stated that the incident where J.R.'s outer clothes were removed while she was in the room with K.M.'s brother was the only inappropriate incident he witnessed. The State impeached the defendant by quoting his prior statement to OCS in January 2001, in which the defendant stated, "One morning [J.R.] . . . woke [him] up because she was jacking [him] off." The defendant testified that the incident did occur but it "slipped [his] mind." The defendant responded positively when asked whether he carried a sexual lubricant with him during the time that he dated Tiffany. When asked whether he had a sexual relationship with Tiffany, the defendant stated that they "[t]ried, but we didn't, couldn't."

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 (quoting **State v. Azema**, 633 So.2d 777, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460)).

Although the defendant argues that the victims are confusing him with their prior abuser, J.R.'s father, the defendant does not deny bringing the girls to the motel room at the time of the incident in question. The defendant also confirmed that he was alone with the girls in the motel room. The defendant, however, denies the facts presented by the victims as to what occurred in the room. The defendant argues that the verdict is irrational and that the victims' testimonies were incredible and inconsistent. We disagree. The defendant notes, in part, that K.M. did not state during her interview with Detective Buquet that the defendant tried to kiss her but testified as such. The defendant further notes that K.M. told Dr. Wetsman that the defendant touched her with his hand, but did not inform anyone else of this. The defendant further notes that K.M. knew the defendant (specifying that K.M. lived with the defendant for a "few months" in 2000 and 2001) before the incident in question, although she testified otherwise. We find the defendant's efforts to undermine the victim's credibility unconvincing. We find it insignificant that K.M. may have failed to consistently reiterate such minor details when she consistently recounted heinous details of vaginal, anal, and oral intercourse. We find that K.M.'s separate accounts of the incident in question were wholly consistent. Furthermore, K.M.'s factual accounts of the incident were consistent with the accounts presented by J.R. We also find it insignificant that the youthful victim may not have recalled knowing the defendant years before the incident in

question, although she apparently spent several weekends in the same household with the defendant in late 2000 to early 2001. K.M. was only six years old at that time. It is not inconceivable that she would not recall knowing the defendant or sleeping in the same household with him on weekends only during a very brief period of her life.

Both victims convincingly indicated that defendant committed the more recent incident of abuse at issue. The jury was reasonable in rejecting the defendant's hypothesis of innocence. 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 the aggravated rape of K.M. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO[8]

In his second assignment of error, the defendant avers that the trial court erred in imposing excessive sentences. The defendant notes that he had no prior felony convictions, and argues that there was no reason for the trial court to impose the life sentences in 2006 KA 2120 and 2006 KA 2121 consecutively. The defendant argues that the convictions were based on weak testimony and that the trial court failed to consider mitigating factors. The defendant argues that the imposition of consecutive sentences herein is cruel and unusual punishment.

Both the United States and Louisiana Constitutions prohibit the imposition of excessive or cruel punishment. U.S. Const. amend. VIII; La. Const. art. I, § 20. 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

[8] The defendant also raises this assignment of error in 2006 KA 2121. This court's response to the defendant's argument that the consecutive nature of the sentences imposed is unconstitutional will be included in both opinions. The propriety of the life sentences is otherwise reviewed independently although the findings are analogous.

punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. **State v. Hurst**, 99-2868, p. 10 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

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. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979); **State v. Lanieu**, 98-1260, p. 12 (La. App. 1st Cir. 4/1/99), 734 So.2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So.2d 962. However, a trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

Louisiana Code Criminal Procedure article 883 provides:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be served consecutively unless the court expressly directs that some or all of them be served concurrently. In the case of the concurrent sentence, the judge shall specify, and the court minutes shall reflect, the date from which the sentences are to run concurrently.

Consecutive sentences for convictions stemming from a common scheme or plan require particular justification. **State v. Thibodeaux**, 2004-1166, p. 5 (La. App. 1st Cir. 4/20/05), 915 So.2d 807, 810.

The penalty for aggravated rape, as set forth in La. R.S. 14:42(D)(1), is life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. In **State v. Johnson**, 97-1906, p. 8 (La. 3/4/98), 709 So.2d 672, 676, in the context of habitual offender sentencing, the Supreme Court stated:

> [T]o rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that:
>
> [he] is exceptional, which in this context means that

> because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

While noting the mandatory nature of the sentence to be imposed herein, the trial court expressly considered the defendant's actions and the testimony presented during the trial. The trial court imposed life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for both aggravated rape convictions and ordered that the sentences be served consecutively. The offenses occurred on different dates and to two different juvenile victims. Thus, consecutive sentences are indicated under La. C.Cr.P. art. 883. **State v. Davis**, 2006-922, p. 4 (La. App. 3rd Cir. 12/29/06), 947 So.2d 201, 204; **State v. Boros**, 94-453, 94-454, pp. 11-12 (La. App. 5th Cir. 11/29/94), 646 So.2d 1183, 1189, writ denied, 94-3148 (La. 5/12/95), 654 So.2d 347 (overruled on other grounds noted in **State v. Young**, 96-0195, pp. 4-7 (La. 10/15/96), 680 So.2d 1171, 1173-1175). Furthermore, much discretion should be afforded the trial court's determination that consecutive sentences were appropriate in this case. We find that the reasons given by the trial court support its imposition of consecutive sentences, particularly in light of the severity of the offenses and the harm suffered by the victims. We further find that the life sentence imposed herein is meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. Thus, to the extent that the defendant argues that the sentence imposed is unconstitutionally excessive, he has failed to clearly and convincingly show that he is exceptional. This assignment of error lacks merit.

REVIEW FOR ERROR[9]

The defendant asks that this court examine the record for error under La. C.Cr.P. art. 920(2). This court routinely reviews the record for such error, whether

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[9] The defendant also requests such a review in 2006 KA 2121. We note that the records are virtually identical and this court's response will be included in both opinions.

or not such a request is made by a defendant. Under La. C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Price**, 2005-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), ____ So.2d ____, ____, (en banc).

CONVICTION AND SENTENCE AFFIRMED.