NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1283

STATE OF LOUISIANA

VERSUS

DAVID CROWSON

Judgment Rendered: February 11, 2011

Appealed from the
Eighteenth Judicial District Court
in and for the Parish of Iberville, State of Louisiana
Trial Court Number 296-03

Honorable Alvin Batiste, Judge Presiding

* * * * * * * * * *

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDonald, J. Concurs.

McClendon J. Concurs with the result reached by the majority.

WHIPPLE, J.

The defendant, David Crowson, was charged by grand jury indictment with aggravated rape, a violation of LSA-R.S. 14:42. The defendant entered a plea of not guilty. The defendant waived his right to a trial by jury. During the initial trial, the trial court granted the defendant's motion for mistrial, but denied the defendant's subsequent motion to quash the indictment. After a new bench trial adopting the record from the previous trial, the defendant was found guilty of the responsive offense of simple rape, a violation of LSA-R.S. 14:43. The defendant was sentenced to five years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant now appeals, assigning error to the denial of his motion to quash and challenging the sufficiency of the evidence to support the conviction. For the following reasons, we affirm the conviction and sentence.

BACKGROUND FACTS

On or about January 20, 2003, the defendant, a seventeen-year-old high school senior in Iberville Parish, contacted D.H. to make arrangements to go golf cart riding with his daughter, A.H. (the victim), stating that she had made several requests for him to go riding on her golf cart.[1] The victim, diagnosed as mentally retarded with an IQ in the bottom one percent of the population at a score of 55, was nineteen years of age at the time. D.H. asked T.H.S., his older daughter who did not live with her parents but lived nearby on the same property, to be present during the defendant's visit with the victim.

The next day, the defendant was already there when T.H.S. arrived. The victim's mother allowed the defendant to go with the victim to her bedroom to

[1]As required by law, we have referenced the victim and immediate family members by initials herein. See LSA- R.S. 46:1844 W.

play games on her computer. T.H.S. checked on the victim and the defendant while they were in the bedroom. The victim and the defendant then asked for permission to ride the victim's golf cart on the property, and they were instructed to take one short ride and return. After the golf cart ride, they received permission to sit outside on the patio.

When T.H.S. noticed that the victim and the defendant were no longer on the patio, she went to the victim's playhouse, a structure that did not have doors, to look for them. When she found them in the playhouse, the defendant was standing behind the victim with his hands in front of her, underneath her lowered pants. The defendant's pants were also lowered, exposing his penis. After T.H.S. screamed, the defendant zipped up his pants, and the victim moved away from the defendant and zipped up her pants. The defendant and T.H.S. then argued briefly before the defendant drove away. The defendant initially reported the incident to the police immediately after leaving the victim's home. The victim and her family also discussed the matter with the police, but presented a different account of the incident.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant argues the trial court erred in denying his motion to quash based on the grounds of double jeopardy. The defendant notes that in May of 2005, the trial court initially had ruled that consent by the victim was a defense to aggravated rape of the mentally infirm. The defendant contends that the State did not challenge this ruling until the evidence revealed, during the State's direct examination, that Dr. Alicia Pellegrin, a clinical psychologist, had examined not only the victim, but also the defendant. The challenged testimony regarding Dr. Pellegrin's inadvertent examination and evaluation of both the defendant and the victim addressed the victim's capacity to "consent" and the defendant's understanding (or lack thereof) of her mental

capacity. The defendant contends that the State thereafter made several "vociferous" objections that contributed to the trial court's ultimate decision to reverse its prior ruling on the issue of consent, provoked the defendant to move for a mistrial, and led to the trial court's decision to grant said motion. Noting that the long-standing, but later-vacated ruling had played a significant role in and was the foundation of the defense's trial preparation, cross-examination, and presentation of evidence, the defendant contends that the retrial that occurred herein under these circumstances violated the interest protected by the double jeopardy clause. The defendant contends that the ground for the mistrial was related to guilt or innocence, triggering his right of protection from double jeopardy. In this regard, the defendant argues that the testimony regarding consent would have, at the very least, created a reasonable doubt regarding his guilt and required an acquittal. The defendant also notes that while the State contended that it was not consenting to the mistrial, the prosecutor stated more than once that the trial court could go ahead and grant the motion for mistrial. Thus, the defendant concludes that the prosecutor continued to revisit the prior established ruling for the sole purpose of causing a mid-trial reversal and provoking a mistrial. The defendant argues that his constitutional protections outweigh the State's competing interests.

During a hearing on May 11, 2005, before the initial trial, the trial court ruled that the State was required to prove that the victim was incapable of consenting due to mental infirmity. The trial took place on February 19, 2008. During the defense's cross-examination of Dr. Pellegrin, the State entered one of many objections when the defense asked the doctor if she was familiar with the AAMR (American Association on Mental Retardation) Guide to Consent. The State argued that Louisiana law provides that where the mental infirmity is lower than 70, consent cannot be given. In response, the defense reminded the trial court of its earlier May 11 ruling. In allowing the cross-examination to continue, the

trial court noted that one of the elements the State had to prove was that the victim had an IQ of 70 or below and that it was agreed at a previous proceeding that consent would be an issue at trial. The State entered another objection when defense counsel asked the court to question the defendant regarding his willingness to waive the attorney-client and doctor-patient privilege as to Dr. Pellegrin's examination of him. The State argued that the proper procedure would be to recall Dr. Pellegrin on this issue during the defense's presentation of its case, if any, and not during the State's case-in-chief. The trial court agreed with the State's argument.

When the defense called Dr. Pellegrin during its case-in-chief, the State objected, arguing that her testimony would be improper and problematic, inasmuch as the defendant had become Dr. Pellegrin's patient after she had evaluated the victim as a patient. The State argued that it was improper and unethical for Dr. Pellegrin to testify on behalf of the defendant after the victim had confided in her as her doctor. The defense noted that Dr. Pellegrin actually examined the defendant weeks before her examination of the victim. The defense further noted that the examinations were for different purposes and were not related, as the victim was generally examined to determine her IQ and the defendant was evaluated regarding his emotional maturity and general level of intellectual functioning. The State then objected to the admissibility of evidence of the defendant's mental state. The trial court ruled that the evidence would be admissible and relevant to show whether the defendant knew or should have known the IQ of the victim. However, the trial court further stated that based on the language of LSA-R.S. 14:42, the court was reversing its prior ruling that the victim's consent would be an issue to be considered in the case. The trial court stated, "I think the statute clearly states that once the State proves that the IQ was

70 or below, then the consent, lawful consent – it's deemed that there's no lawful consent."

The defense moved for a mistrial based on the court's reversal of its prior ruling, noting that the trial preparations and defense had been premised on the court's prior ruling. Notably, the State reiterated its concern with Dr. Pellegrin testifying on behalf of the defense and stated that it also wanted a mistrial. The trial court granted the defendant's motion for mistrial. The State then clarified that it did not agree with the mistrial.

On March 18, 2008, the defense filed a "motion to reconsider vacation of previous ruling on issue of consent and incorporated memorandum" and a motion to quash, alleging that prosecutorial conduct had provoked the defense counsel to move for a mistrial, and, thus, that double jeopardy applied to bar retrial of the case. The trial court denied both of the defendant's motions on April 9, 2008. The trial court rejected the argument that the defense was provoked into requesting a mistrial and instead found that the motion was voluntary.

Thereafter, this court denied the defendant's writ application seeking review of the trial court's denial of the defense motions. In rejecting the defendant's application for writs, this court specifically found that the State does not have to show that the sexual intercourse was without the victim's consent, because, under LSA-R.S. 14:42A(6), sexual intercourse is deemed to be without lawful consent if the victim had an IQ of 70 or below. Finding that the State merely has to show that the victim meets the definition of mental infirmity, this court concluded that the trial court did not err when it reversed its earlier ruling holding to the contrary. See State v. Crowson, 2008-1277 (La. App. 1st Cir. 9/24/08) (unpublished), writ denied, 2008-2480 (La. 1/9/09), 998 So. 2d 712.

When the new trial began, the transcript of the previous trial was adopted. However, the State also filed a motion in limine and argued that it did not have to

prove that the defendant knew or should have known of the victim's mental condition. The trial court stated that evidence of such an element is not required, but ruled that the defendant would be allowed to present evidence regarding his knowledge. The trial court agreed that the evidence would be considered an affirmative defense. The State objected, noting that it would file for review of the ruling. The trial court stated that it would delay deliberations in the case, pending resolution of an application for writs of review by the State, but would allow Dr. Pellegrin to present testimony. The State objected to the presentation of testimony on the issue of the defendant's state of mind or knowledge of the victim's mental infirmity, noting that such testimony could be determined inadmissible on review. The trial court stated that it would allow Dr. Pellegrin's testimony as proffered testimony. This court granted the State's writ application, State v. Crowson, 2009-0260 (La. App. 1st Cir. 2/12/09) (unpublished), and held that since there is no requirement that the State prove the defendant possessed any mental element, his purported lack of knowledge of the victim's mental infirmity would not constitute a defense. Thus, this court reversed the trial court's ruling permitting the defense to present evidence regarding the defendant's knowledge or lack of knowledge of the victim's IQ. The Louisiana Supreme Court denied writs. State v. Crowson, 2009-0494 (La. 9/11/09), 17 So. 3d 968.

Turning to the defendant's double jeopardy arguments, we recognize that the United States Constitution provides that no person shall be twice put in jeopardy of life or limb for the same offense. U.S. Const. amend. V. The Louisiana Constitution provides "[n]o person shall be twice placed in jeopardy for the same offense, except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgment is sustained." La. Const. art. 1 § 15. Thus, under this provision, when the defendant moves for a mistrial, as the

defendant in the present case did, double jeopardy does not bar reprosecution. LSA-C.Cr.P. art. 591.

However, the United States Supreme Court, in a series of decisions, has provided an exception to that rule where the defendant is required to move for a mistrial due to conduct on the part of the government intended to provoke a mistrial request by a defendant. United States v. Dinitz, 424 U.S. 600, 611, 96 S. Ct. 1075, 1081, 47 L. Ed. 2d 267 (1976); United States v. Jorn, 400 U.S. 470, 485, 91 S. Ct. 547, 557, 27 L. Ed. 2d 543 (1971). The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where bad-faith conduct by the judge or prosecutor threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant. State v. Wesley, 347 So. 2d 217, 219 (La. 1977).

In Oregon v. Kennedy, 456 U.S. 667, 674-76, 102 S. Ct. 2083, 2089, 72 L. Ed. 2d 416 (1982), the Supreme Court explained that the intent of the prosecutor must be examined to determine whether the double jeopardy clause has been violated because of prosecutorial misconduct:

> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. A defendant's motion for a mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

Kennedy, 456 U.S. at 675-76, 102 S. Ct. at 2089 (citations omitted). The Court held that a defendant may invoke the bar of double jeopardy only in cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial. Moreover, the Court in Kennedy gave deference to the trial court's findings that the prosecutorial conduct resulting in the termination of the defendant's first trial was not intended by the prosecutor and elected not to disturb the ruling of the trial court.

On appeal, the defendant relies upon State v. Elzey, 2005-0562 (La. App. 4th Cir. 1/11/06), 923 So. 2d 182, writ denied, 2006-0395 (La. 9/15/06), 936 So. 2d 1253, where the trial court made a factual finding that the State's action in provoking a mistrial was intentional. The trial court warned the State about attempting to introduce evidence of prior bad acts. The trial court specifically told the State that it would not allow the State to "back door" evidence of prior bad acts, noting that if the State wished to introduce such evidence, it should have filed a LSA-C.E. art. 404B motion. The trial court had delineated which questions would be allowed by the State and defense counsel. Nonetheless, the State went beyond the limits set by the trial court and continued to question a witness about a prior incident. Thus, the State's argument that it misunderstood the trial court's ruling and did not intend to cause a mistrial was not supported by the trial and hearing transcripts therein. On review, the Fourth Circuit Court of Appeal held the trial court's factual finding that the State intentionally provoked a mistrial was supported by the record and that the trial court did not abuse its discretion in its ruling. Thus, the State was barred by double jeopardy from pursuing a second trial against the defendant on the charge of attempted second degree murder. Elzey, 923 So. 2d at 187.

When a trial court denies a motion to quash, its legal findings are subject to a *de novo* standard of review. See State v. Smith, 99-2094, 99-2015, 99-2019, 99-0606 (La. 7/6/00), 766 So. 2d 501, 504. In the instant case, the record does not support the defendant's contention on appeal that he was provoked into moving for a mistrial. The State objected to Dr. Pellegrin testifying on behalf of the defense as unethical, as the victim was also examined by the doctor as a patient. The State also argued that her testimony was improper, as the defendant's mental state was not part of the State's burden of proof. A careful review of the record reflects that at this point, the State was not asking the trial court to revisit its prior ruling on the issue of the victim's consent as an affirmative defense. Instead, based on its own rereading of the statute at issue, the trial court elected to reverse its prior ruling, though it was not requested to do so by the defense or the State. Additionally, the defendant was not forced by the actions of the State to forgo his right to have his guilt or innocence determined before the first trier of fact as the instant case was a bench trial and the new trial took place after the parties waived the trial judge's offer of recusal. Further, the testimony from the previous trial was adopted in the new trial. Thus, the record does not demonstrate that through misconduct by the prosecutor, the State was afforded a more favorable opportunity to convict the defendant. Because the record contains no clear indication of bad faith or deliberate provocation of the mistrial, we find no error in the trial court's denial of the defendant's motion to quash on grounds of double jeopardy.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant contends that the evidence is insufficient to support his conviction of simple rape. Specifically, the defendant argues that the State failed to prove that the victim's impairment rendered her incapable of understanding the act or that he knew or should have known of the

victim's incapacity. With regard to the victim's ability to understand and consent, the defendant contends that trial testimony proved that the victim had a basic understanding of the mechanics of sex and that her pursuit of him indicates that she perceived the experience as pleasurable. As to the defendant's knowledge or lack thereof regarding the victim's incapacity, the defendant notes that he is younger than the victim and was not in a position of influence or control over her. The defendant further notes that he had a level of cognitive impairment that resulted in minimal disparity in the IQ levels of the defendant and the victim. The defendant also notes that, in Dr. Pellegrin's opinion, he did not know, nor should he have known, of the victim's incapacity, and that the State did not present any testimony to rebut her opinion.

In response to the defendant's arguments regarding the insufficiency of the State's proof of his intent and knowledge of the victim's incapacity, the State contends, citing State v. Porter, 93-1106 (La. 7/5/94), 639 So. 2d 1137, 1140-1141, that "[a]s long as an authorized responsive verdict is a lesser and included grade of the charged offense and evidence is sufficient to support a verdict of guilty of the charged offense, there is no problem with sufficiency of evidence for the responsive verdict." Therefore, the State argues, the defendant's intent is not at issue. Because we find the State proved the requisite elements of the offense for which the defendant was convicted, we pretermit this argument by the State.

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), 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. LSA-C.Cr.P. art. 821. 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," every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438. State v. Wright, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So. 2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So. 2d 1157, 2000-0895 (La. 11/17/00), 773 So. 2d 732.

Rape is the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent. Emission is not necessary, and any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime. Oral sexual intercourse means the intentional engaging in any of the following acts: (1) the touching of the anus or genitals of the victim by the offender using the mouth or tongue of the offender; or (2) the touching of the anus or genitals of the offender by the victim using the mouth or tongue of the victim. See LSA-R.S. 14:41. While the defendant was charged with aggravated rape, he was found guilty of the responsive offense of simple rape. Louisiana Revised Statute 14:43A(2) defines simple rape as a rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of a victim, because it is committed when the victim is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act and the offender knew or should have known of the victim's incapacity. While criminal intent may be specific or general, in the absence of qualifying statutory provisions, the terms "intent" and "intentional" in Title 14 of the Revised Statutes have reference to general criminal intent. State v. Godeaux, 378 So. 2d 941, 944 (La. 1979). Thus, simple rape is a general intent crime. General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. LSA-

R.S. 14:10(2). The trier of fact determines 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).

D.H., the victim's father, testified that the victim is the youngest of three daughters, is mentally handicapped, and has a severe speech problem. The victim attended special education classes at a regular school. He also testified that the victim was unable to handle money and could easily be taken advantage of. Further, the victim had known the defendant for some time, as she had met the defendant at a lock-in dance for special education kids. The day before the instant offense, the defendant called D.H. at work to make arrangements to visit the victim. D.H. told the defendant to come on a weekend so he could be present during the visit, but the defendant said he could not come on the weekend. According to D.H., he explained to the defendant that the victim has the mental capacity of a five-year-old child and does not know about boyfriend/girlfriend relationships, and the defendant said he understood and already had a girlfriend. D.H. did not talk to the victim about sex because of her lack of intelligence, because the victim was not allowed to date, and due to an unsuccessful effort to obtain clear physician guidance. D.H. told the defendant that the visit had to be supervised, and he made arrangements for the visit with the victim's mother. According to D.H., the victim does not understand what sex means.

T.H.S., the victim's older sister, testified that the victim had some normal friends and that a lot of them were younger than she, because she was on the same level with them. According to T.H.S., the victim wanted a boyfriend, but she thought it was mostly a friend to play with and thought sex was kissing. T.H.S. had told the victim not to fool around with boys. T.H.S. acknowledged that the victim had a picture of the defendant in her room and that the other pictures were female friends. T.H.S did not know the defendant, but she knew he had telephone

conversations with the victim. When T.H.S. discovered the sexual encounter between the defendant and the victim, she told him that she was calling the police since the victim was handicapped. According to T.H.S, the defendant stated he was a juvenile and that he had read on the internet that he would not be treated as an adult. They argued and the defendant left. T.H.S. described the victim's state of mind at that point as confused. The victim told T.H.S. that, while she was in the bedroom with the defendant, he asked her to "suck his dick," and she complied. She also told T.H.S. that the day before the incident, the defendant told her to put sheets in the woods. According to T.H.S., the victim said the defendant forced her and hit her and that it hurt. She told him to stop when they were in the woods. After the defendant left, they called their father. Five minutes later, the police arrived at their house. The defendant had already spoken to the police.

Upon leaving the victim's residence, the defendant flagged down Deputy Mike Gaudet of the Iberville Parish Sheriff's Office as he travelled on Highway 386 in his marked unit. They parked their vehicles, and the defendant approached the police unit and identified himself. He provided his address and telephone number and told Deputy Gaudet that he and A.H. had been friends for several years and that she was mentally handicapped and "a little off," but was "of age." The defendant further informed Deputy Gaudet that the victim had been trying to have sex with him for a long time and that he had been avoiding her advances until that morning. The defendant specified that they had only engaged in oral sex and that the victim had only put her hands in his pants before her sister and mother caught them and told him to leave. The defendant said his father would kill him if he found out about the incident and asked the deputy to speak to the victim's family on his behalf. Deputy Gaudet also testified that the defendant seemed to be an intelligent young man. Deputy Gaudet told the defendant to go home. He then contacted the shift lieutenant and went to the victim's residence.

Deputy Gaudet spoke to the victim's mother and sister and then spoke to the victim, in their presence. Deputy Gaudet testified that the victim's mother helped her articulate the facts of the incident, specifying, "as far as not knowing the words, what intercourse meant, a penis meant, vagina, stuff like that." Deputy Gaudet also stated that the victim did not understand why she was being questioned and repeatedly stated as such. The victim led the deputy to the scene, in their yard, and he recovered two sheets with semen on them and sticks and leaves with what appeared to be more semen and saliva on them. Deputy Gaudet collected the items as evidence.

Chief Criminal Deputy Steven Engolio of the Iberville Parish Sheriff's Office assisted with the instant case. Chief Engolio testified that he had experience as a psychiatric nurse. Chief Engolio met with the victim and her family. He testified that the victim was severely mentally handicapped and that her speech was very hard to understand. Initially, the victim's mother and Deputy Theresa Williams had to help Chief Engolio interpret the victim's speech until he became accustomed to her impediment. The interview of the victim took place in the presence of her family. Thereafter, Chief Engolio requested and received past psychiatric evaluations of the victim.

Deputy Gerald Canella, a friend of the defendant's family, picked the defendant up and brought him to Chief Engolio's office. The defendant was advised of his Miranda rights, appeared to understand them, and indicated on the signed rights form that he was in the twelfth grade in high school. Consistent with his prior statement to Deputy Gaudet, the defendant conceded: that he had known the victim for four years before visiting her on the date in question; that she had been constantly asking him to have sex with her before and on the date in question; and that he knew she was "a little slow" and had a speech problem. He also stated that he did not believe that he penetrated the victim who sat on top of him and said,

"Ouch, it hurts." He stated that she wanted him to stop, and he complied. They touched each other "down there," she performed oral sex on him in the woods, and he ejaculated in her mouth. As he was about to leave, the victim went into the club house and pulled her pants down. The defendant also stated that the victim asked to have oral sex again and that he put his fingers in her vagina. She was bent down, and his penis was next to her vagina when her sister walked in and caught them. The defendant also stated that he had studied the law on this matter before having sexual contact with the victim and thought he may have misinterpreted it. Chief Engolio consulted with the district attorney before arresting the defendant.

Dr. Alan Taylor, a clinical psychologist and expert in the field, performed an evaluation of the victim in August of 2000, approximately three years before the instant offense. At the time of the evaluation, the victim was nearing the end of her tenure in school after attending special education classes and would not be receiving a traditional diploma, but a certificate of achievement. Dr. Taylor explained that the certificate was based on attendance in school over a certain period of time and did not have any bearing on qualifications or competence as a diploma would. The victim's overall IQ score was 55, a score in the bottom one percent of the population. Dr. Taylor noted that the cutoff score for a diagnosis of mental retardation is an IQ of 70. The victim's IQ score was further categorized as low moderate, being one point above the lowest moderate score, with the other two categories of mental retardation being severe or mild. Dr. Taylor testified that the victim was not mentally equipped to decide that she wanted to have a boyfriend to have sex with and would have a superficial understanding of such a social relationship as expected of a child at an age level of eight to ten years old. Dr. Taylor further doubted that the victim had any sort of concepts about sexual behavior such as oral sex and would have to be specifically instructed on how to do the type of acts described in the instant offense. Dr. Taylor added that the

victim may go along with such instructions, as a young child might if there was something she hoped to gain from it or motivating factors, such as feeling grown up and wanting to assimilate.

The victim had reading, spelling, and math capabilities at first and second grade levels, contributing to the decision that she would not significantly benefit from further academics. Dr. Taylor generated a follow-up report on the victim on March 27, 2001. A different screening test was used at this point and the victim's score was slightly below 50, consistent with her previous overall IQ testing. Thus, the victim's clinical diagnosis was expressed as mild mental retardation. During cross-examination, Dr. Taylor confirmed that the victim's adaptive behavior or ability to function in terms of what she was able to learn from her family system and school may have been up to ten points higher than her IQ, thus placing her at a maximum score of 65, yet still within the mild mental retardation range. Examples of highly adaptive areas included self-care such as brushing teeth, hair care and chores. However, areas such as communication or independence would be much less adaptive. Dr. Taylor also confirmed that the victim had normal physical sensations and awareness, but noted that in terms of sexual instincts, her level of mental retardation would prevent her from understanding such a concept. Instead, the victim would have more of a mechanical versus relationship context level of understanding of any physical sensations. Dr. Taylor expressed his doubt that there had been any significant changes in the victim's mental capabilities since the examination. During re-direct examination, Dr. Taylor explained that just as some babies touch themselves in a manner that causes physical sensation, there is no linkage between those types of basic physical sensations and an understanding of sexual relationships.

Dr. Pellegrin, also an expert in clinical psychology, evaluated the victim on April 24, 2003. She determined that the victim's verbal IQ was 55 and that her

performance IQ was 57 presenting an overall IQ of 52 (with an estimated seven point margin of error placing her in the mild or moderate retardation category). She also concluded that the victim would have had the same IQ at the time of the offense. Dr. Pellegrin requested but did not receive the victim's prior evaluations, though she was aware of her special education background. During cross-examination, Dr. Pellegrin confirmed that she had questions regarding the victim's ability to distinguish fact from fiction or fantasy and as to whether that was psychiatric or a function of the intellectual impairments. Dr. Pellegrin acknowledged that professional attitudes regarding sexual activity by the mentally impaired had changed, in that there was some recognition that a subset of persons within the population of mentally retarded could be viewed as having the capacity to engage in consensual sex. Dr. Pellegrin stated that she was not sure if the victim was in that subset or not, but noted that the victim had a normal desire for intimacy, an eagerness to socialize and interact with others, and a desire to work. She noted that although anxiety and depression often occur in rape victims, there was no evidence of anxiety or depression.

Dr. Pellegrin further testified that recent research indicated that if appropriate sex education takes place, some people diagnosed as retarded do have the capacity to consent to sexual activity. Dr. Pellegrin agreed that the traditional concept of competence to consent to sexual activity based solely on an inflexible IQ test is outmoded. Regarding the victim's communication difficulties, Dr. Pellegrin confirmed that her speech impediment and mental retardation constitute contributing factors at differing levels that are difficult to ascertain. Dr. Pellegrin confirmed that, especially considering the victim's speech impediment, a lay person would have difficulty in ascertaining the victim's level of mental impairment. However, during re-direct examination, Dr. Pellegrin confirmed that any high-school educated person who had spent time with the victim over a four-

year period ought to be able to detect her mental retardation. Dr. Pellegrin added, "It's obvious from looking at her that she is impaired. You don't know how impaired until you do an evaluation."

Dr. Jon Cuba, an expert witness in emergency medicine, examined the victim after the offense. The victim had a small abrasion on the vagina introitus, right at the entrance to the vagina on the upper left side of her vagina, consistent with trauma that could have been caused by penetration. The victim did not complain of pain but stated that she had a pinched wrist. The victim's hymen was not intact, also consistent with penetration.

The victim was twenty-four years old at the time of trial. She indicated that she knew the difference between real and fake and understood that she was to tell the truth. She answered many questions with incomplete or grammatically incorrect statements or inconsistent answers. For example, when asked what the defendant did to her she stated, "He have sex." When asked how, she stated, "Off the clothes" and that "He say to suck his dick." The victim responded negatively when asked if she complied with the defendant's request, but responded affirmatively when asked if the defendant made her take her clothes off, got on top of her, and stuck something inside of her. She specified that he put his "dick" in her "butt" and stated, "I tell him stop." She responded negatively when asked if she wanted the defendant to do this. She confirmed that the defendant put his penis in her mouth and that she had spit something out.

During cross-examination, the victim confirmed that she liked boys at the time of the offense and at the time of the trial and that she wanted to go out on dates with boys like her sisters. She also responded positively when asked if she wanted the defendant to be her boyfriend, had informed him of such many times, and if she wanted to marry him. When asked if she knew what sex meant, she stated, "Yep" and confirmed that she knew what it was at the time of the offense.

The victim however stated, "No" when asked if she wanted to have sex with the defendant. She initially did not agree when the defense attorney suggested that she knew her parents did not want her to have sex. After further leading questioning, she responded, "Right," when the defense attorney stated, "You were not to go out on dates and you were not to have sex with anybody, right?" When asked if she had told the defendant about what she referred to as her "Hide place," she stated, "David said bring sheets and blankets." The victim initially testified that she did not know what it meant when the defendant told her to put his dick in her mouth, although she knew what a dick was. When asked if it scared her when her sister screamed after she discovered them, the victim stated, "He leave say I want kiss." According to the victim, she kissed the defendant at his request before he left. The victim denied discussing sexual acts with children at a church function in the presence of Carole Penny, a member of the victim's community who taught the victim Catechism. Questioning ceased as the victim became upset and started crying.

Carole Penny testified as a defense witness. She spent time around the victim while teaching her Catechism and attending other functions. Penny knew both of the victim's parents, having grown up and attended school with the victim's father. She described the victim as "a sweet little girl." According to Penny, during one church function she overheard the victim describing sexual actions to a group of ten- and eleven-year-old children. Penny specified that the victim was talking about "blow jobs" and having sex, with detailed descriptions. Penny testified that the victim appeared to understand the mechanics of sex and how to have intercourse. Penny stated that she questioned and chastised the victim and reported the incident to her mother. Penny could not recall the date of the conversation, but confirmed that it occurred before the defendant's arrest for the instant offense. During cross-examination, Penny confirmed that she knew the

defendant and was best friends with the defendant's great aunt. According to Penny, before the trial, the defendant's great aunt asked her if she knew the victim. While the instant offense occurred in 2003, the trial took place in 2008. When asked if the conversation took place about two years before the trial, Penny stated, "I'd say longer than two years ago."

Dr. Pellegrin examined the defendant on March 18, 2003, about two months after the instant offense, and performed IQ testing. Dr. Pellegrin testified that in her opinion, the defendant did not have the ability to determine whether the victim's IQ was below 70 at the time of the offense. Dr. Pellegrin determined that the defendant had an IQ of 86 with a four-point standard error of measure. Considering the margin of error, the defendant could be classified as low average or borderline intellectual functioning. Dr. Pellegrin confirmed that there was a significant gap between the intellectual level of the defendant and the victim and that they would have different perceptions about sex.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. 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 fact finder's determination of guilt. State v. Taylor, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. See State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126 (La. 1987).

In the instant case, the defendant is not contesting on appeal that he had sexual intercourse with the victim, and the evidence of record clearly supports such a finding. Additionally, a finding that the victim did not consent is unnecessary under the applicable provision of the simple rape statute. At the time of the offense, the simple rape statute provided, in pertinent part, "[s]imple rape is a rape committed when the anal, oral, or vaginal sexual intercourse **is deemed to be without the lawful consent of a victim** because ... the victim is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act and the offender knew or should have known [of] the victim's incapacity." LSA-R.S. 14:43A(2) (Emphasis added).

The uncontradicted testimony of the expert witnesses clearly established that A.H. suffers from mild mental retardation. Psychological testing consistently revealed an intelligence quotient below 70. Expert testimony showed that the victim was incapable of fully understanding the nature of the acts in question. Although the victim may have had the capacity to learn the mechanics of such acts, the evidence shows her mental limitations precluded the ability to appreciate the social aspects or the nature of such acts. Moreover, even pretermitting the State's arguments, premised on the Supreme Court's holding in Porter, that it was not required to prove the defendant's knowledge of the victim's incapacity, we find the State did establish that the defendant was well aware of the victim's incapacity. The victim's father testified that he warned the defendant of the victim's mental retardation, and the defendant's statement to the police supports a finding that he acted with knowledge of the victim's incapacity. Viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have determined that the State proved beyond a reasonable doubt, and to the exclusion of any hypothesis of innocence, that the defendant committed the offense of simple rape of A.H.

This assignment of error lacks merit.

CONVICTION AND SENTENCE AFFIRMED.