NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0371

STATE OF LOUISIANA

VERSUS

HAROLD R. JENKINS

Judgment Rendered: September 10, 2010

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 456517

The Honorable William J. Crain, Judge Presiding

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

The defendant, Harold R. Jenkins, was indicted on one count of aggravated rape, a violation of La. R.S. 14:42(6), and pleaded not guilty. Following a jury trial, he was found guilty as charged. Defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. He now appeals, contending that the state failed to present sufficient evidence that the victim suffered from a mental infirmity such that sex with her constituted aggravated rape under the statute. For the following reasons, we affirm the conviction and sentence.

FACTS

H.B., the sister of the victim M.H.,[1] testified at trial. She was twenty-one years old, and indicated that defendant had lived with her mother and the victim since H.B. was fourteen years old. According to H.B., the victim, who was four years older than H.B., was mentally handicapped and had functioned on the same intellectual level since they were children. She testified that the victim loved baby dolls and was also a big fan of the fictional characters Tinkerbell, Hannah Montana, and Strawberry Shortcake.

During the summer of 2008, when H.B. was pregnant with her first child in Florida, the victim and her mother visited her. During the visit, the victim told H.B. that defendant said he was going to get the victim pregnant. H.B. questioned the victim about her statement, but the victim changed the subject. H.B. reported the conversation to her mother.

A.J., the victim's mother, also testified at trial. She testified that the victim's date of birth was September 9, 1984, and that the victim was not the biological child of defendant, whom she married on August 16, 2001.

[1] Pursuant to La. R.S. 46:1844(W), the victim is referenced herein only by her initials. Because identification of the victim's relatives might also compromise the victim's right to privacy, we have also referenced those relatives only by their initials.

According to A.J., the victim had suffered from Asperger's syndrome and mild mental retardation since birth. She had been in special education curricula for her entire school career and had received a certificate, rather than a diploma, upon completion of her education. Depending on the subject, the victim worked at a level between kindergarten and second grade and had the mentality of a six or seven-year-old child.

Upon being informed by H.B. of the previously-described conversation, A.J. questioned the victim concerning her statement. The victim stated that she was afraid that she would go to jail if she disclosed what had happened to her. She admitted, however, that defendant had put the "thing down between his legs" inside her. She told her mother that she scratched defendant, hit him, and told him "no," but that he held her down by the throat. The victim indicated that during the encounters "stuff" did not "come in her," but "came" on defendant. The victim told her mother that "[i]t happened bunches and bunches of times" while her mother was at nursing school. A.J. explained that defendant had supervised the victim while A.J. attended nursing school from 6:00 p.m. to 10:00 p.m. during the week.

The victim also testified at trial. She identified photographs of her bed with a doll, a Tinkerbell pillowcase, and Strawberry Shortcake sheets on the bed. She identified defendant in court, and testified that when her mother was at nursing school, he had put his "thing" inside her. She explained that she had told him to stop doing it and had slapped at him, but he continued anyway. When asked if anything came out of defendant's "thing," she replied that "stuff" that looked like "snot" came "inside of" defendant. The victim stated that defendant told her that he wanted her to have a baby, but not to tell anyone because he did not want to get into trouble. She testified that the things

defendant did to her happened "a whole bunch" of times and hurt her "really bad."

Under cross-examination, the victim acknowledged that she had been to a Subway restaurant and had ordered a sandwich on her own. She stated that she had helped to prepare dinner, had washed dishes, had vacuumed, and had helped to take care of animals. She also indicated that she had been in special education at Fontainbleau High School in Mandeville and had studied math, science, and social studies, but admitted that she had "got some of it wrong."

The state also played at trial a videotaped recording of a July 2, 2008 interview with the victim. In the interview, the victim expressed worry about going to jail. She pointed to her throat and indicated that her mother's husband, "Harold," had made it so that she could not breathe. She stated that he had put his "thing" in her and had told her that he wanted her to have a baby. The victim explained in the interview that she had told defendant "no" after the first time, when she had told him "yeah." She indicated defendant had assaulted her when she was 20, 21, and 22 years old. She indicated that "stuff," which looked like "snot," came from the "thing" between the defendant's legs. She identified the penis on a picture of a boy as a "thing." She explained that the "stuff" did not go in her, but came on defendant. She indicated defendant had felt her breasts, her crotch, and her butt. She stated that defendant had put his thing in her two, three, or four times. She identified the vagina on a picture of a girl as the area of her body she had described. She also claimed defendant had put his thing in her "butt" one time, but subsequently stated he had done that "about four times." She claimed that defendant did not want her to tell anyone because he did not want to go to jail.

Dr. Brian Murphy also testified at trial as an expert in forensic psychology, including IQ testing and interpretation. He explained that on

November 12, 2002, he had evaluated the victim on referral from the Social Security Administration. She had a verbal IQ of 63, a performance IQ of 58, and a full-scale IQ of 58. She had a level of competency at the first percentile level for people in her age group.

Dr. Murphy reevaluated the victim on October 23, 2009. At that time, she had a verbal IQ of 58, a performance IQ of 59, and a full-scale IQ of 54. The victim's IQ scores remained at the mildly mentally retarded level, and she was still in the first percentile of her age group. Dr. Murphy was certain that between the two evaluations, the victim's IQ never exceeded 70 and expressed the opinion with "99.9 percent certainty" that the victim's IQ scores have been static over time at the high 50s level. He indicated that the victim's mental age is at a level such that she thinks like a child.

On cross-examination, Dr. Murphy explained that the IQ range for mild mental retardation is 51 to 69. He conceded that some mentally deficient people worked at Home Depot and at grocery stores. He also conceded that some mentally retarded people have families and get married. When asked if mentally retarded people could understand sex, Dr. Murphy replied that even someone with an IQ in the 15 to 20 range could understand sex, but the victim only had the judgment of a four to six-year-old child. Dr. Murphy also explained that the verbal performance IQ tests had a margin of error of four points and the full scale IQ tests had a margin of error of three points.

The state also played at trial an audio recording of defendant's July 11, 2008 statement. In the statement, defendant admitted that he had had vaginal sex with the victim while her mother was at school. He claimed, however, that he never forced the victim to do anything and never had oral or anal sex with her. He claimed that the victim would walk out of the bathroom naked and

would call him into the bedroom. He claimed she would ask him to feel her breasts, to feel her "pussy," and to "f[___]" her "pussy."

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, defendant argues that no rational trier of fact could have found that the victim was mentally impaired to the extent that sex with her met the legal criteria for aggravated rape.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the state proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. 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," in order to convict, every reasonable hypothesis of innocence is excluded. *State v. Wright*, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, *writs denied*, 99-0802 (La. 10/29/99), 748 So.2d 1157, 00-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. *Wright*, 98-0601 at p. 3, 730 So.2d at 487.

Louisiana Revised Statutes 14:41, in pertinent part, provides:

A. Rape is the act of anal . . . or vaginal sexual intercourse with a . . . female person committed without the person's lawful consent.

B. Emission is not necessary, and any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime.

Louisiana Revised Statutes 14:42, in pertinent part, provides:

A. Aggravated rape is a rape committed ... where the anal . . . or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

. . .

(6) When the victim is prevented from resisting the act because the victim suffers from a physical or mental infirmity preventing such resistance.

. . .

C. For purposes of this Section, the following words have the following meanings:

. . .

(2) "Mental infirmity" means a person with an intelligence quotient of seventy or lower.

After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the state, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of aggravated rape and defendant's identity as the perpetrator of that offense against the victim. The verdict rendered against defendant indicates that the jury accepted the testimony offered against him, including Dr. Murphy's testimony that the victim had an IQ of less than 70 at the time defendant had sex with her, and that the jury rejected defendant's attempts to discredit that testimony. We will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's

determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. *State v. Lofton*, 96-1429, p. 5 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, *writ denied*, 97-1124 (La. 10/17/97), 701 So.2d 1331. Further, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. *See State v. Ordodi*, 06-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662.

This assignment of error is without merit.

REVIEW FOR ERROR

Defendant requests that this court examine the record for error under La. C.Cr.P. art. 920(2). We routinely review the record for such errors, whether 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*, 05-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), *writ denied*, 07-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION AND SENTENCE AFFIRMED.