

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 2536

STATE OF LOUISIANA

VERSUS

PAUL DUFRENE

AS AP
JEW
JMC

**On Appeal from the 17th Judicial District Court
Parish of Lafourche, Louisiana
Docket No. 453602, Division "B"
Honorable Jerome J. Barbera, III, Judge Presiding**

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Paul Dufrene**

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Judgment rendered MAY - 8 2009

PARRO, J.

The defendant, Paul Dufrene, was charged by grand jury indictment with sexual battery, in violation of LSA-R.S. 14:43.1(C)(2). The defendant pled not guilty. The defendant waived trial by jury and was found guilty as charged after a bench trial. The trial court denied the defendant's motion for a new trial and motion for a post-verdict judgment of acquittal. The defendant was sentenced to thirty-five years of imprisonment at hard labor, with the first twenty-five years to be served without the benefit of probation, parole, or suspension of sentence. The trial court noted that the defendant was not eligible for diminution of sentence. The defendant now appeals, contending there was insufficient evidence to support the conviction. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

During the early portion of 2007 (within the first three months of the year), the victim,¹ who was approximately seven years of age at the time, and her two older siblings went to the home of their neighbor, the defendant, in Larose, Louisiana, to watch a *Jurassic Park* movie. The victim sat in a reclining chair while her siblings sat on separate sofas. The defendant sat with the victim in the chair as they watched the movie. According to the victim, the defendant "dugged in [her] pants" on that occasion and touched her "private" area. The children did not stay for the entire movie and were only at the defendant's home for a short time before their mother came over to get them. The victim related the incident to her mother and to the Lafourche Parish Sheriff's Office in April 2007.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant argues that the evidence was insufficient to support the conviction. The defendant argues that the testimony of the child witnesses was unreliable and inconsistent. The defendant notes that the victim

¹ Pursuant to LSA-R.S. 46:1844(W)(1), the identity of the victim will be protected.

testified that she sat on the defendant's lap during the incident in question. The defendant further notes that the victim's sister, who was sitting on a sofa approximately six feet away from the victim, stated that the victim sat beside the defendant. The defendant also notes that the victim's sister testified that she did not see the defendant touch the victim. The defendant argues that the victim's brother gave incriminating details possibly in an effort to make up for feeling guilty about his failure to report the victim's accusations to his mother. The defendant notes that while the victim's brother testified that he saw the defendant rub lotion on the victim, the victim stated that the defendant touched her with his bare hands. Also, the defendant notes that the victim's brother testified that he could not see the defendant's hands because they were underneath a blanket. The defendant contends that testimony was inconsistent with the testimony of the victim and her sister.

The defendant contends that the victim at times appeared incompetent to testify because she had difficulty remembering events that a normal eight-year-old child should have remembered. The defendant specifically notes that the victim could not remember what birthday presents she had received four and one-half months earlier. The defendant further specifies that the victim could not remember going to the doctor. The defendant notes that while the victim testified that her aunt told her the defendant had molested other children, her aunt denied it.

Finally, the defendant notes that the victim could not remember if the defendant ever did anything to make her angry. The defendant concludes that the state failed to meet its burden of proof. The defendant also concludes that the evidence did not exclude the reasonable hypothesis of innocence established by the testimony of the victim's sister, that is, that nothing happened.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

That standard of appellate review, adopted by the legislature in enacting LSA-C.Cr.P. art. 821, is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince any rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. **State v. Brown**, 03-0897 (La. 4/12/05), 907 So.2d 1, 18. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that, in order to convict, the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 02-1492 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). Moreover, where 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. **Richardson**, 459 So.2d at 38. When a case involves circumstantial evidence and the trier of fact reasonably rejects a hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

Sexual battery is defined by LSA-R.S. 14:43.1(A)(1), in pertinent part, as follows:

Sexual battery is the intentional engaging in any of the following acts with another person where the offender acts without the consent of the victim, or where the act is consensual but the other person, who is not the spouse of the offender, has not yet attained fifteen years of age and is at least three years younger than the offender:

(1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender[.]

As the defendant was charged under LSA-R.S. 14:43.1(C)(2), the state was also required to show that the victim was under the age of thirteen years at the time of the offense and that the defendant was seventeen years of age or older.

The trial took place on July 31, 2008, and the victim was eight years old at that

time.² The defendant lived across the street from the victim's home. Prior to the incident in question, the victim and her family had a friendly relationship with the defendant. The victim testified that the defendant would do nice things such as buying her dolls, and she and her siblings watched movies at his house on at least two occasions. As to the occasion in question, when the victim and her older brother and sister were watching *Jurassic Park* at the defendant's home, the victim testified as follows. As her siblings sat on the sofa, the victim sat on the defendant's lap. The defendant placed his hand under her clothing and touched her skin. The victim stood up and pointed to her groin area as she indicated that the defendant touched her private area. She specified that the defendant touched her "[m]ore than one time" during the incident and told her not to tell anyone. The victim further testified that she told her older sister and her mother about two weeks after the incident took place. The victim also recalled relating the incident to the police and during a videotaped interview.

During cross-examination, the victim stated that she had been to the defendant's home on other occasions, once with her mother to get cookies, and remembered being in the defendant's living room on at least two different occasions. On the occasion in question, the victim sat on the defendant's lap because he asked her to do so. She stated that this was the only occasion where the defendant touched her private area. She confirmed that she was sitting, not lying, on the defendant's lap and that the defendant did not use lotion while touching her. She testified that the defendant rubbed her back with his dry hand. The victim further confirmed that the defendant put his finger in her private part, stating, "[h]e touched all up here and all down there." She stated that it did not hurt. The victim further described the defendant's action as "digging in private area."

During the pretrial videotaped interview with the Children's Advocacy Center (CAC), which took place on April 23, 2007, the victim similarly stated that the defendant told her to sit on his lap and specified that they were on a "rocking" and "reclining"

² The victim's date of birth is February 11, 2000.

chair. She stated that the defendant "got higher down there" with his hand and rubbed her "private." When asked for clarification, she specified that her private was a reference to her "vagina," "popcorn," or "lily." She stated that the defendant touched her bare skin by rubbing her with his finger. She further stated that this "didn't feel too good." She stated that she could not say anything because the defendant instructed her not to speak. She stated that it hurt a little and specified that the defendant touched the "inside" of her private. When asked how she knew it was the inside, she stated that she "felt it open." The victim also stated that when she disclosed the defendant's actions, her "nanny" told her a story about a childhood friend whose father did something to her.

The victim was taken to the Children's Hospital on May 8, 2007, and examined by Dr. Adrienne Atzemis. As an expert witness, Dr. Atzemis testified that the victim discussed occasions involving the defendant and stated that he "dugged in" her private. She also called it a "lily" and "vagina" but spelled the word as "v-a-c-h-i-n-a." She stated that it happened during a dinosaur movie and during "Scary Movie 4." A body diagram was used to determine that the victim was referencing her genitalia. Dr. Atzemis testified that the victim's history was consistent with a sexual abuse case. The results of the physical examination were normal. Dr. Atzemis noted that the results of the physical examination were not inconsistent with sexual abuse based on the disclosure given by the victim, including actions that typically would not leave marks or scars. Dr. Atzemis further testified that a delay in disclosure was not unusual in sexual abuse cases.

The victim's sister, who was present during the instant incident, was ten years old at the time of the trial. She testified that the defendant would occasionally do nice things, such as buying juice for her and her siblings and performing magic tricks. The victim's sister remembered watching a movie in the defendant's home on an occasion when she sat on the "big" sofa, her brother sat on the "little" sofa, and the victim sat on

the chair with the defendant. She noted that the defendant's mother lived with him, but she did not see her that day. She further testified that she did not see the defendant do anything with the victim on the chair, nor did she hear anything. During cross-examination, she stated that the victim related the defendant's actions to her a short time after they went to watch the movie, and that she told the victim to tell their mother. Specifically, the victim told her sister that the defendant touched her in the wrong spot and pointed to her private. The victim's sister further testified that she only went to the defendant's house on that one occasion. She responded positively when asked whether she thought she would have heard the victim if she would have made a noise and would have seen the defendant touch her if he had done so. She specified that the victim was sitting on the side of the defendant in the same chair, not laying on him, and she did not see him put lotion on her. She further testified that they only stayed at the defendant's home for about five or ten minutes because the victim wanted to leave and their mother came to get them.

The victim's older brother was in the seventh grade at the time of the trial. He testified that the defendant would often do nice things for him and his siblings, such as allowing them to watch movies at his house, doing magic tricks, and bringing them Kool Aid and juice packs. He testified that he was fond of the defendant until he "heard what he did." The victim's brother recalled going to the defendant's home about "[f]our times I think" to watch movies or pick up juice packs or other things. He also stated, "like, he'd give us stuff." He testified that the last movie they saw there was *Jurassic Park*. He sat on the little sofa, the victim sat on the chair with the defendant, and his other sister sat on the big sofa. He also noted that the defendant's mother lived there, but he did not think she was there on that occasion. The victim's brother testified that he thought the victim was lying down on the defendant's lap and noted that the defendant gave her a blanket. The defendant asked the victim if she wanted some lotion on, and she said yes. The victim's brother further testified that he saw the

defendant rub the victim's upper legs and back with lotion. He assumed that the defendant rubbed other areas but stated that his view was obscured by the blanket that was covering the victim. He also stated they did not finish watching the movie because their mother came. He did not hear the victim say anything.

During cross-examination, the victim's brother testified that he did not tell his mother about the defendant massaging the victim. He stated that while he thought the defendant's actions were wrong, he did not know what to do. He responded positively when asked whether, as the victim's older brother, he felt responsible for what happened. He confirmed that he did not make any statements to try to get revenge and that he was telling the truth. He further testified that his other sister was asleep during a portion of the brief visit. As to the victim's positioning in the chair with the defendant, the victim's brother stated, in part, "I think she was laying down." He reiterated that he "kinda had a little hint" that the defendant was doing something improper to the victim but he could not see because she was under a blanket.

The victim's brother was also interviewed at the CAC on April 23, 2007, when he was eleven years old. The statements made during the videotaped interview were consistent with his trial testimony. He discussed the massage with lotion, and noted that the defendant covered the victim with a blanket.

Sergeant Toby Gambarella of the Lafourche Parish Sheriff's Office was the primary investigator for the instant offense. He, along with Detective Christine Cortopassi, conducted an audiotaped interview of the defendant. During the audiotaped interview, the defendant stated that his date of birth was April 24, 1950. The defendant recalled the instant incident in which the children watched *Jurassic Park* at his home. He noted that the victim sat on his lap while her siblings sat on his sofa. The defendant stated, "it hit me that this shouldn't be happening." So he told the victim to sit on the sofa. The victim asked the defendant to scratch her back and arms, and he did so after she lifted her shirt and rolled back her sleeves. The defendant also

stated that the victim rolled up the legs of her bottom clothing. The victim laid on the defendant with her chest on his legs for less than a minute. The defendant noted that it was "a tempting situation." He stated that the victim sat on his lap briefly. The defendant further stated that he took action to get the victim away from him because, "if I would not have resisted temptation, I would have maybe touched her inappropriately." The defendant did not know why the victim accused him of touching her inappropriately and stated that he avoided her private areas.

The defendant stipulated that he was convicted of six counts of molestation of a juvenile on May 5, 1994, and the minutes and transcript of the **Boykin** examination and sentences for those convictions were admitted into evidence. The defendant further stipulated that during a March 25, 1994 interview, he admitted to numerous acts of sexual misconduct with varying victims, all juvenile girls, and that a transcript was made of that interview. The transcript was admitted into evidence.

Sole defense witness R.G., the victim's aunt, knew the defendant as the neighbor of her sister, the victim's mother. The victim's mother related the instant incident to R.G. just after the victim told her. R.G. arrived at her sister's home before the police arrived and talked to the victim. She testified that she did not inform the victim that the defendant was a convicted sex offender or that he had molested other children. She testified that she only wanted to know what happened to the victim and did not give her information regarding the defendant. She confirmed that the victim referred to her as "Nanny" and stated that she told the victim the story about a childhood friend after the victim related the defendant's actions.

While there were some minor discrepancies as to whether the victim was partially covered by a blanket at the time of the offense and as to whether the defendant used lotion in touching the victim, we cannot say that the trier of fact's determination is irrational under the facts and circumstances presented. See State v. Ordodi, 06-0207 (La. 11/29/06), 946 So.2d 654, 662. The defendant admitted that

the victim was on his lap and that he was tempted by her position. The victim's brother believed that the defendant's actions were not normal. The victim consistently stated that the defendant touched the inside of her private area during the incident in question. The youthful victim's statements during the trial and during the CAC interview were clear and articulate. As the trier of fact, the trial court accepted the victim's testimony. A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Smith**, 600 So.2d 1319, 1324 (La. 1992). In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. **State v. Thomas**, 05-2210 (La. App. 1st Cir. 6/9/06), 938 So.2d 168, 174, writ denied, 06-2403 (La. 4/27/07), 955 So.2d 683. The victim was well under the age of thirteen at the time of the offense, and the defendant was significantly older than seventeen years of age. Viewing the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of sexual battery. For the above reasons, this assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.