NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0789

STATE OF LOUISIANA

VERSUS

TERRI COX

*Judgment Rendered:* MAY 23 2012

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 08 CR3 97693

The Honorable Raymond Childress, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., dissents with reasons.

**GAIDRY, J.**

The defendant, Terri Cox, was charged by grand jury indictment with one count of aggravated rape, a violation of La. R.S. 14:42 and one count of molestation of a juvenile, a violation of La. R.S. 14:81.2. She pled not guilty. Following a jury trial, the defendant was convicted as charged. The defendant was subsequently sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence for the aggravated rape conviction. On the molestation of a juvenile conviction, the defendant received a sentence of imprisonment at hard labor for twenty years. The court ordered that the sentences be served concurrently. The defendant now appeals, urging two assignments of error as follows:

1. Did the district court commit reversible error by violating the defendant's constitutional right to confront her accuser when it permitted the victim to testify against her in an adjacent courtroom through a video monitoring system when there was no justification to have her testify differently from the other state's witnesses?

2. Was there sufficient evidence to convict the defendant of these offenses when the record reflects that the victim's paternal grandmother, who harbored ill feelings toward the defendant, spent over three months grooming her granddaughter before any allegations of rape or molestation surfaced?

For the reasons set forth below, we affirm the defendant's convictions and sentences.

## FACTS

In May 2007, five-year-old D.C.[1] and her younger brother C.H. were removed from their parents' custody and placed in the custody of their grandmother, A.J. Approximately three months later, on or about August

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[1] In accordance with La. R.S. 46:1844(W), the victim herein is referenced only by her initials. To further protect the identity of the victim, her mother is also referenced by initials.

14, 2007, as A.J. was helping D.C. dry off after her bath, D.C. became visibly upset. D.C. told her grandmother that her mother, the defendant, "hurt her." D.C. explained that her mother put her finger in her "cat." [2] D.C. also told A.J. that her mother put her mouth on D.C.'s "cat" and made D.C. put her mouth on hers. D.C. said these instances of sexual abuse by her mother occurred on more than one occasion. The following morning, A.J. reported the matter to the Office of Community Services. The defendant was eventually arrested and charged with aggravated rape and molestation of a juvenile.

At trial, D.C. testified that, on more than one occasion, the defendant touched her vagina with her finger and her tongue. D.C. further testified that the defendant also inserted her finger into D.C.'s vagina. The child explained that the defendant also made her touch the defendant's vagina with her tongue.

D.C. testified that she first disclosed the abuse to her grandmother, A.J. D.C. denied ever discussing the matter with her grandmother again after the initial disclosure. D.C. was later interviewed at the Child Advocacy Center. D.C. disclosed the sexual abuse allegations to her therapist, Lisa Tadlock. On November 7, 2007, D.C. provided a videotaped statement wherein she recounted the abuse she suffered at the hands of her mother. The allegations in the interview were consistent with what D.C. told her grandmother and with what she testified to at the defendant's trial.

The defendant testified on her own behalf. She adamantly denied ever touching D.C. with sexual intent. She also denied ever making D.C. touch her with sexual intent. The defendant claimed that D.C. had been coached and brainwashed by A.J. to make the sexual abuse allegations.

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[2] A.J. testified that D.C. used the term "cat" to describe her vagina.

## VIOLATION OF RIGHT TO CONFRONT ACCUSER

In her first assignment of error, the defendant contends the trial court erred in allowing D.C. to testify outside the presence of the jury. Specifically, the defendant argues that there was no evidence to suggest that D.C. would suffer any emotional trauma from having to testify in open court. In response, the state contends that because this same issue was previously addressed by the Louisiana Supreme Court, the principle of "law of the case" precludes review of this issue in this appeal.

Prior to trial, the state filed a "Motion to Take Testimony Outside the Courtroom Pursuant to Louisiana Children's Code article 329." In the motion, the state alleged the victim was very frightened of the defendant and would not be able to reasonably communicate with the court if required to testify in open court. In a second pleading captioned: "Motion and Order for Closed Circuit Broadcast of Victim's Testimony Under La. R.S. 15:283," the state requested court approval for the victim to testify via closed circuit television. The state submitted that the victim would likely suffer serious emotional distress if she was forced to give testimony in open court.

On the day of trial, a pretrial hearing was held on the state's motion. At the hearing, the state presented the testimony of Lisa Tadlock, who interviewed the victim over a 13-month period regarding the underlying offenses. Based upon Ms. Tadlock's testimony, the court opined that "if the child was called upon to testify in open court with her mother present, that she could suffer serious emotional distress and that she might not reasonably communicate her testimony to the Court or the Jury." In accordance with that finding, the court granted the State's request to allow the victim to

testify outside the presence of the defendant, via closed circuit television. Defense counsel objected to the court's ruling.

The matter proceeded to trial. At trial, the victim testified via closed circuit television. Defense counsel questioned the victim on cross-examination. After the jury convicted the defendant as charged, she filed a counseled motion for a new trial. In the motion, the defendant moved for a new trial on the ground that her constitutional right to confront the witnesses against her was violated. Specifically, the defendant alleged that the court's ruling granting the state's request to permit the victim to testify via closed circuit television was prejudicial error because the court based its decision on stale testimonial evidence. Following a hearing, the trial court granted the motion for a new trial. Subsequently, the court issued written reasons for its judgment on the motion for new trial. The state sought supervisory review of the trial court's ruling granting the defendant a new trial. This court denied the state's writ application. *State v. Cox*, 2010-1400 (La. App. 1st Cir. 9/2/10) (unpublished). The state then sought review in the Louisiana Supreme Court. The Supreme Court granted the writ and reversed, finding that the trial court abused its discretion in granting the defendant's motion for a new trial. *State v. Cox*, 2010-2072 (La. 11/19/10), 48 So.3d 275.

In support of its reversal of the trial court's ruling granting the defendant a new trial, the Supreme Court reasoned:

> ...The Confrontation Clause does not guarantee criminal defendants an absolute right to meet their accusers face-to-face, and the state's interest in protecting child witnesses from the trauma of testifying in a child abuse case justifies a procedure such as use of closed-circuit television when the state has made an adequate showing of necessity. See *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).
>
> The trial judge originally found, based upon expert testimony, that the victim would be likely to suffer serious

> emotional distress if forced to give testimony in open court and that the victim could not reasonably communicate her testimony to the court or jury without using closed-circuit television, as required by Louisiana Revised Statutes 15:283. The trial judge granted the motion for new trial on his observation that the child victim testified *outside the courtroom* and away from the presence of her mother, the defendant, without serious emotional distress. The purpose of the law is to allow witnesses to testify without suffering serious emotional distress. The fact that the law worked as intended does not provide a defendant with evidence that "an injustice has been done." The defendant was able to confront the child victim through cross-examination via closed-circuit television, as allowed by Louisiana law and both the Louisiana and Federal Constitutions. The trial judge abused his discretion in granting the defendant's motion for new trial.

Thus, the state correctly asserts that the issue of whether the defendant's constitutional right to confront her accuser was violated by the trial court's ruling allowing D.C. to testify via closed-circuit television has already been addressed by the Louisiana Supreme Court. The law of the case principle is a discretionary guide which relates to (a) the binding force of a trial judge's ruling during the later stages of trial, (b) the conclusive effects of appellate rulings at trial on remand, and (c) the rule that an appellate court ordinarily will not reconsider its own rulings of law on a subsequent appeal in the same case. *Glenwood Hospital, Inc. v. Louisiana Hospital Service, Inc.*, 419 So.2d 1269, 1271 (La. App. 1st Cir. 1982). It applies to all prior rulings or decisions of an appellate court or the supreme court in the same case, not merely those arising from the full appeal process. *Brumfield v. Dyson*, 418 So.2d 21, 23 (La. App. 1st Cir.), writ denied, 422 So.2d 162 (La. 1982). Reargument in the same case of a previously decided point will be barred where there is simply a doubt as to the correctness of the earlier ruling. However, the law of the case principle is not applied in cases of probable error or where, if the law of the case were applied, manifest injustice would occur. *Glenwood Hospital, Inc.*, 419 So.2d 1269.

The reasons for the "law of the case" doctrine is to avoid relitigation of the same issue; to promote consistency of result in the same litigation; and to promote efficiency and fairness to both parties by affording a single opportunity for the argument and decision of the matter at issue. *Day v. Campbell-Grosjean Roofing and Sheet Metal Corp.*, 260 La. 325, 256 So.2d 105, 107 (1971).

When an appellate court considers arguments made in supervisory writ applications or responses to such applications, the court's disposition on the issue considered usually becomes the law of the case, foreclosing relitigation of that issue either at the trial court on remand or in the appellate court on a later appeal. See *Easton v. Chevron Indus., Inc.*, 602 So.2d 1032, 1038 (La. App. 4th Cir.), writ denied, 604 So.2d 1315 (La. 1992). Therefore, the Supreme Court's prior ruling that the defendant's right to confront her accuser was not violated is law of the case and we will not review this issue on appeal.

## SUFFICIENCY OF THE EVIDENCE

In her second assignment of error, the defendant contends the state failed to present sufficient evidence to support the aggravated rape and molestation of a juvenile convictions.

In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821; *State v. Mussall*, 523 So.2d 1305, 1308-09 (La. 1988).

This standard of review, in particular the requirement that the evidence be viewed in the light most favorable to the prosecution, obliges the reviewing court to defer to the actual trier of fact's rational credibility calls, evidence weighing, and inference drawing. See *State v. Mussall*, 523 So.2d at 1308. Thus, the reviewing court is not permitted to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. See *State v. Burge*, 515 So.2d 494, 505 (La. App. 1st Cir. 1987), writ denied, 532 So.2d 112 (La. 1988).

The crime of aggravated rape is defined in La. R.S. 14:42, which provides, in part, as follows:

> A. Aggravated rape is a rape committed ... where the anal, oral, 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:
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> * * * *
>
> (4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.

"Rape is the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent." La. R.S. 14:41(A). "Emission is not necessary, and any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime." La. R.S. 14:41(B).

Louisiana Revised Statute 14:81.2(A) defines molestation of a juvenile as:

> Molestation of a juvenile is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person, by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue

> of a position of control or supervision over the juvenile. Lack of knowledge of the juvenile's age shall not be a defense.

Based upon our review of the record, we find the evidence sufficient to support the convictions. The eight-year-old victim's trial testimony and her videotaped CAC interview established that the defendant used her finger to penetrate the young child, performed oral sex on the child, and made the child perform oral sex on the defendant. It is well settled that if found to be credible, the testimony of the victim of a sex offense alone is sufficient to establish the elements of the offense, even where the state does not introduce medical, scientific, or physical evidence to prove the commission of the offense by the defendant. See *State v. Hampton*, 97-2096, p. 3-9 (La. App. 1st Cir. 6/29/98), 716 So.2d 417, 418-21.

Although the defendant argues the victim's account of the events was fabricated and should be discredited, the jury obviously found the victim credible and gave credence to her recollection of the events. The jury apparently found the defendant's claim that her mother-in-law manufactured the allegations and manipulated the young victim into believing that her mother sexually abused her to be incredible. These credibility determinations will not be disturbed on appeal.

When viewing the evidence presented at trial in this case in the light most favorable to the prosecution, we are convinced that any rational trier of fact could have concluded beyond a reasonable doubt that all of the elements of the crimes of aggravated rape and molestation of a juvenile were sufficiently proven. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the factfinder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the factfinder. See *State v. Calloway*,

2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). This assignment of error lacks merit.

For all of the reasons set forth above, the defendant's convictions and sentences are affirmed.

**CONVICTIONS AND SENTENCES AFFIRMED.**

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

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**STATE OF LOUISIANA**

**VERSUS**

**TERRI COX**

**HUGHES, J.**, dissenting.

I respectfully dissent from the majority opinion. In this case the defendant received a life sentence based solely on the out-of-court testimony of her own daughter about allegations made when the child was five years old. The allegations were made only after the child had been living with her paternal grandmother for three months and only articulated by the child herself after another three months of work with a social worker.

I conclude that the prior ruling of the supreme court in **State v. Cox**, 2010-2072 (La. 11/19/10), 48 So.3d 275, does not preclude this court's consideration of the defendant/appellant's argument that the expert witness's testimony (on which the trial court's decision to allow D.C. to testify out-of-court was based) was stale and inadmissible, as this argument was not considered by the supreme court in its supervisory review.

The supreme court, in its 2010 decision, ruled only that the trial court's decision to grant a new trial, based upon the trial judge's conclusion that he erred in his earlier order allowing testimony by the victim via closed-circuit television

("CCTV"), was improper. The trial judge granted a new trial because he saw no evidence that the victim was fearful of her mother, as had been asserted by the State. Since the trial court did not order a new trial on the basis of the staleness of the expert witness's testimony, this issue was not ruled on by the trial court or reviewed by the supreme court. Thus, under the unique circumstances of this case, review of the issue raising the staleness of the expert witness's testimony (re-urged on appeal) is not foreclosed.[1]

The only witness to testify at the hearing, social worker Lisa Tadlock, testified that D.C. would suffer emotional trauma if she were compelled to testify in open court. This testimony was stale, nearly two years having passed since Ms. Tadlock's last professional contact with the five to six year-old child.

The defendant asserts that her constitutional right to confront her accuser was violated by the trial court's ruling allowing D.C. to testify via CCTV, on the basis of the stale testimony by Ms. Tadlock. Ms. Tadlock provided counseling to D.C. between September of 2007 and October of 2008 and her testimony, regarding D.C.'s state of mind and corresponding ability to testify in the courtroom in the presence of the defendant, was based on her treatment of D.C. during that period of time.[2] However, Ms. Tadlock's testimony was not taken until June 21, 2010, during the trial court hearing on the State's motion to allow D.C. to testify via CCTV. She based her opinion on her evaluation of D.C.'s mental and

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[1] Although the defendant raised the issue of the staleness of Ms. Tadlock's testimony in her motion for new trial (stating that the court's order allowing D.C. to testify via CCTV was defective "standing alone" because Ms. Tadlock's testimony supporting the order was stale), the trial court did not rule on that contention or make it the basis of his grant of a new trial, though the trial judge did comment on the issue. At the close of the argument by counsel on the motion for new trial and after the trial court verbally indicated that he would grant the motion for new trial, he further stated:

> I think that I agree with the defendant; Ms. Tadlock's testimony was stale. . . I realized that it had been quite some time, you know, between the time that she had seen this child last and she is giving this opinion.

Nevertheless, the supreme court did not discuss or rule on this argument.

[2] We note that although Lisa Tadlock also subsequently met with D.C. in October of 2009, along with an assistant district attorney representing the State in the defendant's trial, Ms. Tadlock did so solely for the purpose of facilitating D.C.'s meeting with the assistant district attorney; Ms. Tadlock did not examine, interview, or counsel D.C. on that date.

emotional state as it existed at the time she was treating D.C. (i.e., between September of 2007 and October of 2008), when D.C. was five to six years old. Yet Ms. Tadlock's testimony was given some twenty months after her last treatment or professional evaluation of D.C., who had by then reached eight years of age.[3]

A trial court's evaluation of expert testimony should not be upset unless the stated reasons of the expert are patently unsound. See **Lirette v. State Farm Insurance Company**, 563 So.2d 850, 853 (La. 1990). However, the expert's opinion in this case, as to the child victim's mental and emotional state, which was based upon an examination of the child some twenty months previously, should be deemed patently unsound. When a person's physical or mental status is at issue, reasonable efforts must be made to ascertain the person's exact condition at the relevant time. See **Handy v. Richard's Cajun Country Food**, 93-1537, p. 12 (La. App. 3 Cir. 6/1/94), 640 So.2d 761, 767. Expert testimony must be both relevant and reliable; otherwise, it is merely subjective belief or unsupported speculation. See **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 589, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469, (1993). Stale information is immaterial as a matter of law. **In re Intelligroup Securities Litigation**, 468 F.Supp.2d 670, 699 (D. N.J. 2006).

Therefore, I would conclude that the defendant's motion for new trial should have been granted on the basis of the stale expert witness testimony, which served as the only evidence that D.C. would suffer serious emotional distress and would be unable to reasonably communicate her testimony to the court or jury if forced to

[3] Ms. Tadlock placed great emphasis, in testifying that D.C. feared the defendant, on her recollection that, during her treatment of D.C., D.C. did not call the defendant "mommy," but rather referred to her as "the 'T' word." However, it should be noted that the record reveals that at no time during her trial testimony did D.C. refer to her mother as the "T" word (although the prosecutor, when questioning D.C., did call Terri Cox "T" and/or "[y]our mom, 'T'"). Nor did D.C. do so during either of the videotaped Child Advocacy Center (CAC) interviews, which took place on August 21, 2007 and November 7, 2001. Further, at the hearing on the defendant's motion for new trial, the trial court stated: "All this 'T word' stuff, I think was a ruse."

give testimony in open court (see LSA-R.S. 15:283 and LSA-Ch.C. art. 329 prerequisites to allowing a witness to testify outside the courtroom via CCTV).

Furthermore, in light of the defendant/appellant's contentions that the testimony of D.C. was the product of the "coaching" and "brainwashing" by her former mother-in-law, A.J.,[4] whether the child testified in court or out-of-court could have prejudiced the defense in this case.

The staleness issue has never been ruled on, which raises a constitutional confrontation issue.

It took the child three months with the paternal grandmother and another three months with the grandmother and a social worker before she could articulate the charges that now result in a life sentence for her mother. If this sentence is to be affirmed, I find it to be constitutionally excessive given the facts of this case.

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[4] A.J. admitted that D.C. did not disclose any allegations of abuse until around the second week of August, 2007, approximately three months after D.C. came into A.J.'s custody. Further, when D.C. was first interviewed by CAC investigator Bethany Case, on August 21, 2007, D.C. did not reiterate the accusations against the defendant. It was not until a second CAC interview on November 7, 2007, after several months of therapy with Ms. Tadlock, that D.C. indicated to Ms. Case that she had been abused by the defendant. Terri Cox further testified as to various instances of conflict between her and her mother-in-law, A.J., which included: verbal and physical fights; A.J. telling her that if she left A.J.'s son, C.J. (Terri's husband and D.C.'s father) that A.J. would make sure she never saw her children again; and A.J. calling her a "no-good b[**]ch." Terri also testified that A.J. obtained custody of her children in May 2007 through OCS, after she and C.J. got into a fight, but that she (Terri) had worked the OCS case plan, received a parenting certificate, and was about to get her children back when A.J. made the allegations of sexual abuse against her to OCS. Terri stated that A.J. "brainwashed" her child, D.C. Terri also presented the testimony of two of her neighbors (Ms. Meyers and Mr. Breland) who testified to seeing A.J. come over to Terri's house one day (prior to the removal of the children by OCS) and hit Terri's car with a baseball bat. Further, Terri's aunt and uncle (Mr. and Mrs. Wendell Cox) testified that, during the trial, they were in the hallway and overheard A.J. tell someone that she wanted to see Terri "fry" and to never be able to see her (Terri's) children again. Testimony was also elicited from A.J. that she had obtained custody of D.C.'s older half-sister (who had a different mother) through OCS, and that she received public funds ("Kinship Care") in the amount of $800 per month for the care of her three grandchildren, as well as food stamps. Although A.J. admitted to having several fights with Terri, she denied: putting D.C. up to the making the allegations of sexual abuse against Terri, damaging Terri's car, or making the alleged statements in the courthouse hallway. A.J. admitted that D.C.'s father, C.J., was living in her home at the time of trial, but she denied that her other son, D.J. (who was convicted of a sex offense in May 2007), was living there or ever visited at her home. Even though A.J. further denied telling D.C.'s mental health counselor at the Bogalusa Mental Health Center that D.C. lied, the counselor testified that A.J. did report to her, in June of 2009, that D.C. had been "lying ... about everything," along with other behavioral problems.