NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1591

STATE OF LOUISIANA

VERSUS

VONNIE FRANK TODD, JR.

Judgment Rendered: MAY 06 2011

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On Appeal from the Sixteenth Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
Docket No. 2008-175376

Honorable Gerard B. Wattigny, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

Defendant, Vonnie Frank Todd, Jr., was charged by bill of indictment with two counts of aggravated incest, violations of LSA-R.S. 14:78.1.[1] He pled not guilty and, following a trial by jury, was found guilty unanimously on count one of the responsive offense of attempted aggravated incest, a violation of LSA-R.S. 14:27 and 14:78.1, and guilty as charged on count two. Subsequently, the state filed a habitual offender bill of information seeking to enhance defendant's sentence on count two pursuant to LSA-R.S. 15:529.1.[2] Defendant filed a motion for new trial, which he subsequently amended twice. The trial court held two hearings on the motion for new trial, and denied the motion on both occasions. Thereafter, the trial court adjudicated defendant to be a third-felony habitual offender on the aggravated incest conviction, and sentenced him pursuant to LSA-R.S. 15:529.1A(1)(b)(ii) to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. The trial court also sentenced defendant on his conviction for attempted aggravated incest to a concurrent sentence of forty-nine and one-half years at hard labor. See LSA-R.S. 14:27D(1)(a) & 14:78.1D(2).[3] Defendant now appeals, arguing in a single assignment of error that the evidence was insufficient to support his convictions and that the trial court erred in denying his motion for new trial. For the following reasons, we affirm defendant's convictions, habitual offender adjudication, and sentences.

FACTS

On the evening of November 17, 2007, numerous members of C.M.'s family gathered at her home in St. Mary Parish, Louisiana, for a party to

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[1] The indictment also included a charge of simple battery, a violation of LSA-R.S. 14:35, but it appears this charge was dismissed by the state.

[2] All references to LSA-R.S. 15:529.1 are made to that provision as it existed prior to its amendment by 2010 La. Acts No. 911, §1 and No. 973, §2. Defendant's predicate offenses were an October 9, 1995 conviction for indecent behavior with a juvenile (actually two separate convictions entered on the same date) and a June 14, 2004 conviction for simple robbery.

[3] All references herein to LSA-R.S. 14:78.1D(2) are made to that provision as it existed at the time the offense was committed, at which time it provided a penalty range of between twenty-five years to life imprisonment. Subsequently, this provision was amended by 2008 La. Acts No. 33, §1, to reduce the maximum possible penalty from life to ninety-nine years imprisonment.

celebrate her upcoming marriage to F.M.[4] Defendant, who is her son and lived with her at the time, was present. Also among the guests were her granddaughters T.T., who was then twelve years old, and S.T., who was then thirteen years old. T.T. and S.T. are cousins to each other and the biological nieces of defendant. During the party, the underage guests were poorly supervised and were allowed access to alcoholic beverages, in which several of them indulged.

After the party, numerous family members spent the night at C.M.'s home. It was necessary for some of them, primarily the children and teenagers, to sleep on pallets of blankets in the living room and dining room area. This group of young people included T.T., S.T., C.B. (T.T's younger brother), B.M. (T.T.'s older half sister), T.M.T. (B.M.'s friend), and E.T. (defendant's son). Since defendant allowed his sister and her boyfriend to sleep in his bedroom, he also slept on the floor with the young people.

At the time that defendant said goodnight to everyone and turned off the lights, T.T. and S.T. were lying on a pallet on the living room floor, as were C.B. and E.T. However, after the lights went off, T.T. and S.T. got up and moved to a recliner in the living room to sleep. C.B. then moved to the spot where T.T. and S.T. previously had been lying, since it was less cramped at that spot. Defendant was on a pallet in the dining room area only a few feet from the living room.

What occurred during the night is highly disputed. The respective versions of events depicted by the testimony of the state witnesses and the defense witnesses are diametrically opposed. According to the testimony of the state witnesses, at approximately 2:00 a.m., defendant sexually molested his two nieces, T.T. and S.T. At trial, T.T. testified that she awoke during the night to see defendant leaning over the recliner with his hand down S.T.'s pants "messing with her vagina." She pinched S.T., who was still sleeping, to wake her up.

[4] Pursuant to LSA-R.S. 46:1844W, the initials of the minor victims and the other witnesses will be used to protect the identity of the victims.

When S.T. woke up and moved closer to T.T, defendant removed his hand from S.T.'s pants. After lighting a cigarette, defendant said he had lost his pack of cigarettes and asked T.T. to help him find it. She looked around the nearby area and then returned to the recliner.

When she got up again to retrieve her blanket, defendant grabbed her by the arm and pulled her to his pallet in the dining area, where he held her down on the floor with his knee, despite her efforts to get up. Defendant unzipped his pants and asked her whether he could "taste" her, which she understood to mean "taste my vagina." When she refused, he pulled her pants down partially, grabbed her hand, and forced her to touch his penis, while asking if she had "ever felt a big penis before." Afterwards defendant released her. T.T. testified that she struggled with defendant as these events occurred, and screamed for him to stop and to leave her alone. She stated her screams were not "really loud," but that she was trying to be loud enough for S.T. to hear her.

When T.T. was released and returned to the recliner, defendant followed and began cursing at her and S.T., calling them obscene names. According to T.T., he also offered them money to pose naked for him, which they refused to do. She and S.T. argued and cursed back at defendant. As the argument grew increasingly loud, it woke up the adults sleeping in the bedrooms. C.M. (defendant's mother and T.T. and S.T.'s grandmother), S.M.T. (T.T.'s mother), and other adults came into the living room. The argument escalated, with several people yelling, and defendant accusing T.T. and S.T. of approaching him for sex. At one point, defendant became violent and struck S.T.

Eventually, defendant left the house and S.M.T. took T.T. and S.T. to a hotel. T.T. testified she had seen defendant only once since that night, which was at her grandmother's wedding a few days later. She was not alone with him at that time. At trial, T.T. testified that the only person, other than defendant, she had ever accused of molesting her was E.T., who she said tried to molest her when she was eleven years old.

The police were not contacted about the events that occurred on November 17, 2007, until several weeks later when T.T.'s father learned about the incident and immediately called the police. Within a few days, S.T.'s father also learned what had occurred and filed a police report. When the police arrived at defendant's residence to arrest him, the man who opened the door told them defendant was not there. When the police indicated they knew defendant was inside, the man called out to defendant that he might as well come out because the police knew he was there. Instead, defendant fled the house through a bathroom window. He was later discovered hiding in the waters of Bayou Teche behind a boat. He began swimming across the bayou, but eventually abandoned the attempt and returned to shore, where he was apprehended. After being advised of his rights, he denied any sexual wrongdoing. He claimed the victims approached him, asked if he wanted to smoke marijuana with them, and even offered to strip for him.

At trial, S.T. gave testimony consistent with the account given by T.T. She testified that she woke up when T.T. pinched her. At that point, she realized defendant had his hand inside her underwear, touching her vagina. When she rolled toward T.T., defendant removed his hand. Shortly thereafter, T.T. went with defendant into the dining area to look for his cigarettes, and she heard T.T. screaming, but was unable to see what was happening. When defendant returned to the living room, he offered money to her and T.T. to make videos for him. She testified he started screaming at them when they refused, calling them obscene names. The screaming woke up the other adults in the house, and they came into the living room and began screaming at each other. During the ensuing argument, defendant pushed his mother and hit S.T. in the face.

S.T. testified that she saw defendant several days later at her grandmother's wedding, but did not really talk to him. She also saw him at her great-grandmother's house on Thanksgiving Day, and even went to the upstairs apartment located behind the house where he was staying at the time, because B.M. wanted to go there. However, she testified that several other adults were

also present, and she felt safe with her aunt being present. Finally, S.T. testified that the only person who asked her to say anything other than the truth concerning the incident was C.M. (her grandmother and defendant's mother), who told her "[t]o just forget about it, like it never happened."

C.B. (T.T.'s twelve-year-old brother) gave testimony at trial corroborating the victims' testimony. As previously noted, C.B. went to sleep on the pallet where T.T. and S.T. were lying at the time that defendant turned out the lights. According to his testimony, he awoke to find defendant's hand down his pants rubbing his buttocks. He testified that defendant called him [T.T.] and asked if he wanted to go smoke something with him. When C.B. responded that he was not [T.T.], defendant crawled over to the recliner and appeared to be touching the girls. C.B. then saw S.T. jump over and quickly move toward T.T.

Additionally, C.B. said he heard whispering from the recliner, then saw T.T. get up and help defendant search for something on the floor before returning to the recliner. When she got up from the recliner and starting looking around a second time, he saw defendant grab her and pull her into the dining area. T.T. screamed and told defendant to stop and let her go. When C.B. crawled over and looked around the corner, he saw defendant holding T.T. down on the floor as she struggled with him. C.B. testified that he went back to his pallet and covered up, explaining that he did so because he was scared of defendant. He stated that he was ten or eleven years old at the time.

T.M.T. testified at trial that he and B.M. slept on the couch near C.B. on the date of the offense. He testified that he woke up at one point during the night and heard C.B. saying, "This ain't [T.T.]. This is [C.B.]." He dozed off again, but woke up when everyone began screaming. When E.T. became angry and ran outside, he followed him and found E.T. crying. He testified that E.T. told him, "I know that my dad did that to [T.T.] and [S.T.]" and "It was just a matter of time before he did it again."

B.M. (T.T.'s half sister) was fifteen years old at the time of trial. She testified she woke on the night in question to see defendant sitting on the coffee

table next to the recliner smoking a cigarette, before getting up and leaning over the recliner. However, she was unable to see what he was doing. She did not see what happened next because she went back to sleep. Although she was concerned about defendant leaning over the recliner where T.T. and S.T. were sleeping, she testified she took no action because she "was scared maybe if I would have got up, he would have done something." The next thing she remembers is being awakened by yelling and arguing.

B.M. further testified that she saw defendant several days later on Thanksgiving Day at her great-grandmother's house. According to B.M., when her family arrived, defendant was standing outside and apologized to them, saying, "I'm sorry for what I did. I was drunk. I didn't know what I was doing."

The testimony of the defense witnesses presents an entirely different scenario. E.T., defendant's son who was fifteen years old at the time of trial, testified that he did not sleep during the night in question because he had a migraine headache. He stated that he saw T.T. go to the pallet where defendant was sleeping, kick defendant, and ask him to smoke a joint with her. According to E.T, when defendant refused, T.T. kicked defendant again and offered to strip for him. E.T. testified that defendant became angry, got up and went into the living room, waking everyone up and telling them to call the police because he was afraid "they was [sic] going to put something on him...." C.M. and F.M. also testified that defendant woke them up, yelling for them to call the police, although they said it was over allegations about smoking marijuana.

Further, E.T. denied seeing defendant put his hand down C.B.'s pants, even though E.T. was lying next to C.B. He testified that he also did not see defendant approach the girls on the recliner, sit next to them smoking a cigarette, put his hand into S.T.'s pant, or pull T.T. into the other room; nor did he hear any signs of a struggle. Additionally, E.T. denied telling T.M.T. that he believed the accusations made against his father.

Additionally, the defense presented testimony from C.M. (defendant's mother and T.T. and S.T.'s grandmother) and H.F. (defendant's grandmother

and T.T. and S.T.'s great-grandmother). In direct opposition to the testimony of T.T. and other state witnesses that T.T. did not go to H.F.'s house on Thanksgiving Day, they testified that both T.T. and S.T. were present on that occasion. H.F. further testified that she asked T.T. and S.T. on Thanksgiving Day whether defendant had tried to touch them or do anything to them, and they both denied he had ever touched them. According to H.F., the girls then went upstairs to defendant's apartment and stayed there most of the day, watching defendant tattoo her nephew's stepson.

C.M. also testified that T.T. and S.T. spent time upstairs in defendant's apartment on Thanksgiving Day. In fact, she said that when she and her husband (F.M.) saw them going upstairs, her husband stopped the girls and asked them why they wanted to go up there in view of their accusations against defendant. She testified they just rolled their eyes and continued upstairs.

Additionally, C.M. testified that T.T. previously has made several accusations of sexual misconduct against her mother's boyfriend, as well as other family members, including C.M.'s uncle and her husband. According to C.M., T.T. was prone to make up lies to hurt people when she was angry. She claimed T.T. was angry at defendant on the day of the incident, because he had earlier scolded her for stealing a pack of cigarettes from F.M.

F.M. gave testimony consistent with C.M.'s testimony in several respects. He also testified that when he questioned T.T. and S.T. about going to defendant's apartment on Thanksgiving Day, they merely giggled and rolled their eyes before proceeding to the apartment. Moreover, he testified that T.T. had accused him of sexually molesting her prior to the instant incident.

The defense also presented the testimony of C.S., whose boyfriend is related to defendant's family. C.S. was present at the gathering held at H.F.'s house on Thanksgiving Day. She testified she questioned T.T. as to whether defendant had touched her, and T.T. indicated he had not. C.S. also testified that T.T. and S.T. spent time in defendant's apartment that day.

Finally, the state presented evidence that defendant had two prior convictions for indecent behavior with a juvenile for two separate incidents that occurred in 1995. Both of the victims in those cases were thirteen years old at the time the offenses were committed. One victim testified that defendant actually raped her, although he accepted a plea bargain to a lesser charge. The other victim testified that defendant performed oral sex on her against her will and then attempted to rape her, but she managed to escape.

LAW AND ANALYSIS

In his sole assignment of error, defendant contends the state's entire case rests on the credibility of the alleged victims, T.T. and S.T., and argues the trial court "abused its discretion by accepting the jury's verdict despite the many credibility issues presented." As such, it appears defendant is assigning error both to the denial of his motion for new trial, as well as to the sufficiency of the evidence.

Initially, we note that, to the extent that defendant's motion for new trial is based on his contention under LSA-C.Cr.P. art. 851(1) that the verdict is contrary to the law and evidence, the denial of the motion is not subject to review on appeal. See **State v. Guillory**, 10-1231, p.3 (La. 10/8/10), 45 So.3d 612, 615 (per curiam); **State v. Brooks**, 01-1138, p.13 (La.App. 1 Cir. 3/28/02), 814 So.2d 72, 81, writ denied, 02-1215 (La. 11/22/02), 829 So.2d 1037. Nevertheless, since much of defendant's argument in brief focuses on his claim that the evidence was insufficient due to the lack of credibility of the state's witnesses, we will first consider the issue of the constitutional sufficiency of the evidence before reaching the issue raised by defendant's motion for new trial based on newly discovered evidence. See **State v. Marcantel**, 00-1629, p.8 n.2 (La. 4/3/02), 815 So.2d 50, 56 n.2.

SUFFICIENCY OF THE EVIDENCE

The standard of review for the sufficiency of evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved

the essential elements of the crime and the defendant's identity beyond a reasonable doubt. See LSA-C.Cr.P. art. 821; **State v. Lofton**, 96-1429, p.4 (La.App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. The **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), standard of review incorporated in LSA-C.Cr.P. art. 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that, in order to convict, the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 01-2585, pp.4-5 (La.App. 1 Cir. 6/21/02), 822 So.2d 141, 144. 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 that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La.App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

In the instant case, defendant was convicted of one count of aggravated incest and one count of attempted aggravated incest. Louisiana Revised Statutes 14:78.1 provides in pertinent part:

> A. Aggravated incest is the engaging in any prohibited act enumerated in Subsection B with a person who is under eighteen years of age and who is known to the offender to be related to the offender as any of the following biological, step, or adoptive relatives: child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew, or niece.
>
> B. The following are prohibited acts under this Section:
>
> (1) Sexual intercourse, sexual battery, second degree sexual battery, carnal knowledge of a juvenile, indecent behavior with juveniles, pornography involving juveniles, molestation of a juvenile, crime against nature, cruelty to juveniles, parent enticing a child into prostitution, or any other involvement of a child in sexual activity constituting a crime under the laws of this state.
>
> (2) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child, the offender, or both.

Thus, in order to sustain a conviction for aggravated incest, the state must prove: (1) that the victim was under eighteen years of age; (2) that the offender knew he was related to the victim within the degree and manner specified in Subsection A; and (3) that the offender engaged with the victim in one of the prohibited acts enumerated in Subsection B. See **State v. Flores**, 27,736, p.5 (La.App. 2 Cir. 2/28/96), 669 So.2d 646, 650. Additionally, in order to support a conviction for attempted aggravated incest, the state must also prove that the defendant specifically intended to engage in one of the prohibited acts listed in Subsection B with the victim. See LSA-R.S. 14:27A; **State v. James**, 02-2079, p.4 (La.App. 1 Cir. 5/9/03), 849 So.2d 574, 579. Specific intent is a state of mind and as such need not be proven as a fact, but may be inferred from the circumstances and actions of the accused. **James**, 02-2079 at p.4, 849 So.2d at 579.

On appeal, defendant does not argue the evidence was insufficient to prove any particular element of the offenses of which he was convicted. In fact, he specifically concedes that he is related to the victims in the specified degree and that the victims' statements, if accepted as true, would establish the occurrence of acts prohibited by LSA-R.S. 14:78.1B. Rather, defendant contends that the only issue on appeal is whether the jury acted rationally in accepting the victims' testimony as credible.

In arguing that the victims' testimony was not credible, defendant points out numerous aspects of their testimony that he maintains were not believable, including the fact that the events described by the victims supposedly occurred with numerous other individuals sleeping in the nearby area, yet the victims did not scream out for help, nor did the other individuals either wake up or see anything occur. In particular, defendant argues it was inconceivable that S.T. would not have woken up immediately if defendant put his hand inside her underwear, or that T.T. would have then helped defendant search for his cigarettes after seeing him touch S.T. in such a manner. He contends it also was unbelievable that T.T.'s sister and brother would have done nothing to help her if

they actually had observed defendant leaning over the recliner where T.T. and S.T. were sleeping or holding T.T. down on the floor against her will.

In further support of his position that the victims' testimony was not credible, defendant points to the testimony of the defense witnesses indicating that T.T. previously has made accusations of sexual misconduct against other family members when she did not get what she wanted. According to defendant, the victims would never have gone into his apartment on Thanksgiving Day, as several defense witnesses testified they did, if defendant had done the things they accused him of doing.

At trial, the jury heard all of the testimony and viewed all of the evidence presented to it, including testimony bearing on the credibility of the victims and the other witnesses. Defense counsel had an opportunity to fully cross-examine the victims on all aspects of their testimony and did so thoroughly. The jury also heard defendant's closing arguments attacking the credibility of the victims and other state witnesses and alleging the victims totally fabricated their accounts of what occurred. After hearing all of the testimony and viewing the evidence, the jury found defendant guilty of the instant offenses. In doing so, it is clear the jury rejected the defense's version of events and accepted the account of the victims and other state witnesses as to what occurred.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. An appellate court will not assess the credibility of witnesses or reweigh the evidence to overturn a jury's determination of guilt. **Lofton**, 96-1429 at p.5, 691 So.2d at 1368-69. 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. **Marcantel**, 00-1629 at p.9, 815 So.2d at 56. This Court is constitutionally precluded from acting as a "thirteenth juror" in assessing

what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342, p.8 (La. 10/17/00), 772 So.2d 78, 83.

After a thorough review of the record, we find that the evidence supports the guilty verdicts. S.T. testified that defendant put his hand inside her underwear and touched her vagina, while T.T. testified that defendant forced her to touch his penis. Even the testimony of a single victim or witness is sufficient to support a conviction. See **State v. Davis**, 01-3033, p.3 (La.App. 1 Cir. 6/21/02), 822 So.2d 161, 163. In this case, the testimony of each of the victims substantially corroborated the testimony of the other. Moreover, the state presented testimony from several additional witnesses corroborating various aspects of the victims' accounts of what occurred, including the testimony of C.B. and B.M. that they saw defendant leaning over the recliner where the victims were sleeping. C.B. further testified that he saw defendant forcibly drag T.T. into the dining area and hold her down on the floor, while she fought him.

Additionally, according to B.M., defendant apologized to her family for what he had done, claiming that he was drunk at the time and did not know what he was doing. Moreover, although defense witnesses testified to the contrary, T.T. and other state witnesses testified she did not attend the family gathering on Thanksgiving Day. It is also significant that defendant fled through a window and attempted to hide when the police arrived to arrest him. While flight from the police is not necessarily indicative of wrongdoing, it is certainly suggestive of such. See **Illinois v. Wardlow**, 528 U.S. 119, 124-25, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000); **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984).

Considering the guilty verdicts returned in this case, the jury obviously accepted the testimony of the state witnesses and rejected the defense's theory that the victims fabricated their accounts of what occurred. See **State v. Andrews**, 94-0842, p.7 (La.App. 1 Cir. 5/5/95), 655 So.2d 448, 453. In reaching this determination, the jury could have concluded that, while some of the actions and responses of the victims and other state witnesses seemingly

were not reasonable, considering their youth and stated fear of defendant, their testimony was nevertheless credible. We cannot say that the jury's verdicts were 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. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the jury and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. See **State v. Calloway**, 07-2306, pp.1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Accordingly, we are convinced that viewing all of 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 defendant was guilty of the instant offenses.

MOTION FOR NEW TRIAL

Defendant argues the trial court erred in denying his motion for new trial based on the fact that T.T. later recanted her trial testimony. He further points out that C.B. (T.T.'s brother) wrote a letter to the trial court stating that he also lied at trial when he testified defendant touched him, T.T. and S.T.; the letter indicates C.B. lied at the behest of T.T. and S.T., because defendant was going to tell on the girls for smoking. (R 386)

Following his conviction, defendant filed a motion for new trial, pursuant to LSA-C.Cr.P. art. 851(1) on the basis that the verdicts were contrary to the law and the evidence. He subsequently amended the motion to assert T.T.'s recantation as newly discovered evidence warranting a new trial under LSA-C.Cr.P. art. 851(3).[5] Following a hearing on October 7, 2009, the trial court denied the motion for new trial. On December 7, 2009, defendant filed a second amended motion for new trial based on allegedly newly discovered evidence consisting of the fact that C.B. purportedly had recanted his trial testimony. A

[5] It also was asserted in the amended motion that there was newly discovered evidence that the witness sequestration order had been violated. However, in denying the motion for new trial, the trial court found defendant had failed to establish any violation of the sequestration order, and defendant has raised no issue on appeal regarding this finding.

hearing was held on the amended motion on March 17, 2010, after which the trial court again denied the motion.

On motion of a defendant, the trial court shall grant a new trial under LSA-C.Cr.P. art. 851(1) whenever the verdict is contrary to the law and the evidence. However, the denial of a motion for new trial based on Article 851(1) is not subject to review on appeal. **Brooks**, 01-1138 at p.12, 814 So.2d at 81. In any event, defendant's assertion that the verdicts were contrary to the law and evidence is based on his contention that the evidence was insufficient to support the verdicts, which we have already found to be meritless.

Defendant also asserts that a new trial should have been granted due to the newly discovered evidence consisting of T.T. and C.B.'s recantations of their trial testimony. With respect to newly discovered evidence, LSA-C.Cr.P. art. 851(3) provides, in pertinent part, that:

> The court, on motion of the defendant, shall grant a new trial whenever:
>
> ****
>
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty; ...[.]

Under this provision, there are four requirements for a motion for a new trial based on newly discovered evidence: (1) the evidence must have been discovered since the trial; (2) failure to learn of the evidence at the time of trial was not due to defendant's lack of diligence; (3) it must be material to the issues at the trial; (4) it must be of such a nature that it would probably produce an acquittal in the event of retrial. **State v. Prudholm**, 446 So.2d 729, 735 (La. 1984). The test to be employed in evaluating whether or not newly discovered evidence warrants a new trial is not simply whether another jury might bring in a different verdict, but whether the new evidence is so material that it ought to produce a verdict different than that rendered at trial. Moreover, the trial court's denial of a motion for new trial will not be disturbed on appeal absent a

clear abuse of discretion. **State v. Maize**, 94-0736, pp.27-28 (La.App. 1 Cir. 5/5/95), 655 So.2d 500, 517, writ denied, 95-1894 (La. 12/15/95), 664 So.2d 451.

When the newly discovered evidence consists of a witness' recantation of trial testimony, it must be borne in mind that recantations are highly suspicious. Except in rare circumstances, a motion for new trial should not be granted on the basis of a recantation, since the repudiation of prior testimony is tantamount to an admission of perjury so as to discredit the witness at a later trial. **Prudholm**, 446 So.2d at 736.

In ruling on a motion for new trial pursuant to LSA-C.Cr.P. art. 851, the trial court can only consider the weight of the evidence, not its sufficiency, and sits as a thirteenth juror. **State v. Steward**, 95-1693, p.12 (La.App. 1 Cir. 9/27/96), 681 So.2d 1007, 1014. In contrast, an appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases, since that determination rests solely within the discretion of the trier of fact. **Steward**, 95-1693 at p.12, 681 So.2d at 1014. Appellate courts may review the grant or denial of a motion for new trial only for errors of law. See LSA-C.Cr. P. art. 858.

In the instant case, T.T. testified at the hearing on defendant's first amended motion for new trial that the majority of the testimony she gave at trial was false. Basically, she testified that the accusations she and S.T. made against defendant were untrue. She specifically testified that defendant never attempted to touch either her or S.T. in a sexual way, nor did he pull her into the dining area and touch her with his penis or attempt to photograph her.

According to her testimony, defendant caught her and S.T. smoking on the night in question and was going to wake up their grandmother to report this fact. Because that made them angry, they made up the accusations of sexual misconduct against defendant. T.T. additionally testified that she and S.T. later spent a weekend working out the details of their story, and coached C.B. on what to say in order to corroborate their accounts. However, she made no claim

that either B.M. or T.M.T. was part of the conspiracy to falsely accuse defendant, or were instructed on how to testify at trial.

Further, T.T. maintained that she did not testify truthfully at trial because a representative from the District Attorney's Office had threatened to put her mother in jail on outstanding warrants if T.T. failed to testify. She indicated she otherwise would not have testified at defendant's trial. However, she admitted on cross-examination that, when she met with the prosecutor before trial, he did not tell her what to say, but only that she should tell the truth.

She also admitted that, after she first told defendant's attorney that she had lied at trial, she later retracted her recantation and denied that she had given false testimony at trial. At the motion hearing, she testified that she retracted her initial recantation because she was scared and did not want her father to know she had lied at trial. Nevertheless, as demonstrated by her recantation at the motion hearing, she later reverted to again declaring that her trial testimony was false. She claimed she was testifying at the motion hearing because she wanted to come forward with the truth. It is noteworthy that T.T., C.B., and their mother, were living in the home of C.M. (defendant's mother) at the time of the motion hearing. However, T.T. denied that her grandmother or anyone else pressured her to recant her trial testimony.

In denying defendant's motion for new trial, the trial court outlined the following oral reasons for its ruling:

> This Court does not find the witness today, [T.T.], to be credible. Either she lied at the first hearing or she's lying today. Under either circumstance, she's a liar and she committed perjury. I don't know, but her testimony no longer has much validity to this Court and to this judge, her testimony today. And she's testified both at the original trial and today that she understands that she was under oath both times and that she understood the difference between a lie and the truth. But she hasn't satisfied the Court today in any way that she's telling the truth today and that she lied before. She's a liar under oath and has committed perjury.
>
> ****
>
> The Court does not find the testimony here today of [T.T.] truthful. The Court does not find that it is based in any fact that the Court can believe. The Court notes that all of the other witnesses who testified at trial contrary to her testimony here today

> have not come forward to recant any of their testimony, which would support her recantation. Despite the fact that she says the other victim and she were involved in a conspiracy to falsely accuse the defendant, despite the fact that she says other witnesses who testified at the trial lied, none of those people came here today to testify that the testimony they gave was [sic] the truth.
>
> So the Court finds that the grounds for new trial are denied.

Our review reveals no reason to disagree with the trial court's finding that T.T.'s recantation was not credible. Following trial, T.T. recanted her trial testimony, then repudiated that recantation, and finally again recanted her trial testimony at the motion hearing. Further, the already inherently suspicious nature of T.T.'s recantation is enhanced by the fact that she was living with defendant's mother, C.M., at the time of the motion hearing. Significantly, S.T. (the other victim) testified at trial that C.M. encouraged her to be untruthful regarding the events giving rise to defendant's convictions. Finally, the trial court also noted that the other state witnesses had not come forward to recant their trial testimony.

T.T.'s assertion that she testified untruthfully at trial because she was mad at defendant and because of purported threats that her mother would be jailed on outstanding warrants does not amount to rare circumstances wherein a motion for new trial should be granted, especially in light of her admission that no one told her how to testify. Since there are no special circumstances that would suggest that T.T.'s latest testimony was truthful, the trial court reasonably could have concluded that her recantation would not have created a reasonable doubt of guilt in the mind of any reasonable juror. See **Prudholm**, 446 So.2d at 736. See also **State v. McClain**, 04-98, pp.11-12 (La.App. 5 Cir. 6/29/04), 877 So.2d 1135, 1143, writ denied, 2004-1929 (La. 12/10/04), 888 So.2d 835 (twelve-year-old victim's recantation too suspicious to be believed when the defendant, who was found guilty of indecent behavior with a juvenile, was a wealthy man who took care of the victim's mother and her children and wanted to marry the mother). Therefore, we find no error or abuse of discretion in the

trial court's denial of defendant's motion for new trial following the first motion hearing.

After the denial of the motion for new trial, defendant once again amended the motion to assert additional newly discovered evidence consisting of the recantation by C.B. of his trial testimony. However, at the hearing held on the amended motion for new trial, C.B. exercised his Fifth Amendment right to remain silent and declined to testify. His mother, S.M.T., was the only witness to testify at the hearing. According to her testimony, she had taken C.B. to the office of defendant's attorney the preceding month, at which time C.B. said that he had lied in court while acting under the influence of T.T. However, S.M.T. admitted that C.B. did not recant his trial testimony until after he and his family were living in C.M.'s home and that T.T. did not recant her testimony until after she spent time staying with C.M. during the summer.

At the conclusion of the hearing, the trial court denied the motion for the following reasons:

> So the Court finds that there's no basis for recantation by [C.B.] of his testimony given at the original trial and for the Court to believe that the recantation is reasonably and truthfully given. And so, therefore, the motion for new trial is denied.

We find no error or abuse of discretion in the trial court's denial of the motion for new trial following the second motion hearing. C.B. ultimately refused to testify at this hearing. Therefore, the only new evidence presented to the trial court was the testimony of his mother that she had heard him recant his trial testimony. The letter that defendant refers to in brief wherein C.B. recants his trial testimony was not sent to the trial court until after the motion hearing and shortly before defendant's sentencing. In any event, the letter constitutes unsworn hearsay. Moreover, the trial court specifically found at the motion hearing that there was no basis to believe the recantation was truthful.

In the instant case, the trial court was confronted with a situation fraught with suspicion. The witness purportedly recanting his testimony was a child closely related to defendant and living in the home of defendant's mother.

Further, no attempt to recant his testimony was made until the child began residing in that home. Under such circumstances, we find no error or abuse of discretion in the trial court's denial of the motion for new trial.

This assignment of error is without merit.

REVIEW FOR ERROR

Defendant requests in brief that this Court review the record for error pursuant to LSA-C.Cr.P. art. 920. Such a request is unnecessary, since this Court routinely reviews all criminal appeals for errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence.

Our review in the instant case indicates that, because the victim, T.T., was twelve years old at the time the offense of attempted aggravated incest occurred, defendant was exposed to a penalty of not less than ten years, nor more than fifty years imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. See LSA-R.S. 14:27D(1)(a) & 14:78.1D(2).[6] However, in imposing the forty-nine and one-half year sentence for this conviction, the trial court failed to restrict defendant's eligibility for parole, probation, or suspension of sentence. Nevertheless, LSA-R.S. 15:301.1A obviates any need to correct a sentence when the trial court fails to recite a mandatory restriction on the defendant's eligibility for parole, probation, or suspension of sentence, since this provision has been interpreted to automatically include the statutory restriction in the sentence, regardless of whether or not the trial court states it. Furthermore, this provision is self-activating, thereby eliminating any necessity of remanding a case for ministerial

[6] As previously noted, after the instant offense was committed, LSA-R.S. 14:78.1D(2) was amended to reduce the maximum possible penalty from life to ninety-nine years imprisonment. It appears the trial court may have given defendant the benefit of the amendment at the time of sentence insofar as the forty-nine and one-half year sentence is one-half of the longest term of imprisonment prescribed under the amended statute. See LSA-R.S. 14:27D(3). The trial court erred if it gave the defendant the benefit of the amendment. Generally, a defendant should be sentenced according to the sentencing provisions in effect at the time the offense is committed. **State v. Sugasti**, 01-3407, p.4 (La. 6/21/02), 820 So.2d 518, 520. However, if any error did occur, it was not inherently prejudicial to the defendant, and therefore, requires no action by this Court. See **State v. Price**, 05-2514, pp.18-22 (La.App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

correction of the sentence. See **State v. Williams**, 00-1725, pp.10 and 14-15 (La. 11/28/01), 800 So.2d 790, 799 & 801.

DECREE

Accordingly, for the foregoing reasons, we affirm the convictions, habitual offender adjudication, and sentences.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.