APPENDIX "C"

RULING:
LA. 5TH CIR. COURT OF APPEAL

301 So.3d 1262
Court of Appeal of Louisiana, Fifth Circuit.

STATE of Louisiana

v.

J.E.

NO. 19-KA-478
September 02, 2020

Synopsis

Background: Defendant was convicted in the District Court, 29th Judicial District, St. Charles Parish, No. 17,740, M. Lauren Lemmon, J., of various sex offenses, including molestation of juvenile under age 13 and molestation of juvenile over age of 13 but under 17. Defendant appealed.

Holdings: The Court of Appeal, Windhorst, J., held that:
1 there was sufficient evidence that defendant committed molestation of victim, his granddaughter, while having supervision or control over victim;
2 it would not second guess jury's witness-credibility determinations;
3 offense of molestation of juvenile under age 13 was serious offense for which unanimous verdict was required; and
4 trial court erred by providing incomplete notice of time limitation for seeking post-conviction relief.

Affirmed in part, vacated in part, and remanded.
Appellate ReviewPost-Trial Hearing Motion

West Headnotes (24)

Change View

1 **Criminal Law** Scope of Review in General
Criminal Law Weight and sufficiency
When the issues on appeal relate to both the sufficiency of the evidence and

one or more trial errors, the reviewing court should first determine the sufficiency of the evidence by considering the entirety of the evidence.

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2 **Criminal Law** Scope of Review in General

The reason for reviewing sufficiency of evidence first, when the issues on appeal relate to both the sufficiency of the evidence and one or more trial errors, is that the accused may be entitled to an acquittal under *Hudson v. Louisiana*, 101 S.Ct. 970, if a reasonable trier of fact, viewing the evidence in the light most favorable to the prosecution, could not reasonably conclude that all of the elements of the offense have been proven beyond a reasonable doubt.

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3 **Criminal Law** Scope of Review in General

When the issues on appeal relate to both the sufficiency of the evidence and one or more trial errors, consideration of sufficiency of evidence precedes consideration of other assignments of error which, if meritorious, result in vacating a conviction due to trial errors, and remand for possible retrial.

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4 **Double Jeopardy** Sufficiency or insufficiency of evidence

When a claim of insufficiency of evidence is found to have merit, it results in a reversal due to a failure to prove a charge beyond a reasonable doubt, to which jeopardy attaches and cannot be retried.

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5 **Criminal Law** Scope of Review in General

Sufficiency of evidence analysis precedes consideration of whether a verdict must be vacated and remanded under *Ramos v. Louisiana*, which found that the Sixth Amendment right to a jury trial, as incorporated against the States by the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense. U.S. Const. Amends. 6, 14.

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6 **Criminal Law** Construction in favor of government, state, or prosecution
Criminal Law Reasonable doubt
Criminal Law Circumstantial evidence

Constitutional standard for testing the sufficiency of evidence requires that the evidence, direct or circumstantial, or a mixture of both, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime have been proven beyond a reasonable doubt, in

accord with *Jackson v. Virginia*.

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7 **Criminal Law** Degree of proof

All evidence, both direct and circumstantial, must be sufficient to support the conclusion that the defendant is guilty beyond a reasonable doubt.

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8 **Infants** Status as to child; position of authority or trust

Sex Offenses Position of trust or authority

There was sufficient evidence that defendant committed molestation of victim, his granddaughter, while having supervision or control over victim, to support convictions of molestation of juvenile; defendant, age 70 at time of trial, was victim's biological grandfather, defendant routinely watched and supervised victim because mother was single mother who worked full time, as victim's grandfather defendant was in position of trust and acted as victim's father-figure, defendant bought victim clothing, took her out to eat, and drove her to sports events, therapy sessions, and school, and mother moved to another state in part because she felt she was losing control over victim due to defendant's influence. La. Rev. Stat. Ann. § 14:81.2.

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9 **Infants** Status as to child; position of authority or trust

Infants Molestation and exploitation in general

Sex Offenses Position of trust or authority

Courts consider the following factors when making a determination as to whether a defendant used influence by virtue of his position of supervision or control over the victim, as an element of the offense of molestation of a juvenile: (1) the amount of time the defendant spent alone with the victim; (2) the nature of the relationship between the victim and the defendant; (3) the defendant's age; and (4) the defendant's authority to discipline. La. Rev. Stat. Ann. § 14:81.2.

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10 **Infants** Molestation and exploitation in general; indecent liberties

Sex Offenses Sex offenses against minors

Harsher penalty provision for molestation of a juvenile where the offender has control or supervision over a juvenile exists because an offender who has control or supervision over a juvenile is in a position of trust. La. Rev. Stat. Ann. § 14:81.2.

11 **Criminal Law** Sufficiency of evidence

Defendant, convicted of molestation of juvenile, waived for appellate review his argument that evidence presented was only sufficient to convict him of lesser charge of indecent behavior with juvenile; jury charge conference was held and responsive verdicts were discussed for each charge, and defendant did not object to exclusion of responsive verdict of indecent behavior with juvenile under 13. La. Code Crim. Proc. Ann. arts. 814, 815, 841.

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12 **Criminal Law** Responsiveness to issues

Statute listing responsive verdicts authorized by the legislature does not list either molestation of a juvenile or indecent behavior with a juvenile; however, as provided for in statute, the inclusion of lesser-included grades of offenses is allowed even when not listed in the statute listing responsive verdicts. La. Code Crim. Proc. Ann. arts. 814, 815.

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13 **Criminal Law** Responsiveness to issues

Indecent behavior with a juvenile is a responsive verdict to molestation of a juvenile.

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14 **Criminal Law** Particular offenses and prosecutions

In finding defendant guilty of various sexual offenses, including molestation of juvenile, jury weighed credibility of victim and victim's brother, who were defendant's grandchildren, and Court of Appeal would not second guess jury's witness-credibility determinations; jury heard and considered that victim was in therapy for anger issues and problems at school, circumstances that prompted her disclosure that defendant molested her, brother's testimony regarding incidents he observed between defendant and victim, and text messages exchanged between mother and defendant immediately after disclosure, including fact that mother demanded money.

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15 **Criminal Law** Credibility of witnesses in general

Criminal Law Credibility of Witnesses

Credibility of a witness, including the victim, is within the sound discretion of the trier of fact, who may accept or reject, in whole or in part, the testimony of any witness.

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16 **Criminal Law** Credibility of witnesses in general

In the absence of internal contradiction or irreconcilable conflicts with physical evidence, the testimony of one witness, if believed by the trier of fact, is sufficient to support a conviction.

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17 **Sex Offenses** Necessity

In sex offense cases, the testimony of the victim alone can be sufficient to establish the elements of a sexual offense, even when the State does not introduce medical, scientific, or physical evidence to prove the commission of the offense.

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18 **Criminal Law** Province of jury or trial court

It is the role of the fact-finder to weigh the respective credibility of the witnesses; thus, the appellate court should not second-guess the credibility determinations of the trier of fact beyond the sufficiency evaluations under the *Jackson v. Virginia* standard of review.

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19 **Criminal Law** Credibility of witnesses in general

Even 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.

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20 **Criminal Law** Assent of required number of jurors

Offense of molestation of juvenile under age 13 was serious offense for which unanimous verdict was required, and therefore verdicts resulting from defendant's jury trial that were not unanimous would be vacated. U.S. Const. Amend. 6; La. Const. art. 1, § 17; La. Code Crim. Proc. Ann. art. 782(A).

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21 **Jury** Application of constitutional provisions in general

For purposes of the Sixth Amendment, federal law defines "petty offenses" as offenses subject to imprisonment of six months or less, and serious offenses as offenses subject to imprisonment over six months. U.S. Const. Amend. 6.

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22 **Jury** Application of constitutional provisions in general

Sixth Amendment's right to a jury trial only attaches to serious offenses. U.S.

Const. Amend. 6.

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23 **Sentencing and Punishment** Advice as to post-conviction or other collateral relief

Trial court erred by providing incomplete notice of time limitation for seeking post-conviction relief. La. Code Crim. Proc. Ann. art. 930.8.

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24 **Criminal Law** Sentence or Punishment

If a trial court fails to advise, or provides an incomplete notice pursuant to statute governing time limitation for seeking post-conviction relief, Court of Appeals may correct said error by informing the defendant of the applicable delay period for post-conviction relief by means of its opinion. La. Code Crim. Proc. Ann. art. 930.8.

West Codenotes

Unconstitutional as Applied

La. Const. art. 1, § 17; La. Code Crim. Proc. Ann. art. 782(A)

***1265** ON APPEAL FROM THE TWENTY-NINTH JUDICIAL DISTRICT COURT PARISH OF ST. CHARLES, STATE OF LOUISIANA, NO. 17,740, DIVISION "D", HONORABLE M. LAUREN LEMMON, JUDGE PRESIDING

Attorneys and Law Firms

COUNSEL FOR PLAINTIFF/APPELLEE, STATE OF LOUISIANA, Joel T. Chaisson, II, Baton Rouge, Louis G. Authement, Hahnville

COUNSEL FOR DEFENDANT/APPELLANT, **JOHN ELMER**, **John Elmer**, Jane L. Beebe

Panel composed of Judges Fredericka Homberg Wicker, Stephen J. Windhorst, and John J. Molaison, Jr.

ORDER

WINDHORST, J.

****1** Considering the State's timely Motion to Recall Opinion pursuant to URCA Rule 2--16.3, in which the State contends that although the opinion rendered by this Court on July 31, 2020 fully complied with and exceeded the requirements of Rule 5--2 by use of initials and other means to ***1266** protect the identity of a minor, and moves this Court to

recall the opinion for purpose of redacting certain additional facts which could conceivably lead to identity of the victim; and further considering that this case involved matters of an unusually sensitive nature which, in this extraordinary case, provide sufficient cause for us to take extra measures to protect the identity of the victim:

IT IS ORDERED that the State's Motion to Recall Opinion filed August 11, 2020 is granted, and the opinion rendered by this Court on July 31, 2020 is recalled for the purpose of redacting from it certain facts which could lead to discovery of the identity of the victim; and that a superseding opinion be issued without changing the substance of the original opinion.

IT IS FURTHER ORDERED that the Clerk of this Court take necessary measures to recall the original opinion and substitute for it the superseding opinion bearing the same date of this order.

IT IS FURTHER ORDERED that the Clerk of Court for the 29th Judicial District Court take all necessary measures to recall and remove from the record the original opinion and substitute for it the superseding opinion, rendered the same date of this order.

IT IS FURTHER ORDERED that Westlaw / Thomson Reuters Corporation and LexisNexis recall the opinion rendered by this Court on July 31, 2020, and substitute for it this Court's superseding opinion, rendered the same date of this order.

Gretna, Louisiana, this 2nd day of September, 2020.

Defendant, J.E., [1] appeals his convictions and sentences. For the reasons stated herein, defendant's conviction and sentence on count six is affirmed; defendant's convictions and sentences on counts three through five are vacated and the matter is remanded to the trial court for further proceedings consistent with this opinion. [2]

PROCEDURAL HISTORY

On February 2, 2018, a St. Charles Parish Grand Jury returned an eight-count indictment charging defendant, J.E., with various sex offenses against J.H. Defendant was charged with aggravated rape of a juvenile under thirteen years of age in violation of La. R.S. 14:42 (count one); first degree rape of a juvenile under thirteen years of age in violation of La. R.S. 14:42 (count two); molestation of a juvenile under the age of thirteen in violation of La. R.S. 14:81.2 (counts three through five); molestation of a juvenile over the age of thirteen but under seventeen in violation of La. R.S. 14:81.2 (count six); sexual battery in violation of La. R.S. 14:43.1 (count seven); and oral sexual battery in violation of La. R.S. 14:43.3 (count eight). On February 6, 2018, defendant pled not guilty at his arraignment.

On January 24, 2019, a twelve-person jury found defendant guilty as charged on counts three through six. He was found not guilty on counts one, two, seven, and eight. The record

shows that defendant was convicted by a vote of eleven out of twelve on counts three through five and unanimously convicted on count six. Following the verdicts, defendant moved for a judgment notwithstanding the verdict, which was denied.

On February 1, 2019, defendant filed a motion for new trial, a motion for post-verdict ***1267*** judgment of acquittal and a notice of intent to appeal. On June 17, 2019, the ***2*** trial court denied defendant's motions. Defendant was sentenced on count six to twenty years in the Department of Corrections, without eligibility to have the conviction set aside or dismissed under La. C.Cr.P. art. 893, and on counts three through five to ninety-nine years each without the benefit of probation, parole, or suspension of sentence. The trial judge ordered counts three, four, and five to run concurrently with each other and consecutively to count six. After sentencing, the trial court granted defendant's appeal. This appeal followed.

FACTS

The victim, J.H., in this case is defendant's granddaughter. At trial, J.H. testified that she was fifteen years old and in the tenth grade. Growing up, she spent a lot of time with her grandparents, defendant (her grandfather) and S.T (her grandmother). Her mom, S.E., was a single parent who worked all the time and her grandparents helped in the summer and with school and sports. She and her brother, P.H., would often stay over at her grandparents' house during the summer and school year, where she had her own room. She testified that she was physically changing and beginning puberty when she was ten years old and in the fifth grade. Defendant noticed her development and would tell her she was beautiful and pretty. J.H. testified that over the course of four years, defendant put his fingers inside of her vagina, performed oral sex on her, placed his penis in her vaginal area, and ejaculated on her.

J.H. testified that the first incident occurred in November of her fifth grade year when she was ten years old and defendant took her to Alabama to do research for a social studies project. They spent two nights in a motel room that had two beds. The first night, she remembered waking up to something moving next to her in her bed and saw it was defendant. He had his hand on her and she pushed defendant away. He told her that "it was normal; that it was okay." She pushed him again and defendant told her that "everything would be okay." Defendant then put ***3*** his hands in her shorts and started touching her vagina. She testified that after that, she "zoned out, and the only thing [she] saw was his face and the way he looked at [her]." Defendant then put his mouth on her vagina. She testified that the touching occurred for about 30 minutes. When he was done, he got out of her bed and went back to his bed, and she immediately took a shower. She was not able to sleep the rest of the night. The next day they worked on her project and defendant took her shopping and bought her an expensive dress. When she arrived home, she did not tell anyone about the incident because she did not know what to say to anyone, and "saying it would have made it real.... I just wanted to believe it was just all a dream;

that it wasn't real."

J.H. testified that the second incident occurred a few months later, when she was still ten years old and she slept at defendant's house. She was asleep in her room when defendant walked in and got into her bed. She told him to "get out," but he did not leave. She was on her back and defendant pulled down her pants, put his mouth on her vagina, and placed his fingers inside of her, which hurt. She testified that she "froze" and "couldn't move." When defendant left, she took a shower because she "felt gross."

J.H. testified she could not remember specifically when the next incident occurred because the incidents "started happening all the time .... It went from about I'd get a week break ... and then move on to once a week to every other day to almost all the time, every time I was ***1268*** over there." After the first two incidents, defendant began to touch himself or have her touch him. Defendant also touched her breasts in his office and on the sofa at his house. He would have her lie on her side or back and place his penis in her vagina area. She testified that "he wouldn't put it in me; he would just like ... thrust against me," and he would ejaculate on her inner thighs or back. J.H. denied that defendant ever put his penis in her mouth or tried to kiss her. However, she testified that he did attempt to move her in a position ***4*** so that her mouth was on his penis when he "would get like, I guess, upside down to where his head was facing my feet, and his legs were by my head." When asked if defendant ever successfully penetrated her, J.H. replied, "Not that I know of" but testified that the tip of his penis went into the opening of her vagina. She recalled one time when she was lying on her back, defendant spread her legs apart and tried to "put it in, but it wasn't hard, so we couldn't. And then he started doing what he'd normally do to me, and then he came and then left."

J.H. testified that the last time defendant touched her occurred a few weeks before her hip surgery in 2017, when she was thirteen years old. Defendant came into her room at his house while she was asleep. She told him to get out but he forced himself into her bed. Defendant pulled her pants down, put his fingers inside her, moved down her body, and then put his mouth on her. Defendant thrusted against her and tried to force himself into her vagina. She flinched and kicked and then he left.

J.H. testified that defendant "put his mouth" on her vagina more than ten times within each of the years she was eleven, twelve, and thirteen years old. The longest amount of time between incidents occurred between the first and second incidents. All of the incidents with defendant occurred in St. Charles Parish at her house and defendant's house and the one time in Alabama.

When asked if defendant ever tried to give her anything in exchange for pleasing him, J.H. replied "He would buy me stuff, but if I wanted something, I would have to give him something in return." She testified that whenever she asked him for something, he would

put his hands in her pants and gesture that he needed "this." While the abuse was going on she would think "Why is this happening to me?" J.H. testified that she did have "about three" conversations with defendant when she was eleven, twelve, and thirteen and she threatened to tell someone. Every ***5*** time she mentioned telling someone, defendant would say, "There's no point, because before the cops would get to me, I'd blow my brains out."

J.H.' mother (S.E.) and the daughter of defendant and S.T., testified that after she divorced J.H. and P.H.'s father, she moved back in with defendant at his home. After living with her parents for approximately a year, she and her children moved, eventually out of state, [3] and she relied on family and friends to help out with the children because she worked full-time. She particularly relied on her parents when J.H. and P.H. started to get older and played sports. S.T. and defendant would drive them to practice and help pay for "extras."

S.E. testified that as J.H. grew older, defendant wanted to always be there for J.H. but not P.H., which struck her "as a little odd." If the children had sports events at the same time, defendant would always go to see J.H. play. One time when she came downstairs, she saw J.H., who was twelve or thirteen years old, sitting on defendant's lap and she made a joke out of ***1269*** the fact that J.H. was too old to sit on his lap. Another time when she and the children slept over at her parents' house, she looked into the room where J.H. was asleep and saw defendant sleeping next to J.H. in his underwear with his hand over her shoulder. She woke him up and asked him what he was doing. Defendant was flustered and said he must have been sleep walking. S.E. testified that if she objected to J.H. sleeping at her parents' house, both J.H. and defendant would "throw a fit." Also, if she punished or disciplined J.H., defendant would go behind her back to fix things. For instance, one time she took away J.H.'s phone because she was not doing well in school, and defendant gave J.H. a phone. Another time, J.H. wanted a Fitbit. [4] Although S.E. told J.H. she could not have one, defendant bought her one anyway.

6 S.E. testified that at the time of J.H.'s disclosure, J.H. was already in therapy because of anger issues and trouble at school. Defendant paid for and drove J.H. to therapy. S.E. testified that there was tension between her and J.H. because "she didn't feel like she needed to follow any rules," except defendant's rules. Around the time when J.H. was going into the fifth grade, J.H. "became defiant," and when she asked her to do something, "it was a fight." S.E. testified that prior to J.H.'s disclosure, she told defendant that she thought J.H. was being molested because she "had all the classic symptoms, that I thought, of being molested ... the change in her appearance, her anger, her attitude."

S.E. testified that defendant and J.H. were often alone together. When she and the children lived only two streets from her parents' house, defendant would often insist that J.H. sleep over because he did not want to pick her up at her house to bring her to school the next

day. Defendant and J.H. would also go hunting alone. S.E. testified that defendant would often take J.H. shopping at places like Victoria's Secret and other boutiques, and they would go out to eat together alone without including other family members. S.E. testified that she trusted defendant to take care of J.H. the same as she would.

S.E. testified that she was aware of the trip J.H. went on with defendant to Alabama in early November 2013, when J.H. was ten years old and in fifth grade. When J.H. came home from the trip, she was wearing a tight, leopard print, V-neck dress which S.E. thought was inappropriate for a ten-year-old girl to wear. The cost of the dress was between sixty and seventy dollars. S.E. testified that the incident "rubbed [her] the wrong way" because it was a lot of money to spend on a dress, and the dress was inappropriate.

S.E. testified that on November 24, 2017, "Black Friday," she went shopping with J.H. and S.T. (J.H.'s grandmother). While shopping, J.H. had thrown a "huge fit" when they refused to buy her something that she wanted. When they arrived ***7** home, she and S.T. questioned J.H. about what was going on with her. J.H. was hesitant to say anything in front of S.T. and wanted her to leave the room. S.T. asked J.H. if "Granddad" did something to her, and J.H. nodded affirmatively. S.E. testified that she was shocked. S.T. immediately called defendant and asked, "What did you do to your granddaughter?" She could not hear what defendant was saying, but did hear S.T. say, "I guess I got my answer." At this point, J.H. "shut down" and would not talk about it anymore. S.E. testified that they did not go into any details concerning what occurred, nor did ***1270** she call the police. J.H. was embarrassed and was "adamant that she was not saying anything else to anybody else." S.E. testified that she did not know what to do. When she later spoke to defendant, he told her that child services would take J.H. and P.H. away, and she was afraid.

S.E. testified that the days between J.H.'s disclosure and her reporting the abuse were "just a whirlwind ... I had my dad calling and texting me, and it was just really emotional. He's threatening to kill himself, and that's my dad." At trial, S.E. identified the text messages exchanged between herself and defendant from November 24-30, 2017. Hours after J.H. disclosed she was abused by defendant, S.E. texted defendant demanding money to take care of J.H. and P.H. in the "lifestyle they were used to" and she wanted their inheritance. Defendant texted that S.T. would be taking over the accounts and that he was "ready to die." S.E. told defendant that she forgave him for "my sake and the kids." She texted him that she loved him and wanted him to get help. Defendant responded to S.E. that she had no idea how much that meant to him and that he was "so very sorry." The two also discussed finances and whether defendant would sign property over to her. S.E. told defendant that she did not want to see him in jail or dead, but that he needed to get help. Defendant texted he had already talked to S.T. about getting help and stated that he had similar issues going back to his childhood. He told her that she was the first and only person he told about these issues in sixty years. At one point, defendant texted, ***8** "I went

more than 30 good years raising a daughter, with many young girls all around often, and no desire to do anything, then something snapped." Another time, he stated, "I hate myself every second for putting everyone through this. All I know to do is to try with all I have to help make life better for everyone I hurt." The two also discussed whether or not to report the incident. Defendant stated that if the incident was reported, he would get life in prison, but whatever S.E. wanted for him, he understood. He told her that he wished they could resolve everything without "involving the State" and asked her to let him know how much time he had so he could get his affairs in order.

On December 2, 2017, S.E. texted her friend, J.H's godmother, informing her that defendant had touched J.H and talked to her about reporting the abuse. The next day, J.H's godmother went to see J.H. and asked her "yes or no" questions about the abuse. J.H. disclosed details confirming the abuse, and responded affirmatively that defendant put his penis in the opening of J.H.'s vagina, touched her vagina with his fingers, ejaculated on her, touched her "butt" with his penis, made her touch his penis with her hand, and touched her breasts. As part of her employment duties, J.H's godmother, a mandatory reporter, disclosed the abuse to the police on her way home. S.E. reported the abuse to the police the next day, December 3, 2017.

A few weeks after defendant was arrested, S.E. testified that she filed a lawsuit for monetary damages against defendant and her half-brother. She filed suit after she became aware that defendant had transferred a large lump sum of money from his checking account into another checking account owned by defendant and her half-brother, and she was worried that J.H. would not receive anything. She also worried that defendant would leave the country. Defendant, in turn, sued J.H. for wrongful incrimination. The suit against defendant was settled for $900,000.00. [5]

1271 **9 On Sunday, December 3, 2017, Detective Christopher Waguespack, a juvenile detective with the St. Charles Parish Sheriff's Office, was notified of a call regarding the possible abuse of a juvenile, J.H, who was then fourteen years old. On December 8, 2017, Detective Waguespack met with J.H. and her mother, S.E. At the time, S.E. was living in Mississippi with J.H. and P.H., her son. Detective Waguespack testified that S.E. informed him that on November 24, 2017, "Black Friday," J.H. told her and S.T. [6] that defendant had been molesting her for the past four years. S.E. provided Detective Waguespack with the text messages between her and defendant.

Detective Waguespack spoke to J.H. alone. He testified that J.H. was shy and it appeared that she did not want to talk to him or be there. When J.H. spoke about the allegations her mood completely changed, she became visibly upset and started to cry. J.H. informed him that defendant first abused her in Alabama when she was ten years old, and the abuse lasted until she moved to Mississippi earlier in 2017, around her fourteenth birthday. She

told him that the first time occurred in Alabama when she stayed in a motel alone with defendant. Defendant put his hand under her clothing and penetrated her with his fingers. She told him that the abuse occurred continuously, every day or every other day, and became worse over the next four years. J.H. stated that defendant had digitally penetrated her with his fingers, ejaculated on her, made her ejaculate him using her hand, performed oral sex on her, and touched her on the breasts, "butt," and vagina.[7] J.H. denied that defendant penetrated her with his penis, but stated that defendant did attempt to penetrate her with his penis at his house during the last incident. She was able to push him away. If she wanted to go shopping or go to the mall with her friends, defendant would ***10*** make her do something for the money. J.H. also stated that defendant threatened many times to kill himself if anyone ever found out, and she never told anyone what was happening because she loved defendant and did not want him to kill himself.

Detective Waguespack testified that based on the information provided to him, J.H. was molested continuously between her tenth and fourteenth birthdays, and the abuse became more intense when she was approximately twelve and a half. J.H. only provided him with time frames of the incidents of abuse, rather than specific dates, which he confirmed was consistent in his experience with other juvenile sex abuse victims. A physical examination was not performed of J.H. since it had been approximately five or six months since the last incident.

Detective Waguespack testified he also interviewed J.H's godmother and S.T., both of whom provided information consistent with the information he received from J.H and S.E. During the interviews, family members indicated that they feared defendant would take his own life or flee the country after learning they had reported the abuse. On December 13, 2017, Detective Waguespack secured an arrest warrant ***1272*** for defendant who turned himself in approximately two weeks later.

Detective Waguespack testified that in March 2018, he took a second recorded statement from J.H., who was fourteen years old at that time. J.H. told him that she was concerned that she was not a virgin anymore because defendant had rubbed his penis on her and she was having problems sleeping at night.

At trial, P.H. (J.H.'s brother) testified that he was thirteen years old and in seventh grade. He testified that he observed specific instances where defendant touched J.H. One day when he was in fifth grade and approximately ten or eleven years old, he got off the school bus at defendant's house, and upon looking through the window, he saw defendant sitting on the couch with J.H., touching her "boobs." He heard J.H. tell defendant to get off of her. A week later he walked in on defendant touching J.H. again "[i]n the chest area." He yelled and cursed defendant and J.H. ***11*** ran upstairs. Defendant told him not to tell anyone or he would hurt him. During the spring of his fifth-grade year, he heard defendant and J.H.

arguing upstairs. When he went upstairs, he saw defendant lying on top of J.H., who was wearing a bathing suit. Defendant was fully clothed. J.H. ran downstairs and he told defendant that he would call the police if it happened again. Defendant responded that he would hurt him or kill himself. Another time he heard J.H. and defendant arguing behind closed doors and J.H. was telling defendant not to touch her. P.H. testified that defendant would hit him in the head, punch him, or slap him when he observed any abuse. He admitted that he only disclosed what he observed between defendant and J.H. after an argument with his mother, S.E.

S.T. (J.H.'s grandmother) testified that J.H. and P.H. lived with her and defendant for several years, and they brought the children to and from school and to practices because S.E. worked. After they moved out, she and defendant continued to bring the children to and from school and to practices and they paid for all of the sports expenses. S.T. testified that defendant would bring the children to school in the morning and would usually take J.H. to volleyball after school. She testified that they saw the children every day. S.T. testified that after the Alabama trip, J.H. and defendant's relationship "started to get a little, like strange" and they spent more time together. She testified that defendant only wanted to take J.H. to practice.

DISCUSSION

1 2 3 In his second *pro se* assignment of error, defendant argues that the evidence was insufficient to support his convictions of molestation of a juvenile. When the issues on appeal relate to both the sufficiency of the evidence and one or more trial errors, the reviewing court should first determine the sufficiency of the evidence by considering the entirety of the evidence. State v. Hearold, 603 So.2d 731, 734 (La. 1992). The reason for reviewing sufficiency of evidence first is that the accused may be entitled to an acquittal under Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), if a reasonable trier of fact, viewing the evidence in the light most favorable to the prosecution, could not reasonably conclude that all of the elements of the offense have been proven beyond a reasonable doubt. Therefore, consideration of sufficiency of evidence precedes consideration of other assignments of error which, if meritorious, result in vacating a conviction due to trial errors, and remand for possible retrial.

4 5 When, however, a claim of insufficiency of evidence is found to have merit, it results in a reversal due to a failure to prove a charge beyond a reasonable doubt, to which jeopardy attaches and cannot be ***1273*** retried. Thus, sufficiency of evidence analysis also precedes consideration of whether a verdict must be vacated and remanded under Ramos v. Louisiana, 590 U.S. ——, 140 S.Ct. 1390, 206 L.Ed.2d 583, 2020 WL 1906545 (2020). Therefore, for the reasons stated herein, this Court will address defendant's sufficiency of evidence claim as to counts three through six, despite that defendant's convictions and sentences must be vacated and remanded for a new trial pursuant to Ramos, supra, as to

counts three through five.

***12** Defendant contends the testimony presented at trial failed to include any evidence to support the element of "the use or influence by virtue of a position of control or supervision." He argues that proving the crime of molestation of a juvenile requires more than "simply having a position of supervision or control; the offender must actually use the influence gained by that position in order to overbear the will of the victim and accomplish the act complained of." He claims that because the State failed to prove this essential element, a responsive verdict of indecent behavior with a juvenile is more appropriate. Defendant also asserts that the State failed to present any evidence to support a finding that he used force, violence, duress, psychological intimidation, or the threat of great bodily harm.

6 The constitutional standard for testing the sufficiency of evidence requires that the evidence, direct or circumstantial, or a mixture of both, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime have been proven beyond a reasonable doubt, in accord with Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

7 The rule as to circumstantial evidence is that "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438. This is not a separate test from the Jackson standard, but rather provides a helpful basis for determining the existence of reasonable doubt. State v. Anderson, 10-779 (La. App. 5 Cir. 3/27/12), 91 So.3d 1080, 1085; State v. Wooten, 99-181 (La. App. 5 Cir. 6/1/99), 738 So.2d 672, 675, writ denied, 99-2057 (La. 1/14/00), 753 So.2d 208. All evidence, both direct and circumstantial, must be sufficient to support the conclusion that the defendant is guilty beyond a reasonable doubt. Id.

Defendant was indicted with three counts of molestation of a juvenile under the age of thirteen, and one count of molestation of a juvenile over the age of thirteen ***13** but under seventeen. The State alleged in each of the four counts that defendant used "force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of defendant's care, custody, control and supervision of the juvenile." La. R.S. 14:81.2 provides, in pertinent part:

> A. (1) 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.

* * *

B. (1)

* * *

***1274** (2) Whoever commits the crime of molestation of a juvenile, when the victim is thirteen years of age or older but has not yet attained the age of seventeen, and when the offender has control or supervision over the juvenile, shall be fined not more than ten thousand dollars, or imprisoned, with or without hard labor, for not less than five nor more than twenty years, or both. The defendant shall not be eligible to have his conviction set aside or his prosecution dismissed in accordance with Code of Criminal Procedure Article 893.

* * *

D. (1) Whoever commits the crime of molestation of a juvenile when the victim is under the age of thirteen years shall be imprisoned at hard labor for not less than twenty-five years nor more than ninety-nine years. At least twenty-five years of the sentence imposed shall be served without benefit of probation, parole, or suspension of sentence.

8 Defendant was found guilty on counts three through five of molestation of a juvenile under the age of thirteen. In those counts, the State had to prove that J.H. was under the age of thirteen at the time of the offenses, and provide evidence to meet the general definition of molestation of a juvenile under La. R.S. 14:81.2 A(1) and D(1). As to count six, the State had to prove J.H.'s age, the general definition ***14** of molestation of a juvenile and that defendant committed the molestation while having supervision or control under La. R.S. 14:81.2 A(1) and B(2). [8]

9 10 The jurisprudence has interpreted the "supervision and control" element of molestation of a juvenile to be satisfied by someone who has emotional control over the victim, as well as by someone who is a live-in boyfriend, non-custodial parent, babysitter, relative, friend, a pastor, or neighbor. State v. Davis, 47,599 (La. App. 2 Cir. 1/16/13), 108 So.3d 833, 841, writ denied, 13-381 (La. 9/20/13), 123 So.3d 163; State v. Ellis, 38,740 (La. App. 2 Cir. 8/18/04), 880 So.2d 214, 219. Louisiana courts consider the following factors when making a determination as to whether a defendant used influence by virtue of his position of supervision or control over the victim: (1) the amount of time the defendant spent alone with the victim; (2) the nature of the relationship between the victim and the defendant; (3) the defendant's age; and (4) the defendant's authority to discipline. State v. Dale, 50, 195 (La. App. 2 Cir. 11/18/15), 180 So.3d 528, 535, writ denied, 15-2291 (La.

4/4/16), 190 So.3d 1203. The harsher penalty provision for molestation of a juvenile where the offender has control or supervision over a juvenile exists because an offender who has control or supervision over a juvenile is in a position of trust. Id.; State v. Moses, 615 So.2d 1030 (La. App. 1 Cir. 1993), writ denied, 624 So.2d 1223 (La. 1993).

The State presented sufficient evidence on each of the four counts that defendant ***1275*** used his position of control and supervision over J.H. to continually abuse her. The evidence establishes that defendant, age seventy at the time of trial, was J.H.'s biological grandfather. S.E., J.H.'s mother, routinely utilized both defendant and S.T. to watch and supervise J.H. and P.H. because she was a single mother who ***15*** worked full time. As J.H.'s grandfather, defendant was in a position of trust and he acted as J.H.'s father-figure. There was sufficient testimony concerning the amount of time J.H. spent under defendant's supervision alone, including a weekend trip to Alabama where the first incident of abuse occurred. Defendant would buy J.H. clothing, take her out to eat, and drive her to sports events, therapy sessions, and school. Defendant ignored other family members, including P.H., so that he could spend time alone with J.H. Additionally, defendant thwarted S.E.'s attempts to parent or discipline J.H. by either giving her what she wanted or returning items to J.H. that her mother had taken away. Defendant also threatened to kill himself if J.H. or P.H. told anyone about the abuse. S.E. testified she moved to Mississippi in part because she felt she was losing control over J.H., due to defendant's influence. Based on the evidence, we find that the State proved that defendant committed the offenses by virtue of his position of control or supervision over J.H. We further find that all elements necessary to support defendant's convictions of molestation of a juvenile were proven by the State. [9]

11 12 13 We further find defendant's argument that the evidence presented was only sufficient to convict him of the lesser charge of indecent behavior of a juvenile is without merit. La. C.Cr.P. art. 814, which lists responsive verdicts authorized by the legislature, does not list either molestation of a juvenile or indecent behavior with a juvenile. However, La. C.Cr.P. art. 815 allows the inclusion of lesser-included grades of offenses even when not listed in La. C.Cr.P. art. 814. Indecent behavior with a juvenile is a responsive verdict to molestation of a juvenile. See State v. Busby, 94-1354 (La. App. 3 Cir. 4/5/95), 653 So.2d 140, 147, writ denied, 95-1157 (La. 9/29/95), 660 So.2d 854. The record shows that a jury charge conference ***16*** was held, the responsive verdicts were discussed for each charge, and defendant did not object to the exclusion of the responsive verdict of indecent behavior with a juvenile under thirteen. An irregularity or error cannot be availed of after a verdict unless it was objected to at the time of occurrence. La. C.Cr.P. art. 841. Furthermore, we note that it was defense counsel who moved to exclude the responsive verdicts for counts three through six. Thus, defendant waived the right to assert this as error.

14 Defendant also challenges the credibility of J.H and P.H.'s accusations of abuse

because they only disclosed the abuse after arguments with their mother, S.E. He also alleges that the text messages exchanged between him and S.E. following J.H's disclosure further undermines J.H's accusations of abuse because S.E. demanded money from him instead of immediately notifying the police. He further challenges J.H.'s disclosure to J.H's godmother, who he argues violated every ethical code concerning her profession by asking J.H. "yes or no" questions concerning the abuse.

15 16 17 18 19 ***1276** The credibility of a witness, including the victim, is within the sound discretion of the trier of fact, who may accept or reject, in whole or in part, the testimony of any witness. State v. Gonzalez, 15-26 (La. App. 5 Cir. 8/25/15), 173 So.3d 1227, 1233. In the absence of internal contradiction or irreconcilable conflicts with physical evidence, the testimony of one witness, if believed by the trier of fact, is sufficient to support a conviction. State v. Hernandez, 14-863 (La. App. 5 Cir. 9/23/15), 177 So.3d 342, 351, writ denied, 15-2111 (La. 12/5/16), 210 So.3d 810. In sex offense cases, the testimony of the victim alone can be sufficient to establish the elements of a sexual offense, even when the State does not introduce medical, scientific, or physical evidence to prove the commission of the offense. Id. It is the role of the fact-finder to weigh the respective credibility of the witnesses; thus, the appellate court should not second-guess the credibility determinations of the trier of ***17** fact beyond the sufficiency evaluations under the Jackson standard of review. State v. Alfaro, 13-39 (La. App. 5 Cir. 10/30/13), 128 So.3d 515, 525, writ denied, 13-2793 (La. 5/16/14), 139 So.3d 1024. Even 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. State v. Vincent, 07-239 (La. App. 5 Cir. 12/27/07), 978 So.2d 967, 973.

The jury heard and considered (1) that J.H. was in therapy for anger issues and problems at school; (2) the circumstances that prompted J.H.'s disclosure; (3) P.H.'s testimony regarding incidents he observed between defendant and J.H., and that he only divulged what he saw after an argument with his mom; and (4) the text messages exchanged between S.E. and defendant immediately after the disclosure, including the fact that S.E. demanded money. In finding defendant guilty of the four counts of molestation of a juvenile, the jury weighed the credibility of the witnesses, which this Court will not second guess on appeal. The jury also heard testimony from J.H's godmother. We find defendant's argument concerning J.H's godmother has no bearing on the weight of the evidence presented by the State against defendant. See Vincent, supra. Accordingly, this assignment of error is without merit.

20 In his first *pro se* assignment of error and supplemental assignment of error, based on the Unites States Supreme Court's ruling in Ramos, defendant argues that his convictions for molestation of a juvenile were unconstitutionally obtained by the return of

non-unanimous verdicts. Defendant argues that he was convicted by a non-unanimous jury on three of his four convictions and that this Court should review the non-unanimous jury verdicts as an error patent. [10] He further argues that a ***18** conviction based on an insufficient number of jurors should constitute both a structural error and an error patent.

The record reflects that on January 24, 2019, defendant was convicted by a vote of eleven out of twelve on counts three through five and unanimously convicted on count six. [11] He was found not guilty on counts one, two, seven, and eight.

***1277** On February 1, 2019, defendant filed a motion for new trial and a motion for post-verdict judgment of acquittal, arguing in both motions that his constitutional rights were violated when the jury returned a non-unanimous verdict. The trial court denied the motions.

Since the punishment for the offenses in counts three through five is necessarily confinement at hard labor, a jury of twelve persons was required. See La. Const. Art. I, § 17; La. C.Cr.P. art. 782; La. R.S. 14:81.2D(1). [12] Non-unanimous verdicts were previously allowed under La. Const. Art. I, § 17 and La. C.Cr.P. art. 782, and the circumstances of this case. The constitutionality of the statutes was previously addressed by many courts, all of which rejected the argument. See Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); State v. Bertrand, 08-2215, 08-2311(La. 3/17/09), 6 So.3d 738, 742-43; State v. Brooks, 12-226 (La. App. 5 Cir. 10/30/12), 103 So.3d 608, 613-14, writ denied, 12-2478 (La. 4/19/13), 111 So.3d 1030.

However, recently the United States Supreme Court in Ramos found that the Sixth Amendment right to a jury trial, as incorporated against the States by the ***19** Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense. The Court held:

> There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court. (Footnotes omitted.)

Id. at 1397.

21 22 For purposes of the Sixth Amendment, federal law defines petty offenses as

offenses subject to imprisonment of six months or less, and serious offenses as offenses subject to imprisonment over six months. The Sixth Amendment's right to a jury trial only attaches to serious offenses. See generally Lewis v. United States, 518 U.S. 322, 327-28, 116 S.Ct. 2163, 135 L.Ed.2d 590 (1996); Hill v. Louisiana, 2013 WL 486691 (E.D. La. 2013).

Based on Ramos and the fact that the instant case is on direct appeal, [13] we find that since the verdicts resulting from defendant's jury trial on counts three through five were not unanimous for these "serious offenses" in compliance with ***1278** Ramos, defendant's convictions and sentences on counts three through five are vacated. Because we find that the State introduced evidence sufficient to sustain convictions on counts three through five, and that the assignment of error claiming insufficiency ****20** of evidence on those counts to be without merit, the matter is remanded to the trial court for further proceedings consistent with this opinion. [14]

Further, because defendant's convictions and sentences on counts three through five have been vacated, we pretermit any discussion of defendant's remaining assignment of error. [15]

ERRORS PATENT DISCUSSION

23 The record was reviewed for errors patent, according to the mandates of La. C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); and State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). The following error patent requires correction.

24 Defendant received an incomplete notice of the time limitation for seeking post-conviction relief. If a trial court fails to advise, or provides an incomplete notice pursuant to La. C.Cr.P. art. 930.8, this Court may correct said error by informing the defendant of the applicable delay period for post-conviction relief by means of its opinion. See State v. Oliver, 14-428 (La. App. 5 Cir. 11/25/14), 165 So.3d 970, 978, writ denied, 14-2693 (La. 10/9/15), 178 So.3d 1001. Thus, defendant is hereby informed that no application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence have become final under the provisions of La. C.Cr.P. arts. 914 or 922.

DECREE

For the reasons stated herein, defendant's conviction and sentence on count six is affirmed; defendant's convictions and sentences on counts three through five ****21** are vacated, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

CONVICTION AND SENTENCE ON COUNT SIX AFFIRMED; CONVICTIONS AND SENTENCES ON COUNTS THREE THROUGH FIVE VACATED; REMANDED

All Citations

301 So.3d 1262, 19-478 (La.App. 5 Cir. 9/2/20)

Footnotes

1 Initials of the victim, defendant, and witnesses whose name can lead to the victim's identity are utilized pursuant to La. R.S. 46:1844 W(3). State v. Ross, 14-84 (La. App. 5 Cir. 10/15/14), 182 So.3d 983.

2 This superseding opinion was issued to afford a greater probability of privacy to the victim and her family than the original, exceeding the requirements of URCA Rule 5-2. It is identical in substance and analysis.

3 S.E. testified that she moved in part because she felt her children did not listen to her when she lived closer to her parents and she felt defendant had a lot to do with it.

4 An electronic device usually worn like a watch, which functions primarily as an activity or fitness tracker.

5 S.E.'s half-brother testified that almost one million dollars was seized from a joint bank account he owned with defendant, although the money only belonged to defendant. He testified defendant talked about leaving the country in November before J.H.'s disclosure.

6 Defendant and S.T. were married over thirty years. S.T. filed for divorce a few weeks after J.H.'s disclosure, which was granted by the time trial occurred.

7 The same day, Det. Waguespack testified he observed the forensic interview between J.H and Lieutenant Renee Kinler, which was consistent with her initial disclosure but more detailed regarding defendant performing oral sex on her. He testified that generally, female sex abuse victims usually feel uncomfortable speaking with males about sex acts and tend to hold back.

8 The jury verdict form as to count six generically refers to molestation of a juvenile and does not include the additional element of control or supervision. However, the element of control or supervision was included as an alternative in count six of the indictment. Further, during *voir dire*, the State stated that it had to prove "that element of intimidation or force or a threat and that person being in a supervisory role," and on "that last count of molestation, the sentence would be 5 to 20 years." The State referenced the supervision and control element as well as the penalty-enhanced charge. During its closing,

the State argued that defendant had supervision and control of J.H. Thus, based on a review of the record, the jury convicted defendant of the more serious control and supervision offense and the evidence was clearly sufficient. See State v. Johnson, 42,323 (La. App. 2 Cir. 8/15/07), 962 So.2d 1126, 1133-34.

9 Even though defendant only challenges one particular element, a review of the record under State v. Raymo, 419 So.2d 858, 861 (La. 1982), shows that the State presented sufficient evidence to establish the remaining essential statutory elements of molestation of a juvenile, including those counts during the commission of which J.H. was under the age of thirteen.

10 This Court notified the Attorney General's Office of the constitutional challenge raised in this appeal, to which no response has been provided.

11 Defendant does not have standing to challenge the constitutionality of his verdict on count six because he was convicted by a unanimous jury. See State v. Saulny, 16-734 (La. App. 5 Cir. 5/17/17), 220 So.3d 871, 879, writ denied, 17-1032 (La. 4/16/18), 240 So.3d 923.

12 Both La. Const. Art. I, § 17 and La. C.Cr.P. art. 782(A) provide, in pertinent part, that a case for an offense committed prior to January 1, 2019, in which the punishment is necessarily confinement at hard labor, shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict, and that a case for an offense committed on or after January 1, 2019, in which the punishment is necessarily confinement at hard labor, shall be tried before a jury of twelve persons, all of whom must concur to render a verdict.

13 See Schriro v. Summerlin, 542 U.S. 348, 351, 124 S.Ct. 2519, 2522, 159 L.Ed.2d 442 (2004), observing that "[w]hen a decision of [the United States Supreme Court] results in a 'new rule,' that rule applies to all criminal cases still pending on direct review," citing Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

14 See State v. Myles, 19-0965 (La. App. 4 Cir. 4/29/20), 299 So.3d 643.

15 In his remaining counseled assignment of error, defendant argues that the trial court imposed an excessive sentence on count six when it ordered count six to run consecutively to his sentences on counts three through five.

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APPENDIX "E"

LA. SUPREME COURT: RULING

310 So.3d 182 (Mem)
Supreme Court of Louisiana.

STATE of Louisiana

v.

John ELMER

No. 2020-K-01131
02/09/2021

Applying For Writ Of Certiorari, Parish of St. Charles, 29th Judicial District Court Number(s) 17,740, Court of Appeal, Fifth Circuit, Number(s) 19-KA-478.

Opinion

***1** Writ application denied.

All Citations

310 So.3d 182 (Mem), 2020-01131 (La. 2/9/21)

End of Document

Additional material from this filing is available in the Clerk's Office.