No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

RAFAEL ARTURO COTO CHINCHILLA – Petitioner

VS.

STATE OF LOUISIANA – Respondent.

APPENDIX

Please find the following documents enclosed:

APPENDIX "A"	**Original Brief of Appellant, Filed on behalf of Petitioner, by the Louisiana Appellate Project, into the Court of Appeal, Fifth Circuit, State of Louisiana**
APPENDIX "B"	**Original Brief of the State of Louisiana, filed into the Court of Appeal, Fifth Circuit, State of Louisiana**
APPENDIX "C"	**Decision on Appellant's Brief, from the Court of Appeal, Fifth Circuit, State of Louisiana, Docket No. 20-KA-60.**
APPENDIX "D"	**Application for Writ of Certiorari Filed by Petitioner, *Pro Sé*, into the Supreme Court of the State of Louisiana**
APPENDIX "E"	**Decision by the Supreme Court of the State of Louisiana, Denying Writ for Petitioner, Docket No. 2021-KO-00274.**

APPENDIX – A

IN THE

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

No. 2020-KA-0060

STATE OF LOUISIANA,

Appellee

versus

RAFAEL CHINCHILLA,

Appellant

ON APPEAL FROM THE CRIMINAL DISTRICT COURT IN AND FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, THE HONORABLE E. ADRIAN JONES, JUDGE PRESIDING, NO. 17-1472 "G"

ORIGINAL BRIEF OF APPELLANT

RESPECTFULLY SUBMITTED,

LOUISIANA APPELLATE PROJECT

Jane L. Beebe
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Addis, LA 70710
[504] 263-8081

(Criminal Appeal)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

STATEMENT OF JURISDICTION

This Court has jurisdiction over this direct appeal pursuant to **Article V, Section 10(A), of the Louisiana Constitution of 1974**. The appellant was convicted on August 30, 2019, of one count of Sexual Battery of a child under the age of 13, one count of Indecent Behavior with a juvenile under the age of 13, and one count of Indecent Behavior with a Juvenile. On September 12, 2019, he was sentenced to 60 years on count one, with 25 years to be served without benefit of parole, probation or suspension of sentence, 20 years on count two, with 10 years to be served without benefit of parole, probation or suspension of sentence, and 7 years on count three. All sentences were to run concurrent with credit for time served. (Rec. pp. 566-7, 1497-1512). On September 18, 2019, the motion for appeal was granted. (Rec. pp. 601-3).

STATEMENT OF THE CASE

Rafael Chinchilla was charged by a bill of information with one count of Sexual Battery of a child under the age of 13, in violation of La. R.S. 14:43.1, one count of Indecent Behavior with a juvenile under the age of 13, in violation of La. R.S. 14:81, and one count of Indecent Behavior with a Juvenile, in violation of La. R.S. 14:81. (Rec. p. 82).[1] On May 8, 2017, probable cause for the arrest was found after a preliminary hearing. (Rec. pp. 618-48). On July 28, 2017, he entered a plea of not guilty. (Rec. p. 6).[2] A pro se motion to quash was denied on August 16, 2018. (Rec. pp. 27, 155-6, 649-63). The defense motions to require a unanimous jury verdict, to declare La. C.Cr.P. 782(A) and La. Const Art. I Sec. 17

[1] A preliminary hearing in accordance with Gwen's Law was held on March 13, 2017, The trial court imposed a zero contact stay away order as a condition of any release on bail. (Rec. pp. 605-15).

[2] A Spanish interpreter was provided to Mr. Chinchilla throughout the court proceedings.

unconstitutional, and for a speedy trial under La. C.Cr. P. 701 were all denied on March 15, 2019. (Rec. pp. 40, 664-84). On March 25, 2019, the trial court held a colloquy with the defendant. (Rec. pp. 43, 685-703). On April 29 and 30, 2019, a six person jury was selected, but a mistrial was declared on April 30, 2019. (Rec. pp. 49-51, 704-35).[3] The defense filed a motion in limine to exclude the term "victim" at trial which was denied on August 12, 2019. (Rec. pp, 65, 745-61). On August 26, 2019, selection for a twelve person jury began and on August 30, 2019, Mr. Chinchilla was found guilty as charged. (Rec. pp. 69-78, 762-1496). On September 12, 2019, Mr. Chinchilla was sentenced to serve 60 years on count one, with 25 years to be served without benefit of parole, probation of suspension of sentence, 20 years on count two, with 10 years to be served without benefit of parole, probation of suspension of sentence, and 7 years on count three. All sentences were to run concurrent with credit for time served. (Rec. pp. 566-7, 1497-1512). On September 18, 2019, the motion for appeal was granted. (Rec. pp. 601-3).

ASSIGNMENTS OF ERROR

1. The the trial court erred in accepting a non unanimous jury verdict on counts two and three in light of the U.S. Supreme Court's recent ruling in *Ramos*.
2. The evidence was insufficient to support the verdict in all three counts.
3. The trial court erred in failing to sustain the objection during rebuttal closing argument when the prosecutor mischaracterized the emergency room doctor's testimony and misled the jury.

[3] On April 30, 2019, the defense filed a motion to admit evidence which was denied by the trial court. The defense sought a supervisory writ with this Court which was dismissed with prejudice after the defense filed a motion to dismiss it as moot since the state had agreed to the introduction of said evidence. (Rec. pp. 502-12).

ISSUES PRESENTED

1. Did the trial court err in accepting a non unanimous jury verdict in light of the U.S. Supreme Court's recent ruling in *Ramos*?
2. Was the evidence insufficient to support the jury's verdict in all three counts?
3. Did the trial court err in failing to sustain the objection during rebuttal closing argument when the prosecutor mischaracterized the emergency room doctor's testimony and misled the jury?

STATEMENT OF FACTS[4]

Haile Benitez testified he had three children. C.B. was 15 years old at the time of trial and had a different mother, Yamilet Perez-Rivero, whom he met and married in Cuba. C.B. was 9 years old when they moved to the U.S.. Mr. Benitez testified he met Mr. Chinchilla and they actually lived in the same house for 8 or 9 months. Mr. Benitez testified he and Yamilet finally divorced in 2016. Mr. Benitez testified that he began to date another women and C.B. asked several times to come live with them. February 13, 2017, C.B. disclosed the sexual abuse to Mr. Benitez. He testified he got his phone and recorded what C.B. was telling him. After the disclosure, Mr Chinchilla texted C.B. saying he and her mother got married. He called Yamilet and told her what C.B. had said. Mr. Benittez testified he called the family doctor who told him to take C.B. to the emergency room. The emergency room doctor recommended C.B. see a doctor at Children's Hospital. The doctor at Children's diagnosed her with "child psychobias" and recommended counseling. (Rec. pp. 774-813, 829-32).

[4] A Spanish translator was provided to Mr. Chinchilla throughout the proceedings and an additional translator provided for Spanish speaking witnesses.

Lashonda Woodfork testified she was the communications supervisor for Kenner Police Department. She provided all the 911 calls in the case. (Rec. pp. 834-8). Nancy Weber Clay testified she worked for the Jefferson Parish 911 Communications Center and processed and provided copies of the calls to law enforcement and the public upon request. (Rec. pp. 839-43).

Officer Craig Blair testified he responded to a complaint of sexual assault by the ER doctor on February 13, 2017, at the Oschner Kenner Hospital. He testified the complaintant was a 13 year old female accusing her stepfather, Mr. Chinchilla. Officer Blair testified that when he learned another incident had occurred in Metairie he contacted the Jefferson Parish Sheriff's Office. He was unable to communicate with the mother because she only spoke Spanish so a bilingual officer was also called as well as DCFS. A Kenner detective then took over the case. (Rec. pp. 844-59).

Alexis Englade was a crime scent technician with the Kenner Police Department and she went to the hospital and took pictures of the complaintant. (Rec. pp. 859-64).

Deputy Brian Knowles testified he was with the Jefferson Parish Sheriff's Office and was called to the hospital in response to C.B.'s allegation of sexual assault. He spoke with C.B., her mother and the mother's friend. Deputy Knowles also contacted DCFS. The case was then handled by Detective Tillman. (Rec. pp. 864-72).

Yanicet Garrido testified she was a store manager at Family Dollar. She knew Yamilet Perez from coming to the store and was introduced to her ex-husband, Haile Benitez. They had one daughter together, C.B. Mr. Chinchilla was in a relationship with Ms. Perez. Ms. Garrido testified that C.B. primarily stayed with them, but would visit almost every weekend. She testified that C.B. often asked to come live with the but she never

explained why. In February 2017, Haile Benitez was called and asked to pick C.B. up from school. Ms. Garrido testified she was asking C.B. about an award she won at school and to see pictures. Haile asked to see the phone and in scrolling through saw a video of C.B. screaming to be left alone. C.B. disclosed the sexual assault allegation to them and they took her to the hospital. On the same day, C.B. received a text from Mr. Chinchilla saying he and Ms. Perez had gotten married. Ms. Garrido testified that since this allegation C.B. and her mother have not had contact. (Rec. pp. 874-901).

Dr. Neha Mehta was qualified as an expert in pediatrics and child sexual abuse. Dr. Mehta testified that she conducted a physical exam of C.B. at Children's Hospital and obtained a medical history via audio recording. C.B. had a normal genital and anal examination. Dr. Mehta testified the marks on her breast did not have any medical or forensic significance and were likely due to the fact that her breasts were growing. Dr. Mehta diagnosed C.B. as having been sexually abused. She was aware of the sexting also found on C.B.'s phone with another peer-aged male. Dr. Mehta referred to this as a much more common occurrence in teenagers. (Rec. pp. 911-81).

Deputy Judd Harris testified he was assigned to the Personal Violence Unit (hereinafter "PVU") in the Jefferson Parish Sheriff's Office and investigated the allegations made by C.B. against Mr. Chinchilla. Deputy Harris testified that he referred C.B. to the Child Advocacy Center (hereinafter "CAC") for a forensic interview. He was present for that interview. Once Dr. Mehta diagnosed C.B. as having been sexually abused he prepared the arrest warrant for Mr. Chinchilla. He also got a search warrant to seize Mr. Chinchilla's cell phone and C.B.'s cell phone. Deputy Harris also applied for a search warrant from Instagram, Facebook and

Snapchat. All arrest and search warrant applications were granted by the Commissioner. ICE Agents originally detained Mr. Chinchilla and he and Detective Foltz with the Kenner Police Department executed their warrant and took him for an interview. Mr. Chinchilla was never wanted by ICE on any immigration issues, but Deputy Harris notified them that they were looking for him after the arrest warrant was granted. Deputy Harris acknowledged that Mr. Chinchilla voluntarily gave them his phone. He testified that C.B. did not know any specific dates that the alleged incidents happened and she only said the first count happened in August 2015. Deputy Harris admitted that no one corroborated that Mr Chinchilla had been left alone with C.B. on the date of the alleged incident. (Rec. pp. 982-1015).

Brittney Bergeron testified she was the forensic interviewer at CAC and interviewed C.B. Ms. Bergeron testified that she was always alone in the room with the complaintant, but she tells them that the interview is being recorded and that she has an earpiece if anyone watching the interview has a question or needs clarification. The video of the interview was played for the jury. She testified that they do not make or form any opinions about the validity of any allegations. Ms. Bergeron testified that C.B. mentioned two incidents where her breasts were sucked and one incident of kissing. (Rec. pp. 1016-42).

Yamilet Perez-Rivero testified that she believed C.B. when she first reported, but by the time of trial she no longer supported her or believed her allegations. She testified that the day C.B. told her was the same day she wed Mr. Chinchilla. Ms. Perez testified that she began to have suspicions about her story when the doctor at Ochsner told her she had not been sexually abused. She testified she really began to doubt her daughter when C.B. stopped answering her phone calls and when she heard her

daughter say to someone else that she did not care about her mother. Ms. Perez testified that her daughter was taken to all the doctors and went through the whole process but was never diagnosed with being sexually abused. She testified that her first husband would put Mr. Chinchilla down using derogatory names such as Indian, Palestine, and Guajido. Ms. Perez testified that C.B. knew she and Mr. Chinchilla were going to the courthouse to initiate the marriage and get signatures the day she reported.[5] (Rec. pp. 1043-98).

Cassandra Knight testified she was a supervisor at DCFS. She met with the mother, Yamilet Perez-Rivero, twice and attended the CAC interview of C.B. She testified that Ms. Perez supported C.B. and was cooperative with her investigation. Ms. Knight testified they make observations only and she determined that this was a valid case and C.B. was not being coached to make a false claim. She also testified that as a teenage girl C.B. was prone to make bad decisions, but it did not lessen her credibility. (Rec. pp. 1112-36).

Peter Foltz testified he was a detective with the Kenner Police Department. He spoke with with the mother, Yamilet Perez-Rivero, and monitored the CAC interview of C.B. C.B.'s father, Hailey Benitez was also present and the two appeared cordial and supportive of their daughter. C.B. recounted and incident when Mr. Chinchilla put his mouth on her vagina and another time she showered after an incident and wore a bathrobe, a word she did not know in english and needed translation. Det. Foltz prepared the arrest warrant for Mr. Chinchilla. Mr. Chinchilla was read his rights and gave a statement to Det. Foltz. The recording was played for the jury. Det. Foltz testified that Mr. Chinchilla went by the

[5] Ms. Perez testified that in Cuba the marriage process begins with signatures and a second date is given for the actual marriage. She and Mr. Chinchilla both mistakenly thought their wedding day was just this first date for signatures and they were to get a second date for the wedding.

nickname Jonathan and texted C.B. using this name. He identified a text on C.B.'s phone in Spanish from Jonathan that was translated as "I can't resist any longer . There is a fire in me for us to make love" and a second text that said, "delete." A video was also taken off of C.B.'s phone in which she is heard saying, "Don't call me like that anymore Jonathan. Leave me alone. Shut up." (Rec. pp. 1137-80).

Detective Solomon Burke was qualified as an expert in digital forensics and mobile device analysis. He retrieved various texts and videos from Mr. Chinchilla and C.B.'s phones. (Rec. pp. 1217-70).

C.B. testified she was a junior in high school and had been in the United States since she was 9 years old. She testified Mr. Chinchilla went by the nickname Jonathan. C.B. told the jury that when she was 11 years old her mother was getting paperwork for her taxes and Mr. Chinchilla came into her bedroom, took off her clothes, and put his penis inside her vagina one time. She took a shower afterwards and he brought her money for school and books. C.B. testified that another time her mother went walking and Mr. Chinchilla came home early from work. She testified she was in a robe after taking a shower and he sucked on her breast. C.B. testified that the final time was when Mr. Chinchilla picked her up from school and they had stopped at Raising Cane's. She went inside and she locked her bedroom door but Mr. Chinchilla had a key. C.B. told the jury that Mr. Chinchilla unlocked the door, threw her onto the bed and sucked on her breasts. She did not tell anyone because Mr. Chinchilla said he paid all the bills and they would suffer if she told anyone. C.B. identified a letter she was going to send to Axel, a boy that she liked in middle school. It was dated November 17, 2016. Mr. Chinchilla found the letter. C.B. denied making the current allegations against him because he found that letter. She also identified several Snapchat and Instagram messages

between her and Axel asking for advice. On cross examination, C.B. testified that during the first incident she punched and kicked Mr. Chinchilla so much that they fell off the twin size bed and were on the floor when he inserted his penis into her vagina one time. C.B. did not recall telling Dr. Mehta that Mr. Chinchilla unlocked her door with a key. She also never mentioned in her statement to police that Mr. Chinchilla would try and kiss her at different times. C.B. testified she recorded the video when Mr Chinchilla was downstairs calling her names and she believed it was proof that he had sexually abused her. She also admitted that some of her conversations on social media with Axel were if they had sex one day how they would do it. (Rec. pp. 1279-1337).

Axel Salazar Garcia testified that he and C.B. were friends in middle school and they often talked on social media and on the phone. He did not recall the Snapchat messages with C.B. wherein he said he wanted to touch her vagina, suck on her breasts and "hit it hard." (Rec. pp. 1338-45).

The defense called Dr. Tessa Hue who was qualified as an expert in emergency room medicine. She testified that she examined C.B. on February 13, 2017. Dr. Hue testified that C.B. told her she had marks on her breasts from sexual abuse and showed her the video on her phone. C.B. also showed her a photo with a red mark near her breast which the doctor admitted could be caused by clothing. After her examination, Dr. Hue saw "no marks of bruising, erythema, or marks consistent with teeth marks." Dr. Hue reported the incident to the police as required by law, but she found nothing in her exam that validated what C.B. had alleged. (Rec. pp. 1346-76),

Fernando Perez-Rivero testified he was an uncle to C.B. and for awhile his sister, Ms. Perez, and her daughter C.B. lived together in Cuba, Miami and Louisiana. He admitted that Mr. Benitez referred to Mr.

Chinchilla as "India" and "Palestine" which are both derogatory terms. Mr. Perez testified that when Yamilet and C.B. left Cuba Mr. Benitez wouldn't sign the papers allowing them to legally go, unless they let him go with them. He testified he no longer supported C.B. because there has been no proof to her allegations. (Rec. pp. 1377-1404).

Ivonne Armijo and Marisol Aranguren both testified they knew Mr. Chinchilla for many years and they met him when he was referred to them to do some repair work on their house. They both said he as a good worker and knew him as a family man. (Rec. pp. 1405-15).

SUMMARY OF THE ARGUMENT

The jury convicted Mr. Chinchilla by less than a unanimous verdict on counts two and three contrary to the U.S. Supreme Court's recent decision in *Ramos*. The jury's verdict on all three counts was based on insufficient evidence. The trial court erred in failing to sustain the objection during rebuttal closing argument when the prosecutor mischaracterized the emergency room doctor's testimony and misled the jury.

STANDARD OF REVIEW

The general rule is that appellate courts review trial court rulings under a deferential standard with regard to factual and other trial determinations, while legal findings are subject to a de novo standard of review. *State v. Hunt*, 09-1589, (La. 12/1/09), 25 So.3d 746, 751. When a trial court makes findings of fact based on the weight of the testimony and the credibility of the witnesses, a reviewing court owes those findings great deference, and may not overturn those findings unless there is no evidence to support those findings. *Id.* A "trial judge's ruling [on a fact question],

based on conclusions of credibility and weight of the testimony, is entitled to great deference and will not be disturbed on appeal unless there is no evidence to support the ruling." *State v. Bourque*, 622 So.2d 198, 222 (La. 1993).

ARGUMENT ISSUE ONE: Error Patent/*Ramos* decision

Mr. Chinchilla was convicted by a non-unanimous jury on two of his three counts and this Court should review the non-unanimous jury verdict as an error patent. (Rec. pp. 1493-4). The defense filed a motion to require a unanimous jury verdict which was denied on March 15, 2019. (Rec. pp. 40, 664-84). The law is clear under the Sixth Amendment, the government can only sustain a conviction and sentence at hard labor based upon a unanimous verdict. The vast majority of the Bill of Rights have been fully incorporated and made applicable to the states through the Fourteenth Amendment.

The U.S. Supreme Court heard oral argument in *Ramos* on October 7, 2019. On April 20, 2020, the United States Supreme Curt ruled in *Ramos v. Louisiana*, 2020 U.S. LEXIS 2401, U.S. S. Ct. No. 18-5924 that a guilty verdict must, as a matter of constitutional law, be premised on a unanimous vote of the jury. Therefore, a conviction premised on an insufficient number of jurors' votes should readily constitute both a structural error and an error patent.

When the validity of Louisiana's non-unanimous six person juries was called into question, the Louisiana Supreme Court observed:

> Although the matter is not free from doubt, we have held without discussion that under such circumstances we may, from the minute entry, discover by mere inspection the basis for a defendant's contention that a non-unanimous jury verdict represents constitutional error patent on the face of the proceedings. State v. Bradford, 298 So. 2d 781 (La.1974); State v. Biagas, 260 La. 69, 255 So.2d 77 (La. 1971).

We therefore consider on its merits the contention of the unconstitutionality of a non-unanimous verdict by a six-person jury.

State v. Wrestle Inc., 360 So. 2d 831 (La. 1978). The Louisiana Supreme Court rejected the merits of Wrestle's contention and endorsed the view of Professor Lee Hargrave, the Coordinator of Research for the Constitutional Convention of 1974: ""If 75 percent concurrence (9/12) was enough for a verdict as determined in *Johnson v. Louisiana*, 406 U.S. 356, (92 S. Ct. 1620, 32 L. Ed. 2d 152) (1972), then requiring 83 percent concurrence (5/6) ought to be within the permissible limits of Johnson." *Id.* at 838. Ultimately the U.S. Supreme Court reviewed the merits of the Louisiana Supreme Court's error-analysis finding: "[W]e believe that conviction by a nonunanimous six-member jury in a state criminal trial for a non petty offense deprives an accused of his constitutional right to trial by jury." *Burch v. Louisiana*, 441 U.S. 130, 134, 99 S. Ct. 1623, 1625 (1979). The Court upheld the conviction of Petitioner Wrestle, because it was unanimous, and reversed the conviction of the Petitioner Burch, whose conviction was not.

The Louisiana courts continue to recognize that the validity of a verdict – based upon the number of jurors who voted for it – is reviewable as error patent. *See State v. Arceneaux*, 19-60 (La. App. 3 Cir 10/09/19) ("The defendant is correct in that if the Supreme Court finds a non-unanimous jury verdict to be unconstitutional for the types of verdicts returned in the present case and if the Supreme Court applies such a holding retroactively to include the jury verdicts returned in the present case, the verdicts returned in the present case would be improper and would be considered an error patent."); *State v. Ardison*, 52739 (La. App. 2 Cir 06/26/19), 277 So. 3d 883, 897 ("Under Louisiana law, the requirement of a unanimous jury conviction specifically applies only to crimes

committed after January 1, 2019. The instant crimes were committed in 2017, and thus, the amended unanimous jury requirement is inapplicable to Ardison's case. Ardison's assertion of an "error patent" is without merit."); *State v. Aucoin*, 500 So. 2d 921, 925 (La. App. 3rd Cir. 1987) ("In our earlier opinion, *State v. Aucoin*, 488 So.2d 1336 (La. App. 3rd Cir. 1986), pursuant to court policy, the record was inspected and we found a patent error from the polling of the jury; the verdict represented a finding of guilty with only nine jurors concurring when ten is required. We reversed and remanded the case. The State filed an application for a rehearing alleging that the polling of the jury actually was a ten to two verdict but there was an error in transcribing the polling of the jury verdict and requested an opportunity to correct the transcript.").

Mr. Chinchilla was convicted by a non-unanimous jury on two of his three counts, which occurred before 2019. As is consistent with state court rulings for a six person jury, the matter should now be considered by all Louisiana state courts as an error patent in light of the U.S. Supreme Court's ruling in *Ramos*.

ASSIGNMENT OF ERROR TWO: Insufficient evidence/Post Verdict Judgement of Acquittal

In the present case, the evidence was insufficient to prove the elements of the crimes charged. La. C.Cr.P. art. 821, paragraph B, presents a codification of the *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct 2781, 61 L.Ed. 2d 560 (1979) standard.

In *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct 2781, 61 L.Ed. 2d 560 (1979), the United States Supreme Court set out the standard by which appellate courts are to review the sufficiency of the evidence in criminal prosecutions:

> . . . the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of the fact

> could have found the essential elements of the crime beyond a reasonable doubt.

Also see State v. Matthews, 375 So.2d 1165 (La. 1979). In reviewing the sufficiency of the evidence to support a criminal conviction, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the court to determine whether the evidence is minimally sufficient. A complete reading of the transcript of this trial shows that the state failed to meet the burden of proof enunciated by the Supreme Court in *Jackson v. Virginia*. In *State v. Dixon*, 620 So.2d 904 (La. App. 1st Cir 1993), the First Circuit explained:

> The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt.

The rule regarding circumstantial evidence is set forth in La. R.S. 15:438 as follows:

> . . . assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence.

Ultimately, all the evidence in the record, viewed in a light favorable to the state, must satisfy the reviewing court that a rational trier of fact could have found the defendant guilty of the crime for which he was convicted, beyond a reasonable doubt. *State v. Perow*, 616 So.2d 1336 (La. App. 3d Cir. 1993). The circumstantial evidence rule is a component of this reasonable doubt standard. On appeal, the issue is whether a rational trier of fact, viewing the evidence in a light favorable to the state, could find that all reasonable hypotheses of innocence were excluded.

In order for the State to obtain a conviction, it must prove the elements of the crime beyond a reasonable doubt. In this case, the entire case rested on the allegations made by C.B. on the very day her mother married a man

other than her father. There was absolutely no physical evidence in this case. The ER doctor, Dr. Tessa Hue, who initially examined C.B. testified she found no evidence to support the allegations made by C.B. that Mr. Chinchilla had kissed her breasts. Dr. Hue saw no bruising or redness around the breast. She testified any marks she did see could have been stretch marks from recent growth or marks from a poor fitting bra. Dr. Hue saw no evidence of bite marks, lacerations, bruising or hickies on C.B.'s breasts. The physical examination at Children's Hospital also found no physical evidence of abuse, but Dr. Mehta and DCFS found it to be a valid claim. Dr. Mehta testified that any marks on C.B.'s breasts had no "medical or forensic value." (Rec. pp. 911-81, 1112-36, 1346-76).

C.B. claimed a video showing her yelling at Mr. Chinchilla for calling her names was evidence that he had just kissed her breasts, and somehow this was evidence for the third count. (Rec. pp. 1137-80). She also alleged Mr. Chinchilla had kissed her breasts once before and that was the entirety of the evidence presented by the state for the second count. C.B. also alleged that sometime in August 2015, the first alleged assault, and one of the few times Mr. Chinchilla was ever alone with C.B., he entered her bedroom while her mother was getting some tax documents. C.B. claimed Mr. Chinchilla forced himself on her and she punched and kicked him so much they fell off the bed. She testified that Mr. Chinchilla forcibly took off her clothes and inserted his penis into her vagina one time and then withdrew and walked away. No one else in the household testified to any bruising, destroyed property, or torn clothing. C.B.'s testimony was all the evidence presented in the first count. (Rec. pp. 1279-1337).

By the time of trial, C.B.'s mother, Yamilet Perez-Rivero, no longer believed her daughter's allegations. All state witnesses agreed that Ms. Perez had fully supported and participated in the investigation of her

daughter allegations against her new husband. She brought C.B. to all appointments and took the matter very seriously. The first and most serious account was alleged to have occurred when Ms. Perez was out acquiring documents for the IRS in 2015. In their presentation of evidence to the jury on this very serious count, the state did not even provide any evidence from the IRS showing Ms. Perez needed to provide additional documentation in 2015. Even though she no longer believed her daughter's allegations, Ms. Perez had cooperated fully with the police and the state all along and it can be reasonably assumed she would have provided these documents to the state and the defense if they existed and she could have provided even the scantest of corroboration of C.B.'s claims. (Rec. pp. 1016-42, 1043-98, 1112-36, 1137-80)

Unfortunately, the trial court did not see the flawed proof and lack of evidence to convict Mr. Chinchilla beyond a reasonable doubt. C.B. was the only one making any claims and no evidence or corroboration was gathered beyond that. The state introduced texts messages from Jonathan, which was Mr. Chinchilla's nickname and number in C.B.'s phone, that showed some improper dialogue, but no evidence or admission of any crime committed. Likewise, the defense introduced several lewd Instagram and Snapchat messages between C.B. and her classmate and friend, Axel Salazar Garcia, which also never proved anything had happened. (Rec. pp. 1217-70, 1279-1337, 1338-45). Most telling was that Axel was a state witness in this case and had not been charged with carnal knowledge or any other crime with C.B. when she was underage based solely on social media messaging and texts because it simply does not prove anything actually happened. The jury and the trial court failed to legitimately hold the state to its burden to prove all of the elements of the crime and to prove them beyond a reasonable doubt. Any and all reasonable doubts must be decided

in favor of Rafael Chinchilla and not the state. The evidence was insufficient in this case to support the requisite elements beyond a reasonable doubt.

ASSIGNMENT OF ERROR THREE: Improper Closing Argument

The prosecutor in rebuttal close was refuting the defense argument that the first doctor to see C.B. found no evidence of sexual abuse but since the allegation was made, she had to report it to police as a matter of law. The state mischaracterized the evidence presented by saying Dr. Hue was the defense's expert who diagnosed C.B. as having child sexual abuse. This was misleading to the jury and an overreach by the prosecutor mischaracterizing the testimony. The trial court failed to sustain the defense's objection. Dr. Hue had to report this as child sexual abuse because an allegation was made. It was a forgone conclusion mandated by law before her exam and expertise were ever applied to the case. Dr. Mehta the expert in child abuse at Children's Hospital also found no physical evidence that had any "medical or forensic value" but based on other factors in her expertise she found a valid claim was made. Her testimony was vastly different from what Dr. Hue found yet had to report by law. The prosecutor mischaracterized the testimony of Dr. Hue and clearly misled the jury. (Rec. pp. 911-81, 1346-76, 1464-6).

La. C.r.P. 774 requires that closing arguments at trial be confined "to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." *State v. Smallwood*, 09-86, (La. App. 5 Cir. 7/28/09), 20 So.3d 479, 489; *State v. Robertson*, 08-297 (La. App. 5 Cir. 10/28/08), 995 So.2d 650. Closing arguments shall not appeal to prejudice. *Id.* at 659. A prosecutor has considerable latitude in making closing arguments. *State v. Jackson*,

04-293, (La. App. 5 Cir. 7/27/04), 880 So.2d 69. However, prosecutors may not resort to personal experience or turn their arguments into a referendum on crime. *Robertson*, at 659-60.

The trial judge has broad discretion in controlling the scope of closing arguments. *Robertson* at 660. A conviction will not be reversed due to improper remarks during closing argument unless the reviewing court is thoroughly convinced that the remarks influenced the jury and contributed to the verdict. *Id.* (citing *Jackson*, 04-293 at 5-6, 880 So.2d 69 at 73). In making its determination, the appellate court should give credit to the good sense and fair-mindedness of the jury that has seen the evidence and heard the argument, and has been instructed that the arguments of counsel are not evidence. *Id.*

In addition, assuming the prosecutor's argument was improper, reversal is not required when such error was limited and did not show significant impact on the outcome of the case. *State v. Huckabay*, 00-1082 (La. App. 4 Cir. 2/6/02), 809 So.2d 1093, 1110; *State v. Francis*, 95-194 (La. App. 5 Cir. 11/28/95), 665 So.2d 596, 604; *State v. Foster*, 09-837 (La. App. 5 Cir. 6/29/10), 33 So.3d 733, 741-3.

The trial court should have stemmed the damage by sustaining the objection. (Rec. pp. 1464-6). Once the jury heard this misleading comment from the prosecutor, the nearly unavoidable inference made a fair trial and fair assessment of the evidence unlikely since Mr. Chinchilla was accused of a sex crime against a juvenile.

The error was not harmless because the verdict was not solely unattributable to the error. Louisiana adopted the federal test for harmless error enunciated in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The test in *Chapman* is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the

verdict obtained." 386 U.S. at 24; 87 S. Ct. at 828. *Chapman* was refined in *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). The *Sullivan* inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.*, 113 S. Ct. at 2081.

In the present case, the error in not sustaining the objection was not harmless because it was so prejudicial and depicting Mr. Chinchilla as a child sex abuser. The state implied to the jury that since "all" experts diagnosed sexual abuse they can therefore find Mr. Chinchilla a sex abuser based on all of these doctor's expertise. Dr. Hue only testified she had to report and diagnose the claims because a claim was made by a juvenile. Her investigation showed no evidence of sexual abuse. Perhaps this was why the state did not call the first doctor to see C.B. as a witness. The state tried to mitigate her testimony after the fact by mischaracterizing it in rebuttal close, when the defense can no longer correct the mislead. The jury's verdict can not be considered "unattributable" to this error.

CONCLUSION

Wherefore, the appellant's convictions and sentences should be reversed.

RESPECTFULLY SUBMITTED:

LOUISIANA APPELLATE PROJECT

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing brief upon the Jefferson Parish District Attorney's Office, Appeals Division, and upon Judge E. Adrian Adams, by delivering copies of same to each by hand, mail or email this 25th day of June, 2020.

s/Jane L. Beebe
JANE L. BEEBE

APPENDIX – B

IN THE
FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

NO. 2020-KA-0060

STATE OF LOUISIANA, APPELLEE v. RAFAEL CHINCHILLA, APPELLANT

CRIMINAL PROCEEDING ON APPEAL
FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
THE HONORABLE E. ADRIAN ADAMS, PRESIDING

[Original Brief of the State of Louisiana]

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Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Statutory Provisions

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Statement of Facts

1. Testimony of the victim, C.B.

1.1 The First Incident (Court 1). C.B. testified that, when she was eleven years old, her mother left her and her younger brother home alone with Appellant while she went out to obtain paperwork needed to complete her taxes (R. at 1280:29–32, 1281:20–24). Appellant and her brother were in Appellant's room; C.B. was in her bedroom asleep. (R. at 1280:32–81:1.) She woke up to Appellant entering her room; confused, she asked him to leave. (R. at 1281:2–3.) He ignored her, and C.B. stated Mr. Appellant climbed into bed with her, got on top of her, and began to remove her clothes. (R. at 1281:6–8.) Screaming, she begged for him to stop — but he persisted. (R. at 1281:7–8.) He removed her underwear and forced his penis inside C.B.'s vagina (R. at 1281:9, 1281:25–1282:1) while C.B. pleaded for him to stop (R. at 1281:9–10). "After he was done," Appellant returned to his bedroom, and C.B. ran to her

bathroom. (R. at 1281:11-12.) She felt "disgusting" and immediately took a shower. (1281:12-13.) Chinchilla returned to C.B.'s room and offered her money — claiming it was to help her pay for school books. (R. at 1281:14-15.)

1.2 The Second Incident (Count 2). C.B. testified that later that same year (R. at 1282:25-26) her mother left her home by herself while her mother went out to exercise (R. at 1282:12-15.) C.B. took a shower, watched television, and enjoyed time by herself in her room. (R. at 1282:15-16.) While C.B.'s mother was still away, Appellant unexpectedly returned home from work and came into C.B.'s bedroom. (R. at 1282:16-18.) Only wearing a bathrobe, C.B. asked him to leave; instead, he approached her, removed her bathrobe, and began to suck on her breasts. (R. at 1282:20-21, 1283:10-11.) She recollected that Appellant's actions left purple and reddish marks on both her breasts. (R. at 1283:2-11.)

1.3 The third incident (Count 3). C.B. also testified to a third major incident concerning Appellant (R. at 1284:8-14) which occurred when she was approximately thirteen years old (R. 1288:7-9). She stated that her mother unexpectedly had to go to the Northshore one afternoon, and Appellant picked her up from school in her mother's place. (R. at 1284:17-19.) C.B. knew no one else would be home, and was reluctant to be alone with Appellant. (R. at 1284:21-23) ("[H]e was taking me to the house and I took my time like while I was getting out of the car, I didn't want to be home alone with him ... [b]ecause I know he would try to do something.") C.B. went to her room and locked the door — but Appellant had a key. (R. at 1284:27-28.) He unlocked her door, came into C.B.'s room, threw her on the bed, exposed her breasts, and sucked on them again. (R. at 1284:31-85:1.) When he finished, Appellant stepped out of C.B.'s bedroom, and C.B. grabbed her cellphone to document what he had done. (*See* R. at 1287:1-4.) As before, C.B. recalled Appellant's actions had left "marking" on her breasts, and she

took a picture of it. (R. at 1287:2–6.) C.B. recalled that shortly after this incident, while they were still alone, Appellant began "telling me stuff … like he was calling me names …." (R. at 1287:14–15.) She shouted back, telling him to leave her alone, and secretly used her phone to video record their interaction. (R. at 1287:14–23.) Her mother returned home later that afternoon, after the incident, and she, Appellant, and C.B.'s younger brother left together; C.B. stayed home to avoid being around Appellant. (R. 1286:14–31.) C.B. recalled exchanging social media messages with her friend Axel later that same day in which she, alluding to the abuse, confided that she "had something really important to tell my family that could change my whole life." (R. at 1292:19–21.) C.B. testified that this final incident occurred on February 3 (R. at 1307:18–19) of 2017.

1.4 Other inappropriate behavior toward the victim. C.B. testified that Appellant frequently sent her text messages expressing his romantic interest in her or threatening to harm her. (*See* R. at 1283:12–21) ("[T]he messages would be like, Oh, I love you. If I see you with anyone, I'm going to kill you.") She attempted to save Appellants messages by taking screenshots of them and hiding them in the "notes" application on her phone; some she was able to preserve, but others she was forced to delete because Appellant repeatedly confiscated her phone and inspected its contents. (R. at 1283:22–31.) C.B. also testified Appellant recurrently attempted to kiss her and engage in rough "play," which included striking her. (R. at 1283:32–84:7) ("[H]e would try to kiss me, he would play rough with me like hit me or stuff like that….[W]hile my mom wasn't looking, he would try to kiss me, he would bite me.") C.B. said Appellant threatened to kill her if she ever disclosed what he had done to her (R. at 1288:13–14) and warned her that her mother and brother would suffer if he ever stopped paying their bills (R. at 1287:27–88:1).

1.5 Discovery of the Abuse. One afternoon, C.B.'s father picked her up from school, although her mother was scheduled to do so. (R. at 1307:9–11.) Later that day, C.B. attempted to show her father pictures of a school event she had won which she had on her phone. (R. at 1307:11–13.) Her father took the phone from her hand to look at the pictures, and began swiping through the pictures on her phone; in doing so, he discovered the video C.B. had recorded of her interaction with Appellant on the day of the last incident. (R. at 1307:14–19.) C.B.'s father asked her what the video was, and she began to cry (R. at 1307:22–23) and finally disclosed her abuse at Appellant's hands (R. at 1307:29–30). After her disclosure to her father, C.B. recalled she received a text message from Appellant informing her that he had just married C.B.'s mother — a fact C.B. testified she had no prior knowledge. (R. at 1308:17–18, 24–26) ("I knew that my mom wanted to get married to him, but I didn't think it was going to happen that day or anytime soon.")

1.6 Other Significant Facts. C.B. testified that, at the time of the abuse, she primarily lived with her mother and Appellant; after the abuse started, C.B. testified she had asked "many times" to live with her father instead, so she could escape Appellant's abusive behavior. (R. at 1309:6–12.) When her father asked why C.B. testified she did not tell him of the abuse because she was scared of what might happen to her, her mother, and her younger brother. (R. at 1309:13–20.)

2. Testimony of H.B., the victim's biological father. He stated that C.B. was his biological daughter, that she was fifteen years old and a junior at Bonnabel High School at the time of trial. (R. at 775:14–25.) H.B. testified he was born in Cuba (R. at 774:5–6) where he met (R. at 776:1–5) and later married, Y.P.R., C.B.'s mother (R. at 776:12–13). After C.B. was born, H.B. and Y.P.R. separated (R. at 776:19–28) but both remained in C.B.'s life (R. at 776:29–32). Y.P.R.'s father lived in the

United States (R. at 777:6–12) and, when C.B. was nine years old (R. at 778:3–5) he fell ill (R. at 777:13–15). As a result, Y.P.R. and C.B. were offered the opportunity to emigrate to the United States (R. at 777:16–18); fearing he may never see his daughter again (R. at 777:25–27) H.B. joined them (R. at 777:31–78:2). H.B., Y.P.R., and C.B. stayed together briefly in Miami, and then Y.P.R. and C.B. moved to Louisiana — and H.B. joined them several months later. (R. at 778:6–27.) They all shared an apartment briefly (R. at 779:2–14) until H.B. got his own apartment (R. at 779:15–18). C.B. primarily stayed with Y.P.R. but stayed with H.B. three to four times a month. (R. at 779:29–32.) H.B. and Y.P.R. finalized their divorce in November of 2016. (R. at 780:17–18). During this time, H.B. had met and begun dating Yanicet Garrito. (R. at 780:28–81:2) — who ultimately moved in with him (R. at 781:31–82:2). Corroborating C.B., H.B. testified C.B. repeatedly asked to come stay with H.B. and his girlfriend. (R. at 783:29–84:5.) Concerned, he asked her why, but she would only state that she did not want to be around Appellant. (R. at 803:25–05:13 H.B. testified he learned of the abuse on February 13, 2017. (R. at 784:6–10.) That day, he stated that C.B.'s mother, Y.P.R., called him and asked him to pick C.B. up from school, saying only that "there was a problem." (R. at 784:13–23.) He picked C.B. up from school and brought her to his home to spend time with him and his girlfriend, Yanicet. (R. at 784:28–31.) When they arrived, he recalled that that C.B. began showing Yanicet photos on her phone from a party she had attended at school. (R. 784:31–85:2.) Playfully (R. at 785:20–23) he took C.B.'s phone from her hand and started swiping through the photos on her phone and, in doing so, discovered a video in which he recalled C.B. begging to be left alone (R. at 785:3–8) — that is, the video C.B. had recorded after the last incident of abuse by Appellant (R. at 1287:14–23). He asked what the video was, and C.B., crying, disclosed Appellant had sexually abused her. (R. at 785:8–10.) Instinctively, H.B. asked C.B. to

repeat what she had said and partially recorded her disclosure on his phone. (R. at 786:25–28.) He recalled that, shortly after C.B.'s disclosure, C.B. received a text message from Appellant in which he advised C.B. that he had just been married. (R. at 787:16–23.) Like C.B., H.B. testified that this text message was the first he learned that Appellant and C.B.'s mother were getting married that day; he was clear that C.B.'s mother had not told him anything about that when she called earlier in the day. (R. at 787:27–29.) After C.B.'s disclosure, H.B. called her mother, Y.P.R., and, without telling her what C.B. had said, asked her to come to his house — and advised her of C.B.'s disclosures when she arrived. (R. at 790:16–22.) H.B. and Y.P.R. called C.B.'s family doctors, and they advised H.B. and Y.P.R. to take C.B. to the emergency room (R. at 791:1–7) — which they did (R. at 791:8–9). After C.B. was seen by the emergency room physician, the hospital contacted the police (R. at 791:19–22) and recommended C.B. be examined by a child sexual abuse expert at Children's Hospital (R. at 5–7) and C.B.'s family doctors made the necessary referral (R. at 792:8–10). The following day, H.B. and Y.P.R. took C.B. to Children's Hospital for an examination and, afterward, the doctor who conducted that examination explained that she had diagnosed C.B. (R. at 793:9–11) and recommended she begin counseling to help her cope with the emotional pain she was experiencing because of the abuse she had experienced at the hands of Appellant (R. at 793:18–23). The doctor at Children's Hospital also recommended C.B. receive a forensic interview at the Children's Advocacy Center. (R. at 794:3–5.) Later, he recalled that a child protection investigator conducted an investigation into C.B.'s disclosures and concluded that C.B.'s disclosures were valid. (R. at 794:23–95:8.)

3. Testimony of Yanicet Garrido, H.B.'s girlfriend. Ms. Garrido testified she met C.B.'s and began dating C.B.'s father after he

moved to Louisiana. (R. at 875:32–76:9.) Eventually, she moved in with C.B.'s father and, at that time, she confirmed C.B. was primarily living with her mother and Appellant but would frequently visit H.B. at their home. (R. at 876:25–77:4.) Like H.B., Ms. Garrido also recalled that on multiple occasions — probably more than four times (R. at 898:2–7) — C.B. asked to come live full time with H.B. and her at H.B.'s home — which concerned both H.B. and her. (R. at 877:12–78:1.) On the date of C.B.'s disclosures, she confirmed that C.B.'s mother contacted H.B. asking him to pick C.B. up from school. (R. at 878:2–12.) She also confirmed that C.B.'s mother did not explain why she needed H.B.'s assistance. (R. at 878:17–20.) Ms. Garrido testified that, when H.B. and C.B. arrived home after school, C.B. began to show Ms. Garrido pictures on her phone of a party C.B. had attended at school. (R. at 878:30–79:2.) She corroborated C.B. and H.B.'s testimony that H.B. at one point playfully took the phone away from C.B. and began swiping through the photos and video on C.B.'s phone. (R. at 879:2–13.) Ms. Garrido stated that, when H.B. was going through C.B.'s pictures, he discovered a video on C.B.'s phone in which C.B. could be heard screaming and asking to be left alone (R. at 879:27–30) in obvious emotional pain (R. at 880:5–7). She testified that she also saw and heard the video on C.B.'s phone and distinctly recognized C.B.'s and Appellant's voices on that video (R. at 895:17–28, 900:4–15). To her ear, it sounded as though C.B. felt she was in danger (R. at 896:7–12) and that she was afraid of Appellant (R. at 900:11–17). She testified she could tell something was seriously wrong. (R. at 901:4–8.) When H.B. asked C.B. about the video, Ms. Garrido confirmed C.B. disclosed having been sexually abused by Appellant. (R. at 880:8–11.) Ms. Garrido also recalled that, after the disclosure, C.B. received a text message from Appellant advising C.B. that Appellant had just gotten married — information neither she, C.B., nor H.B. knew before that text message. (R. at 880:18–881:8.) Ms. Garrido also

corroborated the family's additional steps after C.B.'s disclosures: the call to C.B.'s mother (R. at 881:9–14) the call to C.B.'s family doctors (R. at 882:4–7) the trip to the Oschner Kenner emergency room (R. at 882:13–18) the call by C.B.'s treating physician at the hospital to the police (R. at 882:19–24) the recommendation by the doctor at Oshner that C.B. be examined at Children's Hospital (R. at 882:31–83:2)

4. Testimony of Doctor Neha Mehta. Dr. Mehta is the Medical Director of the Audrey Hepburn Care Center at Children's Hospital (R. at 911:27–12:2) and testified as an expert in general pediatrics as well as child sexual abuse pediatrics (R. at 919:29–20:10). She testified that child sexual abuse is surprisingly common, with some research suggesting that as many one out of every four children experiences some form of sexual abuse before adulthood. (R. at 920:12–23.) She described in detail the guidelines she uses in conducting a child sexual abuse examination (R. at 921:10–925:2) and explained that, typically, there are no physical findings diagnostic of abuse during such examinations (R. at 925:3–26:26) and why (R. at 926:27–928:21). Dr. Mehta testified that she conducted a child sexual abuse examination on C.B. (R. at 928:25–29.) During that examination, Dr. Mehta obtained an audio recorded medical history from C.B. (R. at 930:7–20) in which C.B. described her abuse at the hands of Appellant, and which was consistent with C.B.'s trial testimony (*see* State's Trial Ex. 30). Dr. Mehta testified that delays in the disclosure of child sexual abuse, such as C.B.'s in this case, were extremely common. (R. at 939:23–41:10.) She also testified that the close familial relationship between C.B. and Appellant before and after the abuse disclosed by C.B. was typical in child sexual abuse cases (R. at 944:26–945:17) as was the location of the abuse in C.B.'s case, *i.e.*, the family home (R at 945:18–28). Although given the nature of the abuse in C.B.'s case, Dr. Mehta did not expect to find any physical evidence in this case, she performed a

physical examination of C.B. (R. at 945:29–46:16.) And, as expected, C.B. had a normal genital and anal examination — although, as described by C.B., Dr. Mehta did note faint, pinkish marks on both of C.B.'s breasts which Dr. Mehta suspected were stretch marks. (R. at 946:17–28.) Dr. Mehta further testified that in her experience it was not uncommon for children who had been victims of child sexual abuse to believe that their sexual abuse was the cause for normal physical changes in their bodies (such as stretch marks). (R. at 946:29–47:11.) After her examination of C.B., Dr. Mehta testified she diagnosed C.B. with "child sexual abuse." (R. at 947:23–27.) In connection with that diagnosis, Dr. Mehta testified that research in this area has proven that false reports by children of child sexual abuse are extremely rare. (R. at 948:4–21.) In particular, she discussed one large study of over seven thousand suspected child sexual abuse cases which found that only 0.1 percent of all reports by children involving sexual abuse was ever found to be false. (R. at 948:22–949:1.) In light of her diagnosis in this case, Dr. Mehta testified she recommended safety planning, to ensure C.B. would not have any further unsupervised interaction with Appellant (R. at 949:10–13) counseling for C.B. (R. at 949:13–17) as well as a forensic interview of C.B. (R. at 949:29–32). Dr. Mehta also testified that it is not uncommon in cases involving child sexual abuse for one or more of a victim's parents to shift from supporting to not supporting the victim during the life of a case — and, according to research, actually occurs in roughly half of cases. (R. at 950:12–51:29.)

5. Testimony of Brittney Bergeron, CAC forensic interviewer. Ms. Bergeron testified that, at the time of C.B.'s disclosures, she was employed as a forensic interviewer by the Jefferson Parish Children's Advocacy Center and specialized in conducting fact-finding interviews of children who had disclosed child sexual abuse, physical abuse, or who

may have witnessed violent crimes. (R. at 1017:13–25.) She conducted a forensic interview with C.B. in this case which was audio and video recorded. (R. at 1030:1–27.) During Ms. Bergeron's testimony, that interview was published to the jury (R. at 1034:22–28) was consistent with C.B.'s trial testimony (*see* State's Trial Ex. 43) and touched on all three incidents alleged by C.B. (R. at 1040:11–42:3).

6. Testimony of Y.P.R., mother of the victim. Y.P.R. testified that, when C.B. first disclosed to her that Appellant had sexually abused her, she immediately and completely believed C.B. and supported her in her allegations (R. at 1045:18–22.) However, she testified that she no longer was supporting C.B. (R. at 1045:23–25.) She testified that on the day C.B. disclosed the abuse to her, she married the Appellant. (R. at 1047:31–1048:2.) However, she further testified that neither she (R. at 1054:20–22, 1058:3–7) Appellant (R. at 1054:23–24, 1058:8–9) nor C.B. (R. at 1058:10–12) knew that she and Appellant would be finally married that day (R. at 1058:3–14). She testified that in Cuba, her home country, a wedding consists of two ceremonies — one in which the bride and groom state their willingness and intention to marry, and a second, later ceremony in which the bride and groom are actually married. (R. at 1048:13–18, 1053:27–54:12.) She claimed that on the day C.B. disclosed the abuse, she was under the impression that, as in her home country, she was attending a preliminary ceremony, and that a later wedding would follow. (R. at 1048:18–21, 27–30.) She further claimed that she and Appellant had obtained their license to marry a week to fifteen days before the date C.B. disclosed the abuse. (R. at 1049:3–11.) But that was untrue; when shown a copy of her marriage certificate, she was forced to admit that she and Appellant received their license to marry on the same day C.B. disclosed the abuse in this case — and, in fact, just thirty-six minutes before their wedding ceremony. (R. at 1051:31–53:6.) The

unexpected nature of her and Appellant's wedding was confirmed by pictures of the ceremony — which showed Appellant wearing a hat, a regular work shirt, and a pair of jeans. (R. at 1059:15–23.) As Y.P.R. stated, "I thought that what we were doing was the first signature in this situation, and I wasn't -- we were not dressed up like wore white or anything like that." (R. at 1048:18–21.) Although she claimed it had nothing to do with her decision to stop supporting C.B. in her allegations against Appellant (R. at 1064:15–20) Y.P.R. testified, at length, about the personal hardships she had suffered after C.B. had disclosed the abuse, and Appellant was arrested; she said Appellant was the "breadwinner of the house" and that he paid all of the bills (R. at 1063:25–26.) After his arrest, she testified she lost her apartment (R. at 1063:13–15) lost her car (R. at 1063:16–17) and that she "quickly" had to start working (R. at 1063:18–19). She testified she was "homeless" after C.B.'s disclosure and Appellant's arrest. (R. at 1063:6–11.) She claimed that Dr. Mehta at Children's Hospital never diagnosed C.B. with child sexual abuse (R. at 1073:2–15, 1074:20–23) — testimony which was contradicted by Dr. Mehta's and which Y.P.R. herself later contradicted (R. at 1087:21–32) — and that this is what, primarily, first caused her to suspect that C.B. was lying (R. at 1071:28–72:11, R. at 1087:10–20) Suspicion which, Y.P.R. claimed, crystalized when C.B. disrespected her and expressed a lack of care or concern for Y.P.R. (R. at 1072:12–73:1.) She also claimed that C.B.'s father, H.B., had used several derogatory names for Appellant. (R. at 1083:1–28)

7. Testimony of Cassandra Knight. Ms. Knight testified she was a supervisor for the Louisiana Department of Children and Family Services. (R. at 1113:5–8.) She was assigned to investigate C.B.'s disclosures of in-home sexual abuse. (R. at 1117:10–24.) She attended the forensic interview with C.B. (R. at 1118:10–12) personally interviewed

C.B. (R. at 1119:12–18) personally interviewed Y.P.R., C.B.'s mother (R. at 1118:7–9) and personally interviewed H.B., C.B.'s father (R. at 1124:21–24). In particular, Ms. Knight testified that, throughout her interviews with the family members, she did not notice any circumstances suggesting that C.B.'s disclosures had been falsified or were the result of coaching by either parent or anyone else. (R. at 1120:14–16.) She recalled that, contrary to Y.P.R.'s testimony at trial, during her interview with the mother, Y.P.R. had stated that her relationship with H.B. was "good," "healthy," and that there were no problems during their marriage and amicable divorce. (R. at 1122:22–23:1.) In particular, she recalled that Y.P.R. confirmed that H.B. did pay $250 each month in child support — contrary to Y.P.R.'s testimony at trial. (R. at 1124:16–20.) Ms. Knight also testified that H.B. had never been especially pushy or inappropriate during her investigation. (R. at 1125:2–9.) After her investigation, Ms. Knight testified that the Department of Children and Family Services closed the case as a validated finding of in-home child sexual abuse. (R. at 1118:15–22.)

8. **Testimony of Deputy Judd Harris.** Deputy Harris testified that, at the time of C.B.'s disclosures, he was a detective in the Personal Violence Unit of the Jefferson Parish Sherriff's Office (R. at 983:18–20) and was assigned as the responding detective for the Sherriff's Office in this matter (R. at 987:17–22). He received notification of the incident from Deputy Knowles and coordinated his investigation with Detective Peter Folse, the lead detective assigned to investigate C.B.'s disclosures for the Kenner Police Department. (R. at 987:23–88:18.) Following her disclosures, Detective Folse made arrangements for C.B. to receive a forensic interview at the Children's Advocacy Center, which Deputy Harris attended. (R. at 988:7–31, 989:27–30.) Deputy Harris also obtained copies of C.B.'s medical records concerning Dr. Mehta's child

sexual abuse examination of C.B. (R. at 1008:19–22.) In light of C.B.'s disclosures to the road deputies, during the forensic interview at the Children's Advocacy Center, as well as Dr. Mehta's diagnosis of child sexual abuse following C.B.'s examination at the Audrey Hepburn Care Center at Children's Hospital, Deputy Harris obtained an arrest warrant for Appellant. (R. at 990:20–25.) Deputy Harris forwarded that warrant to the United States Immigration and Customs Enforcement Agency (ICE), and requested their assistance in locating Appellant. (R. at 992:8–17.) He later received notification from ICE that Appellant had been located and taken into custody on the warrant he had obtained (R. at 992:15–17) and requested that Appellant be transported to the Jefferson Parish Sheriff's Office detective bureau for purposes of an interview (R. at 992:18–22). Before any questioning, Deputy Harris advised Appellant of his rights using a standard Jefferson Parish Sherriff's Office advice of rights form (R. at 23–32) which explained Appellant's rights in both the English and Spanish language (R. at 993:1–3). Deputy Harris did not offer Appellant anything of value in exchange for Appellant making a statement and neither threatened nor coerced Appellant into making a statement. (R. at 994:12–22.) Following this advice of rights, Deputy Harris participated in an audio and video recorded interview with Appellant concerning C.B.'s disclosures. (R. at 994:23–25.) Of particular note, Deputy Harris recalled an exchange with Appellant during that interview wherein Appellant suggested that Y.P.R., C.B.'s mother, would fully exculpate him and asked Deputy Harris and Detective Folse to call her. (R. at 1008:2–7.) When he and Detective Folse called Y.P.R., as Appellant requested, Y.P.R. "said she didn't know what he [Appellant] was talking about." (R. at 1008:8–11.) In connection with Appellant's arrest, Deputy Harris seized Appellant's cell phone (R. at 994:26–30) obtained a search warrant for it (R. at 996:4–8) and submitted it to the Jefferson Parish Crime Laboratory for analysis (R. at

997:6–10). He also obtained a search warrant for C.B.'s phone (R. at 997:11–14) and likewise submitted it to the crime laboratory for forensic download (R. at 998:4–6). In light of C.B. and Axel's indications that they had communicated about the abuse in question via Snapchat and Instagram, Deputy Harris also obtained search warrants for C.B.'s chat records from Snapchat (R. at 998:7–28) and Facebook, Inc., the parent company for Instagram (R. at 1000:14–19) — and later received records from both companies (R. at 999:7–10, 1001:10–17, 1002:17–20).

9. Testimony of Detective Peter Folse. Detective Folse testified he is a criminal investigator employed by the Kenner Police Department in its criminal investigations division. (R. at 1137:12–18.) He was the lead detective assigned to investigate this case for the Kenner Police department. (R. at 1141:14–18.) He had handled numerous child sexual abuse cases both before (R. at 1138:4–7) and after (R. at 1138:8–10) C.B.'s disclosures. Detective Folse testified that, in his experience, child sexual abuse allegations are very common. (R. at 1140:5–8.) Similar to C.B.'s case, he stated that delay between abuse occurring and its disclosure was "very common" (R. at 1140:9–14) that victims often exhibit sexualized behaviors (such as sending sexually suggestive messages (R. at 1140:15–20) that it is impossible to simply look at an accused and know that they sexually abuse children (R. at 1140:21–25) that it is impossible to simply look at a child and know that they had been abused (R. 1140:26–30) that victims disclose abuse in varied ways (1140:31–41:4) and that it is not uncommon for friends and family to have no idea that sexual abuse is occurring (R. at 1141:5–13).

Detective Folse testified that, after his supervisor assigned the case to him for investigation, he reviewed Officer Blair's report, contacted then Detective Harris with the Sherriff's Office, and made arrangements with the Jefferson Parish Children's Advocacy Center for

C.B. to receive a forensic interview. (R. at 1141:14–31.) Detective Folse was present for that interview and observed it from a separate room. (R. at 1143:3–8.) He testified that nothing about C.B.'s interview — her appearance, her demeanor, her presentation, the way she behaved — led him to suspect C.B. was being untruthful. (R. at 1143:12–18.) Mirroring Dr. Mehta's testimony, Detective Folse testified that that location where C.B. disclosed the abuse had occurred was typical for child sexual abuse cases (R. at 1143:19–23.) He noted that C.B.'s description of the abuse during her forensic interview was both detailed and in her own words. (R. at 1143:28–44:1.) Detective Folse also noted that the interview was non-leading in format (R. at 1144:2–4) and that C.B. included sensory details in her description of the abuse (R. at 1144:5–8). In particular, he noted that C.B.'s use of the phrase "stomach-to-stomach" to describe the missionary position and "put his mouth down there" to describe oral sex appeared to be age-appropriate. (R. at 1144:9–32.) Detective Folse also noted that C.B.'s description of the abuse included idiosyncratic detail, namely C.B.'s inability to recall the English word for "bathrobe" — the garment she stated she was wearing during the second incident of sexual abuse she described. (R. at 1145:1–20.) On the whole, Detective Folse noted that C.B.'s description of the abuse was "plausible, physically possible, and realistic," appropriately consistent with other disclosures, and was not so verbatim or rote as to suggest having been rehearsed or memorized. (R. at 1145:21–31.)

Following C.B.'s disclosures during the forensic interview, Detective Folse obtained a warrant for Appellant's arrest in connection with the offense she described as occurring in Kenner. (R. at 1146:17–23.) Appellant was taken into custody, transported to the Sherriff's Office Detective Bureau, and advised of his *Miranda* rights in both English and Spanish. (R. at 1148:4–31.) Similar to Deputy Harris, Detective Folse testified that Appellant was not threatened, coerced, or offered anything

of value in connection with his making statements concerning the investigation in this case. (R. at 1149:1-16.) Detective Folse testified that he participated in an audio and video recorded interview with Appellant, and identified a recording of that interview — which was played for the jury. (R. at 1149:12-51:30.)

During that interview, Appellant did not deny that there would be text messages on C.B.'s phone which were sent from his phone — and saved under his nickname "Jonathan." (R. at 1156:3-9, 1157:6-10, State's Trial Ex. 74.) And, indeed, Detective Folse testified that, during the investigation, Kenner Police and the Sherriff's Office located some of those text messages on C.B.'s phone. (R. at 1157:11-21.) Those text messages were shown to the jury and translated from Spanish into English. The first message was from Appellant to C.B. and stated: "I can't resist any longer. There is a fire in me for us to make love. Delete." (R. at 1160:10-12.) The second message — corroborating C.B., H.B., and Yanicet's testimony — stated: "Hello, [C.B.] I got married. I don't -- I don't want -- I don't want for us to irrespect one another any longer." (R. at 1165:32-66:2.)

Detective Folse also recalled that, during C.B.'s disclosures, she stated that she delayed her disclosure of the abuse because Appellant warned her that her mother wouldn't have money anymore and would be out on the street if she told anyone what Appellant had done. (R. at 1161:28-62:2.) Detective Flose testified that this paralleled (and was corroborated by) certain claims Appellant made during his interview in which Appellant repeatedly stated that, if he was arrested and went to jail, no one would be able to pay the bills and that his family would not be cared for. (R. at 1162:3-14.)

Detective Folse also recalled that during her disclosures, C.B. stated that the first incident of abuse by Appellant occurred when her mother, Y.P.R., left her and her brother home alone with Appellant when

she went to get paperwork for her taxes. (R. at 1162:15-23.) During his interview with Appellant, Detective Folse testified that Appellant independently, and without any prompting for investigators, verified that he had been home alone with C.B. during this occasion — thereby further corroborating C.B.'s account during her disclosures. (R. at 1162:15-32.)

Detective Folse testified that the Kenner Police Department and the Sherriff's Office had obtained a video surveillance recording from the outside of C.B. and Appellant's home corresponding to the date of the last incident of abuse C.B. disclosed. (R. at 1169:10-15.) That surveillance was identified by Detective Folse (R. at 1171:3-6) played for the jury (R. at 1172:5-19) and corroborated C.B.'s account for the events leading up to and following the last incident of abuse by Appellant (R. at 1172:21-76:12).

10. Testimony of Sergeant Lashonda Woodfork. Sgt. Woodfork testified she is a supervisor with the Kenner Police Department's communications section. (R. at 834:12-17.) She identified an audio recording of a phone call placed by the emergency room where C.B. was initially examined reporting C.B.'s disclosures. (*See* R. at 836:10-37:22, 838:10-21, State Trial Ex. 12, 13.)

11. Testimony of Nancy Weber Clary. Ms. Weber testified she works for the Jefferson Parish Sheriff's Office 911 Communication Center. (R. at 839:23-26.) She identified an audio-recorded telephone call between the Kenner Police Department dispatcher and the Jefferson Parish Sheriff's Office 911 Center requesting Sheriff's Deputies respond to the emergency room where C.B. was examined because two of the incidents she reported occurred in Metairie, not Kenner. (*See* R. at 840:29-41:30, State Trial Ex. 14, 15.)

12. Testimony of Officer Craig Blair. Officer Blair testified he is a patrol officer employed by the Kenner City Police Department. (R. at 844:29-31.) After C.B. disclosed the abuse at the Oschner Kenner Hospital emergency room, her treating physician reported the disclosures to the Kenner Police Department — and Officer Blair was dispatched to obtain an initial report from C.B. (R. at 845:26-46:16.) Upon his arrival, Officer Blair met with C.B. (R. at 847:1-5) who was thirteen years old at the time (R. at 846:21-23) and took a brief written statement from her (R. at 850:3-14). C.B. advised Officer Blair that she had evidence on her phone relating to the last incident of sexual abuse — the photos and video she had taken after the incident (R. at 852:32-53:7) — and, after viewing them, Officer Blair contacted a Kenner Police Department Crime Scene Unit and had the photographs and video preserved (R. at 853:8-18).

13. Testimony of Crime Scene Technician Alexis Englade. Officer Engalade testified she is a crime scene technician with the Kenner City Police Department. (R. at 860:11-17.) After C.B. disclosed the abuse at the emergency room, she was contacted by Officer Blair and asked to photograph C.B.'s person and certain items on C.B.'s cellphone. (R. at 861:6-21, 862:12-17.)

14. Testimony of Deputy Brian Knowles. Deputy Knowles testified he is a road deputy with the Jefferson Parish Sheriff's Office. (R. at 865:10-18.) After C.B. disclosed the abuse at Oschner Kenner's emergency room and repeated her disclosures to Officer Blair, Deputy Knowles testified he was dispatched at the request of Officer Blair because portions of the abuse disclosed by C.B. occurred outside of Kenner, in unincorporated Jefferson Parish. (R. at 866:18-32.) Upon his arrival, he met with C.B. concerning her disclosures and noted her

demeanor and affect was consistent with his training concerning disclosures of child sexual abuse. (R. at 868:31–69:1–22.)

15. Testimony of Axel Salazar, C.B.'s Friend. Axel testified that he and C.B. had become friends when they attended Meisler Middle School together. (R. at 1339:1–6.) He testified Cynthia had confided in him that something had happened to her (R. at 1343:6–12.) that someone had come into her room to force sex on her (R. at 1344:20-22) but never would say who it was (R. at 1343:6–12). He recalled that C.B. stated multiple times she disliked living with Appellant. (R. at 1341:15–16.) When he came to visit her at home, he often found her locked in her room, crying. (R. at 1341:16–18.) She cried at school frequently. (R. at 1341:20–21.) In speaking with C.B., Axel recalls she stated she was afraid of Appellant, and went to her room to close herself off so she would not have to see him. (R. at 1342:9–17.) He also noticed C.B. avoided personal contact and became nervous or scared when people touched her. (R. at 1341:31–42:8.) Axel encouraged C.B. to tell her mother about what was going on so she "wouldn't feel alone or sad" and promised, "whatever happened, as her friend, I will always be there for her." (R. at 1342:30–31.)

16. Detective Solomon Burke, Expert in Digital Forensics. Detective Burke was accepted as an expert in the field of mobile device analysis and digital forensics analysis. (R. at 1224:2–13.) He downloaded the contents of three cellphones in this matter (R. at 1227:14–19) — one belonging to C.B. (R. at 1230:21–32), one to C.B.'s mother (R. at 1227:32–28:3) and one to Appellant (R. at 1232:16–19). He testified that his analysis revealed an outgoing text message to C.B. on Appellant's phone from the date of C.B.'s disclosure advising her that he had just gotten married. (R. at 1242:23–43:22.) Also, he discovered a partial message on Appellant's phone, which had been marked for deletion, and

which had been received on the date of the last incident described by C.B. (R. at 1250:31–52:12.) Although he was unable to recover the name of the person who had sent the message, it had been received by Appellant's phone shortly after the incident described by C.B. and read: "Leave me alone. I can't stand you." (*Id.*)

17. Dr. Tessa Hue, Emergency Room Physician. Dr. Hue testified as an expert in emergency room medicine. (R. 1348:3–15.) She examined C.B. at the hospital the day she disclosed Appellant's abuse. (R. at 1348:23–25.) Dr. Hue obtained a medical history from C.B. upon her arrival — which was consistent with C.B.'s trial testimony. (*Compare* R. at 1358:28–1359:22 *with* R. at 1278:27–1314:19.) Dr. Hue also conducted a physical examination of C.B.; she testified that, although C.B. indicated the beast sucking from the last incident had left marks on her breasts, and identified those marks, on inspection, they appeared to be stretch marks — and unlikely to have been caused by sucking. (R. at 1350:19–28.) When shown the photograph C.B. took of her breast shortly after the final incident, Dr. Hue agreed it showed erythema, or faint redness, consistent with what C.B. had described. (R. at 1368:24–69:20.) Dr. Hue testified that her diagnosis of C.B. was "sexual assault with rape" because "she didn't find anything on exam to diagnose otherwise." (R. at 1352:23–1353:12.) She agreed that nothing about her examination of C.B., to her mind, proved that C.B.'s claims were untrue (R. at 1374:4–8) and recommended C.B. be referred to the Audrey Hepburn Care Center for examination by an expert in child sexual abuse (R. at 1371:27–1) — expertise to which Dr. Hue testified she would defer (R. at 1372:8–12).

18. Fernando Perez Rivero, C.B.'s Maternal Uncle. Mr. Rivero testified C.B. is his sister's daughter. (R. at 1378:21–23.) He claimed Haile, C.B.'s father, used derogatory terms when referring to Appellant.

(R. at 1383:1–30.) He testified he was surprised by C.B.'s allegations because he "didn't expect something like that" from Appellant. (R. at 1384:10–12.) However, on cross-examination as a character witness, he admitted he also was unaware that Appellant had had multiple other secret sexual relationships with various women during his relationship with C.B.'s mother. (R. 1396:22–97:15, 1399:2–9.)

19. Ivonne Arimijo. Ms. Arimijo testified as a character witness. She stated she met Appellant when he did repair work on her home (R. at 1406:28–31) had always treated her and others with respect (R. at 1407:7–12) and had a reputation for doing good work (R. at 1408:5–10). On cross-examination, she also had no idea Appellant was having multiple affairs with different women behind his wife's back. (R. at 1409:6–8, 9–27.)

20. Marisol Aranguren. Ms. Aranguren also testified as a character witness. She stated she had also met Appellant when he did work on her home and that he appeared to be a contentious and honest worker (R. 1412:26–13:16.)

Summary of the Argument

In Appellant's counseled brief on Appeal, he contends that the verdicts as to counts 2 and 3 were non-unanimous. Hence, because this matter is on direct appeal, he claims the United States Supreme Court's decision in *Ramos* is applicable and requires the reversal of these two counts. In Appellant's pro se brief, he further contends that the jury's verdict as to count 1 was also non-unanimous and requires reversal. Review of both the trial transcript and the jury poling slips, lodged with this court on appeal, confirms that the jury's vote as to Count 1 was unanimous. Hence, the State agrees with Appellant's counsel on appeal that, as to count one, there are no defects requiring reversal under *Ramos*. Appellant's pro se argument to the contrary is wholly

unsupported by the record on appeal and is false. As to Counts 2 and 3, a review of the record confirms Appellant's claim that the jury's verdicts were non-unanimous. Accordingly, the State must concede that these verdicts are contrary to *Ramos*, and must be vacated — along with their attendant sentences.

As to Appellant's second claim, that the evidence, in this case, was insufficient as to all three counts — in light of its concession that Counts 2 and 3 require reversal — the State limits its discussion regarding sufficiency to Count 1. On that count, the testimony of C.B. the victim, as accepted by the finder of fact, outlined an incident in which Appellant penetrated her vagina with his penis. This act fits the applicable definition of sexual battery. The testimony of C.B. further confirms that this incident occurred when she was eleven years old. Exhibits entered into evidence at trial established Appellant's date of birth and proved that, at the time of the incident constituting Count 1, Appellant was older than seventeen and that he was more than three years older than C.B. at the time of that incident. Accordingly, viewing the evidence in the light most favorable to the State, there was sufficient evidence to establish each element of sexual battery on a child younger than thirteen beyond a reasonable doubt.

Finally, as to Appellant's second claim, that the State's rebuttal closing argument misrepresented Dr. Hue's testimony and misled the jury, this claim is without merit. The State's closing argument was within the scope of Louisiana Code of Criminal Procedure Article 774, Appellant failed to avail himself of the remedy of requesting an admonition, and the jury was instructed that closing Arguments were not to be considered as evidence.

Argument

Claim # 1: The Verdicts Rendered are Contrary to *Ramos*

Previously under Louisiana law, for an offense committed before January 1, 2019, in which punishment was necessarily confinement at hard labor, ten of twelve jurors were required to concur to render a verdict. *See* La. Const. Art. I, § 17; LSA-C.Cr.P. art. 782. On April 20, 2020, in *Ramos v. Louisiana*, the United States Supreme Court held that the Sixth Amendment right to a jury trial, as incorporated by the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense in both federal and state courts. —U.S.—, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020). "For purposes of the Sixth Amendment, federal law defines petty offenses as offenses subject to imprisonment over six months." *State v. Harrell*, 19-371, p. 12 (La. App. 5 Cir. 7/8/20); —So.3d—, 2020 WL 3832806, at *7.

The Louisiana Supreme Court has recognized the *Ramos* decision to be applicable to cases pending on direct review. *State v. Ford*, 20-241 (La. 6/3/20); —So.3d—, 2020 WL 3424531 (holding that, as "[t]he present matter was pending on direct review when *Ramos v. Louisiana* was decided ... the holding of *Ramos* applies.") Applying *Ramos* to cases involving "serious offenses" on direct review where non-unanimous jury verdicts had been returned, this Court has vacated the convictions and sentences and remanded the matters to the trial court for further proceedings. *See Harrell*, 2020 WL 3832806, at *7; *State v. Rivas*, 19-378, p. 4 (La. App. 5 Cir. 5/21/200; —So.3d—, 2020 WL 2569820, at *3.

In this case, during a bench conference with both the State and Appellant's trial counsel, the trial court manually counted each polling slip for all three charges. (R. at 1493:28–1494:7.) According to the record, the vote of the jury as to count one was twelve to zero in favor of guilty—and was therefore unanimous, consistent with *Ramos*. (R. at 1493:30–94:1.) However, the vote as to both counts two and three was ten to two

in favor of guilty. (R. at 1494:2–7.) Physical inspection of the jury polling slips, included in the trial court record lodged with this Court on appeal confirms the counts reflected in the trial transcripts as to all three of the counts against Appellant. Accordingly, the holding in *Ramos* controls in this case—and the State must therefore concede, as to counts two and three, Appellant's counseled claim number 1 has merit.

Claim # 2: The Evidence Was Insufficient

When considering the sufficiency of the evidence, Appellate courts ask whether: "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Clifton*, 17-538, p. 13 (La. App. 5 Cir. 5/23/18); 248 So.3d 691, 702. "[I]n making such a determination," the Louisiana Supreme Court has said, "a reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." *State v. Smith*, 600 So.2d 1319, 1324 (La. 1992). Appellate courts will not second-guess fact-finders; thus, if any reasonable fact-finder could convict, the State's evidence is sufficient — and any challenge to it fails. *See id.*

In any criminal case, the State may prove a crime's elements with direct or circumstantial evidence; the State is never limited to direct testimony. "Circumstantial evidence consists of proof of collateral facts and circumstances from which the existence of the main fact can be inferred according to reason and common sense." *Clifton*, 248 So.3d at 703. When the State's case consists exclusively of circumstantial evidence, that evidence "must exclude every reasonable hypothesis of innocence." LSA-R.S. 15:438. However, this is merely an "evidentiary guideline for the jury;" the test is, and has always been, proof beyond a

reasonable doubt. *State v. Bridgewater*, 823 So.2d 877 (La. 2002). Thus, there is no stricter standard of review for circumstantial evidence. *State v. Maxie*, 614 So.2d 1318 (La. App. 3 Cir. 1993). Ultimately, "[a]ll evidence, both direct and circumstantial, must be sufficient to support the conclusion that the defendant is guilty beyond a reasonable doubt." *Clifton*, 248 So.3d at 703.

When a fact-finder rationally rejects a defendant's hypothesis of innocence, that hypothesis fails — and cannot support reversal. *State v. Francois*, 03-1313 (La. 4/14/04); 874 So.2d 125; *State v. Sosa*, 921 So.2d 94 (La. App. 5 Cir. 2006). Thus, on review, unless there is another hypothesis so persuasive that a rational juror could not find guilt beyond a reasonable doubt, a conviction must stand. *Id.* Hence, appellate courts will not consider merely whether some conceivable hypothesis might afford an exculpatory explanation of the events. *State v. Davis*, 637 So.2d 1012 (La. 1994). That is, reviewing courts will not rule out every hypothesis before affirming a jury's verdict — that would usurp the fact-finder's purpose. *State v. Williams*, 768 So.2d 728 (La. App. 2 Cir. 2000). Instead, a reviewing court will reverse a conviction only if no rational fact-finder, including the judge or jury who already did convict, could convict — assuming it found every fact and inference in the State's favor.

"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." *Clifton*, 248 So.3d at 703. Furthermore, "[i]n the absence of internal contradiction or irreconcilable conflict with the physical evidence, the testimony of one witness, if believed by the trier of fact, is sufficient to support a conviction." *Id.* And, in particular, "[i]n 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 offenses." *Id.*

In this case, Appellant was convicted of one count of sexual battery on a child younger than thirteen (Count 1), one count of indecent behavior with a child under the age of thirteen (Count 2), and one count of indecent behavior with a child (Count 3). Because the State concedes error requiring reversal under *Ramos* as to counts 2 and 3, it pretermits discussion of the sufficiency as to these counts and limits its discussion to Count 1. Sexual battery is defined in relevant part as "the intentional touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender, [directly or through the cloathing], or the touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim, [directly or through the cloathing]," when the victim has not yet attained fifteen years of age and is at least three years younger than the offender." *Id.* Also, "La. R.S. 14:43.1(C)(2) provides for a harsher penalty when the victim is under the age of thirteen and the offender is seventeen years of age or older." *Id.*

A review of the record, in this case, reveals that the evidence presented at trial established each element of the offense alleged in count one — sexual battery on a child younger than thirteen. C.B. testified at trial to an act committed by Appellant which occurred when C.B. was eleven years old. (R. at 1280:29-32, 1281:20-24). The marriage certificate between Y.P.R. and Appellant (State's Trial Ex. 44) as well as the audio recorded interview with Appellant (State's Trial Ex. 74) established that Appellant would have been over the age of seventeen at the time of this incident and, further, that the difference in ages between C.B. and Appellant would have been greater than three years. Finally, C.B.'s description of the first incident of sexual abuse, in which she stated that Appellant penetrated her vagina with his penis (R. at 1281:9,

1281:25-82:1) falls within the definition of sexual battery for purposes of sexual battery on a child younger than thirteen.

While C.B. and Appellant were the only people present for this first incident — and, so, independent eye-witness corroboration was therefore simply unavailable — significant other portions of her testimony were corroborated by other witnesses and independent evidence. Both H.B. and his girlfriend verified C.B.'s account of her initial disclosure of the abuse. Forensic cell phone downloads corroborated that Appellant had sent C.B. text messages describing his desire to have sexual intercourse with C.B. Axel, C.B.'s school friend, testified that C.B. had discussed being abused around the time she claimed at trial that the abuse had started as well as throughout the period after that abuse and leading up to her ultimate disclosure of it. Dr. Mehta, an individual Appellant stipulated was an expert in child sexual abuse pediatrics, testified C.B. gave a clear and detailed description of this initial incident of abuse and, in fact, diagnosed C.B. with child sexual abuse. Finally, C.B.'s description with this initial incident was appropriately consistent throughout her numerous out of court descriptions of it as well as her in court testimony under both direct and cross-examination. Accordingly, the State submits that the evidence, in this case, was sufficient to establish all of the elements necessary to prove Appellant's guilt beyond a reasonable doubt as to Count 1.

Claim # 3: Improper Rebuttal Closing Arguments

Louisiana Code of Criminal Procedure Article 774 states: "[c]losing arguments should be confined to the evidence admitted, to the lack of evidence, to conclusions of fact to be drawn from the evidence, and to the law applicable to the case." It further provides that "[t]he argument shall not appeal to prejudice." *Id.* Even so, a prosecutor has considerable latitude in making closing arguments. *State v. Jackson*, 04-

293 (La. App. 5 Cir. 7/27/04); 880 So.2d 69, 73. Accordingly, jurisprudence has long recognized that an appellate court will not reverse a conviction because of improper closing arguments unless it is thoroughly convinced that the remarks influenced the jury or contributed to the verdict." *See State v. Howard*, 98-0064, p. 26 (La. 4/23/99); 751 So.2d 783, 812. And, in making this decision, credit should be given to the jury's good sense and fairmindedness. *Jackson*, 880 So.2d at 73.

In this case, during rebuttal closing arguments, the undersigned stated: "Their own expert told you that her diagnosis, after she came in, was child sexual abuse." (R. at 1464.) Defense counsel objected and the court overruled that objection. (R. at 1464:16–66:12.) Thereafter, the undersigned stated: "I'm going to say it again. The medical records from their own expert said, "Diagnosis, child sexual abuse with rape." (R. at 1466:20–22.) On appeal, Appellant claims the undersigned "mischaracterized the testimony of Dr. Hue and clearly mislead the jury."

On the contrary, the undersigned's statements were entirely accurate and were well within the State's considerable latitude in making closing arguments. During her direct testimony, Dr. Hue specifically testified that her "[e]ncounter diagnosis" of C.B. "was sexual assault with rape." (R. at 1352:23–26.) When defense cousel asked Dr. Hue to verify whether that was in fact her diagnosis of C.B., Dr. Hue testified that "[t]hat was my diagnosis not based on my exam findings but based on her complaint because I didn't find anything on exam to diagnose otherwise." (R. at 1352:27–30.) On cross-examination by the State, Dr. Hue agreed that "nothing about [her] interactions with [C.B.] proved to [her] mind that it [the abuse] didn't happen." (R. at 1374:4–8.) Dr. Hue also testified that she would defer in her own diagnosis to the diagnosis of Dr. Mehta at Children's Hospital. (R. at 1372:8–12.) And when asked by the State: "if the medical director of the Audrey Hepburn Care Center in

New Orleans at Children's hospital ... testified that her diagnosis for [C.B.] ... was child sexual abuse, would you defer to that diagnosis ...," Dr. Hue responded, "[a]bsolutely." (R. at 1372:13-21.) Furthermore, it was Appellant — not the State — who called Dr. Hue as a witness (R. at 1346:12-13) and it was Appellant — not the State — who offered her as an expert (R. at 1348:3-15). Hence, the State submits that the rebuttal closing argument in this case neither misstated Dr. Hue's testimony not mislead the jury.

Furthermore, even if the undersigned's argument was improper — but it was not — the State notes that the proper remedy under Article 771 of the Code of Criminal Procedure would have been for the Court to admonish the jury; however, the defense did not request such an admonishment. That article provides that when a prosecutor's remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant in the mind of the jury, the court shall admonish the jury upon request of the defendant. Here, Appellant never asked the trial court to provide the principal, and preferred remedy, for the infraction he claimed occurred — but which the trial court ultimately held had not occurred.

Moreover, the trial Court's jury charges included an instruction that opening and closing statements were not to be considered as evidence. Specifically, the trial court instructed the jury as follows: "[t]he statements and arguments made by the lawyers are not evidence....The opening statements and closing statements are not to be considered as evidence." (R. at 1479:12-21.) Hence, even if the undersigned rebuttal closing argument was improper, the jury was instructed that that argument was not evidence, and not to consider it as such. Appellant fails to show how he was prejudiced in this case, and any error — if there was error — would be harmless.

In this case, the undersigned's closing argument was within the scope of Louisiana Code of Criminal Procedure Article 774, Appellant failed to avail himself of the remedy of requesting an admonition, and the jury was instructed that closing Arguments were not to be considered as evidence. As such, there is no merit to this claim.

Conclusion

The State submits that the claims raised by Appellant as to Count 1, sexual battery on a child younger than thirteen, are all without merit. The State concedes that the jury's verdicts as to Count 2 and Count 3, indecent behavior with a juvenile, violate *Ramos* and therefore require reversal. Accordingly, the State prays this Court affirm Appellant's conviction and sentence as to Court 1. It is compelled to pray this Court reverse Appellant's convictions and sentences as to Counts 2 and 3, and remand those counts to the district court for further proceedings.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been served on all parties by placing same in the United States Mail, this 4th day of September, 2020

BY:

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 23, 2020** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

20-KA-60

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE E. ADRIAN ADAMS (DISTRICT JUDGE)
MATTHEW R. CLAUSS (APPELLEE)
GRANT L. WILLIS (APPELLEE)
THOMAS J. BUTLER (APPELLEE)
JANE L. BEEBE (APPELLANT)

MAILED

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GRETNA, LA 70053

STATE OF LOUISIANA

VERSUS

RAFAEL ARTURO COTO CHINCHILLA

NO. 20-KA-60

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 17-1472, DIVISION "G"
HONORABLE E. ADRIAN ADAMS, JUDGE PRESIDING

December 23, 2020

STEPHEN J. WINDHORST
JUDGE

Panel composed of Judges Robert A. Chaisson,
Stephen J. Windhorst, and John J. Molaison, Jr.

AFFIRMED IN PART; VACATED IN PART; REMANDED

SJW
RAC
JJM

COUNSEL FOR PLAINTIFF/APPELLEE,
STATE OF LOUISIANA

Honorable Paul D. Connick, Jr.
Thomas J. Butler
Matthew R. Clauss

COUNSEL FOR DEFENDANT/APPELLANT,
RAFAEL ARTURO COTO CHINCHILLA

Rafael Arturo Coto Chinchilla
Jane L. Beebe

WINDHORST, J.

Defendant, Rafael Arturo Coto Chinchilla, appeals his conviction of sexual battery of a juvenile under thirteen (count one), indecent behavior with a juvenile under thirteen (count two), and indecent behavior with a juvenile (count three). For the reasons that follow, we affirm defendant's conviction and sentence on count one for sexual battery of a juvenile under thirteen, and vacate defendant's convictions and sentences on counts two and three for indecent behavior with a juvenile under thirteen and indecent behavior with a juvenile, and remand the matter to the trial court for further proceedings.

STATEMENT OF THE CASE

On July 18, 2017, the Jefferson Parish District Attorney filed a bill of information charging defendant, Chinchilla, with sexual battery of a juvenile under thirteen in violation of La. R.S. 14:43.1 (count one), indecent behavior with a juvenile under thirteen in violation of La. R.S. 14:81 (count two), and indecent behavior with a juvenile in violation of La. R.S. 14:81 (count three), all involving the same victim. Defendant pled not guilty.

Jury selection and trial began on August 26, 2019, and trial before a twelve-person jury concluded on August 30, 2019. The jury unanimously found defendant guilty as charged on count one, but found defendant guilty as charged by a ten to two concurrence on counts two and three. On September 12, 2019, the trial court sentenced defendant for count one to sixty years imprisonment at hard labor, twenty-five years of the sentence to be served without benefit of parole, probation, or suspension of sentence. Defendant was informed that, as to count one, upon release he must register as a sex offender for the duration of his life and conform to all of the rules, regulations, and terms of the sex offender registration laws. As to count two, the trial court sentenced defendant to twenty years imprisonment at hard labor, ten years of the sentence to be served without benefit of parole, probation, or

suspension of sentence. As to count three, defendant was sentenced to seven years imprisonment at hard labor. The trial court ordered the sentences to run concurrently.

FACTS

The testimony at trial revealed the following. H.B., the victim's father, married the victim's mother, Y.P., shortly before the victim, C.B., was born, and the three lived together in Cuba. H.B. and Y.P. eventually separated but did not divorce while living in Cuba. While they were still married, they legally immigrated to the United States with C.B. and initially lived in Miami.

Y.P. and C.B. moved to New Orleans, while H.B. remained in Miami for eight or nine months before moving to New Orleans and living with C.B., Y.P., and Y.P.'s brother.[1] By that point, Y.P. had met Chinchilla, who lived with them for a few months. H.B. later moved into his own apartment and, despite having no formal custody agreement, would bring C.B. to his apartment three times a month.

After H.B. moved to New Orleans, he met Yanicet Garrido through Y.P., and eventually became involved in a relationship with her. Ms. Garrido moved in with him, and C.B. continued to visit him. According to H.B., over the course of two days, C.B. asked multiple times to live with him and Ms. Garrido. C.B. told H.B. that she did not want to go anywhere with or be around defendant.

On February 13, 2017, Y.P. called H.B. and asked him to pick C.B. up from school. At his house, C.B. showed Ms. Garrido photographs on her phone of a school party but when H.B. tried to see the photographs, she did not want to give him the phone. H.B. eventually got the phone and found a video of her saying, "leave me alone Jonathan, leave me alone." H.B. and C.B. clarified that this referenced defendant, who goes by "Jonathan." When H.B. asked C.B. about it, she

[1] H.B. and Y.P., the victim's parents, divorced in November of 2016.

began crying, saying defendant sexually abused her. According to Ms. Garrido, defendant did not visually appear in the video, but she heard defendant's voice in it, and C.B.'s voice sounded like she was in danger. C.B. was thirteen and a half years old when she disclosed this sexual abuse.

Soon thereafter, H.B. asked Y.P. to come see him, and when she arrived at his house, he relayed to her what C.B. told him. Upon instruction from C.B.'s doctor, H.B. brought her to the hospital where she was seen by a doctor, and the police were contacted. At the hospital, the police spoke to C.B. The emergency room doctor recommended that C.B. see an expert at Children's Hospital.

At Children's Hospital, the doctor diagnosed her with "child psycho bias" and recommended C.B. receive counseling. The doctor also recommended that C.B. be interviewed at the Child's Advocacy Center (CAC). H.B. said he took C.B. to counseling multiple times, which seemed to help her, and also to CAC for an interview. A child protection investigator opened a case regarding these allegations and made a "valid finding of child sexual abuse." Detectives looked at C.B.'s phone and took a photograph of a photograph on C.B.'s phone from November of 2016 showing a mark on C.B.'s breast where defendant licked her. H.B. testified that he had seen the mark in person while C.B. changed clothes, but she told him it was a mark from her bra.

After defendant was arrested, Y.P. gave H.B. text messages from C.B.'s phone and a letter between C.B. and a friend. H.B. testified that he never doubted C.B. and that, while Y.P. was initially supportive, she no longer supported C.B and had not contacted her for over two years. Y.P. testified that she became suspicious of C.B.'s accusations because Ochsner did not give "proper proof" that C.B. was sexually abused, "all of the exams came out negative," and C.B. was never diagnosed with sexual abuse. She recounted a brief story that occurred "[a]fter everything got cooled down," where C.B. said she did not care about her mom. Y.P. testified that

it was that moment that she found out C.B. was "manipulated by the people that surrounded her." She also stopped believing C.B. because her grades were very good, and C.B. "never rejected him." Y.P. testified that H.B. called defendant derogatory nicknames, and that she and defendant did not get along with Ms. Garrido.

C.B. testified that she was ten years old when her mother met defendant. She stated that in August 2015, when she was eleven years old, her mom left her with defendant at their home while she did paperwork for her taxes. She stated that she was asleep when defendant came into her room. She said he woke her up, and she told him to get out. She testified that defendant then went on her bed, and she tried to get him to move. She stated that defendant got on top of her. She punched and kicked him until they fell to the floor. She stated that she told him to stop and screamed at him, but he would not leave. She testified that defendant removed her panties and put his penis in her vagina. She stated that after he was done, he went back to his room, and she went to the bathroom to take a shower "because [she] felt disgusting." Afterwards, he returned to her bedroom and gave her money for school books; she testified that she told him she wanted him to leave.

C.B. also testified to a later incident in 2015 when her mom was out walking, and defendant arrived at their Metairie home early from work. She stated that she had a bathrobe on, and defendant entered her bedroom. She told him to leave; he took off her bathrobe and sucked on her breasts, leaving "purple and reddish" marks on both of her breasts. C.B. stated that defendant would try to kiss or bite her when her mother was not looking and sent her messages like, "oh, I love you. If I see you with anyone, I'm going to kill you." She took screenshots of some of those messages but others she erased because defendant would occasionally take her phone and check it.

C.B. stated that the last incident occurred on February 13, 2017, when she was thirteen years old, at their house in Kenner after he picked her up from school in his green truck and bought her favorite food. She testified that she did not want to be alone with him "because [she] knew he would try to do something" so she stalled going into the house. She testified that she went to her room and locked the door; but, defendant unlocked it with his key and threw her on the bed. She stated that he sucked on her breasts again. She said her mom and brother arrived home sometime later. She took a photograph on her phone of the mark defendant left; she also took a video of herself telling him to leave her alone. She stated that when she took the video, she felt really bad and wanted to call the police. She said that she took the video as proof that he was calling her names. C.B. stated that defendant told her that if she told her mom what he did, her brother would hate her, and they would suffer because he pays all of the bills; she testified that he said he would send someone to kill her if she called the police. Some of defendant's threats did come true.

She stated that she told her dad numerous times that she wanted to live with him because she "didn't want to live with [her] mom because Rafael was there." She said she was scared to tell her dad what was going on.

A.G., a friend of C.B. when she was about eleven years, testified at trial that he and C.B. used to talk on the phone, that she told him that somebody had entered her room and tried to force her to have sex, and that she often cried when they spoke on the phone. A.G. stated that C.B. was afraid of defendant and would "close herself in the room" because "she didn't like to see him or even eat when he was there." He testified that C.B. would become scared if the two of them got physically close, and that she did not like people touching her.

Dr. Tessa Hue, an emergency medicine physician, testified that she examined C.B. at Ochsner Hospital on February 13, 2017.[2] Dr. Hue stated that C.B. told her that, one day that month, defendant picked her up from school, and once at home she locked her door, but defendant unlocked it with a key and came in. She told Dr. Hue defendant sucked on her breasts, leaving marks. C.B. also disclosed to Dr. Hue other incidents between 2015 and 2017, explained that her father found the video, and showed Dr. Hue the video. She noted during her physical examination that there were streaks on C.B.'s breasts "consistent with stretch marks," and there was no bruising or marks consistent with teeth marks. Dr. Hue testified that she noted in her report an "encounter diagnosis" of sexual assault, which was not based on the exam findings but on C.B.'s complaint because she did not find anything during the exam to diagnose otherwise.

Dr. Neha Mehta is the Medical Director at the Audrey Hepburn Care Center, a comprehensive child abuse center at Children's Hospital.[3] Dr. Mehta testified that a close familial relationship like that between defendant and C.B. is very common between abuser and victim and that it is also common for the abuse to occur in their shared home. Dr. Mehta testified that she conducted and recorded a child abuse examination of C.B., including obtaining her medical history. C.B. told her that she had never really disclosed details of her abuse until her father found the video, which Dr. Mehta indicated is "the norm." C.B.'s version of events in the audio recording was played for the jury and was consistent with her prior statements.

Brittney Bergeron, a forensic interviewer at the Jefferson Children's Advocacy Center, also interviewed C.B. Ms. Bergeron indicated that during the interview, C.B. mentioned an incident at her mother's prior apartment, two incidents wherein her breasts were sucked, and some incidents regarding kissing. The audio

[2] Dr. Hue was admitted as an expert in emergency room medicine.

[3] Dr. Mehta was accepted as an expert in the fields of general pediatrics and child sexual abuse pediatrics.

and video recording of C.B.'s forensic interview was admitted into evidence and played for the jury. Her description of the three incidents to Ms. Bergeron was consistent with her prior statements.

ASSIGNMENTS OF ERROR

Defendant, through counsel, asserts that (1) the trial court erred in accepting a non-unanimous jury verdict on counts two and three in light of the U.S. Supreme Court's recent ruling in Ramos v. Louisiana, 590 U.S.— , 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020); (2) the evidence was insufficient to support the verdict in all three counts; and (3) the trial court erred in failing to sustain defendant's objection during rebuttal closing argument regarding the prosecutor's mischaracterization of the emergency room doctor's testimony, which misled the jury. Defendant, in a *pro se* brief, reasserts that he was denied his constitutional rights to trial by jury, due process, and equal protection when he was convicted by a non-unanimous jury and, that the evidence was insufficient to support the verdict.

Sufficiency of the Evidence

We first consider whether the evidence at trial was sufficient to prove the crimes charged beyond a reasonable doubt. If a reasonable trier of fact, when 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, then the defendant is entitled to an acquittal under Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), and State v. Hearold, 603 So.2d 731, 734 (La. 1992). Accordingly, when evidence is found to be insufficient, it results in a reversal and acquittal due to a failure to prove the crime charged beyond a reasonable doubt, to which jeopardy has attached, and the case cannot be retried. Consideration of sufficiency of evidence must therefore precede consideration of any other assignment of error which, if meritorious, would result in vacating the conviction due to trial errors, and remand for possible retrial.

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), 2020 WL 1906545.

The constitutional standard for sufficiency of the evidence is whether, upon viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find that the State proved all of the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Defendant in the instant case was found guilty by a jury of sexual battery of a juvenile under thirteen in violation of La. R.S. 14:43.1 (count one), indecent behavior with a juvenile under thirteen in violation of La. R.S. 14:81 (count two), and indecent behavior with a juvenile in violation of La. R.S. 14:81 (count three).

La. R.S. 14:43.1 defines sexual battery in pertinent part as follows:

> the intentional touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender, directly or through clothing, or the touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim, directly or through clothing, when any of the following occur:
>
> * * *
>
> (2) The victim has not yet attained fifteen years of age and is at least three years younger than the offender.[4]

La. R.S. 14:81 defines indecent behavior with a juvenile, in pertinent part, as:

> Indecent behavior with juveniles is the commission of any of the following acts with the intention of arousing or gratifying the sexual desires of either person:
>
> (1) 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. Lack of knowledge of the child's age shall not be a defense;[5]

[4] La. R.S. 14:43.1(C)(2) provides for a harsher penalty when the victim is under the age of thirteen, and the offender is seventeen years of age or older.

[5] La. R.S. 14:81(H)(2) provides for a harsher penalty when the victim is under the age of thirteen, and the offender is seventeen years of age or older.

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. Clifton, 17-538 (La. App. 5 Cir. 5/23/18), 248 So.3d 691, 702. 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.; State v. Bruce, 14-877 (La. App. 5 Cir. 3/25/15), 169 So.3d 671, 675, writ denied, 15-833 (La. 3/4/16), 187 So.3d 1007.

The record supports a finding that the State presented evidence at trial to establish each element of the offenses for which defendant was convicted. At trial, C.B. testified regarding three separate incidents involving defendant, including one that constitutes sexual battery and two other acts that constitute indecent behavior with a juvenile. She was between the ages of eleven and thirteen at the time of the incidents. Defendant was between the ages of twenty-nine and thirty-one at the time of the incidents.[6]

According to C.B.'s testimony, the first incident occurred in August 2015, when she was eleven years old and at home with defendant while her mother was out. She testified that defendant removed her clothes while she punched and kicked him; that her resistance made them fall off of her bed and onto the floor; and that defendant put his penis in her vagina. C.B. testified to a second incident later in 2015, when defendant removed her bathrobe and sucked on both of her breasts. C.B. described a third incident on February 3, 2017, when defendant unlocked her bedroom door, threw her on her bed, and sucked on her breast. C.B.'s testimony at trial was consistent with other interviews she gave, including those with Dr. Mehta and Ms. Bergeron.

[6] The affidavit for arrest warrant and the waiver of rights form admitted into evidence at trial indicate defendant's date of birth is February 25, 1986.

On appeal, defendant asserts that C.B.'s allegations were uncorroborated and that there is no physical evidence of abuse. Defendant argues that C.B. was impeached and that impeachment testimony is not sufficient to sustain a conviction. Defendant's arguments fail given that a victim's testimony 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. This Court has upheld a defendant's conviction for aggravated rape where there was no physical evidence of the offense, and the jury heard about the alleged animosity between the defendant and the victim's father, noting that the victim's testimony was enough to sustain the defendant's conviction. State v. Hernandez, 14-863 (La. App. 5 Cir. 9/23/15), 177 So.3d 342, writ denied, 15-2111 (La. 12/5/16), 210 So.3d 810.

In addition, a victim's testimony need not be uncontradicted to support a conviction. The resolution of conflicting or contradictory testimony is one of the fundamental tasks for the trier of fact, who may accept or reject, in whole or in part, the testimony of any witness. *See* State v. Bailey, 04-85 (La. App. 5 Cir. 5/26/04), 875 So.2d 949, 955, writ denied, 04-1605 (La. 11/15/04), 887 So.2d 476, cert. denied, 546 U.S. 981, 126 S.Ct. 554, 163 L.Ed.2d 468 (2005). The contradictions among witness testimony noted by defendant are not irreconcilably inconsistent with C.B.'s testimony that defendant vaginally penetrated her and sucked on her breasts. An appellate court cannot re-evaluate the credibility of witnesses or re-weigh the evidence. State v. Caffrey, 08-717 (La. App. 5 Cir. 5/12/09), 15 So.3d 198, 202, writ denied, 09-1305 (La. 2/5/10), 27 So.3d 297.

Further, C.B.'s disclosure of the abuse was supported by evidence beyond her testimony. The State presented evidence through text messages, videos, and photographs. The jury also heard from C.B.'s friend that she told him of the first incident and alluded to other incidents. The jury heard C.B. retell her version of

events multiple times with the recorded interviews, which were consistent with her previous statements.

The jury heard all testimony in this matter and obviously found C.B.'s version of the events credible. This Court should not second guess that credibility determination. State v. Simon, 10-1111 (La. App. 3 Cir. 4/13/11), 62 So.3d 318, 323, writ denied, 11-1008 (La. 11/4/11), 75 So.3d 922. Accordingly, considering the law and the evidence admitted at trial, we conclude that a rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could have found beyond a reasonable doubt that the evidence was sufficient under the standard set forth in Jackson to support defendant's convictions of sexual battery of a juvenile under thirteen, indecent behavior with a juvenile under thirteen, and indecent behavior with a juvenile. Accordingly, defendant is not entitled to a judgment of acquittal.

Non-unanimous Verdict

Defendant alleges that the jury verdict for his convictions on counts two and three, indecent behavior with a juvenile under thirteen and indecent behavior with a juvenile, are invalid because they were rendered by a non-unanimous jury, and that the non-unanimous verdict violates the Sixth and Fourteenth Amendments of the United States Constitution. Because the punishment for these offenses is imprisonment for more than six months, a jury of twelve persons was required.[7] See La. Const. Art. I, §17; La. C.Cr.P. art. 782; La. R.S. 14:81. 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

[7] Defendant was found guilty of sexual battery of a juvenile under thirteen years of age (count one), which has a penalty of imprisonment at hard labor for not less than twenty-five years nor more than ninety-nine years ; and indecent behavior with a juvenile under thirteen years of age (count two), which has a penalty of imprisonment at hard labor for not less than two nor more than twenty-five years, and indecent behavior with a juvenile (count three), which has a penalty of a fine of not more than five thousand dollars, or imprisonment, with or without hard labor, for not more than seven years, or both. La. R.S. 14:81. Given the potential penalty for all three counts is more than six months imprisonment, a jury of twelve persons was required for each count.

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. 03/17/09), 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. 04/19/13), 111 So.3d 1030.

However, recently the United States Supreme Court in Ramos v. Louisiana, *supra*, 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. [8] Id. at 1397. As a result of this decision, all defendants who were convicted of serious offenses by non-unanimous juries and whose cases are still pending on direct appeal will be entitled to a new trial. The State contends that count one should be affirmed because the record indicates a unanimous verdict on that count, but acknowledges that this assignment of error has merit as to counts two and three because there was a ten to two verdict on these counts.

Based on Ramos, and that the instant case is on direct appeal,[9] we find that because the verdict was not unanimous for these serious offenses as required by Ramos, defendant's convictions and sentences for counts two and three are vacated and the matter is remanded to the trial court for further proceedings.

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[8] 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).

[9] 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.").

Assignment of Error Three

Defendant further alleges that the State's rebuttal closing argument was improper because it mischaracterized testimony from Dr. Hue (the emergency room doctor) as the defense expert who diagnosed C.B. as having suffered sexual abuse. He argues that the trial court erred in not sustaining defendant's objection because the misleading comment made a fair trial and fair assessment of the evidence unlikely. Defendant also contends that the error was not harmless because it was so prejudicial and depicted defendant as a child sex abuser. The State contends that the statements were accurate because Dr. Hue stated that her encounter diagnosis was sexual assault with rape and that her diagnosis was based on C.B.'s complaint.

The prosecutor has considerable latitude in making closing arguments; but, this latitude has limits. State v. Pierce, 11-320 (La. App. 5 Cir. 12/29/11), 80 So.3d 1267, 1277. La. C.Cr.P. art. 774 confines argument to the evidence admitted, the lack of evidence, conclusions of fact that the state or defendant may draw therefrom, and the applicable law.

The trial judge has broad discretion in controlling the scope of closing arguments. State v. Greenup, 12-881 (La. App. 5 Cir. 8/27/13), 123 So.3d 768, 775-76, writ denied, 13-2300 (La. 3/21/14), 135 So.3d 617. A conviction will not be reversed based on improper remarks during closing arguments unless the reviewing court is thoroughly convinced that the remarks influenced the jury and contributed to the verdict. Id. A mistrial is a drastic remedy and is warranted only when trial error results in substantial prejudice to the defendant that deprives him of a reasonable expectation of a fair trial. State v. Pierce, 11-320 (La. App. 5 Cir. 12/29/11), 80 So.3d 1267, 1277.

In the instant case, defense counsel objected to the State's rebuttal argument. Specifically, the prosecutor stated:

> Counsel wants to ask about proof. Let's talk about this. Every single professional who handles these cases every single day of their lives came in and told you that this is real. Their own expert told you that her diagnosis, after she came in, was child sexual abuse. And what did her –

Defense counsel objected, asserting that "She testified the opposite." The judge overruled the objection, and at no time did defendant request the trial court to admonish the jury or request a mistrial.

Upon review, the record does not support concluding that the prosecutor's remarks mischaracterized Dr. Hue's testimony. On direct examination, defense counsel asked to read the encounter diagnosis from a copy of her medical report after C.B.'s exam, to which Dr. Hue responded sexual assault with rape. Defense counsel asked if that was her diagnosis, and she stated, "That was my diagnosis not based on my exam findings but based on her complaint because I didn't find anything on exam to diagnose otherwise." Counsel then asked if the term "encounter diagnosis" meant the diagnosis was not based on the exam. Dr. Hue explained that if she cannot find a cause for their symptoms, their diagnosis is still going to be what they told me brought them in for medical attention. Thus, the jury heard sufficient explanation regarding Dr. Hue's diagnosis and the basis for her diagnosis.

In addition, we do not find that this statement was so prejudicial as to warrant a mistrial. First, the prosecutor simply reiterated a statement made by a doctor, and the doctor explained the meaning of terminology used during her testimony. Second, the trial judge instructed the jury that "The statements and arguments made by the lawyers are not evidence" and "The opening statements and the closing statements are not to be considered as evidence." Third, defense counsel did not request a mistrial or an admonition under La. C.Cr.P. art. 771.

In light of the foregoing, we find that the trial judge properly overruled defense counsel's objection and that this assignment of error lacks merit.

ERRORS PATENT

We have reviewed the record for errors patent, according to La. C.Cr.P. art. 920; State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). On review, we find two patent errors requiring this case be remanded to the trial court.

First, La. R.S. 15:540, *et seq.*, requires registration of sex offenders and La. R.S. 15:543(A) requires the trial judge to provide written notification of the registration requirement of La. R.S. 15:542 and La. R.S. 15:542.1 to the defendant. The trial court informed defendant that he was required to comply with the sex offender notification/registration requirements, but the Uniform Commitment Order (UCO), under the Sentence Conditions section, does not indicate that these provisions are applicable. Thus, we remand this matter for the trial court to correct the UCO to reflect that defendant shall comply with the sex offender registration requirements, and the Clerk of Court for the Twenty-Fourth Judicial District Court to send the corrected UCO to the appropriate authorities and the Department of Corrections' legal department. La. C.Cr.P. art. 892(B)(2); State v. Carriere, 19-366 (La. App. 5 Cir. 12/26/19), 289 So.3d 149, 153.

Second, we note that the UCO does not include the trial court's recommendation that defendant be allowed to participate in "any self-help and/or work release programs" that may be available to him. Where there is a conflict between the transcript and the minute entry, the transcript prevails. State v. Lynch, 441 So.2d 732, 734 (La. 1983). Accordingly, we remand the case for correction of the UCO to reflect the court's recommendation for any self-help and/or work release programs available to defendant, and direct the Clerk of Court to transmit the corrected UCO to the appropriate authorities as well as to the Louisiana Department of Public Safety and Corrections' legal department. La. C.Cr.P. art. 892(B)(2); State v. Vance, 17-72 (La. App. 5 Cir. 8/30/17), 225 So.3d 1192, 1196.

DECREE

For the reasons stated above, we affirm defendant's conviction and sentence on count one, but vacate defendant's convictions and sentences based on non-unanimous jury verdicts on counts two and three, and remand this matter for further proceedings.

AFFIRMED IN PART; VACATED IN PART; REMANDED

APPENDIX – D

SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO. _____

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

STATE OF LOUISIANA

VS.

RAFAEL ARTURO COTO CHINCHILLA

Applicant: **Rafael A. C. Chinchilla**
Have there been any other filings in this Court in this matter? [ ] Yes [X] NO
Are you seeking a Stay Order? **No**
Priority Treatment? **No**
If so you MUST complete & attach a Priority Form

LEAD COUNSEL/PRO SE LITIGANT INFORMATION

APPLICANT:

Name: **Rafael A. C. Chinchilla #747756**
Address: **Rayburn Correctional Center**
Highway 21
Angie, LA. 70426-3030

Phone No. _____ Bar Roll No. _____

RESPONDENT:

Name: **Adrian Adams, Judge**
Address: **24th Judicial District Court**
200 Derbigny Street
Gretna, Louisiana, 70054

Phone No. _____ Bar Roll No.

Pleading being filed: [X] In proper person, [ ] In Forma Pauperis
Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

[ ] Civil, [X] Criminal, [ ] Bar, [ ] Civil Juvenile, [ ] Criminal Juvenile, [ ] Other

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____ Docket No._____
Judge/Commissioner/Hearing Officer: _____ Ruling Date: _____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: **24th Judicial District / Jefferson** Docket Number: **17-1472**

Judge and Section: **Adrian Adams – Division "G "** Date of Ruling/Judgment: **Direct Appeal**

APPELLATE COURT INFORMATION

Circuit: **Fifth** Docket No. **20-KA-60**

Action: **Affirmed in part; Vacated in part; Remanded**

Applicant in Appellate Court: **Rafael A. C. Chinchilla** Filing Date: **Timely** Ruling Date: **12/ 23/ 20**

Panel of Judges: **SJW, RAC, JJM** En Banc: [ ]

REHEARING INFORMATION

Applicant: _____ Date Filed: _____ Action on Rehearing:
Ruling Date: _____ Panel of Judges: _____ En Banc: [ ]

PRESENT STATUS

[ ] Pre-Trial, Hearing/Trial Scheduled date: **N/A**, [ ] Trial in Progress, [X] Post Trial
Is there a stay now in effect? **No.** Has this pleading been filed simultaneously in any other court? **No.**
If so, explain briefly

VERIFICATION

I, *Rafael Arturo Coto Chinchilla*, hereby certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

_____ _____
DATE RAFAEL ARTURO COTO CHINCHILLA

SUPREME COURT
STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

RAFAEL ARTURO COTO CHINCHILLA

Louisiana Fifth Circuit Court of Appeals,
Judgment rendered December 23, 2020, Under Docket Number 20- KA-60

24th Judicial District Court, Parish of Jefferson
Under Docket Number 17-1472

APPLICATION FOR WRIT OF CERTIORARI

Respectfully Submitted,

Rafael Arturo Coto Chinchilla #747756
Rayburn Correctional Center
27268 Highway 21, North
Angie, Louisiana 70426-3030

INDEX

MAY IT PLEASE THE COURT:

STATEMENT OF WRIT GRANT CONSIDERATIONS

Petitioner seek writs with this Honorable court, because the trial court of the 24th Judicial District Court, Parish of Jefferson and the Louisiana Fifth Circuit Court of Appeals erroneously interpreted and misapplied the United States Constitution, laws of this State, and applicable statutes in this case. The decisions made by the trial court and the appellate court has caused a great material injustice in this case and requires this court's attention.

STATEMENT OF CASE

On July 18, 2017, the Jefferson Parish District Attorney filed a bill of information charging petitioner, Rafael Arturo Coto Chinchilla, with sexual battery of a juvenile under thirteen in violation of *La. R.S. 14:43.1* (count one), indecent behavior with a juvenile under thirteen in violation of *La. R.S. 14:81* (count two), and indecent behavior with a juvenile in violation of *La. R.S. 14:81* (count three), all involving the same victim. Petitioner pled not guilty.

Jury selection and trial began on August 26, 2019, and trial before a twelve-person jury concluded on August 30, 2019. The jury unanimously found petitioner guilty as charged on count one, but found defendant guilty as charged by a ten to two concurrence on counts two and three. On September 12, 2019, the trial court sentenced petitioner to sixty years imprisonment at hard labor on count one, twenty-five years of the sentence to be served without the benefit of parole, probation, or suspension of sentence. Petitioner was informed that, as to count one, upon release, he must register as a sex offender for the duration of his life and conform to all of the rules, regulations, and terms of the sex offender registration laws. On count two, the trial court sentenced petitioner to twenty years imprisonment at hard labor, ten years of the sentence to be served without the benefit of parole, probation, or suspension of sentence. As to count three, petitioner was sentenced to seven years imprisonment at hard labor. The trial court ordered the sentences to run concurrently.

ASSIGNMENT OF ERRORS

1) The evidence in the instant case was insufficient to support a guilty verdict on all three counts of the bill of information.
2) The trial court erred in failing to sustain the objection during rebuttal closing arguments when the prosecutor mischaracterized the emergency room doctor's testimony, mislead the jury, and tainted the outcome of the trial.

SUMMARY OF THE ARGUMENT

The trial and appellate courts erred by not overturning the jury's verdicts on all three counts which were based on substantial insufficient evidence. The trial and appellate courts also erred in failing to sustain the objection during rebuttal of closing arguments when the prosecutor mischaracterized the emergency room doctor's testimony, which mislead the jury, and tainted the outcome of the trial.

LAW AND ARGUMENT

ASSIGNMENT OF ERROR #1

In the present case, the evidence was insufficient to prove the elements of the crimes charged. *La. C.Cr.P. art. 821*, paragraph B, presents a codification of the *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) standard.

In *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the United States Supreme Court set out the standard by which appellate courts are to review the sufficiency of the evidence in criminal prosecutions:

> *"...the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of the fact could have found the essential elements of the crime beyond a reasonable doubt."*

Also see *State v. Matthews*, 375 So.2d 1165 (La. 1979). In reviewing the sufficiency of the evidence to support a criminal conviction, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the court to determine whether the evidence is minimally sufficient. A complete reading of the transcript of this trial shows that the state failed to meet the burden of proof enunciated by the Supreme Court in *Jackson v. Virginia*.

In *State v. Dixon*, 620 So.2d 904 (La. App. 1st Cir. 1993), the First Circuit explained:

> *"The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt."*

The rule regarding circumstantial evidence is set forth in *La. R.S. 15:438* as follows:

> *"...assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."*

Ultimately, all the evidence in the record, viewed in a light most favorable to the state, must satisfy the reviewing court that a rational trier of fact could have found the defendant guilty of the crime for which he was convicted, beyond a reasonable doubt. *State v. Perow*, 616 So.2d 1336 (La. App. 3rd Cir. 1993). The circumstantial evidence rule is a component of the reasonable doubt standard. On appeal, the issue is whether a rational trier of fact, viewing the evidence in a light most favorable to the state, could find that all reasonable hypothesis of innocence was excluded.

In order for the State to obtain a conviction, it must prove the elements of the crime beyond a reasonable doubt. In this case, the entire case rested on the allegations made by C.B. on the very day her mother married a man other than her father. There was absolutely no physical evidence in this case. The Emergency Room Doctor, Dr. Tessa Hue, who initially examined C.B. testified she found no evidence to support the allegations made by C.B. that the petitioner had kissed her breasts. Dr. Hue saw no bruising or redness around the breast. She testified any marks she did not see could have been stretch marks from recent growth or marks from a poor fitting bra. Dr. Hue saw no evidence of bite marks, lacerations, bruising, or hickies on C.B.'s breasts. The physical examination at Children's Hospital also found no physical evidence of abuse, but Dr. Mehta and Department of Child and Family Services found it to be a valid claim. Dr. Mehta testified that any marks on C.B.'s breasts had no "medical or forensic value." (Rec. pp. 911-81, 1112-36, 1346-76).

C.B. claimed a video showing her yelling at the petitioner for calling her names was evidence that he had just kissed her breasts, and somehow this was evidence for the third count. (Rec. pp. 1137-80). She also alleged the petitioner had kissed her breasts once before and that was the entirety of the evidence presented by the state for the second count. C.B. also alleged that some time in August 2015, the first alleged assault, and one of the few times the petitioner was ever alone with C.B., he entered her bedroom while her mother was getting some tax documents. This lie could have been contradicted and/or countered, because it is a well known fact taxes are done at the beginning of the year and not in the summer. C.B. claimed the petitioner forced himself on her and she punched and kicked him so much they fell off the bed.

C.B. further testified that the petitioner forcibly took her clothes off and inserted his penis into her vagina one time and then withdrew and walked away. No one else in the household testified to any bruising, destroyed property, or torn clothing. C.B.'s testimony was all the evidence presented in the first count as well. (Rec. pp. 1279-1337).

By the time of trial, C.B.'s mother, Yamilet Perez-Rivero, no longer believed her daughter's allegations. All state witnesses agreed that Ms. Perez had fully supported and participated in the investigation of her daughter's allegations against her new husband. She brought C.B. to all appointments and took the matter very seriously. The first and most serious account was alleged to have occurred when Ms. Perez was out acquiring documents for the Internal Revenue Service in 2015. In their presentation of evidence to the jury on this very serious count, the state did not even provide any evidence from the Internal Revenue Service showing Ms. Perez needed to provide additional documentation in 2015. Even though she no longer believed her daughter's allegations, Ms. Perez had cooperated fully with the police and the state all along and it can be reasonably assumed she would have provided these documents to the state and the defense if they existed and she could have provided even the scantest corroboration of C.B.'s claims. (Rec. pp. 1016-42, 1043-98, 1112-36, 1137-80).

Unfortunately, the trial court did not see the flawed proof and lack of evidence to convict the petitioner beyond a reasonable doubt. C.B. was the only one making any claims and no evidence or corroboration was gathered beyond that. The defense introduced several lewd *Instagram*™ and *Snapchat*™ messages between C.B. and her classmate and friend Axel Salazar Garcia, which also never proved anything had happened. (Rec. pp. 1217-70, 1279-1337, 1338-45). Most telling was that Axel was a state witness in this case and had not been charged with carnal knowledge or any other crime with C.B. when she was underage based solely on social media messaging and texts because it simply does not prove anything actually happened. The jury and the trial court failed to legitimately hold the state to its burden to prove all of the elements of the crime and to prove them beyond a reasonable doubt. Any and all reasonable doubts must be decided in favor of Rafael Chinchilla, the petitioner; and not the state. The evidence was insufficient in this case to support the requisite elements beyond a reasonable doubt. The state did not meet this burden in trial, in direct appeal, and certainly not now.

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Louisiana jurisprudence has long held that impeached testimony, as a general rule, is not sufficient to sustain a conviction. *State v. Chism*, 591 So.2d 383, 386 (La. App. 2 Cir. 1991) citing *State v. Laprime*, 437 So.2d 1124 (La. 1983).

The State's entire case rested on the uncorroborated allegations made by C.B. on the very day her mother married a man other than her father.

However, not only were C.B.'s allegations uncorroborated, C.B. was impeached in several regards.

First, C.B. made statements and went to great lengths to try to portray the impression that her, Yamilet, ceased attempting to contact her. C.B. testified that her mother never calls her or sees her anymore. (Rec. p. 1311). C.B. further testified that she wished her mother was still in her life. (*Id.*)

However, C.B.'s mother testified that she has repeatedly tried to contact her daughter, but that her calls have gone unanswered and unreturned. (Rec. p. 1088). Yamilet has even had other people attempt to contact her daughter on her behalf, to no avail. (*Id.*)

C.B. also claimed she had no idea petitioner and her mother were getting married anytime soon. (Rec. p. 1308). Yet C.B.'s mother testified that C.B. knew at least two weeks prior to her making her allegations that she and the petitioner were getting married. (Rec. pp. 1090-91). In fact, C.B. was with the petitioner and her mother when they went to the courthouse the first time. (*Id.*)

It is also not insignificant that the person C.B. allegedly made the allegations to, her father, apparently lied at trial to conceal his animosity towards petitioner. C.B.'s father, Haile Benitez, adamantly denied ever referring to petitioner using derogatory racial slurs, such as "Indio, Palestine," or "Guajido." (Rec. pp. 811-12). However, both C.B.'s mother and uncle testified that Haile often used these derogatory names when referring to the petitioner. (Rec. p. 1083; Rec. p. 1383).

C.B.'s father also apparently lied about the circumstances when he, C.B., and Yamilet ever asked him to sign a release so she and C.B. could immigrate to the United States.[1] (Rec. p. 802). According to C.B.'s father, he and Yamilet "agreed to come together to the United States and mutually help one another with the girl." (Rec. p. 803). However, C.B.'s uncle, who left Cuba after C.B., her father, and her mother, told the jury that C.B.'s father refused to sign the

[1] Under Cuban law, both parents of a child must sign a release before the child can emigrate. (Rec. pp. 1386-87).

release for C.B. unless he and Yamilet did paperwork that allowed him to leave Cuba as well. Rec. p. 1387). When asked how would he characterize C.B.'s father's refusal to sign C.B.'s release, C.B.'s uncle replied, "He saw it as an opportunity to benefit himself." (Rec. p. 1388).

Additionally, the video C.B. recorded on her phone after the alleged third incident impeaches C.B.'s account more than it corroborates it. The interpreter told the jury that C.B. stated in this video, "Don't call me like that anymore, Jonathan. Leave me alone. Shut up." (Rec. p. 1164). When defense counsel asked Detective Foltz whether C.B. sounded frightened on the video or just upset, Detective Foltz responded, "It's fair to say she was just upset." (Rec. p. 1188). The point is that in the video, C.B. sounds like an emotional teenager in an argument with a parent, not someone who she just fended off an attempted molestation. C.B.'s choice of words in the video also contradicts her allegation of what transpired immediately prior. Notably, C.B. does not say, "Stay out of my room," or "Don't touch me like that/again," or "Keep your hands off me," or "I'm going to tell mom," or indeed anything that suggests she was just molested. No, instead she said, "Don't call me like that anymore Jonathan. Leave me alone. Shut up." The State would have been better off not even playing this video.

There is also the fact that none of the improper texts C.B. alleged petitioner sent to her were recovered from the petitioner's phone. C.B. claimed petitioner sent her text messages stating that he loved her and that she would kill her if her saw her with anyone else. (Rec. p. 1283). C.B. also allegedly took a screenshot of a message from the petitioner that states, "I cannot contain the needs and desires for us to make love. Erase or delete." (Rec. p. 1257). However, petitioner voluntarily turned over his phone to police. Detective Solomon Burke testified that he is the supervisor for the digital forensics unit of the Jefferson Parish Sheriff's Office. Detective Burke personally extracted the data from the petitioner's phone, but was unable to locate a single incriminating text from petitioner's phone. (Rec. pp. 1252-63).

The State got almost every single one of its witnesses to express their opinion as to C.B.'s veracity. Besides the fact that this was highly improper and defense counsel was ineffective for allowing it to go the extent that it did, these witness's opinions as to C.B.'s credibility cannot be considered as substantive evidence of petitioner's guilt. After the persistent victim bolstering testimony is removed, all the State has left is the uncorroborated, impeached testimony of the alleged victim, C.B. Petitioner respectfully submits that under Louisiana jurisprudence C.B.'s impeached testimony is not sufficient to sustain a verdict of guilty on all three counts.

ASSIGNMENT OF ERROR #2

The prosecutor in rebuttal closing arguments was refuting the defense argument that the first doctor to see C.B. found no evidence of sexual abuse, but since the allegation was made, she had to report it to police as a matter of law. The state mischaracterized the evidence presented by saying Dr. Hue who was the defense's expert who diagnosed C.B. as having child sexual abuse. This was misleading to the jury and an overreach by the prosecutor mischaracterizing the testimony. The trial court failed to sustain the defense's objection. Dr. Hue had to report this as child sexual abuse because an allegation was made. It was a forgone conclusion mandated by law before her exam and expertise was ever applied to the case. Dr. Mehta, the expert in child abuse at Children's Hospital, also found no physical evidence that had any "medical or forensic value" but based on other factors in her expertise she found a valid claim was made. Her testimony was vastly different from what Dr. Hue found yet had to report by law. The prosecutor mischaracterized the testimony of Dr. Hue and clearly mislead the jury. (Rec. pp. 911-81, 1346-76, 1464-6).

La. C.Cr.P. art. 774 requires that closing arguments at trial be confined "to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." *State v. Smallwood*, 20 So.3d 479, 489 (La. App. 5 Cir. 7/28/09). *State v. Robertson*, 995 So.2d 650, (La. App. 5 Cir. 10/28/08). Closing arguments shall not appeal to prejudice. *Id at 659*. A prosecutor has considerable latitude in making closing arguments. *State v. Jackson*, 880 So.2d 69 (La. App. 5 Cir. 7/27/04). However, prosecutors may not resort to personal experience or turn their arguments into a referendum on crime. *Robertson, at 659-60.*

The trial judge has broad discretion in controlling the scope of closing arguments. *Robertson at 660*. A conviction will not be reversed due to improper remarks during closing arguments unless the reviewing court is thoroughly convinced that the remarks influenced the jury and contributed to the verdict. *Id.* (*citing Jackson*, 04-293 at 5-6, 880 So.2d 69 at 73). In making its determination, the appellate court should give credit to the good sense and fair-mindedness of the jury that has seen the evidence and heard the argument, and has been instructed that the arguments of counsel are not evidence. *Id.*

In addition, assuming the prosecutor's argument was improper, reversal is not required when such error was limited and did not show significant impact on the outcome of the case.

State v. Huckaby, 809 So.2d 1093 (La. App. 4 Cir. 2/6/02), *State v. Francis*, 665 So.2d 596, 604, (La. App. 5 Cir. 11/28/95); and *State v. Foster*, 33 So.3d 733, 741-3 (La. App. 5 Cir. 6/29/10).

The trial court should have stemmed the damage by sustaining the objection. (Rec. pp. 1464-6). Once the jury heard this misleading comment from the prosecutor, the nearly unavoidable inference made a fair trial and fair assessment of the evidence unlikely since the petitioner was accused of a sex crime against a juvenile.

The error was not harmless because the verdict was not solely unattributable to the error. Louisiana adopted the federal test for harmless error enunciated in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The test in Chapman is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24; 97 S.Ct. at 828. *Chapman* was refined in *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The *Sullivan* inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in tis trial was surely unattributable to the error." *Id.*, 113 S.Ct. at 2081.

In the present case, the error in not sustaining the objection was not harmless because it was so prejudicial and depicting the petitioner as a child sex abuser. The state implied to the jury that since "all" experts diagnosed sexual abuse they can therefore find the petitioner a sex abuser based on all of these doctor's expertise. Dr. Hue only testified she had to report and diagnose the claims because a claim was made by a juvenile. Her investigation showed no evidence of sexual abuse. Perhaps this was why the state did not call the first doctor to see C.B. as a witness. The state tried to mitigate her testimony after the fact by mischaracterizing it in rebuttal closing arguments, when the defense can no longer correct the mislead. The jury's verdict can not be considered "unattributable" to this error.

CONCLUSION

WHEREFORE, Rafael Arturo Coto Chinchilla, pro se and in proper person, respectfully requests that, following all reasonable delays and due proceedings had, this Honorable Court grant relief in the foregoing entitled matter, in accordance with the foregoing discussion and applicable jurisprudence.

PRAYER

WHEREFORE Petitioner PRAYS that this foregoing Application for Writ of Certiorari be granted and a reversal be warranted herein.

Respectfully Submitted,

Rafael Arturo Coto Chinchilla # 747756
Rayburn Correctional Center
27268 Highway 21, North
Angie, Louisiana 70426-3030

VERIFICATION

I, *Rafael Arturo Coto Chinchilla*, do hereby declare under penalty of perjury that the foregoing facts contained herein are true and correct to the best of my knowledge and belief and the foregoing has been forwarded to the District Attorney in and for the 24th Judicial District Court, Parish of Jefferson, State of Louisiana this _____ day of January, 2021, Angie, Louisiana 70426-3030.

Rafael Arturo Coto Chinchilla

APPENDIX – E

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS.

No. 2021-KO-00274

RAFAEL ARTURO COTO CHINCHILLA

IN RE: Rafael Chinchilla - Applicant Defendant; Applying For Writ Of Certiorari, Parish of Jefferson, 24th Judicial District Court Number(s) 17-1472, Court of Appeal, Fifth Circuit, Number(s) 20-KA-60;

April 27, 2021

Writ application denied.

JTG

JLW

SJC

WJC

JBM

PDG

Hughes, J., would grant.