APPENDIX

APPENDIX INDEX

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 31, 2023
Lyle W. Cayce
Clerk

No. 21-30638

TERRY L. TERRY,

Petitioner—Appellant,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary*,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:18-CV-812

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

In 2010, Terry L. Terry was convicted of three counts of juvenile molestation in violation of LA. REV. STAT. § 14:81.2. Presently before us is Terry's appeal of the denial of his § 2254 petition challenging those convictions and his sentence—specifically, his claim on appeal that the evidence at trial was legally insufficient for a conviction on the last count. Mindful of the high threshold of deference for federal habeas proceedings and the corroborating evidence available at trial, we find that the state court was not objectively unreasonable in rejecting Terry's sufficiency challenge. Accordingly, we AFFIRM.

I.

Having been molested by Petitioner Terry L. Terry as children, Terry's two, now adult, daughters, A.L. and T.C., became concerned when they learned in 2008 that Terry had remarried and now lived in the same house with two young children. Afraid that Terry might repeat his behavior, A.L. and T.C. contacted the Department of Children and Family Services (DCFS),[1] but were told that DCFS could do nothing about the children in Terry's care unless they pressed charges. A.L. called the police to file a complaint against Terry on June 16, 2008. It was discovered that Terry's nephew's children were staying with him. In response to A.L.'s complaint and in conjunction with law enforcement, DCFS scheduled interviews on June 19, 2008, for the children with the Gingerbread House, a children's advocacy nonprofit whose main purpose is to conduct forensic interviews of children who are suspected of having been physically or sexually abused.

During her interview, the youngest of Terry's nephew's three children, S.B., disclosed that she had been "squeezed" and "pinched" in the butt and the vagina by "Terry Terry Terry." S.B. also explained that the touching occurred underneath her clothes, while she had gone to bed, and that such touching occurred more than once. The next day, a brief follow-up interview was conducted of S.B., during which the interviewer clarified where the touching occurred. Terry was subsequently arrested.

The State of Louisiana charged Terry with three counts of juvenile molestation: Count I alleged that Terry molested his daughter, A.L., during 1985 to 1994; Count II alleged that Terry molested his daughter, T.C., during

[1] In testimony, A.L. referred to DCFS instead as the Office of Child Services.

1990 to 1994; and Count III, the subject of the instant appeal, alleged that Terry molested his grandniece, S.B., in 2008.

At trial, the jury heard the Gingerbread House interviews, as well as testimony from law enforcement, DCFS, the Gingerbread House employee who had interviewed S.B., an expert witness who had examined S.B. and found signs of sexual abuse, Terry's daughters A.L. and T.C., S.B. herself, as well as S.B.'s biological parents, Terry's wife, and various other family members. The jury convicted Terry on all three counts, and Terry was sentenced to concurrent 15-year prison terms on the first two counts and a concurrent 50-year prison term on the last. These convictions and sentences were affirmed on direct appeal by the Louisiana Second Circuit Court of Appeal, and the Louisiana Supreme Court denied Terry's writ application. *State v. Terry*, 47,425 (La. App. 2d Cir. 2012); 108 So. 3d 126, *writ denied*, 2012-2759 (La. 6/28/13), 118 So. 3d 1096.

Terry, proceeding *pro se*, sought post-conviction relief in state court and advanced, *inter alia*, a claim that the evidence was insufficient to support his conviction on Count III. The First Judicial District Court of Louisiana dismissed Terry's sufficiency-of-the-evidence claim as repetitive and ultimately denied Terry's petition as to all of his claims. The Louisiana Second Circuit Court of Appeal and Louisiana Supreme Court both denied Terry's resulting petition for supervisory review.

In 2018, still proceeding *pro se*, Terry filed a § 2254 petition raising several claims for relief—including, as relevant here, a claim that the trial evidence was legally insufficient to convict him on Count III. The district court adopted the magistrate judge's recommendation in full, denying Terry's § 2254 petition but granting a Certificate of Appealability as to the sufficiency of the evidence on Count III. Terry timely appealed.

Again proceeding *pro se*, Terry filed both an opening and reply brief in the instant appeal. He was then appointed counsel on November 29, 2022, and submitted a supplemental brief.

II.

Before turning to the evidence presented at trial, we begin by noting the proper legal standards that guide our review. "In a habeas corpus appeal, we review the district court's findings of fact for clear error and its conclusions of law *de novo*, applying the same standards to the state court's decision as did the district court." *Jenkins v. Hall*, 910 F.3d 828, 832 (5th Cir. 2018) (citation omitted).

"The Anti-Terrorism and Effective Death Penalty Act ('AEDPA') governs a federal habeas court's review of a state prisoner's claims that were adjudicated on the merits in state court." *Fields v. Thaler*, 588 F.3d 270, 273 (5th Cir. 2009) (citing 28 U.S.C. § 2254(d)). AEDPA "imposes important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases." *Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (per curiam). Indeed, under AEDPA, "federal courts cannot grant relief unless the state adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,'" or it "'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Reeder v. Vannoy*, 978 F.3d 272, 276 (5th Cir. 2020) (quoting 28 U.S.C. § 2254(d)(1)-(2)).[2] In other words, "[t]o satisfy the standards of § 2254(d), a state prisoner must show that the state court's ruling on his claim 'was so

[2] Notably, a state court's determination of a factual issue must be presumed to be correct unless the petitioner rebuts the presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Miller v. Thaler*, 714 F.3d 897, 901 (5th Cir. 2013) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

This standard is intentionally "difficult to meet," because it reflects the view that habeas corpus does not serve as a "substitute for ordinary error correction through appeal" but rather "guard[s] against extreme malfunctions in the state criminal justice systems." *Harrington*, 562 U.S. at 102-03 (citation omitted); *see also Boyer v. Vannoy*, 863 F.3d 428, 440-41 (5th Cir. 2017).

Here, Terry seeks postconviction habeas relief on sufficiency-of-the-evidence grounds, which is governed by the standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *West v. Johnson*, 92 F.3d 1385, 1393 (5th Cir. 1996). Per *Jackson*, it is not the reviewing court's role to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt," but to ask, instead, "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*, 443 U.S. at 318-19 (internal quotations and citations omitted). Relief "[u]nder section 2254 . . . 'on a claim of insufficient evidence is appropriate only if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.'" *Ramirez v. Dretke*, 398 F.3d 691, 694 (5th Cir. 2005) (quoting *West*, 92 F.3d at 1393).

"This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. In reviewing the record, courts do not "reevaluate the weight of the evidence or . . . the credibility of the witnesses," *United States v. Fields*,

977 F.3d 358, 363 (5th Cir. 2020) (quoting *United States v. Bowens*, 907 F.3d 347, 350 (5th Cir. 2018)) (alteration in original). Nor is it "necessary that the evidence exclude every reasonable hypothesis of innocence; the jury is free to choose among reasonable constructions of the evidence." *Id.* (quoting *United States v. Pennington*, 20 F.3d 593, 597 (5th Cir. 1994)).

Thus, a habeas claim brought under *Jackson* is subject to a "twice-deferential" standard. *Parker v. Matthews*, 567 U.S. 37, 43 (2012); *see also Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam) ("We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference."). The first layer of deference is to the jury's determinations at trial. "[O]n direct appeal, 'it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial.'" *Coleman*, 566 U.S. at 651 (quoting *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam)). As to this first stage, reviewing courts apply the *Jackson* standard and "may set aside the jury's verdict on the ground of insufficient evidence *only if no rational trier of fact could have agreed with the jury*." *Cavazos*, 565 U.S. at 2 (emphasis added).

The second layer of deference is to the state court's decision as to the jury's determinations. "[A] state-court decision rejecting a sufficiency challenge may not be overturned on federal habeas unless the 'decision was objectively unreasonable.'" *Parker*, 567 U.S. at 43 (citation omitted); *see also Coleman*, 566 U.S. at 651 ("And second, on habeas review, 'a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court.'" (quoting *Cavazos*, 565 U.S. at 2)).

III.

Terry advances three arguments challenging his conviction for Count III. First, in both his *pro se* and counseled briefing, he argues no rational jury

could find that he was the individual who molested S.B. Second, and in the alternative, he argues in both his *pro se* and counseled briefing that no rational jury could find that the described acts were "lewd or lascivious" as required under the law. Third, he argues that the evidence failed to establish that any molestation occurred in Caddo Parish, Louisiana, as opposed to Mississippi. Notably, this last argument was neither raised nor addressed by counsel in the supplemental briefing.

A.

Terry maintains that the state court[3] unreasonably applied *Jackson* in determining that the evidence presented at trial was sufficient to support his conviction, because Terry was not sufficiently identified by S.B. as the person who touched her. In so arguing, Terry's counsel emphasizes two primary points in the supplemental brief: first, that "the *only* connection in the record to the Petitioner-Appellant by S.B. is her use of the nickname 'Terry Terry Terry,'" which S.B. used to refer to several other people, including her biological father, Jonathan; and second, repeated testimony at trial where S.B. says either that "Jonathan" (her biological father) or her "daddy" touched her. Such evidence, Terry argues, renders unreasonable the state court's conclusions that S.B. "stated that Defendant was the person who did those acts alleged by her" or that S.B. "provided sufficient information to show that she was indeed referring to Defendant and not her biological father" as the perpetrator.

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[3] As the Louisiana Second Circuit Court of Appeal (henceforth, "the state court") was the last court to issue a reasoned decision on Terry's sufficiency claim, this is the relevant state court decision to be reviewed. *See Reeder*, 978 F.3d at 276 n.5 (explaining that "[t]his analysis is applied to the 'last related state-court decision' that provides a 'relevant rationale'" (quoting *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018))).

It is true that S.B., both in her Gingerbread House interviews (at four years old) and at trial (at six years old), gave inconsistent accounts as to who "Terry Terry Terry" was—confirming, at various points, that "Terry Terry Terry" referred to M.B. (S.B.'s biological mother), J.B. (S.B.'s biological father), her two younger brothers, and her daddy's brother (Terry). The inconsistent reference does, admittedly, make some of the testimony confusing. That alone, however, is not dispositive. The uncertainty only begins the inquiry, as the jury was entitled to look to contextual clues as to the identity of "Terry Terry Terry." It is here that Terry overlooks several pieces of identifying and corroborating evidence that would not be unreasonable for the jury—or the trial court—to have considered in reaching its determinations.

First, circumstantial evidence regarding S.B.'s living arrangements could reasonably have furnished support for the jury's conclusion that Terry was the perpetrator. Initially, S.B.'s biological parents sent all three of their biological children (S.B. and her two brothers, N.B. and Justin[4]) to live with Terry.[5] At some point, however, N.B. moved back in with M.B., leaving only

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[4] The boy's first name (Justin) is used in lieu of his initials (J.B.) in order to avoid confusion with S.B.'s biological father Jonathan, who bears the same initials, and will be more extensively referenced as "J.B." throughout this opinion.

[5] Testimony about the reasons for this arrangement conflicted. S.B.'s biological mother, M.B., testified that she had sent the kids to live with Terry because she was having a nervous breakdown, felt like she had no help with the children, and needed time to get on her feet. J.B., S.B.'s biological father, however, testified that the kids stayed with Terry because of financial reasons, namely, that he was not working, and denied that M.B. had experienced a nervous breakdown. Terry's then-wife, Jennifer Terry, testified that J.B. and M.B. had been kicked out of Terry's mother's house and were struggling with housing, and that she had offered to take in both M.B. and the children. According to Jennifer Terry, M.B. chose to stay with J.B. but asked if Terry and Jennifer Terry could take the children without her. Terry similarly suggested that they took in the children because J.B. and M.B. did not have a place to live. Regardless of the reason, the facts show that S.B. was three, almost four, when she went to live with Terry. At first, for ten months to a year, they

the two youngest in Terry's care. At the time the Gingerbread House interview took place, S.B. had been living with Terry, Jennifer Terry (Terry's wife), and Justin for almost two years, since 2006. In her first Gingerbread House interview, S.B. stated that she lived with her "momma, daddy, and Justin." She also stated that her "daddy," named "Terry Terry Terry," is the one who touched her. In light of this evidence, the jury could reasonably have found that the "daddy" with whom S.B. lived and who touched her was, in fact, Terry—a conclusion bolstered both by M.B.'s admission that S.B. called Terry "dad" and by testimony from Terry's sister that S.B. called Terry and Jennifer Terry "mom" and "dad."

Likewise, the timing elements in S.B.'s description of the touching—that it occurred in her bedroom while she was in bed, and occurred more than once (first happening when she was three and again when she was four)—also support the conclusion that Terry was the perpetrator, as during that timeframe, S.B. was not living with her biological father J.B., but was in Terry's custody.

Moreover, Terry's arguments that the record confirms that "Terry Terry Terry" unequivocally referred to J.B. is belied by the actual testimony. It is true that, when asked at trial to whom she had meant to refer when she said during her Gingerbread House interview that "Terry Terry Terry was [her] daddy," S.B. responded "Jonathan" [J.B.] and that she similarly responded "[y]es, sir," when asked whether she meant "Jonathan" when she said that "Terry Terry Terry did things to [her]." But in the same testimony, S.B. also stated that Terry Terry Terry was her "daddy's brother."[6] Terry

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resided in a trailer in Shreveport, Louisiana, before moving to Mississippi, where they lived for several months before Terry's arrest on the present charges.

[6] As to inconsistencies as to whom S.B. was referring when she named her "daddy," the jury could have reasonably found that S.B. referred to Terry as her "daddy"

was therefore at least one of the individuals who S.B. referred to by the moniker "Terry Terry Terry." Indeed, the moniker would seem to apply most naturally to Petitioner, whose first *and* last name is Terry.

These inconsistencies in S.B.'s trial testimony as to Terry Terry Terry's identity are actually similar to the inconsistencies upon which Terry attacks S.B.'s Gingerbread House interview statements; as a result, neither set of statements, in isolation, furnishes conclusive identification.[7] But again, the jury was entitled to consider S.B.'s testimony in context. At the Gingerbread House, S.B. was a four-year-old who was allowed to play with markers while answering questions. At trial, she was a six-year-old being asked to recount, in the formal setting of the courtroom, events that had happened at least two years earlier. Whether due to the temporal gap or S.B.'s relative comfort in the two settings, the jury could have reasonably found that the contemporaneous Gingerbread House statements were more accurate. Further, by the time S.B. testified at trial, she had been living in the custody of J.B. and M.B., her biological parents. The jury, who had the benefit of live testimony in which they could evaluate the tenor, tone, and cadence of each witness's response, could also have reasonably believed that the parents, who expressed that they did not believe S.B.'s allegations and who wanted Terry to avoid conviction, had influenced S.B.'s trial testimony.[8] These are all

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during the time when she lived with him and that, by the time of trial, at which point she had been living with M.B. and J.B., she referred to J.B. as her "daddy."

[7] Although Terry implies in his *pro se* briefing that these inconsistencies render S.B.'s testimony internally contradictory and conflicting, S.B. was a young child both in the Gingerbread House interviews and at trial. The fact that her testimony was at times unclear is thus best understood (and could have reasonably been understood by the jury) to be a function of her age, not her truthfulness.

[8] Although M.B. denied this, there was at least some suggestion that Terry was giving them financial support while the children lived with him. M.B. also testified that they had discussed letting Terry adopt the children.

possibilities that preclude the conclusion that *no rational trier of fact* could have agreed with the conviction. And in any event, ultimately, "discrepancies in witness testimony go to the weight and credibility of the evidence, which [this court] do[es] not review." *United States v. Bowen*, 818 F.3d 179, 188 (5th Cir. 2016).[9]

Second, Terry fails to address other incriminating evidence introduced at trial. For instance, Dr. Ann Springer, a pediatrician at LSU Health Sciences Center and the medical director for the CARA Center,[10] testified as an expert in child abuse medicine. Dr. Springer examined S.B. for signs of sexual abuse on June 19, 2008. She stated that before the examination, she had been informed that S.B. had disclosed in an interview that her caretaker, her great uncle, had "squeeze[d] and pinche[d] her behind and vagina." Dr. Springer's examination revealed chronic redness irritation of the vulva and labia majora, chronic yeast infection, and tissue separation of the hymen consistent with sexual abuse and digital penetration. Based on these findings, Dr. Springer's report indicated physical neglect and sexual abuse.

Critically, Terry does not meaningfully address Dr. Singer's testimony. Though he claims two additional doctors refuted Dr. Springer's opinion (Dr. Lococo and Dr. Taylor), that evidence only came in through the testimony of S.B.'s biological parents M.B. and J.B. The defense never

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[9] The state court's statement that S.B. "stated that Defendant was the person who did those acts alleged by her" could be read to imply that S.B. unequivocally identified Terry at trial, which is not supported by the record. However, this statement would be accurate if, rather than read in isolation, it is read to incorporate the preceding analysis—in other words, if it incorporates the various context clues to reach the conclusion that S.B., when she said that "Terry Terry Terry" and her "daddy" had touched her, was referring to Terry.

[10] The CARA Center provides diagnosis and support for victims and suspected victims of child abuse.

introduced direct testimony from these doctors, nor was Dr. Springer ever asked to share her findings with another medical professional. Faced with such evidence, it would not be unreasonable for the jury to find Dr. Springer's testimony credible.[11]

Third, there is testimony from other professionals involved in the investigation that indicated that Terry's behavior was "surprising" and potentially suspicious. JaLes Washington, a child protection investigator for Caddo Parish who was assigned to S.B.'s case, testified that at the beginning of the investigation, she called Terry to notify him that DCFS needed to see the children due to an allegation of abuse or neglect, but she did not provide any details as to the allegation on that initial call. She did not specify, for instance, whether DCFS was looking into sexual abuse as compared to physical neglect. Washington also testified that Terry would have no reason to believe that he, as opposed to S.B.'s parents, was the subject of the investigation. Shortly after this phone call with Washington, however, Terry called her and left a voicemail in which Terry was "upset" and stated that he had not molested anyone. Washington testified that the voicemail was surprising given that Terry was denying molesting anyone when that allegation had not yet been brought before him. Detective Dorothy Brooks of the Caddo Parish Sheriff's Office corroborated this testimony when she reiterated that Terry was not told any specifics about the allegations during his initial contacts with DCFS.

The defense did elicit testimony from several witnesses, such as S.B.'s biological parents and Terry's then-wife, Jennifer Terry, who testified that

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[11] Although Terry claims that this testimony does not help confirm identity, it could reasonably be viewed by a jury to corroborate the conclusion that S.B. had been molested (which some witnesses disputed) during a time when she was under Terry's care and custody.

they had seen nothing to indicate any abuse and they did not believe the allegations. The mere existence of such testimony, however, is insufficient to clear the demanding hurdle to warrant habeas relief. Terry's challenge is tantamount to a request to re-weigh the evidence and make inferences in his favor, but that is not our role. Particularly when viewed in the light most favorable to the prosecution, the evidence described above would likely suffice for a conviction even under a direct application of *Jackson*, let alone under the twice deferential standard required here. It simply cannot be said that the state court was objectively unreasonable in its determination that the jury had sufficient evidence to convict Terry on Count III.

B.

In the alternative, Terry contends that no rational jury could have found that, even assuming he touched S.B., he engaged in a "lewd or lascivious act." Under Louisiana law, "[a] 'lewd or lascivious act,' for purposes of molestation of a juvenile, is one which tends to excite lust and to deprave morals with respect to sexual relations and which is obscene, indecent, and related to sexual impurity or incontinence carried on in wanton manner." *State v. Redfearn*, 44,709, p. 11 (La. App. 2d Cir. 9/23/09); 22 So. 3d 1078, 1087, *writ denied*, 2009-2206 (La. 4/9/10); 31 So. 3d 381; *see also* LA. REV. STAT. § 14:81.2 (2008). Repeating an argument that he had previously raised in state court, Terry claims in both the *pro se* and counseled briefing that the "described painless squeezing or pinching [of] S.B.'s butt and vagina" does not satisfy Louisiana's definition for "lewd or lascivious."

Though it did not address this argument directly, the state court did reference both the expert's testimony finding that S.B. had been sexually abused and S.B.'s own testimony about what had been done to her and where, which it found "sufficient to prove the elements of the offense."

We agree. The evidence was clearly sufficient for a rational jury to find that the described acts were "lewd and lascivious"—and Terry's alternative explanations do not disturb this conclusion. Terry's counsel's argument, for instance, that it can be normal for adults to "squeeze and pinch" a child's behind under their clothes, flies in the face of common sense. Terry's provided examples of when such behavior might occur—such as when a child needs help with the restroom—are far afield of the facts before us. As the district court correctly noted in rejecting this argument, "[t]here [is] certainly no innocent explanation for such actions."

Equally unavailing is counsel's suggestion that acts must be painful in order to be obscene or indecent. The law does not require that victims must feel pain in order for molestation to qualify as lewd and lascivious, and Terry neither cites case law nor identifies statutory language in support of his argument. Nor is there caselaw support for why evidence that he squeezed and pinched a child's genitals, at night, while that child was in bed, would be insufficient for the jury to find that his conduct was "lewd and lascivious." A rational jury certainly could have found that the described acts were "obscene, indecent, and related to sexual impurity," *see Redfearn*, 44,709 at p. 11; 22 So. 3d at 1087, and thus the state court was not objectively unreasonable in rejecting this claim.

C.

Finally, Terry contends—in his *pro se* briefing only—that the evidence was insufficient to establish that any molestation occurred in Louisiana as opposed to Mississippi.

As a threshold issue, the place of the crime is not an element of the offense of molestation of a juvenile under Louisiana law. *See State v. Rideout*, 42,689, p. 4 (La. App. 2 Cir. 10/31/07); 968 So. 2d 1210, 1212, *writ denied*, 2008-2745 (La. 9/25/09); 18 So. 3d 87. Instead, this issue is one of venue

rather than sufficiency. *Id.* ("[I]f the defendant feels that he is being charged for an offense that occurred in another parish, or that the State cannot prove the venue of the alleged crime, he must raise the issue before trial by a motion to quash, and it must be decided by the court before trial."). Accordingly, this argument must be properly addressed through a motion to quash and not a sufficiency challenge.[12] As Terry has not done so, he fails to preserve this argument.

Even were that not so, the record reflects that a jury could have reasonably found that some or all of the criminal acts against S.B. occurred in Caddo Parish, Louisiana, based on S.B.'s indications in her second Gingerbread House interview that Terry had touched her in a trailer both in Mississippi and "here" (which the jury could reasonably have taken to be Caddo Parish).[13]

IV.

We do not find that the state court was objectively unreasonable in rejecting Terry's claim that there was insufficient evidence to convict him on Count III. Accordingly, we AFFIRM the district court's denial of his § 2254 petition.

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[12] Terry also failed to preserve this argument, as he did not file a motion to quash or otherwise raise a pretrial challenge to the venue.

[13] Again, it was undisputed that S.B. had spent the first year or so living with Terry in Louisiana; S.B. was three, almost four, when she went to live with Terry; and S.B. indicated that she was "three" when the molestation began.

United States Court of Appeals

FIFTH CIRCUIT
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NEW ORLEANS, LA 70130

October 31, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 21-30638 Terry v. Hooper
USDC No. 5:18-CV-812

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

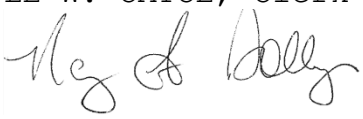
Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Ms. Rebecca Edwards
Mr. Dustin Charles Talbot

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

TERRY L TERRY #584134	CIVIL ACTION NO. 18-cv-812 SEC P
VERSUS	JUDGE FOOTE
DARREL VANNOY	MAGISTRATE JUDGE HORNSBY

JUDGMENT

For the reasons assigned in the Report and Recommendation of the Magistrate Judge previously filed herein, and having thoroughly reviewed the record, including the written objections filed, and concurring with the findings of the Magistrate Judge under the applicable law:

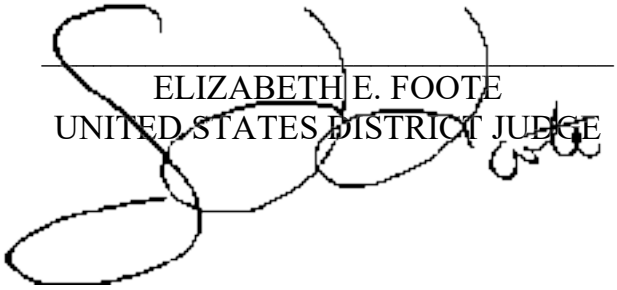
It is ordered that Petitioner's petition for writ of habeas corpus is denied; and

It is further ordered that a certificate of appealability is granted as to the sufficiency of the evidence on count three (molestation of S.B.) pursuant to 28 U.S.C. § 2253(c)(1).

Rule 11 of the Rules Governing Section 2254 Proceedings for the U.S. District Courts requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. The court, after considering the record in this case and the standard set forth in 28 U.S.C. Section 2253, denies a certificate of appealability as to all other claims because the applicant has not made a substantial showing of the denial of a constitutional right.

THUS DONE AND SIGNED at Shreveport, Louisiana, this the

__24th_____ day of __September_____, 2021.



ELIZABETH E. FOOTE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

TERRY L TERRY #584134	CIVIL ACTION NO. 18-cv-812 SEC P
VERSUS	JUDGE ELIZABETH E. FOOTE
DARREL VANNOY	MAGISTRATE JUDGE HORNSBY

REPORT AND RECOMMENDATION

Introduction

Terry Lynn Terry ("Petitioner") was convicted of three counts of molestation of a juvenile. Caddo Parish District Judge John Mosely sentenced Petitioner to concurrent terms of 15 years on counts one and two, and a concurrent 50-year term on count three. The convictions and sentences were affirmed on direct appeal. State v. Terry, 108 So.3d 126 (La. App. 2d Cir. 2012), writ denied, 118 So.3d 1096 (La. 2013). Petitioner also pursued a post-conviction application in state court. He now seeks federal habeas corpus relief on several grounds. For the reasons that follow, it is recommended that his petition be denied.

Sufficiency of the Evidence

A. Introduction

Petitioner was convicted of molesting three persons. A.L. and T.C. are sisters and the biological daughters of Petitioner and his first wife. They were adults at the time of trial. The adult daughters were estranged from Petitioner after enduring childhood molestation, for which Petitioner was not charged at the time. They became concerned and

contacted a state agency after they learned that Petitioner had remarried and had two young children living in his home. One of those children was S.B., the daughter of Petitioner's nephew. Petitioner was eventually charged with molesting A.L., T.C., and S.B. Petitioner challenges the sufficiency of the evidence to support his conviction of molesting T.C. and S.B.

B. Adult Daughter A.L.; (Tr. Vol. 2, p. 367)

A.L., the oldest daughter, testified that she was born in 1980 and was 30 years old at the time of the trial in 2010. When she was a child, she lived with her parents, sister T.C., and brother S.T. She said her father began to touch her inappropriately when she was in middle school, sometimes when her mother was away at work. The family then lived on Riding Club Lane in Shreveport, and A.L. shared a bed with her sister.

A.L. testified that Petitioner would touch and fondle her beneath her pajamas while she pretended to be asleep. She also described how Petitioner would have her use soap to rub his penis while he was taking a shower. She said that there were more than five of each such incidents. She also described a time that Petitioner was helping her with her homework and had his hand up her shirt. A.L. said she also engaged in oral sex with Petitioner, and he often "practically begged" to have intercourse, but that never happened. A.L. described a number of other acts of oral and manual stimulation orchestrated by Petitioner, and she said that these events happened before she entered foster care the summer before her freshman year of high school.

C. Adult Daughter T.C. (Tr. Vol. 3 p. 460)

T.C. testified that she was born in 1985 and was 25 at the time of trial. She remembered being interviewed as a child and asked about any abuse by her father. At the time, she lied because she did not want him to get in trouble. In about 2004, after T.C. had a child of her own, she called her mother and her sister to express guilt about covering up for her father.

T.C. described for the jury an incident that happened in the family's trailer on Riding Club Lane when she was about four or five. T.C. said she was naked, and Petitioner was sitting on the toilet getting ready to run her bath water. She had one foot in the tub when Petitioner kissed her. T.C. testified that she remembered thinking:

> [H]e should not be kissing me like this, because it wasn't a peck, it wasn't, there wasn't tongue involved, but it was, I remember thinking distinctly even at that age that he should not be kissing me like this, it felt wrong, and then after that, I felt extremely uncomfortable. And I didn't want to look. I didn't understand. You know, I don't really know if he was touching me or not, but I know I went from thinking that he shouldn't be kissing me like this to extremely uncomfortable and what ended up happening to stop it was, I kind of lifted my foot a little bit and the water went under my foot and I slipped. And I remember, you know, whoa, like a little girl and I remember after that I just got in [the] tub.

T.C. was asked to describe the kiss. She answered, "Sensual." She added that it was, "How you might kiss your husband without tongue, you know, slow, soft, and longer than, for what our relationship was, the kiss should not have happened that way, no, sir." She said that she froze and was "extremely uncomfortable," knowing that it was not right. She added that part of her remembers maybe some touching, but she could not tell for sure because she was so uncomfortable.

T.C. recalled an interview with Detective Brooks, in 2008, a couple of years before trial. After reviewing the interview to refresh her memory, T.C. said that she remembered saying that she had "sensations in my vaginal area" but she could not tell for sure if she was touched because she never looked. "I do remember sensations in my vaginal area that made me think that he was touching me, but I never looked." She described the sensation to Detective Brooks as pressure.

D. Linda Isaac (Tr. Vol. 3 p. 498)

Linda Isaac is employed by the Department of Children and Family Services. She was a child protection investigator in 1993. She interviewed A.L., then 13, and learned what had been happening to her at home. She also interviewed T.C., who knew that her parents were mad at each other and that it had something to do with what Petitioner had done to her sister, but she did not disclose that she had been abused. Ms. Isaac also talked to Petitioner, who said he had been molested as a child four or five times by someone other than his parents. He admitted molesting A.L. over the course of five years, and he described specific sex acts that were consistent with A.L.'s report.

E. Youngest Victim S.B.; (Tr. Vol. 4, p. 584)

Witnesses testified that Petitioner's nephew had three children, including S.B. In 2006, when S.B. was three years old, the children went to live with Petitioner because their mother was having a nervous breakdown. Petitioner was living on Pelican Lodge Road (in Caddo Parish) when the children first moved in. S.B. and one younger brother lived with Petitioner and his wife for 10 months to a year in a trailer in Shreveport. Petitioner and his then wife had sole care of S.B. for a significant period of time. Petitioner then moved to

Mississippi, and S.B. moved as well. Petitioner was arrested after he and the children had lived in Mississippi for a couple of months.

Crystal Clark (Tr. Vol. 4, p. 645) testified that she is a family advocate/forensic interviewer at the Gingerbread House. The main purpose of the center is to conduct forensic interviews of children who are suspected of being physically or sexually abused. She interviewed S.B. in June 2008, and a video of the interview was played for the jury. A transcript is in the record under seal at Doc. 23-5.

S.B. said in the recorded interview that she was four years old and lived with her mother, daddy, and J.B. (her two-year-old brother). Ms. Clark asked S.B. the names of her family members, and S.B. responded "Terry Terry Terry" each time. She said she had another brother named N., age 5, but then she said he was her sister and his name was Terry Terry Terry. S.B. was able to recite the alphabet, with some help, and she was able to identify body parts, including "vagina" and "butt" without prompting.

Ms. Clark asked S.B. if anyone had ever touched her on her vagina, and she said no. Clark asked if anyone ever touched her on her butt, and S.B. nodded yes and said, "My daddy." She said that her daddy's name was Terry Terry Terry and that he touched her there with his hand, under her clothes, while she was in bed. She said he pinched and squeezed her there, and he said, "I love you." S.B. said this happened more than one time.

Ms. Clark then asked S.B. about another part of her body, and S.B. said that he "squeezed me and pinches me right there," indicating an area that she said was called her vagina. She said it happened more than once and was done under her clothes while she was "asleep." Ms. Clark asked S.B. if anybody else pinched or squeezed her on her vagina

or butt besides her dad, and S.B. answered, "My dad." She said that he used his hand to make the contact. S.B. said that her mother, who she again called Terry Terry Terry, was at home and asleep when these things happened.

Ms. Clark interviewed S.B. again the next day (Doc. 23-6) to determine whether the touching she described happened in Louisiana or Mississippi. S.B. was asked where she said Mr. Terry Terry touched her, and she repeated her claims that he squeezed and pinched her butt and vagina. S.B. said that they had a trailer in Mississippi and "here" in Caddo Parish. She was asked if Terry Terry touched her "in Mississippi and here," and she nodded yes.

S.B. was six when she testified at trial. Tr. Vol. 4 p. 584. She identified her parents as Jonathan and Michelle and said she had two brothers, N. and J. The recordings of the Gingerbread House interviews were played, and S.B. said that everything she said in the videos was the truth. She admitted on cross-examination that she was not correct when she told Ms. Clark that Terry Terry Terry was the name of her mother and father. She also said that she was living in a trailer in Mississippi when these things happened. Defense counsel asked if when she said on the video that Terry Terry Terry were her mother and father, she meant Michelle and Jonathan. S.B. agreed. Defense counsel then asked, "So when you said Terry Terry Terry did things to you, you meant Jonathan?" S.B. replied, "Yes, sir."

On redirect, S.B. clarified that her parents were Michelle and Jonathan. She was asked, "Who is Terry Terry Terry?" She answered, "My … my daddy's brother." But she said she never lived with Terry Terry Terry. The prosecutor referred to the video where S.B. said Terry Terry Terry was doing certain things to her, and she asked S.B., "Now,

who do you mean when you said 'Terry Terry Terry'?" S.B. replied, "Jonathan." She was also asked if she had ever called Terry Terry Terry "daddy," and she said yes. S.B. repeated on re-cross that when she said Terry Terry Terry did things to her that she meant Jonathan.

F. Dr. Ann Springer (Tr. Vol. 5, p. 779)

Dr. Ann Springer is a pediatrician at LSUHSC who specializes in child abuse medicine. She examined S.B. in June 2008 when the child was age four. Dr. Springer was told that the child disclosed at the Gingerbread House that a great uncle squeezed and pinched her behind and vagina. Her examination found chronic redness and irritation of the vulva and labia, secondary to poor hygiene, chronic yeast infection, and tissue separation of the hymen that was consistent with sexual abuse and digital penetration.

G. Other Witnesses

Several other witnesses testified for the prosecution and defense. S.B.'s mother testified that she believed the medical evidence was being fabricated and S.B. was telling "kid stories" or had been coached. The child's father also said he did not believe Petitioner did anything wrong to S.B. Detective Brooks testified about going through old case files that showed that in 1993, when A.L. was 13, Petitioner confessed to molesting her for five years. A case worker from the 1993 investigation told Brooks that Petitioner had been remorseful and tearful, and they did not think he would reoffend, so they did not call the sheriff's office. The agency's plan was for Petitioner to not come back to the family home, but he was later found there when the agency made an unannounced visit. The girls were then removed from the home. Brooks testified that she was unable to get Petitioner to cooperate with the current investigation.

Petitioner's current wife testified that three children, including S.B., began living with them in 2006. Several other adult and minor relatives also lived with them at times. She said she was home every day and that nothing happened to S.B. while she was in their home. She also said that her house was meticulous and that the children were clean while they lived with them. Petitioner's sister said she was not uncomfortable with him being around S.B. because she knew he did not do what he was accused of doing. Petitioner's former girlfriend testified that she lived with him from 1995 to 2000. They received a letter during that time from A.L. that accused Petitioner of molestation. The girlfriend asked her daughter whether Petitioner had ever touched her inappropriately, and the girl said no. The girlfriend's daughter gave similar testimony at trial.

H. Petitioner (Tr. Vol. 6, p. 925)

Petitioner testified about his family's history and said that he never did anything with A.L. "other than running some baths." He attributed the 1993 investigation to A.L. getting mad at him after he told her that she could no longer date a certain boy. He submitted to a psychiatric evaluation and ultimately agreed to do whatever the agency wanted because he was told that he was facing 20 years to life. He said the case plan was for him to leave the home, and he and the child would receive counseling. He specifically denied T.C.'s claim that he passionately kissed her, and he denied touching her vaginal area.

Petitioner said that he and his current wife took in his nephew Jonathan's children when the parents were having a difficult time, with the understanding that the parents

would get the kids back. One of those children was S.B. Petitioner denied that he ever molested S.B. or performed any other lewd, lascivious act on the child.

Petitioner said that he had been working all around the country on various construction projects. He was in Iowa when he got word that there was a warrant for his arrest. Within three days, he quit his job, packed their belongings, and drove back to Shreveport, where he promptly turned himself in to the sheriff.

On cross-examination, Petitioner said that the investigators and physician who testified against him disliked him because of the nature of the charges against him. He said that Ms. Isaac, the investigator from the first investigation, was lying when she wrote in her report that he admitted to molesting A.L. Petitioner conceded, however, that he confessed in juvenile court and submitted to a case plan. He contended that A.L. testified against him in the 2010 trial because she was still mad that he would not let her see her boyfriend in 1993 (even though she was married to another man by the time of trial). He claims that A.L. made up her allegations because of a "whooping" he gave her when she refused to change clothes and cussed him out. There was testimony from A.L. and T.C. that they went to see Petitioner in jail, and he apologized to A.L. for what he had done to her. Petitioner denied that was what he said he was sorry for, and they were lying if they said otherwise. His son testified that Petitioner admitted that he molested A.L. and had done so because his parents also molested him. Petitioner testified that he never said that to his son.

I. Petitioner's Burden

Petitioner argued on direct appeal that the evidence was insufficient to support his convictions on counts two (T.C.) and three (S.B.). In evaluating the sufficiency of evidence to support a conviction "the relevant question is 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, 99 S.Ct. 2781, 2789 (1979). The Jackson inquiry "does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit." Herrera v. Collins, 113 S.Ct. 853, 861 (1993).

Habeas corpus relief is available with respect to a claim that was adjudicated on the merits in the state court only if the adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d). Thus a state-court decision rejecting a sufficiency challenge is reviewed under a doubly deferential standard. It may not be overturned on federal habeas unless the decision was an objectively unreasonable application of the deferential Jackson standard. Parker v. Matthews, 132 S.Ct. 2148, 2152 (2012); Harrell v. Cain, 595 Fed. Appx. 439 (5th Cir. 2015).

J. Count Two; T.C.

Petitioner was convicted of molestation of a juvenile, as defined in La. R.S. 14:81.2(A) as the "commission by anyone over the age of seventeen of any lewd or

lascivious act upon the person or in the presence of any child under the age of seventeen … with the intention of arousing or gratifying the sexual desires of either person, … by the use of influence by virtue of a position of control or supervision over the juvenile." Petitioner argues that the State did not prove that he used influence by virtue of his position, that the evidence did not show that the offense occurred within the date range charged in the bill of information, and that the State did not prove that the kiss described by T.C. was a lewd and lascivious act. The State contends that the third argument was not exhausted because it was not included in a petition to the Supreme Court of Louisiana, which makes it procedurally defaulted. The procedural bar defense may be valid, but the court may elect to skip the defense and deny a claim on the merits. King v. Davis, 883 F.3d 577, 585 (5th Cir. 2018). That course will be followed here.

Petitioner first argues that there was insufficient evidence to find that he used influence by virtue of a position of control or supervision over T.C. The state appellate court help that the State presented sufficient evidence on this element. It noted that Petitioner was T.C.'s biological father, still married to her mother, and living with the family. He was often the only parent at home with the children while his wife worked a night shift. He was clearly in a supervisory capacity as he gave T.C. her bath, which is when the offense occurred. State v. Terry, 108 So.3d at 143.

This issue was adjudicated on the merits in the state court, so habeas corpus relief is available only if that decision was an objectively unreasonable application of the deferential Jackson standard. Petitioner argues that the "use of influence" element is the functional equivalent of a non-physical use of force and that more than simply having a

position of supervision or control is required; the offender must actually use the influence to accomplish the act. Even if Petitioner is correct on this point of law, the evidence showed that the child's father employed his supervisory role as a parent to gain access to the naked child as he drew her bath. The state appellate court's decision might be debatable, but it was not an objectively unreasonable application of Jackson to the facts presented to the jury.

Petitioner argues that his kiss was not a lewd or lascivious act within the meaning of the statute. The state appellate court noted that whether an act is lewd or lascivious depends upon the time, place, and all circumstances surrounding its commission, including the actual or implied intention of the actor. State v. Terry, 108 So.3d at 143. Petitioner argued to the appellate court that a sensual kiss of a four or five-year-old girl when he was giving her a bath was insufficient, alone, to satisfy the element. The court responded that there was more than just the kiss. T.C. testified that she was naked and stepping into the bathtub when Petitioner kissed her passionately and possibly touched her vaginal area (as reflected by her testimony that she recalled a type of sensation in her genital area). The court determined that it was reasonable for the jury to conclude that the kiss, in these circumstances, was a lewd and lascivious act. Id.

Petitioner contends that he was charged based on a probable cause affidavit that alleged French kissing, but the victim never testified that there was French kissing, and she said there was no tongue involved. An affidavit in support of a warrant does not require that the State prove its precise contents to obtain a conviction. The statutory elements are what are at stake. Petitioner also urges that the lack of evidence of a French kiss means he

was charged without probable cause. That would not matter because "illegal arrest or detention does not void a subsequent conviction." Gerstein v. Pugh, 95 S.Ct. 854, 865 (1975). See also Montoya v. Scott, 65 F.3d 405, 421 (5th Cir. 1995).

Petitioner also focuses on State v. Louviere, 602 So.2d 1042 (La. App. 4th Cir. 1992), where a 72-year-old neighbor attempted to kiss two nine-year-old girls. One clenched her teeth to resist his tongue, and the other said the kiss was not unlike one from her granny's stepmother who had no teeth. The appellate court found that this attempted French kiss, with no indication of any other action planned, fell short of the statutory element of a lewd or lascivious act.

Louviere is not controlling, and its facts are distinguishable. The children in that case were clothed, and neither described the kiss as sensual or involving any possible touching of the genitals. Petitioner may have had a reasonable argument to present the appellate court, but the court reviewed the evidence and applicable law and determined that the lewd or lascivious act element was met in this case. The result might have been debatable on appeal in the state court, but habeas relief is not permitted because the state court's decision is far from an objectively unreasonable application of Jackson to the review of the jury verdict.

Petitioner makes a one-sentence argument that the evidence on count two was insufficient because T.C. was unable to state when the offense occurred, and the time range she provided means the offense may have occurred before the beginning of the date range described in the bill of information (1990-1994). The state appellate court found no merit in this argument because T.C. testified that she remembered the incident occurred in the

trailer on Riding Club Lane around 1990 to 1991. State v. Terry, 108 So.3d at 143-44. Petitioner has not demonstrated that this was an objectively unreasonable application of Jackson to the facts presented.

K. Count Three; S.B.

Petitioner argues that the evidence is insufficient to convict him of molestation of S.B. because the State did not prove that he was the person who committed the acts described by the child in her Gingerbread House interview. Petitioner notes that the child described every member of her family as Terry Terry Terry during the interview and suggested that her biological father, Jonathan, was the one who touched her. The appellate court acknowledged that there was some testimony by S.B. where she referred to both Jonathan and Petitioner as her dad, but the court found that she sufficiently identified Petitioner to overcome any alleged confusion. Specifically, she stated that the acts occurred while she was living with Petitioner. State v. Terry, 108 So.3d at 144.

"[A] federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court." Cavazos v. Smith, 132 S. Ct. 2, 4 (2011). "The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" Id. And "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." Id.

S.B.'s testimony and Gingerbread house statement did contain ambiguities and even inconsistencies. But the jurors were able to view S.B. in person and watch the video, which allowed them to witness the child's body language and hear any oral nuances in the tone

or meaning of her statements. The jurors then assessed the child's credibility and the weight of her testimony. They elected to accept the child's contention that it was Petitioner who performed the acts, while the child was living with him, and there was evidence to support that conclusion.

The appellate court applied the deferential Jackson standard and determined that the verdict could not be overturned based on sufficiency of the evidence. Habeas relief is likewise unavailable given the demanding standard of Section 2254(d). To the extent Petitioner challenges the credibility of S.B., "under Jackson, the assessment of the credibility of the witnesses is generally beyond the scope of review." Schlup v. Delo, 115 S.Ct. 851, 868 (1995).

Petitioner also argues that the evidence was insufficient to show that a lewd or lascivious act was committed on S.B. The appellate court acknowledged this argument, noted that S.B. described how Petitioner touched and pinched on her vagina, and generally determined that the evidence was sufficient to support the conviction. The court did not specifically discuss whether the touching and pinching met the definition of a lewd and lascivious act, but "Section 2254(d) applies even where there has been a summary denial." Cullen v. Pinholster, 131 S.Ct. 1388, 1402 (2011). "There is no text in the statute requiring a statement of reasons" by the state court. Harrington v. Richter, 131 S.Ct. 770, 784 (2011). The touching and pinching of her private areas, as described by S.B., was sufficient to allow a rational juror to determine that they were acts intended to arouse or gratify the sexual desires of Petitioner. There was certainly no innocent explanation for such actions.

The state court's decision on this issue withstands review under Section 2254(d), so it is recommended that the petition be denied at to this issue. But Petitioner has made an adequate showing of a potential constitutional violation on this claim to warrant appellate review. It is, therefore, also recommended that Petitioner be granted a certificate of appealability under 28 U.S.C. § 2253(c) with respect to the sufficiency of the evidence on count three, molestation of S.B.

Petitioner next argues that there was insufficient evidence that the actions happened in Louisiana rather than Mississippi. The state appellate court noted that the place of the crime is not an element of the offense, and the remedy for a defendant who believes he is charged with an offense that occurred outside of the court's venue is to file a pretrial motion to quash. Petitioner did not file such a motion, so his objection to the issue of venue was not reviewable. Even if the issue had been preserved, the court said, there was testimony by witnesses to establish that some or all of the criminal acts against S.B. happened in Caddo Parish. The location the child described in her video interview, as well as testimony from the child's mother, established that the acts occurred while Petitioner and the children lived in Caddo Parish. State v. Terry, 108 So.3d at 144-45. This determination is supported by the evidence, so habeas relief is not available.

Other Crimes Evidence; Kidnapping

A. Background Facts

Detective Dorothy Brooks stated during her testimony that a woman accused Petitioner of kidnapping her. This issue was explored outside of the presence of the jury, and the court admonished the jury to disregard the evidence. Petitioner argues that the trial

court erred in allowing the State to present false evidence of other crimes, the admonishment to the jury was an insufficient remedy, and defense counsel was ineffective for failing to move for a mistrial.

Detective Brooks was asked about Petitioner's arrest. She said that he was supposed to come to her office for a meeting. He called maybe twice, but he never showed up. The prosecutor asked at what point Petitioner was arrested. Brooks answered:

> I obtained a warrant for him. And I think he was arrested in some other state because he left town. And as a matter of fact, I talked, I can't even remember the name, I don't know if it was a state trooper, but the guy told me that Mr. Terry was with the some [*sic*] lady. And the lady—they stopped at a store, and she went in the store and handed them a note saying that he had kidnapped her or something. And that was how we got Mr. Terry, found out where he was at and then he turned hisself [*sic*] in.

Tr. Vol. 5, p. 740-41.

On cross-examination, defense counsel began to ask about the police officer from another jurisdiction. The prosecutor asked for a sidebar, after which Brooks was questioned outside the presence of the jury. Brooks explained that "we got a call" from who she believes was a state trooper, not from Louisiana, who told her that a woman that Petitioner had picked up somewhere along the line came in a store and handed over a note that said she had been kidnapped. Brooks said she did not include this in any of her reports because it happened outside of her jurisdiction. She admitted that she probably should not have mentioned it in her testimony. After some discussion, the prosecutor told the court that no more allegations of kidnapping or any other crimes were going to be mentioned, and he acknowledged that Petitioner did voluntarily turn himself in. Defense counsel, Joseph Clark, said he would "yield to the court to admonish this witness." The court did

admonish Brooks not to refer to any alleged kidnapping or to discuss Petitioner's arrest other than to say that he voluntarily surrendered himself. With input from defense counsel and the prosecutor, the court then admonished the jury:

> The Court: All right. Ladies and gentlemen of the jury, first of all, I apologize for the inconvenience, but let me admonish you that there are no allegations or any evidence of any kidnapping involving this defendant in the State of Louisiana or outside the State of Louisiana. In addition, upon learning of his arrest, the defendant voluntarily returned to Louisiana and turned himself in.
>
> (Sidebar discussion.)
>
> The Court: All right. Ladies and gentlemen, let me further admonish you that there are no allegations or evidence that he was running from the State of Louisiana to avoid prosecution. So with those two things that I have admonished, you are to disregard any testimony or any evidence of such allegations. Thank you very much.

B. Knowing Use of False Evidence

Petitioner first argues that it was error for the State to solicit false evidence of other crimes through Detective Brooks when the prosecutor knew that Petitioner turned himself in. "[T]he Due Process Clause is violated when the government knowingly uses perjured testimony to obtain a conviction." Kinsel v. Cain, 647 F.3d 265, 271 (5th Cir. 2011), citing Napue v. Illinois, 79 S.Ct. 1173 (1959). To establish a denial of due process through the use of perjured testimony, a petitioner must show "that (1) the witness gave false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false." Reed v. Quarterman, 504 F.3d 465, 473 (5th Cir. 2007).

The transcript shows that the prosecutor did not solicit this testimony. The kidnapping matter was not reflected in the reports, so it was perhaps not even known to the prosecutor. In any event, once Brooks mentioned the matter without prompting, the prosecutor quickly called for a bench conference that led to the admonishment of Brooks and the jury. When Petitioner raised these issues on direct appeal, the appellate court noted that the State "did not ask the witness to elaborate on the allegations" and requested a bench conference to address the matter. The court found the assignment of error to be without merit. There is no basis for habeas relief with respect to this claim, given the complete lack of indication that the prosecutor knowingly presented false testimony.

C. The Admonishment

Petitioner argues that the court's admonishment to the jury was insufficient to remedy the prejudice caused by the comment. Petitioner's argument relies on Louisiana Code of Evidence articles, but federal habeas corpus relief does not lie for errors of state law. Swarthout v. Cooke, 131 S.Ct. 859, 861 (2011). Petitioner has not demonstrated that he has a properly exhausted and meritorious federal constitutional claim based on the alleged inadequacy of the admonishment.

D. Ineffective Assistance of Counsel

Petitioner argues that defense counsel rendered ineffective assistance of counsel when he did not object and move for a mistrial. To establish ineffective assistance of counsel, Petitioner must demonstrate both deficient performance by his trial counsel and prejudice resulting from that deficiency. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). To show that his trial counsel's performance was deficient, he must show that his

attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id., 104 S.Ct. at 2064. To demonstrate prejudice from his trial counsel's deficient performance, he must show that his attorney's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

Petitioner argued various ineffective assistance claims in his post-conviction application. The trial court summarily rejected them as unsupported allegations that did not meet Petitioner's burden of proof. Tr. Vol. 8, p. 1660-64. The appellate court denied a writ application "on the showing made." Tr. Vol. 9, p. 1839. The Supreme Court of Louisiana denied a writ application in a per curiam opinion that stated Petitioner "fails to show he received ineffective assistance of counsel under the standard of Strickland" and failed to satisfy his burden with respect to his other claims. Tr. Vol. 9, pp. 1886-87.

It is debatable whether Petitioner properly exhausted his state court remedies with respect to this particular Strickland claim. Rather than explore the procedural history, it suffices to say that Petitioner has not presented a meritorious Strickland claim on this point. Defense counsel do often move for a mistrial when prejudicial evidence is mentioned, but courts routinely deny such motions and instead issue an admonishment to the jury. It is almost certain that any motion for mistrial in this instance would have likewise been denied. Nothing would have resulted beyond the admonishment that the court issued. Counsel was not acting outside the range of competent performance when, instead of moving for a mistrial, he attempted to obtain a suitable admonishment that clarified there was no evidence of any kidnapping and that his client turned himself in voluntarily.

Amendment of Bill of Information

The bill of information charged that Petitioner committed "Molestation of a Juvenile, 3 Counts 14:81.2(A) & (C) (counts 1 and 2) & 14:81(A) (C) & (E)(1) (count 3)." The bill then set forth facts related to each count. During the trial, the prosecutor stated that defense counsel had informed him that the statute cited for count three was missing the ".2" part of the citation, so the State moved to amend the bill to correct the technical defect. Defense counsel stated that this was "without objection." The court granted the request.

Petitioner argues that the court committed reversible error when it allowed the State to make this amendment. He presented this claim in his post-conviction application. The trial court reviewed state law that allows the court to at any time amend the charge to correct defects or imperfections. The court held that it was "evident that this was a technical defect, such that the trial court did not err in allowing the State to amend the indictment." Tr. 1660-61. Writ applications with respect to this issue were summarily denied by the higher state courts.

The sufficiency of a state indictment or bill of information is not a matter for federal habeas corpus relief unless it can be shown that the charging instrument "is so defective that the convicting court had no jurisdiction." Morlett v. Lynaugh, 851 F.2d 1521, 1523 (5th Cir. 1988). For a charging instrument to be fatally defective, no circumstances can exist under which a valid conviction could result from facts provable under the instrument. State law is the reference for determining sufficiency and if the issue "is presented to the highest state court of appeals, then consideration of the question is foreclosed in federal

habeas corpus proceedings." Morlett, supra. See also Wood v. Quarterman, 503 F.3d 408, 412 (5th Cir. 2007); McKay v. Collins, 12 F.3d 66, 68-69 (5th Cir. 1994). And "[a]n issue may be squarely presented to and decided by the state's highest court when the petitioner presents the argument in his application for postconviction relief and the state's highest court denies that application without written order." Evans v. Cain, 577 F.3d 620, 624 (5th Cir. 2009). The charging instrument in this case was presented to the state's highest court, so there is no basis for habeas relief with respect to this issue.

Petitioner makes the related claim that counsel rendered ineffective assistance with respect to this issue. The state courts summarily denied petitioner's Strickland claims. The state courts found no merit in the argument that the bill was improperly amended, so counsel cannot be deemed ineffective for failing to press a meritless issue. "[C]ounsel is not required to make futile motions or objections." Garcia v. Stephens, 793 F.3d 513, 525 (5th Cir. 2015), quoting Koch v. Puckett, 907 F.2d 524, 527 (5th Cir. 1990).

Miranda Claim

Petitioner argues that it was error to allow a child protection investigator to testify about statements Petitioner made during the 1994 investigation because Petitioner made the statements without a waiver of Miranda rights. Petitioner identifies that investigator as Jales Washington, but the portion of the transcript he quotes from at length is from the testimony of Linda Isaac.

Ms. Isaac testifies (Tr. Vol. 3, p. 498) that in 1993-94 she was employed by the Department of Children and Family Services as a child protection investigator. She described how the agency received a hotline tip of abuse, and she began an investigation

by speaking to a school counselor, A.L., the mother, and Petitioner. She conducted the interview of Petitioner at her office in the state office building, after calling him and asking him to come in at a particular time. Only Isaac and Petitioner were in the room. Isaac testified that Petitioner admitted that he had been molesting A.L. for five years, and he described oral sex and fondling in some detail. Petitioner said that he was going to try to stop abusing the child and planned on going to a counselor.

Ms. Isaac testified that she prepared a report and, consistent with the protocol at that time, referred the matter to family services for the development of a case plan. Isaac was asked if, in 1994, she was required to call the police if someone confessed to abuse. She said they "didn't have to call the police" and would not if the abuser was removed from the home and appeared to be going along with the case plan requirements.

Defense counsel asked Isaac if she told Petitioner that he had the right to an attorney or the right to remain silent. She said, "No, I didn't read the Miranda rights because I am not a police officer." She explained that "we don't read those not even to this day." She said that she could not have arrested Petitioner if she wanted to and did not consider herself a criminal investigator. Rather, her purpose was to provide services to youth and families. She said that, under the protocol in 1994, they would report to the D.A.'s office the validation of the case, but that report would not provide details.

Petitioner raised this argument in his post-conviction application. The last reasoned state court opinion is from the trial court. The habeas court looks through the unexplained writ denials that followed and affords deference to the trial court's explanation for the denial of this claim. Wilson v. Sellers, 138 S. Ct. 1188 (2018). The trial court explained

that the claim lacks merit because a child protection officer does not act as a law enforcement agent who is required to administer Miranda warnings. Tr. Vol. 8, p. 1663. The court cited State v. Bernard, 31 So.3d 1025 (La. 2010), which addressed a similar situation.

The Court held in Miranda v. Arizona, 86 S.Ct. 1602, 1612 (1966) that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." It added, "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id.

The Louisiana Supreme Court held in Bernard that Miranda did not apply to a child protection worker who had no authority to make an arrest and was not asked by police to interview the defendant. The worker did not conduct the interview to investigate criminal allegations, nor were any charges brought as a result of her report. Other courts have also held that child protection service investigators are ordinarily not required to administer Miranda warnings. People v. Keo, 40 Cal. App. 5th 169, 253 Cal. Rptr. 3d 57 (2019); State v. Jackson, 116 NE 3d 1240 (Ohio 2018).

The state court denied this claim on the merits. Habeas corpus relief is available with respect to a claim that was adjudicated on the merits in the state court only if the adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the

United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d).

Petitioner has not pointed to any clearly established federal law, as decided by the Supreme Court, that is in conflict with the state court's decision. Ms. Isaac was not a law enforcement officer, and the record does not indicate that Petitioner was in custodial interrogation within the meaning of Miranda when she questioned him. Habeas relief is not available on this claim, nor is it available on Petitioner's related claim that counsel rendered ineffective assistance of counsel by not moving for a mistrial. The motion for a mistrial would have lacked merit under Bernard, decided several months before the trial, so counsel was not ineffective in this regard.

No Expert Witness

Dr. Ann Springer testified for the prosecution that S.B. had poor hygiene and had tears in her hymen. Petitioner argues that defense counsel was ineffective because he did not use funds (allegedly) granted him by the court to hire an expert witness to rebut that testimony. He points to the testimony of the child's mother, who suggested that other physicians did not make such findings. The mother was asked her reaction to hearing that there was physical evidence of tears in S.B.'s hymen. She said that she did not believe it. When asked why, this exchange followed:

A: I had took her to a doctor's after I heard this.

Q: You did?

A: Yes, sir, I did.

Q: And what doctor did you take her to?

A: I took her to Dr. Lococo and Dr. Taylor in Vivian.

Q: Did you provide any reports from those doctors - -

A: Yes, sir, I did to Mr. Clark (defense counsel).

Tr. Vol. 4, p. 617. The child's father said he was upset when he first heard the allegations and "thought they had evidence," but "the two doctors that examined her afterwards said that there was no evidence." Tr. 684. Petitioner submitted with his post-conviction application a note from Dr. Lococo that said:

> "On behalf of Mr Terry Terry, I never received any calls or requests for any information concerning Mr Clark's findings. I did not receive a summons to appear in court. Regarding Mr Terry's children, they were brought to Dr's appointments and were neat in appearance."

The trial court rejected all ineffective assistance claims as unsupported allegations on which Petitioner had not met his burden of proof. Tr. Vol. 8, p. 1661.

"Claims that counsel failed to call witnesses are not favored on federal habeas review because the presentation of witnesses is generally a matter of trial strategy and speculation about what witnesses would have said on the stand is too uncertain." Woodfox v. Cain, 609 F.3d 774, 808 (5th Cir. 2010). A petitioner who makes such a claim must demonstrate prejudice by naming the witness, demonstrating that the witness was available to testify and would have done so, setting out the content of the proposed testimony, and showing that the testimony would have been favorable to a particular defense. Id., citing Day v. Quarterman, 566 F.3d 527, 538 (5th Cir. 2009). See also Evans v. Cockrell, 285 F.3d 370, 377 (5th Cir. 2000) (reversing grant of habeas relief for lack of such a showing).

The trial testimony and the note from Dr. Lococo contain no details about what the physicians found. The witnesses suggest that they found no evidence of abuse, but the Lococo note gives no indication of the actual findings. S.B.'s mother stated that she provided defense counsel with copies of reports, but there is no indication that any such reports are in the record. Given the lack of information about the content of the proposed testimony from the physicians, the undersigned cannot find that the state court's denial of this claim was an objectively unreasonable application of Strickland to the facts presented.

Extension of Limitations Period

Petitioner argues that the state court should have granted a motion to quash count one (A.L.) because the statute of limitations expired and was later extended. The state argues that Petitioner raised a similar claim in a pro se appeal brief but did not assert the federal claims he now raises and did not present any claim about the denial of a motion to quash in his writ application to the Supreme Court of Louisiana. The State contends that he also did not include the claim in his post-conviction application filed in the trial court, although he did include it in writ applications to the appellate and supreme courts. The State raises exhaustion and procedural bar defenses based on those proceedings. The defenses may be well founded, but the claim can also be denied on the merits.

The state appellate court explained that, at the time A.L. was abused, the limitations period for molestation of a juvenile was 10 years from when the victim attained the age of 18. A.L. turned 18 on January 31, 1998, meaning the limitations period would not expire until January 31, 2008. The code article that provides for the limitations period, La. C.Cr.P. Art. 571.1, was amended in 2005, before that period of limitations would have run. The

amendment increased the limitations period to 30 years from when the victim attains the age of 18. The prosecution was commenced in October 2008, within that time.

The appellate court cited authority for the proposition that the State's right to prosecute is retained until the statute of limitations has run, and until it does run it may be extended at the will of the State. State v. Terry, 108 So.3d at 152-53. Petitioner argues that the limitations period expired before the legislature extended it. The appellate court set forth a detailed timeline that indicates the limitations period did not run before the legislative extension. Petitioner does not explain how the court was incorrect.

The Supreme Court has held that extensions of expired statutes of limitation would violate the Ex Post Facto Clause. Stogner v. California, 123 S.Ct. 2446 (2003). But the Court specifically stated that its holding did not affect the many decisions that have upheld extensions of unexpired statutes of limitation. Id. at 2453. Petitioner has not cited any Supreme Court decision or other clearly established federal law that would prohibit the legislative extension of the unexpired limitations period that applied to his case.[1] The state court's denial of this claim does not allow for habeas relief.

[1] Petitioner does invoke State ex rel. Nicholson v. State, 169 So. 3d 344 (La. 2015), which addressed a legislative extension of the limitations period for sex crimes when the offender's identity is established through DNA testing. The court held that the new law could not apply retroactively to the defendant. The key distinction is that in Nicholson the offenses in question had prescribed about three years *before* the legislature enacted the DNA provision. The court cited Stogner and held that the new law could not revive the prescribed charges. Nicholson, therefore, does nothing to help Petitioner, whose limitations period had not expired before it was extended.

Accordingly,

It is recommended that Petitioner's petition for writ of habeas corpus be denied; and

It is further recommended that a certificate of appealability be granted as to the sufficiency of the evidence on count three (molestation of S.B.) pursuant to 28 U.S.C. § 2253(c)(1).

Objections

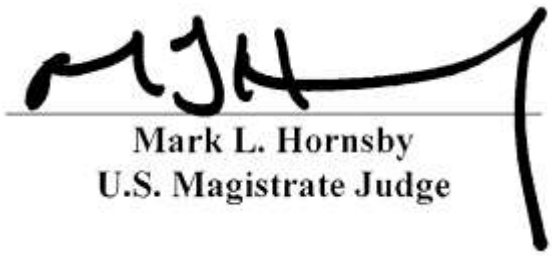
Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed. R. Civ. P. 6(b). A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 14 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See Douglass v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

An appeal may not be taken to the court of appeals from a final order in a proceeding under 28 U.S.C. § 2254 unless a circuit justice, circuit judge, or district judge issues a certificate of appealability. 28 U.S.C. § 2253(c); F.R.A.P. 22(b). Rule 11 of the Rules Governing Section 2254 Proceedings for the U.S. District Courts requires the district court

to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate may issue only if the applicant has made a substantial showing of the denial of a constitutional right. Section 2253(c)(2). A party may, within fourteen (14) days from the date of this Report and Recommendation, file a memorandum that sets forth arguments on whether a certificate of appealability should issue.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 2nd day of July, 2021.



Mark L. Hornsby
U.S. Magistrate Judge

Judgment rendered November 21, 2012.
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 47,425-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA — Appellee

versus

TERRY LYNN TERRY — Appellant

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 272,724

Honorable John D. Mosley, Jr., Judge

* * * * *

ELTON B. RICHEY & ASSOCIATES, LLC
By: Christopher Hatch — Counsel for Appellant

TERRY L. TERRY — *Pro Se*

CHARLES R. SCOTT
District Attorney

JACOB P. BROUSSARD
LAURA W. FULCO
BRIAN H. BARBER
Assistant District Attorneys — Counsel for Appellee

* * * * *

Before DREW, MOORE & SEXTON (Pro Tempore), JJ.

SEXTON, JUDGE

Following a jury trial, Defendant Terry Lynn Terry was convicted of three counts of molestation of a juvenile in violation of La. R.S. 14:81.2. Thereafter, Defendant was sentenced to two concurrent sentences of 15 years' imprisonment at hard labor on Counts I and II and 50 years' imprisonment at hard labor on Count III. Twenty-five years of the 50-year sentence were ordered to be served without benefit of parole, probation or suspension of sentence. All sentences are to run concurrently and Defendant was given credit for time served. Defendant was notified of his requirement to register as a sex offender (upon release) and the trial judge imposed 30 days in parish jail "in lieu" of court costs. Defendant now appeals. We affirm Defendant's convictions and sentences.

FACTS

Defendant was convicted of molesting three persons, A.L., T.C. and S.B.[1] A.L. and T.C. are sisters and the biological daughters of Defendant and his first wife. S.B. is the daughter of Defendant's nephew.

In 2008, T.C. received a telephone call from an investigator attempting to contact Defendant about past-due payments on a vehicle. During the conversation, T.C. learned that her father had remarried and that there were two young children, a boy and a girl, living with them. T.C. was concerned because her estranged father had molested her and her sister, A.L., when they were younger. T.C. immediately contacted A.L., who in turn contacted the Office of Community Services ("OCS") to report that Defendant had children in his home and that he had a prior history of

[1] In accordance with La. R.S. 46:1844(W), the victims and minors associated with this case will be referred to herein by their initials only.

molesting his daughters. Once OCS was able to locate its old files on Defendant, A.L. and T.C., A.L. was told that nothing could be done unless she pressed charges against Defendant. A.L. contacted Detective Dorothy Brooks of the Caddo Parish Sheriff's Department and discussed her concerns and reasons for moving forward with the allegations against her father. An investigation was conducted by the Caddo Parish Sheriff's Department, which ended with Defendant being charged with three counts of molestation of a juvenile.

Following a jury trial, Defendant was found guilty as charged on three counts of molestation of a juvenile in violation of La. R.S. 14:81.2(A) and (C) on two counts (victims A.L. and T.C.) and in violation of La. R.S. 14:81.2(A), (C) and (E) on one count (victim S.B.). Defendant filed motions for post-conviction judgment of acquittal and/or modification of judgment. In addition, a motion for new trial was filed. The motions were heard and denied by the trial court. Immediately thereafter, Defendant was sentenced on Counts I and II to 15 years at hard labor and 20 days in jail in lieu of payment of court costs.[2] On Count III, Defendant was sentenced to 50 years at hard labor with 25 years of the sentence to be served without benefit of probation, parole or suspension of sentence and to 30 days in jail in lieu of court costs. The sentences were imposed concurrently and Defendant was given credit for time served. A timely motion to reconsider sentence was denied and this appeal ensued.

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[2] As will be noted below, the sentencing range changed following the commission of the first two offenses.

Trial Testimony

A.L., Defendant's oldest daughter, was the first to testify. A.L. stated that she was born on January 31, 1980. A.L. testified that she and the family (A.L., her sister T.C., their brother S.T., their mother and Defendant) lived in several homes, including one in Shreveport. A.L. did not remember the first time her father touched her, but she testified, "I don't really remember a first time per se. It just seems to be something that continued on. I could give you certain situations that I recall." According to A.L., her father began touching her inappropriately when she was in middle school. A.L. recalled first of being abused by Defendant at the family home on Riding Club Lane. Her mother, who had not worked for a long time, had gotten a job working nights at Wal-Mart.

While she was not certain about all the specifics of the instances of abuse, A.L. remembered that she would pretend to be asleep when her father would enter the room that she shared with her sister. Defendant would touch and fondle her breasts and vaginal area while she pretended to be asleep.

A.L. was also able to recall instances when Defendant would take showers and "we would use a soap and help him rub himself." A.L. stated that Defendant would be stimulated during that time. A.L. also recounted instances when Defendant would abuse her while helping her with homework. A.L. recalled one incident where Defendant was helping her with math homework and he had his hand inside her shirt. Her brother S.T. walked into the room and Defendant moved his hand very quickly. A.L.

was unsure whether S.T. had seen anything, but she said there was a sudden tension in the room. A.L. did not know whether S.T. asked a question or said anything, but he walked out of the room and closed the door. According to A.L., Defendant usually locked the door, but not the time her brother walked in on them.

The fondling eventually progressed to oral sex before A.L. went to high school. A.L. testified in graphic detail how Defendant would perform oral sex on her, as well as having her perform oral sex on him. She stated her father begged her many times to allow him to have sex with her, to let him "put it in," and while Defendant would rub his penis "all in the area," there was never any penetration. A.L. recalled this happening even when Defendant was living with his sister. Finally, A.L. recounted instances where Defendant would lay a towel on the floor in his room; A.L. was unclothed and Defendant rubbed baby oil all over her body.

At her boyfriend's insistence, A.L. finally told her mother about the abuse. However, she testified that her mother was not very supportive of her and, while her mother did make Defendant leave the home, she allowed him to return sometime later. A.L. testified that she was upset by Defendant's return. She testified, "I hated him being there, . . . it made me feel like nothing." A.L. ran away to a friend's home during this time, but returned when OCS was was called. A short time later, A.L. went into foster care the summer before her freshman year in high school.

A.L. recalled that she and her sister T.C. were taken from the home, but her brother S.T. was allowed to stay. A.L. and her sister stayed with

their foster parents for three months or so before her Aunt Linda (her mother's sister) took them into her home.

A.L. indicated she did not want Defendant to have any more children, "[j]ust for my own peace of mind. . . . I guess at the time it made me feel better to say it because I felt like I was doing something." Once A.L. found out that Defendant had a girlfriend with a daughter and she wanted to warn Defendant's girlfriend. A.L. wrote a letter to Defendant's girlfriend. Defendant apparently intercepted the letter and contacted A.L. or her mother to express his displeasure with A.L. for sending the letter.

At this juncture, we note the later testimony of Dr. Ann Springer, a pediatrician at LSUHSC and the Medical Director at the CARA Center, which provides outpatient diagnosis and management for victims and suspected victims of all forms of child abuse and neglect. Dr. Springer stated that she examined A.L. on January 20, 1994, and A.L. had a normal exam. Dr. Springer opined, however, that a normal exam does not rule out sexual abuse. Most times, even when a child has been penetrated, healing has occurred by the time the child gets to medical care. Her diagnosis of A.L. was sexual molestation based on reported history.

As previously noted, in 2008, A.L. contacted OCS after receiving a call from her sister, T.C. A.L. stated that T.C., who lived in their childhood home with her own family, would periodically receive telephone calls from people who were trying to contact Defendant. T.C. didn't usually share much information with A.L. about the calls; however, T.C. did contact A.L. at that time because she said she had a weird feeling about the most recent

call. A lady was attempting to contact Defendant to repossess his vehicle. T.C. was informed that Defendant had a wife and kids. Once A.L. received this information, she wanted the contact information to follow up on the matter.

A.L. called the person who had been attempting to locate Defendant and obtained some additional information. Thereafter, A.L. contacted OCS, telling them that she "had this horrible feeling I just knew something was wrong." She wanted them to look further into it.

A.L. did not think that OCS was aware of her father's history because the records had not been in the computer system. A.L. testified that she did not know if the children were male or female, but she "just had this overwhelming feeling that something was not right." OCS told her that there was nothing they could do about it unless she pressed charges against her father. Prior to finding out that there were children in Defendant's custody, A.L. had not considered pressing charges against her father. As stated, A.L. initially met with Det. Brooks regarding her complaint and provided the officer with information about Defendant's past abuse of her. A.L. learned that the children in Defendant's custody were the children of her paternal cousins, whom she had not met.

A.L. then learned that Defendant was arrested for molesting her, her sister T.C. and S.B. A.L. went to visit Defendant at Caddo Correctional Center on the day he was arrested. She believed that she needed to do that for closure. T.C. made the visit with her. A.L. testified that Defendant

apologized to her for the things he had done to her. A.L. thought Defendant was apologizing for the abuse.

T.C. testified that she was born on April 18, 1985. The first home T.C. recalled her family living in was their grandfather's house; they moved several times before moving to Riding Club Lane. In recalling the memory of the abuse, T.C. stated that they were living on Riding Club Lane, sometime around 1990 or 1991. T.C. was naked and Defendant was sitting on the toilet getting ready to run her bath water. T.C. said that she had one foot in the bathtub. T.C. remembered thinking while Defendant was kissing her that:

> [H]e should not be kissing me like this, because it wasn't a peck, it wasn't, there wasn't tongue involved, but it was, I remember thinking distinctly even at that age that he should not be kissing me like this, it felt wrong, and then after that, I felt extremely uncomfortable. And I didn't want to look. I didn't understand. You know, I don't really know if he was touching me or not, but I know I went from thinking that he shouldn't be kissing me like this to extremely uncomfortable and what ended up happening to stop it was, I kind of lifted my foot a little bit and the water went under my foot and I slipped. And I remember, you know, whoa, like a little girl and I remember after that I just got in [the] tub.

T.C. described the kiss as being sensual. She went on to explain, "The word that, you know, like it's how you might kiss your husband without tongue, you know, slow, soft and longer than, for what our relationship was, the kiss should not have happened that way, no, sir." T.C. testified that she remembered some touching, but being so uncomfortable she could not say for sure what happened. She knew something was wrong, and she just felt stuck. In an interview with Det. Brooks, T.C. reported that she thought Defendant may have touched her because she remembered sensations or

pressure in her vaginal area, but she was not sure; she was so uncomfortable that she just wanted things to stop. She did not look to see what Defendant was doing, but she vividly remembered the sensations and it made her think that Defendant was touching her.

T.C. remembered being interviewed at her elementary school when she was 9 years old. Linda Isaac, with the Department of Children and Family Services, testified that she was involved in the OCS investigation of A.L.'s allegations against Defendant in December 1993 and interviewed the two sisters at their schools. T.C. did not recall the substance of the entire conversation with Ms. Isaac, but she did remember being asked questions about her father and her sister. At the time of the interview, T.C. felt intimidated and scared. She did remember her conversations with A.L. when she was told that Defendant was doing things to her. T.C. also remembered that Ms. Isaac asked her about touching; and, in response to the question, T.C. gave an answer she believed would not get anyone in trouble, including her father. While T.C. knew that something was wrong, she did not know exactly what had happened to A.L. T.C. testified that she thought she was protecting her father at that point.

T.C. stated that she was conflicted about how she could honor her mother and father when her father had abused her. T.C. stated that she also felt badly about the fact that she never told anyone about the abuse. After telling her family about the abuse in 2004, T.C. did not do anything further to pursue the matter until she received the call from the private investigator

looking for Defendant and learned that Defendant was married and had two young children. This is why she called A.L. and shared the information

On cross-examination, T.C. stated that she was not sure exactly when the incident in the bathroom occurred, but it was before kindergarten – probably when she was four or five years old. She recalled only that one event.

Ms. Isaac also spoke to A.L., who was 13, at her middle school. Her impression was that A.L. was truthful about her allegations and that she had been violated by her father. Although she was embarrassed, A.L. was specific with her about the sexual abuse. Ms. Isaac observed that A.L. was hurt and had lost her trust because her mother did not believe her and was still letting Defendant come to the home to babysit A.L. and her siblings. Ms. Isaac believed that "this daddy needed to be out of this home ASAP," and "the mother needed . . . to come to the realization that her child has been molested by her father [.]"

During the course of the investigation, Ms. Isaac also interviewed Defendant. In response to questioning, Defendant told Ms. Isaac that he had been molested as a child by different people, but not his mother or father. He told her what happened between him and A.L. and that it occurred over a five-year period. His description of the acts corroborated that given by A.L. Defendant told Ms. Isaac that "sometimes [A.L.] was to wear these little short t-shirts and it would just be so provocative it just seemed as if she was seducing him."

Ms. Issac testified that Defendant also told her that only the kids were home when the incidents took place; his wife would be at work. Defendant related to Ms. Isaac that A.L.'s response during their time together was to say "no" and "stop." She did not kiss or caress him back, but would just "lay there." At that time, in 1993-94, because he admitted to the abuse and the parents agreed that Defendant would move out and seek treatment, the case was referred to family services with an eventual plan for reunification. According to Ms. Isaac, however, such a case would now automatically be reported to the appropriate police authority for arrest and prosecution.

A.L.'s and T.C.'s mother testified that she married Defendant and got pregnant with A.L. when she was 14 and Defendant was 16. Together they had three children, A.L., S.T., and T.C. She testified that she has worked as a cashier in the Wal-Mart pharmacy for 17 years.

The mother stated that, in late 1993, A.L. came to her after Defendant had left and after A.L.'s boyfriend told A.L. to tell her mother what was going on or he would. A.L. told her that Defendant had been molesting her and her mother called Defendant and told him not to come back to the home. She also told him that, if he did, she would kill him. Defendant told her that "it wasn't what it seems," but he agreed not to come home.

The mother testified that Defendant started seeing a counselor and said he was doing better and she "made the wrong decision in believing him" and let him move back home. Defendant never admitted or denied the allegations, just said it "was not what it seems."

The mother testified that she remembered talking to Ms. Isaac and getting upset about the details of the abuse. She agreed that Defendant needed to stay away from the children. At that point, Defendant was living elsewhere, but was "coming and going" from the home. A social worker observed Defendant at home and, not long after that, A.L. and T.C. were removed from the home and placed in foster care.

S.T. testified that he is the brother of A.L. and T.C. He is the middle child. Recalling events from his childhood, S.T. testified that he noticed strange things going on between his father and A.L., *i.e.*, Defendant and A.L. being behind a locked door "doing homework," which happened more than once. According to S.T., Defendant admitted to him that he molested A.L. S.T. was about 17 years old at that time. S.T. further testified that Defendant told him that he was molested by his father when he was younger and S.T. believed that Defendant was justifying his actions. S.T. stated that he felt responsible because he did nothing to stop the abuse.

At the time of trial, S.B., the third victim, was 6 years old and in the first grade. Recall that S.B. is Defendant's nephew's biological daughter. When asked who her parents were, S.B. correctly related their names as J.B. and M.B. S.B. also named her brothers and knew who was older and younger.

According to the testimony of S.B.'s mother, father and Defendant, Defendant's nephew and his family, including S.B., had been living together in at least three or four other locations within the previous two years. In 2006, the nephew's three children (including S.B. who was then three years

old) went to live with Defendant because their mother was having "like a nervous breakdown" and she needed to take some time so they could "get back on their feet." S.B.'s mother testified that the kids had also lived with Defendant and his wife off and on for a time prior to that occasion. At some point, the mother took the oldest child back home with her to see if she could handle one child before having them all at home, leaving S.B. and one other sibling with Defendant. There was much testimony about money allegedly being paid to Defendant or by Defendant to his nephew for help with bills, but it is undisputed that his nephew and wife placed S.B. in the sole care of Defendant and his then current wife for a period of time.

The mother testified that she met Defendant about eight years prior to the trial. S.B. was approximately three years old and the younger boy was two years old when they first went to live with Defendant. At the time, Defendant was living on Pelican Lodge Road. S.B. and one sibling lived with Defendant and his wife for ten months to a year in a trailer in Shreveport. Thereafter, Defendant moved to Mississippi because of a work release program and S.B. moved as well.[3]

The record also reflects that Defendant was, at some point, trying to adopt the children. The mother testified that she wanted "to give him a chance to take the kids" following her "nervous breakdown" because she did not believe she could give them what they needed (basic essentials –

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[3] Prior to the children going to live with Defendant, OCS was involved with the family while they were all living with Defendant and his mother. The mother testified that OCS stated that there was not enough room in the house and that there were issues with cleanliness of the residence and animals living inside of the home. OCS was also involved with the family about a year and a half before Defendant's trial when S.B. was burned after she was playing with a lighter. Another incident that OCS investigated occurred when S.B. took narcotic pain medication she found on the floor of the home while in the care of a babysitter.

food, clothing, shelter) at that time. When asked if the adoption was stopped because Defendant got arrested and the kids were taken away, the mother said, "It's not true," and that she did not recall the details. She testified that they never went to court or filed any papers, but she was going to let Defendant adopt the children. Defendant was arrested after he and the children had been living in Mississippi for a couple of months.

After allegations of sexual abuse arose, S.B. was interviewed at Gingerbread House. Crystal Clark testified that she is a family advocate/forensic interviewer at Gingerbread House. She interviewed 4-year-old S.B. at Gingerbread House twice, on June 19 and 20, 2008. The second interview was necessary because Det. Brooks needed to determine exactly where (Louisiana or Mississippi) the touching incident described by S.B. in the first interview occurred.

During the first interview, S.B. told Ms. Crystal that she lived with "Terry Terry Terry," her dad and mom. When she was three and four, when Terry would come into her bedroom, she would pretend to be asleep, but she was not. He would wake her up and "pinch" her butt and vagina with his hand. He always told her he loved her. When asked what she called her private area, S.B. said that her mama called it a vagina. In the second interview, S.B. told them that the abuse happened in the new house where they live now (travel trailer in Mississippi) and the old trailer house where they were before they moved (in Vivian on Old Atlanta Road).

Gingerbread House videos were played for the jury. S.B. responded affirmatively when asked if she was in the videos and whether everything she said in the videos was the truth.

On cross-examination, S.B. stated that she told Ms. Crystal in the video that her father's name was "Jonathan Terry Terry Terry" and her mother's name was "Terry Terry Terry." When asked at trial, S.B. stated that her parents' names were J.B. and M.B. (the correct names). S.B. stated that she was living in a trailer in Mississippi when "these things" happened to her. S.B. was questioned about drawings of both male and female figures presented to her during her interview at Gingerbread House. S.B. said that she was asked names of certain body parts, which she called "vagina and the butt." S.B. was questioned further and she said she called both her mother and father "Terry Terry Terry." S.B. said she was identifying her father, J.B., as the one doing "things" to her during the interview at Gingerbread House.

On redirect, S.B. properly identified her mother and father by their names. S.B. identified "Terry Terry Terry" as her father's brother. S.B. stated that she never lived with "Terry Terry Terry." S.B. again stated that she was referring to her father J.B. when she told Ms. Crystal that "Terry Terry Terry" was doing certain things to her. In her testimony, the interviewer (Ms. Crystal) described the anatomical drawings labeled by her and S.B. for the jury.

Dr. Springer examined S.B. on June 29, 2008. Dr. Springer testified that the colposcopic exam of S.B. showed chronic irritation of her vulva and

labia majora. There was also chronic irritation secondary to poor hygiene and S.B. had a yeast infection. Dr. Springer observed tissue separation of S.B.'s hymen in a pie-shaped wedge at the 12:00 and 6:00 positions. According to Dr. Springer, her observations were consistent with sexual abuse and digital penetration. Her diagnosis of S.B. was physical neglect (hygiene and yeast infection) and sexual abuse.

According to Dr. Springer, no other physician has contacted her regarding her findings.

S.B.'s mother testified that she believed the medical evidence was being fabricated and that S.B. was just telling "kid stories" or had been coached to make such accusations. She did not believe that Defendant had done anything that he was accused of doing. S.B.'s father was of the same mind until he was made aware of Dr. Springer's findings; however, ultimately he testified that he does not believe Defendant did anything wrong to S.B.

JaLes Washington also testified. Ms. Washington is a Caddo Child Protection Investigator who was involved in the 2008 investigation of Defendant when he was living with S.B. and family. Ms. Washington testified that she contacted Defendant and he told her he was taking care of his nephew's kids because their parents were unfit – the father was basically "no good." Defendant related to Ms. Washington that he was trying to adopt the kids. At one point, Defendant left a voice mail message for Ms. Washington stating that he had never molested anyone. Significantly, the allegations of molestation had not been disclosed to him at that time.

Ms. Washington further testified that, after speaking with Dr. Springer and seeing S.B.'s Gingerbread House videos, she felt that this was a valid case. Ms. Washington discussed a plan with them, whereby the children were to be kept away from Defendant. The family was referred to intensive in-home care to help them find a home more suitable for the children because of the inadequate shelter issue. She testified that her investigation revealed that Defendant, his wife and the children (including S.B.) were living in Mississippi for several months prior to Defendant's arrest.

Det. Brooks testified that A.L. called her on June 16, 2008, to report that she had been sexually molested by Defendant for several years beginning when she was a small child. According to Det. Brooks, A.L. called at this time because she had told Defendant that, if she ever found out he had children, she would call and report what he had done to her. A.L. told Det. Brooks that, back in 1993, she thought that her father had pled guilty to molesting her and had gone to jail. She found out later that he was never arrested and charges were never brought.

Det. Brooks then started looking for the old files. She contacted Ms. Washington, who was able to locate them. Ms. Washington provided Det. Brooks with documents which revealed that, in 1993, Defendant confessed to molesting A.L. for five years. A.L. was 13 at the time. Det. Brooks contacted the investigator and case worker from the 1993 investigation. Investigators told her that Defendant had been remorseful and tearful and that they did not think he would re-offend, so they did not

call the Sheriff's Office at that time. OCS's plan was that Defendant was not to come back to the family home. An OCS worker made an unannounced visit and found Defendant there. As described earlier in this opinion, the girls were then removed from the home for a year.

Det. Brooks further testified that she spoke with T.C., who told her she had blocked out a lot of what had occurred during her childhood, but remembered one incident in the bathroom where Defendant kissed her passionately and she felt pressure on her vagina from Defendant's hand or penis. According to Det. Brooks, T.C. did not disclose this in the earlier investigation because she was scared her family would break up.
Det. Brooks' felt that the sisters were concerned because they believed that people who molest children do not stop. Since Defendant was living with his nephew's children, their concern was to make sure those children were safe, especially since Defendant was trying to adopt them.

Det. Brooks also corroborated other testimony regarding Defendant's confession to S.T., the brother of A.L. and T.C. Det. Brooks testified that she spoke with S.T. and he related to her the statement by his father that he had molested A.L.

Det. Brooks also testified about her meetings and discussions with S.B.'s parents. She explained that S.B.'s mother stated to her that Defendant was a really good man, a good provider for the children. S.B.'s mother did not want the children taken away; she told Det. Brooks that she was crying because Defendant was paying their bills and he would stop if they took the children. Based on the parents' reaction – they were mad

about the accusations and would not believe it – Det. Brooks did not think they would cooperate and keep the children away from Defendant.

Det. Brooks testified that she was unable to get Defendant's cooperation with the investigation. It was Det. Brooks' belief that Defendant was arrested in another state. She explained that she received a call from an officer in another jurisdiction who told her that Defendant was traveling with a woman; and, when they stopped at a store, the woman went inside and gave a worker a note stating that the man she was with had kidnapped her. Det. Brooks explained that this is how Defendant was located. Defense counsel objected and the jury was admonished to disregard Det. Brooks' hearsay testimony about an out-of-state arrest because there were no allegations or evidence of kidnapping against Defendant in Louisiana or outside the state. Instead, upon learning of his arrest warrant, Defendant voluntarily returned to Louisiana and turned himself in.

Defendant's current wife testified on his behalf. She testified that she has been married to Defendant since March 2004 and they had no children of their marriage; but, on May 8, 2006, his nephew's three children, including S.B., began living with them. According to her testimony, several other adult and minor relatives lived with them sporadically through the relevant time period. At one point, she and Defendant just had the two youngest children of Defendant's nephew, one of whom was S.B. Defendant's wife testified that she was not working and was home every day. She testified that nothing happened to S.B. while she was in their

home. She stated that the house was meticulous and the children were clean while they lived with them.

Defendant's sister testified that she lived with Defendant and his wife on Old Atlanta Road in Vivian at the same time S.B. was in the home. She testified that she was not uncomfortable with Defendant being around S.B. because she knows "he did not do" what he is accused of doing. Defendant's sister further testified that Defendant was never around S.B. by himself and that, when she was at work, Defendant's wife was always there.

A former girlfriend of Defendant's also testified on his behalf. She testified that she lived with Defendant from 1995 to 2000. They were in a relationship and were supposed to get married. Also in the household were her two children and S.T., Defendant's son. She stated that Defendant was a father figure to her children. She explained that the only time she ever felt uncomfortable with her daughter being in Defendant's presence was when A.L. sent a letter to Defendant about the molestation allegations. Defendant's girlfriend opened the letter, read it and then asked her daughter whether Defendant had ever touched her in an inappropriate way, to which the girl replied, "no." The daughter also testified at trial that Defendant never did anything inappropriate to her.

Finally, Defendant testified on his own behalf. He acknowledged that he was accused of improper acts with A.L., but maintained that those things did not happen. Defendant stated that, other than running baths, he did not do anything to A.L. like what she alleged. According to Defendant, A.L.

made the allegations because of tension between Defendant and her boyfriend.

According to Defendant, his son, S.T., blames his problems on Defendant not disciplining him more when he was young. S.T. disrespected his stepmother and did drugs, so they made him move out. He has not seen S.T. since then. Defendant testified that he never kissed T.C. passionately or touched her inappropriately.

Defendant testified that, during the 1993-94 investigation, he spoke with Ms. Isaac on the phone. He agreed to go to counseling and participated in requested psychiatric evaluations. He testified that he was at the state office building talking with Ms. Isaac when she turned the recorder off and stated, "We can go to court, I can put her (A.L.) on the stand, make her cry and you are going to do 20 to life." Defendant testified that, in response, he told Ms. Isaac, "I'll do what you want me to do." He explained that the matter was in juvenile court and he remembers crying, answering questions and just leaving. According to Defendant, the case plan was for him to leave home, not be around the children and to go to counseling, after which there was to be a reevaluation then to see whether he could be reunited with his family.

Defendant acknowledged that he has one arrest, a domestic dispute in 2004 between him and his current wife. He testified that the couple took in his nephew's children because their mother was in LSU Hospital with some mental issues, his nephew was out of work and they had financial problems. Defendant stated that he was trying to help them get back on their feet.

Defendant testified that he never did anything inappropriate to S.B. while she was living with him and his wife.

On cross-examination, Defendant stated that neither Ms. Isaac, Det. Brooks, Ms. Washington, Dr. Springer nor the prosecutor liked him because of the charges against him. He stated that, for this reason, Det. Brooks fabricated the charges against him, as did Dr. Springer about the evidence regarding tears in S.B.'s hymen. He also testified that Ms. Isaac falsified charges and was lying. Defendant denied telling Ms. Isaac that he had been molesting A.L. for five years. However, he then told the jury that he actually did tell her that because he did not want to go to prison. According to Defendant, everything Ms. Isaac testified to about his "confession" was perjury. He maintained that he never admitted specifics or details; he just admitted the charges so he would not go to prison. Defendant also admitted that he did confess under oath to the same charges in juvenile court.

Defendant suggested that A.L. came to court 17 years after the fact to testify against him because he would not let her see her boyfriend in 1993. He also testified that A.L. made up the allegations because of a "whooping" he gave her when she refused to change clothes and cussed him out. In addition, Defendant claimed that A.L. and T.C. are lying about him apologizing to A.L. for molesting her when they went to see him at the jail. He also denied telling his son that he molested A.L. or that his parents molested him.

After hearing all of the testimony, as described above, the jury found Defendant guilty on all three counts. This appeal ensued.

DISCUSSION

Defendant's appellate counsel raises the following assignments of error on appeal (verbatim):

1. The evidence adduced at trial is insufficient to support defendant's convictions for molestation of a juvenile.

2. The trial court's admonishment of the jury to disregard testimony regarding a "kidnapping" committed by defendant was insufficient to undo the prejudice caused by that testimony.

3. The matter should be remanded for resentencing because defendant's sentences were prematurely imposed contrary to La. C. Cr. P. art. 873, the trial court failed to state the reasons for the sentences as required by La. C. Cr. P. art. 894.1, and the sentences are unconstitutionally excessive.

Defendant, *pro se*, also assigns the following as error (vertabim):

1. The evidence was insufficient evidence to support defendant's conviction of molestation of a juvenile (in addition to those raised by Appellant's Counsel in His Original Brief) Because The Elements Of The Crime Did Not Exist In Count #2.

2. A. Procedural defect, abuse of discretion: The trial court failed to weigh the prejudicial affect of other crimes 'alleged,' against the judicial economy of a joinder.
B. This error, permitted the state to present inadmissible other crimes evidence which prejudiced defendant without meeting requirements of law. Therefore, the state was relieved of its burden of proof and many legal requirements.

3. Trial court erred: Abuse of discretion by denying motin to quash procedurally barred prosecution and applied a new law divesting defendant of substantive rights.

Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence to support the convictions, but only specifically argues the sufficiency of evidence with regards to Counts II and III. For completeness and out of an abundance of caution, this opinion includes a description of the testimony supporting the conviction on Count I, molestation of A.L., and we note that the evidence overwhelmingly supports the conviction on this count.

Argument and Applicable Law

According to defense counsel, Defendant's conviction of molestation of T.C., Count II, should be reversed because the state failed to present any evidence that Defendant used any influence upon T.C. by virtue of his having a position of supervision or control over her in order to commit a lewd and lascivious act upon her. Additionally, T.C. was unable to say when the offense occurred, and the time range she provided allows for the possibility that the offense could have occurred prior to the beginning of the time frame alleged in the bill of information. In a *pro se* brief, Defendant also challenges the sufficiency of the evidence introduced by the state at trial to support his conviction on Count II.

Defense counsel also asserts that the evidence is insufficient to support Defendant's conviction of molestation of S.B., Count III, in that: the state failed to prove that Defendant was the person referred to by S.B. in her Gingerbread House interview as the person involved; the state failed to prove that the acts occurred in Louisiana; the state did not establish that the acts of "pinching and squeezing" as described by S.B. constitute lewd and

lascivious acts; and S.B.'s testimony has so many internal contradictions that no rational fact finder could reasonably rely on her testimony to find Defendant guilty beyond a reasonable doubt.

The standard of appellate review for a sufficiency of the evidence claim is 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 proven beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Tate*, 01-1658 (La. 5/20/03), 851 So. 2d 921, *cert. denied*, 541 U.S. 905, 124 S. Ct. 1604, 158 L. Ed. 2d 248 (2004); *State v. Cummings*, 95-1377 (La. 2/28/96), 668 So. 2d 1132; *State v. Murray,* 36,137 (La. App. 2d Cir. 8/29/02), 827 So. 2d 488, *writ denied*, 02-2634 (La. 9/05/03), 852 So. 2d 1020.

In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. *State v. Wiltcher,* 41,981 (La. App. 2d Cir. 5/09/07), 956 So. 2d 769; *State v. Burd*, 40,480 (La. App. 2d Cir. 1/27/06), 921 So. 2d 219, *writ denied*, 06-1083 (La. 11/09/06), 941 So. 2d 35. Such testimony alone is sufficient even where the state does not introduce medical, scientific or physical evidence to prove the commission of the offense by defendant. *State v. Robinson*, 36,147 (La. App. 2d Cir. 12/11/02), 833 So. 2d 1207; *State v. Ponsell*, 33,543 (La. App. 2d Cir. 8/23/00), 766 So. 2d 678, *writ denied*, 00-2726 (La. 10/12/01), 799 So. 2d 490. *See also State v. Johnson*, 96-0950 (La. App. 4th Cir.

8/20/97), 706 So. 2d 468, *writ denied*, 98-0617 (La. 7/02/98), 724 So. 2d 203, *cert. denied*, 525 U.S. 1152, 119 S. Ct. 1054, 143 L. Ed. 2d 60 (1999). The appellate court does not assess the credibility of witnesses or reweigh evidence. *State v. Smith*, 94-3116 (La. 10/16/95), 661 So. 2d 442. A reviewing court accords great deference to a jury's decision to accept or reject the testimony of a witness in whole or in part. *State v. Hill,* 42,025 (La. App. 2d Cir. 5/09/07), 956 So. 2d 758, *writ denied*, 07-1209 (La. 12/14/07), 970 So. 2d 529.

> Molestation of a juvenile is defined in La. R.S. 14:81.2, in pertinent part, as:
>
> (A) Molestation of a juvenile is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person, by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile. Lack of knowledge of the juvenile's age shall not be a defense.

The essential elements of the crime of molestation of a juvenile, each of which the prosecution must prove beyond a reasonable doubt, are (1) the accused was over the age of 17; (2) the accused committed a lewd or lascivious act upon the person or in the presence of a child under the age of 17; (3) the accused was more than two years older than the victim; (4) the accused had the specific intent to arouse or gratify either the child's sexual desires or his or her own sexual desires; and (5) the accused committed the lewd or lascivious act by use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm or by the use of

influence by virtue of a position of control or supervision over the juvenile. La. R.S. 14:81.2; *State v. LeBlanc,* 506 So. 2d 1197 (La. 1987); *State v. Watson*, 39,362 (La. App. 2d Cir. 4/20/05), 900 So. 2d 325*; State v. Elzie,* 37,920 (La. App. 2d Cir. 1/28/04), 865 So. 2d 248, *writ denied,* 04–2289 (La. 2/04/05), 893 So. 2d 83.

For purposes of molestation of a juvenile, a "lewd or lascivious act" is one which tends to excite lust and to deprave morals with respect to sexual relations and which is obscene, indecent and related to sexual impurity or incontinence carried on in a wanton manner. *State v. Redfearn*, 44,709 (La. App. 2d Cir. 9/23/09), 22 So. 3d 1078, *writ denied,* 09-2206 (La. 4/09/10), 31 So. 3d 381. The determination of whether or not an act is lewd or lascivious, for purposes of statute defining indecent behavior with a juvenile, depends upon the time, the place and all of the circumstances surrounding its commission, including the actual or implied intention of the actor. *State v. Houston*, 40,642 (La. App. 2d Cir. 3/10/06), 925 So. 2d 690, *writ denied,* 06-0796 (La. 10/13/06), 939 So. 2d 373, *appeal after new sentencing hearing*, 41,743 (La. App. 2d Cir. 3/28/07), 954 So. 2d 311.

Analysis: Sufficiency of Proof as to Count II

Defendant contends that the single act described by T.C., a sensual kiss when he was giving her a bath when she was four or five years old, is insufficient, standing alone, to meet the essential elements of the offense. Contrary to Defendant's argument, however, there was more than just a "sensual" kiss. T.C. testified that she was naked and preparing for a bath when she was four or five years old; and, as she was stepping into the

bathtub, Defendant kissed her passionately and then possibly touched her vaginal area with his hand or penis. The victim stated that she recalled some type of sensation in her genital area at the time, but she was not certain exactly what caused the sensation. T.C. did believe, however, that there may have been some touching by Defendant.

It is undisputed that T.C. was under the age of 17 years old at the time of the offense, Defendant was over the age of 17 years and their age difference was more than 2 years. It was reasonable for the jury to conclude that the kiss, as described by the victim, who was naked and getting into the bathtub, and who felt a "sensation" in her vaginal area at the same time, was a lewd and lascivious act. *See State v. Boutte*, 384 So. 2d 773 (La. 1980); *State v. Anderson*, 09-934 (La. App. 5th Cir. 3/23/10), 38 So. 3d 953, *writ denied*, 10-0908 (La. 11/12/10), 49 So. 3d 887; *State v. Ragas*, 607 So. 2d 967 (La. App. 4th Cir. 1992), *writ denied*, 612 So. 2d 97 (La. 1993); *State v. Louvierre*, 602 So. 2d 1042 (La. App. 4th Cir. 1992), *writ denied*, 610 So. 2d 796 (La. 1993); *State v. Rollins*, 581 So. 2d 379 (La. App. 4th Cir. 1991); *State v. Jacob*, 461 So. 2d 633 (La. App. 1st Cir. 1984).

Furthermore, the state presented sufficient evidence to show that Defendant used his influence by virtue of his position of supervision or control over the victim in order to commit this offense. As T.C.'s biological father, who was still married to the victim's mother and living with his family, Defendant was often the only parent at home with the children while his wife worked nights at Wal-Mart. Defendant clearly was in a supervisory capacity as he gave T.C. her bath, which is when the offense occurred. *See*

State v. Goss, 46,193 (La. App. 2d Cir. 5/18/11), 70 So.3d 6; *State v. A.B.M.*, 10-648 (La. App. 3d Cir. 12/08/10), 52 So. 3d 1021.

Finally, there is no merit to defense counsel's contention that T.C.'s testimony left open the possibility that the offense happened outside the time frame alleged in the bill of information. T.C. testified that she remembered that this incident occurred in the trailer on Riding Club Lane around 1990-91. Count II of the bill of information set forth a time frame of 1990-1994. This assignment of error is without merit.

Analysis: Sufficiency of the Evidence as to Count III

Defendant also urges that the evidence is insufficient to convict him of the molestation of S.B. because the state failed to prove that he was the person who committed the acts described by the victim in her Gingerbread House interview. Defendant also contends that the state failed to establish that the acts occurred in Louisiana and that the acts of "pinching and squeezing," as described by the four-year-old victim in the Gingerbread House interview, were not sufficient acts to meet the definition of "lewd or lascivious acts" under La. R.S. 14:81.2. Finally, Defendant argues that the victim's testimony contained internal conflicts; and, as such, no rational trier of fact could have reasonably relied on her testimony to find Defendant guilty beyond a reasonable doubt.

While there was some testimony by S.B. that she referred to both her biological father, J.B., and Defendant as "Dad," she sufficiently identified Defendant to overcome any alleged confusion on the part of the young

victim, who stated that Defendant was the person who did those acts alleged by her.

During her interviews at Gingerbread House, S.B. described how Defendant touched and pinched on her vagina. The victim referred to Defendant as "Terry Terry Terry," and it was revealed during the trial that she may have called others by the same name; however, S.B. provided sufficient information to show that she was indeed referring to Defendant and not her biological father as the person who touched her inappropriately. Specifically, S.B. stated that the inappropriate acts occurred while she was living with Defendant.

Molestation of a juvenile does not have, as an element of the offense, the place of the crime. *State v. Rideout*, 42,689 (La. App. 2d Cir. 10/31/07), 968 So. 2d 1210, *writ denied*, 08-2745 (La. 9/25/09), 18 So. 3d 87. If a defendant feels that he is being charged for an offense that occurred in another parish, or that the state cannot prove the venue of the alleged crime, he must raise the issue before trial by a motion to quash; and it must be decided by the court before trial. La. C. Cr. P. art. 615. Venue is not considered an essential element to be proven by the state at trial; rather it is a jurisdictional matter to be proven by the state by a preponderance of the evidence and decided by the court in advance of trial. *Id.*; *State v. Rideout*, *supra*; *State v. Gatch,* 27,701 (La. App. 2d Cir. 2/28/96), 669 So. 2d 676, *writ denied,* 96-0810 (La. 9/20/96), 679 So. 2d 429. In the instant case, Defendant failed to file a pretrial motion to quash; and, therefore, his objection to the issue of venue is not reviewable. *State v. Pugh*, 44,251 (La.

App. 2d Cir. 5/27/09), 12 So. 3d 1085; *State v. Rideout, supra; State v. Mueller*, 10-0710 (La. App. 4th Cir. 12/08/10), 53 So. 3d 677.

Even if the issue of venue had been properly and timely raised, there was testimony by witnesses to establish that some (or all) of the alleged criminal acts against S.B. did, in fact, occur in Caddo Parish. The location described by the victim in the Gingerbread House tape, as well as testimony from S.B.'s mother, was sufficient to establish that the acts occurred while Defendant and the children resided in Caddo Parish. T.B. testified that they were in Caddo Parish the majority of the time the children lived with Defendant. Furthermore, the place where the abuse took place, as described by the victim, was Defendant's home in Caddo Parish. See *State v. McBroom*, 27,027 (La. App. 2d Cir. 5/10/95), 655 So. 2d 705.

In this case, several experts who interviewed or examined S.B. opined that there was ample evidence that S.B. had been sexually abused. There was also direct testimony from S.B. explaining what Defendant did to her and where. As previously noted by this court, the testimony of the victim alone is sufficient to prove the elements of the offense. *State v. Humphries*, 40,810 (La. App. 2d Cir. 4/12/06), 927 So. 2d 650, *writ denied*, 06-1472 (La. 12/15/06), 944 So. 2d 1284; *State v. Ingram*, 29,172 (La. App. 2d Cir. 1/24/97), 688 So. 2d 657, *writ denied*, 97-0566 (La. 9/05/97), 700 So. 2d 505. A reviewing court accords great deference to the jury's decision to accept or reject the testimony of a witness in whole or in part. *State v. Hill, supra*. Furthermore, where there is conflicting evidence about factual matters, the resolution of which depends upon a determination of the

credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. *State v. Allen*, 36,180 (La. App. 2d Cir. 9/18/02), 828 So. 2d 622, *writs denied*, 02-2595 (La. 3/28/03), 840 So. 2d 566, 02-2997 (La. 6/27/03), 847 So. 2d 1255, *cert. denied*, 540 U.S. 1185, 124 S. Ct. 1404, 158 L. Ed. 2d 90 (2004).

Prejudicial "Other Crimes" Evidence

Defense counsel argues that false testimony by Det. Dorothy Brooks that Defendant committed a "kidnapping" was unduly prejudicial to Defendant and that the trial court's admonishment regarding the testimony was insufficient to overcome the prejudice. According to Defendant, a new trial should be ordered due to the severe prejudice suffered by him as a result of the untrue and prejudicial testimony.

The state argues that Det. Brooks was not testifying as to Defendant's character or his criminal convictions for the purposes contemplated in the applicable Code of Evidence provisions. Furthermore, it argues that the admonishment to the jury was sufficient; and Defendant suffered no prejudice, particularly as there was no evidence offered regarding the alleged kidnapping.

La. C. E. art. 404 provides that evidence of other crimes, acts or wrongs is generally not admissible. When a witness refers directly or indirectly to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible, upon request of the defendant, the defendant's remedy is a request for an admonition to the jury

or a mistrial pursuant to La. C. Cr. P. art. 771.[4] *State v. Burns*, 44,937 (La. App. 2d Cir. 2/02/10), 32 So. 3d 261; *State v. McGee*, 39,336 (La. App. 2d Cir. 3/04/05), 895 So. 2d 780; *State v. Holmes*, 02-2263 (La. App. 4th Cir. 2/26/03), 841 So. 2d 80.

As Det. Brooks was testifying about talking to Defendant about the allegations of abuse involving S.B., Det. Brooks stated that she obtained a warrant for Defendant after he failed to show up for a meeting. Though Defendant did call twice, he did not report to the office as he claimed he would. Det. Brooks testified:

> I obtained a warrant for him. And I think he was arrested in some other state because he left town. And as a matter of fact, I talked, I can't even remember the name, I don't know if it was a state trooper, but the guy told me that Mr. Terry was with the some [*sic*] lady. And the lady- - they stopped at a store, and she went in the store and handed them a note saying that he had kidnapped her or something. And that was how we got Mr. Terry, found out where he was at and then he turned hisself [*sic*] in.
>
> Mr. Broussard: After the fact, that you weren't ever able to interview Mr. Terry at all, that didn't work out.
>
> Det. Brooks: No.
>
> Mr. Broussard: If I could have just one moment, Your Honor.
>
> (Pause.)
>
> (Whereupon a discussion off the record was held.)
>
> Mr. Broussard: I think that's all I have for you, Detective Brooks.

---

[4] A mistrial shall be granted upon motion of the defendant when a remark or comment is made within the hearing of the jury by the judge, district attorney or court official during trial or in argument and that remark refers to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible. La. C. Cr. P. art. 770(2); *State v. Smith*, 43,136 (La. App. 2d Cir. 4/23/08), 981 So. 2d 200; *State v. Ellis*, 42,520 (La. App. 2d Cir. 9/26/07), 966 So. 2d 139, *writ denied*, 07-2190 (La. 4/04/08), 978 So. 2d 325. For purposes of article 770, a law enforcement officer is not considered a "court official," and an unsolicited, unresponsive reference to other crimes evidence made by a law enforcement officer is not grounds for a mandatory mistrial under La. C. Cr. P. art. 770. *Id.*

Det. Brooks: Okay.

Cross-Examination

Mr. Clark: Detective Brooks, I'm not quite sure where to start with you, but I want to start at the end or your testimony. Now, you've said that Terry Terry – and he was married, wasn't he to–

Det. Brooks: Jennifer.

Mr. Clark: - Jennifer. So it wasn't just Mr. Terry with the children, was it? It was not just Terry with N.B. and/or J.B. and S.B.?

Det. Brooks: She said she had a mother.

Mr. Clark: Now, they were in Mississippi when you began your investigation, is that correct?

Det. Brooks: Yes.

Mr. Clark: And I want to know who it was and where they were that reported to you that Mr. Terry was under arrest with them. You said there was a police officer in another jurisdiction.

Det. Brooks: Okay.

Mr. Clark: Where was that and who was it?

Mr. Broussard: Your Honor, may we approach briefly?

(Whereupon a sidebar discussion was held.)

(Whereupon the jury was excused from the courtroom.)

The Court: For the record, we are going to bring Detective Brooks in for questioning outside the presence of the jury on a limited issue which is by agreement of the State and defense and Court.

(Whereupon the witness returned to the courtroom and was seated in the witness stand.)

Outside of the jury's presence, Det. Brooks then stated that a bulletin was put out for Defendant after it was learned that he had left town, but law enforcement officers did not know what state he was in at that time. Det. Brooks said that they received numerous calls and were told that Defendant was traveling in a red Jeep. Detective Brooks went on to say that she was "thinking" that it was within "our" jurisdiction; however, she found out that it was not. As she recalls, once the authorities arrived at the store, Defendant had already left. Defendant later turned himself in to "our jail." Since it was outside the jurisdiction, Det. Brooks did not include the information in her report. Det. Brooks stated that she did not have any further information on the alleged kidnapping victim. Det. Brooks stated that she believed that Defendant would eventually turn himself in and that is what, in fact, happened.

At that point, the state indicated that the matter had been discussed with Det. Brooks and there would be no further mention of any other crimes, including any alleged kidnapping. The state acknowledged that Defendant did voluntarily surrender himself. Defense counsel stated:

> Well, I was under the impression the admonishment was coming from the Court and not from counsel and that therefore I would yield to the Court to admonish the witness.
>
> The Court: All right. For the record, we are outside the presence of the jury, and at this time the jury will be admonished when they come in. However, Detective Brooks, I am going to admonish you not to make reference to any allegations or any possible evidence of kidnapping or anything like that which as far as the Court is concerned did not take place.

The jury was then admonished outside the presence of Det. Brooks.

The Court: All right. Ladies and gentlemen of the jury, first of all, I apologize for the inconvenience, but let me admonish you that there are no allegations or any evidence of any kidnapping involving this defendant in the State of Louisiana or outside the State of Louisiana. In addition, upon learning of his arrest, the defendant voluntarily returned to Louisiana and turned himself in.

(Sidebar discussion.)

The Court: All right. Ladies and gentlemen, let me further admonish you that there are no allegations or evidence that he was running from the State of Louisiana to avoid prosecution. So with those two things that I have admonished, you are to disregard any testimony or any evidence of such allegations. Thank you very much.

The record does not show that defense counsel raised a contemporaneous objection to the testimony of Det. Brooks regarding the alleged kidnapping. Instead, it appears from the record that defense counsel was attempting to impeach the testimony of the detective on that issue. However, once the state asked for a bench conference, there was, apparently, an agreement made that further testimony on the matter would be elicited outside of the jury's presence.

As noted above, Det. Brooks was not a court official within the meaning of La. C. Cr. P. art. 770. The trial court appropriately admonished the jury to disregard the remarks and no mistrial was declared. While there was a reference to the alleged kidnapping during Det. Brooks' direct testimony, the state did not ask the witness to elaborate on the allegations. On the other hand, defense counsel did question the detective further about the kidnapping remark during cross-examination. At that point, the state requested a bench conference and questioning on the matter was

discontinued and the trial judge told the jury there was no evidence of kidnapping and that Defendant voluntarily turned himself in. This assignment of error is without merit.

Sentencing Issues

Defense counsel asserts that the trial court sentenced Defendant immediately following the denial of his post-trial motions without Defendant waiving the time delays set forth in La. C. Cr. P. art. 873. Defendant also argues that the trial court did not comply with the mandatory provisions of La. C. Cr. P. art. 894.1 in giving the considerations and factual basis for the sentences imposed. Finally, defense counsel contends that Defendant's sentences are constitutionally excessive.

According to the state, Defendant did not suffer any prejudice as a result of the trial court's failure to observe the article 873 delay; and, as such, remand for resentencing is unnecessary. The state points out that Defendant's sentencing was continued at least four times, and Defendant knew that he was to be sentenced at the time his sentencing hearing was held. Additionally, there was no objection to Defendant's sentencing after his motions were denied. Finally, the state notes that Defendant's sentences are not excessive and points out that no contemporaneous objection was made to the sentences.

Failure to Follow Delays

La. C. Cr. P. art. 873 provides:

> If a defendant is convicted of a felony, at least three days shall elapse between conviction and sentence. If a motion for a new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is

> overruled. If the defendant expressly waives a delay provided for in this article or pleads guilty, sentence may be imposed immediately.

When the trial court imposes the sentences immediately after the denial of the defendant's motions for new trial and post-verdict judgment of acquittal, there must be a showing on the record that the defendant waived the delay required by La. C. Cr. P. art. 873. However, when the defendant does not complain of actual prejudice, the error is subject to the harmless error analysis. *See State v. Russell*, 42,479 (La. App. 2d Cir. 9/26/07), 966 So. 2d 154, *writ denied*, 07-2069 (La. 3/07/08), 977 So. 2d 897; *State v. Wilson*, 469 So. 2d 1087 (La. App. 2d Cir. 1985), *writ denied*, 475 So. 2d 778 (La. 1985).

Defendant filed several post-trial motions on the day of sentencing. The trial court failed to observe the 24-hour sentencing delays as required by La. C. Cr. P. art. 873. While Defendant has alleged prejudice from this, his only argument is that the sentences imposed were maximum sentences. This standing alone is insufficient to prove prejudice by imposition of the sentences without observance of the delay. Defendant did not object to the immediate sentencing on the day of imposition; and, furthermore, Defendant did not raise the issue in his motion to reconsider sentence. As such, Defendant has failed to show actual prejudice. Accordingly, this claim is without merit.

Consideration of La. C. Cr. P. art. 894.1

The test imposed by the reviewing court in determining the excessiveness of a sentence is two-pronged. First, the record must show

that the trial court took cognizance of the criteria set forth in La. C. Cr. P. art. 894.1. The trial judge is not required to list every aggravating or mitigating circumstance so long as the record reflects that he adequately considered the guidelines of the article. *State v. Smith,* 433 So. 2d 688 (La. 1983); *State v. Lathan*, 41,855 (La. App. 2d Cir. 2/28/07), 953 So. 2d 890, *writ denied*, 07-0805 (La. 3/28/08), 978 So. 2d 297. The articulation of the factual basis for a sentence is the goal of La. C. Cr. P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with La. C. Cr. P. art. 894.1. *State v. Lanclos,* 419 So. 2d 475 (La. 1982); *State v. Egan,* 44,879 (La. App. 2d Cir. 12/09/09), 26 So. 3d 938*; State v. Swayzer*, 43,350 (La. App. 2d Cir. 8/13/08), 989 So. 2d 267, *writ denied*, 08-2697 (La. 9/18/09), 17 So. 3d 388.

Following Defendant's conviction, a presentence investigation report was ordered. While the trial court did not specifically indicate which sentencing factors it considered in sentencing Defendant, the record is replete with information to form an adequate factual basis for Defendant's sentences. The trial judge indicated that he believed there was sufficient testimony to support that Defendant had, in fact, committed the crimes, including Defendant's admissions regarding A.L. The trial court also noted that, based on the longevity of the acts, it would appear that, if given the opportunity, Defendant would commit the same type of crime. Prior to sentencing, the trial court reviewed Defendant's presentence investigation

report. Considering these factors, we find that there was sufficient compliance with the mandates of La. C. Cr. P. art. 894.1; and, as such, a remand is unnecessary.

Constitutional Excessiveness

The second prong is that a determination be made regarding the constitutional excessiveness of a sentence. A sentence violates La. Const. Art. 1, §20, if it is grossly out of proportion to the seriousness of the offense or nothing more than a purposeless and needless infliction of pain and suffering. *State v. Smith*, 01-2574 (La. 1/14/03), 839 So. 2d 1; *State v. Dorthey*, 623 So. 2d 1276 (La. 1993); *State v. Bonanno,* 384 So. 2d 355 (La. 1980). A sentence is considered grossly disproportionate if, when the crime and punishment are viewed in light of the harm done to society, it shocks the sense of justice. *State v. Weaver,* 01-0467 (La. 1/15/02), 805 So. 2d 166; *State v. Lobato,* 603 So. 2d 739 (La. 1992); *State v. Robinson,* 40,983 (La. App. 2d Cir. 1/24/07), 948 So. 2d 379; *State v. Bradford*, 29,519 (La. App. 2d Cir. 4/02/97), 691 So. 2d 864.

The trial judge is given wide discretion in the imposition of sentences within the statutory limits, and the sentence imposed by him should not be set aside as excessive in the absence of a manifest abuse of his discretion. *State v. Williams*, 03-3514 (La. 12/13/04), 893 So. 2d 7; *State v. Thompson*, 02-0333 (La. 4/09/03), 842 So. 2d 330; *State v. Hardy*, 39,233 (La. App. 2d Cir. 1/26/05), 892 So. 2d 710. On review, an appellate court does not determine whether another sentence may have been more appropriate, but whether the trial court abused its discretion. *State v. Cook,* 95-2784

(La.5/31/96), 674 So. 2d 957, *cert. denied*, 519 U.S. 1043, 117 S. Ct. 615, 136 L. Ed. 2d 539 (1996).

The law in effect at the time of the commission of the offense is determinative of the penalty which the convicted accused must suffer. *State v. Sugasti*, 01-3407 (La. 6/21/02), 820 So. 2d 518; *State v. Morrison*, 45,620 (La. App. 2d Cir. 11/24/10), 55 So. 3d 856.

La. R.S. 14:81.2 was enacted in 1984. The subsection under which Defendant was sentenced as to Counts I and II at the time of the offenses reads as follows:

> (C) Whoever commits the crime of molestation of a juvenile when the offender has control or supervision over the juvenile shall be fined not more than ten thousand dollars, or imprisoned, with or without hard labor, for not less than one nor more than fifteen years, or both.

La. R.S. 14:81.2 has been amended several times and the subsection under which Defendant was sentenced as to Count III provided (at the time of the offense) that:

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

Defendant was sentenced to concurrent sentences of 15 years' imprisonment at hard labor on Counts I and II and 50 years' imprisonment at hard labor on Count III with credit for time served. Twenty-five years of the 50-year sentence was ordered to be served without benefit of parole, probation or suspension of sentence. Defendant was notified of his requirement to register as a sex offender upon his release, and the trial judge

imposed 30 days in the parish jail "in lieu" of court costs. Defendant's timely motion to reconsider sentence was denied by the trial judge.

Defendant's sentences on Counts I and II of the bill of information were restricted to the maximum sentence available at the time of the commission of the crime – 15 years at hard labor. Considering the fact that Defendant preyed on his oldest daughter over a period of at least five years, this sentence is certainly not excessive. Based on A.L.'s testimony, it is obvious that she was deeply scarred by Defendant's continued molestation of her throughout her childhood. Defendant used his relationship with his daughter as a substitute for what was lacking in his marriage as he discussed his dreams, issues and problems with her while repeatedly violating her. Defendant also brought his younger daughter into the twisted activities as he violated her at a very young age. There is nothing about these sentences that shocks the sense of justice.

With regard to the penalty on Count III, the trial court imposed a mid-range sentence. Considering Defendant's repeat behavior, the age of the victim, Defendant's refusal to accept responsibility for his actions, as well as his apparent inability to be rehabilitated, it cannot be said that this sentence is excessive. The trial court certainly could have imposed a greater sentence for this offense. The trial court's reasoning and the record provide ample justification for imposition of this sentence. This sentence does not shock the sense of justice.

This assignment of error is without merit.

Pro Se Assignments of Error

Failure to Grant Motion to Sever

According to Defendant, the trial court's failure to grant his motion to sever was an abuse of discretion. Defendant also argues that the denial of the motion to sever caused severe prejudicial harm to him as impermissible other crimes evidence was automatically admitted during the trial. According to Defendant, the other crimes evidence of Counts I and II was too old to have a bearing on the most recent offense. Defendant also contends that the evidence was admitted only upon a verbal request by the state not to sever the charges.

Defendant asserts that the state was "afforded the luxury of never having to enumerate its rationale of the use of the other 'crimes' evidence or its relevance to the issue at hand, one charge to the other." According to Defendant, the state was not required to prove that the evidence was not being admitted to prove character; therefore, the state was permitted to bypass procedural and jurisprudential law requirements. Defendant takes the position that the joinder of the offenses was improper as it allowed the admission of evidence that was not relevant to all charges.

La. C.E. art. 412.2 provides:

> A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.

> B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.
>
> C. This Article shall not be construed to limit the admission or consideration of evidence under any other rule.

La. C. Cr. P. art. 493 provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial.

La. C. C. P. art. 493.2 provides:

> Notwithstanding the provisions of Article 493, offenses in which punishment is necessarily confinement at hard labor may be charged in the same indictment or information with offenses in which the punishment may be confinement at hard labor, provided that the joined offenses are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Cases so joined shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.

On the second day of jury selection, before the prospective jurors were brought into court, defense counsel moved to sever, seeking a separate trial for Count III. Defense counsel argued that Counts I and II were punishable with or without hard labor, while Count III carried a mandatory hard labor sentence. Defense counsel also pointed out that Count III would have to be tried by a 12-person jury, while Counts I and II could be tried by

a 6-person jury. It was Defendant's position that the state was trying to circumvent a 6-person jury with a mandatory unanimous verdict requirement and combine it with a 12-person jury that required only 10 jurors to concur to reach a verdict. Counsel also argued that Defendant could not be denied his right to be tried on Counts I and II by a 6-person jury. The state objected to the motion as untimely and also argued that the offenses could be tried jointly in accordance with La. C. Cr. P. art. 493.2. After hearing the arguments, the trial judge ruled that the offenses could be joined pursuant to La. C. Cr. P. arts. 493 and 493.2 and that Defendant's request to sever was denied.

The trial court did not err in finding that the state could charge and prosecute the three felony offenses jointly in accordance with La. C. Cr. P. arts. 493 and 493.2. Offenses where hard labor confinement is required and offenses in which hard labor confinement may be imposed can be tried jointly, provided the offenses are of the same or similar character. The three counts of molestation in which Defendant preyed on his daughters and then upon another young female relative in his custody are certainly of similar character and can even be considered to be part of a common scheme or plan. The trial judge correctly denied Defendant's motion to sever. *See State v. Humphries*, 40,810 (La. App. 2d Cir. 4/12/06), 927 So. 2d 650, *writ denied*, 06-1472 (La. 12/15/06), 944 So. 2d 1284; *State v. Friday*, 10-2309 (La. App. 1st Cir. 6/17/11), 73 So. 3d 913, *writ denied*, 11-1456 (La. 4/20/12), 85 So. 3d 1258.

Failure to Grant Motion to Quash Prosecution

_____Defendant contends that he was deprived of a substantive right when the trial court applied the current version of La. C. Cr. P. art. 571.1 which extended the time period in which the state was allowed to file charges against him. According to Defendant, the statute is the only Louisiana statute that is "fixed, substantive, and mandatory." Defendant's interpretation of art. 571.1 is that the time period for filing the charges against him was a fixed period that began to run once the victims reached the age of 17.

La. C. Cr. P. art. 571.1 currently provides that:

> Except as provided by Article 572 of this Chapter, the time within which to institute prosecution of the following sex offenses: sexual battery (R.S. 14:43.1), second degree sexual battery (R.S. 14:43.2), oral sexual battery (R.S. 14:43.3), felony carnal knowledge of a juvenile (R.S. 14:80), indecent behavior with juveniles (R.S. 14:81), ***molestation of a juvenile or a person with a physical or mental disability (R.S. 14:81.2),*** crime against nature (R.S. 14:89), aggravated crime against nature (R.S. 14:89.1), incest (R.S. 14:78), or aggravated incest (R.S. 14:78.1) which involves a victim under seventeen years of age, regardless of whether the crime involves force, serious physical injury, death, or is punishable by imprisonment at hard labor shall be thirty years. This thirty-year period begins to run when the victim attains the age of eighteen (Emphasis added).

La. C. Cr. P. art. 571.1 was amended in 2005 to extend the period of time in which prosecution could be instituted from 10 years to 30 years after the victim reached the age of 18. A.L. was born on January 31, 1980. The initial period within which the state would have been able to bring prosecution against Defendant was 10 years from A.L.'s birthday on January 31, 1998, until January 31, 2008. La. C. Cr. P. art. 571.1 was

amended in 2005, which was before the initial period of limitations against Defendant would have run. Therefore, the increased period of limitations of 30 years is applicable to the three offenses with which Defendant was charged.[5] See *State v. Adkisson*, 602 So. 2d 718 (La. 1992); *State v. Anderson*, 10-779 (La. App. 5th Cir. 3/27/12), 91 So. 3d 1080. As noted by the supreme court in *State v. Ferrie*, 243 La. 416, 144 So. 2d 380, 384 (La. 1962), *abrogated on other grounds by State ex rel. Olivieri v. State*, 00-0172 (La. 2/21/01), 779 So. 2d 735:

> In the absence of a statute of limitations, the State retains the right to prosecute for crimes indefinitely. But when a right of grace has been extended, the State relinquishes the right to prosecute once the statute of limitations has run; until it does run, the State's right to prosecute is retained and may be extended at the will of the State.

This claim is without merit.

CONCLUSION

For the foregoing reasons, the convictions and sentences of Defendant Terry Lynn Terry are affirmed.

AFFIRMED.

[5] There is likewise no limitations problem with the charges involving T.C. or S.B., both of whom were born later than A.L.

FILED

DEC 09 2010

B. WASHINGTON
DEPUTY CLERK OF COURT

STATE OF LOUISIANA	*	NUMBER: 272,724
VERSUS	*	FIRST JUDICIAL DISTRICT COURT
TERRY LYNN TERRY		CADDO PARISH, LOUISIANA
PERMANENT ASSIGNMENT	*	SECTION "2"

RESPONSIVE VERDICTS FOR THE CHARGE OF MOLESTATION OF A JUVENILE - COUNT 1

The responsive verdicts for the charge of MOLESTATION OF A JUVENILE -COUNT 1 upon the person of A[redacted]T[redacted], now A[redacted]L[redacted] should read:

1. We, the Jury, find the defendant, TERRY LYNN TERRY, guilty as charged of MOLESTATION OF A JUVENILE;

DATE: 12/9/2010 [redacted]
FOREMAN

(a) Do you find that the defendant, TERRY LYNN TERRY, accomplished this act by use of influence by virtue of a position of control and supervision over A[redacted]T[redacted] now A[redacted]L[redacted]:

YES ✓ N[redacted]

12/9/2010
DATE FOREMAN

OR

2. We, the Jury, find the defendant, TERRY LYNN TERRY, guilty of ATTEMPTED MOLESTATION OF A JUVENILE;

DATE: _____ _____
FOREMAN

(a) Do you find that the defendant, TERRY LYNN TERRY, accomplished this act by use of influence by virtue of a position of control and supervision over A[redacted]T[redacted] now A[redacted]L[redacted]

YES _____ NO _____

_____ _____
DATE FOREMAN

OR

3. We, the Jury, find the defendant, TERRY LYNN TERRY, guilty of INDECENT BEHAVIOR OF A JUVENILE;

DATE: _____ _____
FOREMAN

OR

4. We, the Jury, find the defendant, TERRY LYNN TERRY, guilty of ATTEMPTED INDECENT BEHAVIOR OF A JUVENILE;r

DATE: _____ _____
FOREMAN

OR

5. We, the Jury, find the defendant, TERRY LYNN TERRY, NOT GUILTY.

DATE: _____ _____
FOREMAN

FILED

DEC 09 2010

B. WASHINGTON
DEPUTY CLERK OF COURT

STATE OF LOUISIANA NUMBER: 272,724

VERSUS * FIRST JUDICIAL DISTRICT COURT

TERRY LYNN TERRY * CADDO PARISH, LOUISIANA

PERMANENT ASSIGNMENT * SECTION "2"

RESPONSIVE VERDICTS FOR THE CHARGE OF MOLESTATION OF A JUVENILE - COUNT 2

The responsive verdicts for the charge of MOLESTATION OF A JUVENILE -COUNT 2 upon the person of T[redacted] T[redacted], now T[redacted] C[redacted] should read:

1. We, the Jury, find the defendant, TERRY LYNN TERRY, guilty as charged of MOLESTATION OF A JUVENILE;

DATE: 12/9/2010 [redacted]
FOREMAN

(a) Do you find that the defendant, TERRY LYNN TERRY, accomplished this act by use of influence by virtue of a position of control and supervision over T[redacted] T[redacted], now T[redacted] C[redacted];

YES ✓

12/9/2010 [redacted]
DATE FOREMAN

OR

2. We, the Jury, find the defendant, TERRY LYNN TERRY, guilty of ATTEMPTED MOLESTATION OF A JUVENILE;

DATE: _____ _____
FOREMAN

(a) Do you find that the defendant, TERRY LYNN TERRY, accomplished this act by use of influence by virtue of a position of control and supervision over T[redacted] T[redacted] now T[redacted] C[redacted]

YES _____ NO _____

_____ _____
DATE FOREMAN

OR

3. We, the Jury, find the defendant, TERRY LYNN TERRY, guilty of INDECENT BEHAVIOR OF A JUVENILE;

DATE: _____ _____
FOREMAN

OR

4. We, the Jury, find the defendant, TERRY LYNN TERRY, guilty of ATTEMPTED INDECENT BEHAVIOR OF A JUVENILE;

DATE: _____ _____
FOREMAN

OR

5. We, the Jury, find the defendant, TERRY LYNN TERRY, NOT GUILTY.

DATE: _____ _____
FOREMAN

95

FILED

DEC 09 2010

B. WASHINGTON
DEPUTY CLERK OF COURT

STATE OF LOUISIANA * NUMBER: 272,724

VERSUS FIRST JUDICIAL DISTRICT COURT

TERRY LYNN TERRY * CADDO PARISH, LOUISIANA

PERMANENT ASSIGNMENT * SECTION "2"

RESPONSIVE VERDICTS FOR THE CHARGE OF MOLESTATION OF A JUVENILE - COUNT 3

The responsive verdicts for the charge of MOLESTATION OF A JUVENILE -COUNT 3 upon the person of S[redacted] B[redacted], should read:

1. We, the Jury, find the defendant, TERRY LYNN TERRY, guilty as charged of MOLESTATION OF A JUVENILE;

DATE: 12/9/2010 [redacted]
FOREMAN

(a) Do you find that the defendant, TERRY LYNN TERRY, accomplished this act by use of influence by virtue of a position of control and supervision over S[redacted] B[redacted],

YES ✓

12/9/2010 [redacted]
DATE FOREMAN

(b) Was S[redacted] B[redacted] under the age of thirteen years old.

YES ✓

12/9/2010 [redacted]
DATE FOREMAN

OR,

2. We, the Jury, find the defendant, TERRY LYNN TERRY, guilty of ATTEMPTED MOLESTATION OF A JUVENILE;

DATE: _____ _____
FOREMAN

(a) Do you find that the defendant, TERRY LYNN TERRY, accomplished this act by use of influence by virtue of a position of control and supervision over S[redacted] B[redacted]

YES _____ NO _____

_____ _____
DATE FOREMAN

(b) Was S[redacted] B[redacted], under the age of thirteen years old.

YES _____ NO _____

_____ _____
DATE FOREMAN

OR,

3. We, the Jury, find the defendant, TERRY LYNN TERRY, guilty of INDECENT BEHAVIOR OF A JUVENILE;

DATE: _____ _____
FOREMAN

96

(a) Was S[redacted] B[redacted], under the age of thirteen years old.

YES ______________________ NO ______________________

______________________ ______________________
DATE FOREMAN

OR,

4. We, the Jury, find the defendant, **TERRY LYNN TERRY**, guilty of **ATTEMPTED INDECENT BEHAVIOR OF A JUVENILE**

DATE: ______________________ ______________________
FOREMAN

(a) Was S[redacted] B[redacted] under the age of thirteen years old.

YES ______________________ NO ______________________

______________________ ______________________
DATE FOREMAN

OR,

5. We, the Jury, find the defendant, **TERRY LYNN TERRY**, **NOT GUILTY.**

DATE: ______________________ ______________________
FOREMAN