Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the 22nd day of October, 2019, are as follows:

BY CRICHTON, J.:

2018-CK-01763 *STATE OF LOUISIANA IN THE INTEREST OF E.S. (Parish of St. Tammany)*

We granted the writ in this matter primarily to address the constitutionality of mandatory lifetime sex offender registration under R.S. 15:542 as applied to a juvenile. This is a direct appeal by the juvenile, E.S., who was adjudicated delinquent for the first degree rape of a child under the age of thirteen years old. Finding that there was insufficient evidence to determine E.S. was fourteen years old at the time of the offense, and therefore mandatory disposition pursuant to Ch. C. art. 897.1 and R.S. 15:542 is inapplicable to the case at hand, we affirm the adjudication of first degree rape, reverse the court of appeal's determination that there was sufficient evidence to establish E.S.'s age, vacate the disposition of the district court and remand for redisposition.

AFFIRMED IN PART, REVERSED IN PART, DISPOSITION VACATED, AND REMANDED FOR REDISPOSITION.

Chief Judge Susan M. Chehardy of the Court of Appeal, Fifth Circuit, appointed as Justice pro tempore, sitting for the vacancy in the First District.

Retired Judge Michael Kirby appointed Justice ad hoc, sitting for Clark, J.

Weimer, J., concurs in the result and assigns reasons.

10/22/19

SUPREME COURT OF LOUISIANA

No. 2018-CK-01763

STATE OF LOUISIANA IN THE INTEREST OF E.S.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF ST. TAMMANY

CRICHTON, J.

We granted the writ in this matter primarily to address the constitutionality of mandatory lifetime sex offender registration under R.S. 15:542[1] as applied to a juvenile.[2] This is a direct appeal by the juvenile, E.S., who was adjudicated delinquent for the first degree rape of a child under the age of thirteen years old. Finding that there was insufficient evidence to determine E.S. was fourteen years old at the time of the offense, and therefore mandatory disposition pursuant to Ch. C. art. 897.1[3] and R.S. 15:542 is inapplicable to the case at hand, we affirm the adjudication of first degree rape, reverse the court of appeal's determination that

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* Chief Judge Susan M. Chehardy of the Court of Appeal, Fifth Circuit, assigned as Justice pro tempore, sitting for the vacancy in the First District. Retired Judge Michael Kirby appointed Justice ad hoc, sitting for Justice Marcus R. Clark.

[1] R.S. 15:542 provides in pertinent part:

> A. The following persons *shall* be required to register and provide notification as a sex offender or child predator in accordance with the provisions of this Chapter:
>
> ***
>
> (3) Any juvenile, who has attained the age of fourteen years at the time of commission of the offense, who has been adjudicated delinquent based upon the perpetration, attempted perpetration, or conspiracy to commit any of the following offenses:
>
> (a) Aggravated or first degree rape (R.S. 14:42) . . .

[2] This case was consolidated – for purposes of oral argument only – with a companion case, *State in Interest of A.N.*, 18-1571 (La. 10/[22]/19), -- So. 3d --, because we intended to examine the constitutionality of R.S. 15:542 as applied to juveniles. In both cases, however, the constitutional issue is pretermitted by resolution of evidentiary or procedural issues.

[3] Ch. C. art. 897.1 provides in pertinent part:

> B. After adjudication of a felony-grade delinquent act based upon a violation of R.S. 14:42, first degree rape, or R.S. 14:44, aggravated kidnapping, the court shall commit the child who is fourteen years or older at the time of the commission of the offense to the custody of the Department of Public Safety and Corrections to be confined in secure placement until the child attains the age of twenty-one years without benefit of probation or suspension of imposition or execution of sentence.

there was sufficient evidence to establish E.S.'s age, vacate the disposition of the district court and remand for redisposition.

FACTS AND PROCEDURAL HISTORY

In February 2017, five-year-old N.H. reported to her grandfather that E.S. "has me put his missy in my mouth." N.H.'s grandfather asked her to repeat herself, with which she complied, but otherwise he did not inquire further. According to N.H.'s grandfather, "missy" was the term N.H. used at the time to describe the sexual parts of a person. He thereafter repeated N.H.'s disclosure to N.H.'s mother who then reported the allegations to law enforcement.

Detective Scott Davis, an investigator for the St. Tammany Parish Sheriff's Office, began investigating the complaint of sexual assault and scheduled a forensic interview of N.H. at the Children's Advocacy Center in Covington (the "CAC") on February 8, 2017. The interviewer, Barbara Hebert, Ph.D., was the executive director of the CAC at the time of the interview and is a licensed professional counselor.[4] At the beginning of the interview, Dr. Hebert told a story wherein one child told the truth and one child told a lie. N.H. properly indicated which child told the truth and which told a lie. Several generic questions – such as "[i]s anyone mean to you?" – did not elicit any information relative to E.S., and Dr. Hebert eventually asked N.H. to tell her about E.S. Among other things, N.H. twice said that E.S. is "nice."

As N.H. began to indicate she was ready for the interview to be over, Dr. Hebert became more direct in her questioning.

DR. HEBERT:	Did you say anything to your mom or [grandmother] about [E.S.]?
N.H.:	I told [my grandfather] something.
DR. HEBERT:	What did you tell [your grandfather]?
N.H.:	That's inappropriate.
DR. HEBERT:	Well, this is a place where we can talk about some of those inappropriate things.

[4] Dr. Hebert testified that she has a Ph. D. in counselor education.

N.H.:	This is really yucky.
DR. HEBERT:	It's okay. You can tell me because kids tell me stuff all the time. Because I'm here to help them.
N.H.:	Well he tells me to suck his missy.
DR. HEBERT:	Okay.
N.H.:	And I don't. I just did it once.
DR. HEBERT:	Okay, so you did it once.
N.H.:	Actually, I did it lots of times.

N.H. indicated that the alleged sexual abuse occurred in E.S.'s room because "otherwise they'll catch him." Upon request, she clarified that a missy is "that pointy thing" and pointed to her groin area. Dr. Hebert presented N.H. with an anatomical drawing of a boy and asked which part of the body was the "missy." N.H. circled the boy's penis, said "that's what I sucked," and added that it tasted like skin. With spelling assistance and at her own suggestion, N.H. wrote on a piece of paper "I sucked [E.S.'s] misy [sic]." She reported doing this "lots of times" and at one point said it occurred "twenty times."[5] Dr. Hebert asked N.H. if she was telling the truth or pretending, and N.H. answered "the truth."

The victim was thereafter evaluated at the Audrey Hepburn Care Center in New Orleans (the "AHCC"), and a report summarizing the evaluation again indicated that N.H. made consistent disclosures related to the alleged sexual abuse.[6] Based on information provided by the victim's mother, observation of the victim's statements during the CAC interview, and review of the AHCC report, Detective Davis executed an arrest warrant affidavit in which he asserted that there was

[5] N.H. used the number "twenty" three times during the interview: once to indicate that her father had been at school for twenty days, once to indicate that she had been in school for twenty days, and once to describe how many times the alleged sexual abuse occurred.

[6] The interview at the AHCC was not introduced into evidence at the adjudication hearing. E.S. argues that this Court should consider inconsistencies in the AHCC interview that are not in the record because such inconsistencies would render N.H.'s disclosures less credible. Alternatively, he requests that this Court remand the case to the district court for introduction of the AHCC interview. E.S. fails, however, to make any showing that he ever attempted to introduce the AHCC interview at the adjudication hearing. He presents no evidence to support a finding that the district court committed reversible error or, in fact, that the district court did anything at all with respect to admission or exclusion of this evidence.

probable cause to arrest E.S. for first degree rape of a victim under thirteen years of age. The affidavit alleged that the incidents took place on or about March 31, 2016, or generally between November 2015 and March 2016.

At the October 4, 2017 adjudication hearing, the State sought not only to prove that E.S. committed first degree rape upon the victim but also that the alleged sexual abuse occurred when E.S. was fourteen years old, which would trigger mandatory dispositions under Ch. C. art. 897.1 and R.S. 15:542. The petition charging E.S. expanded the time frame provided in the original arrest warrant affidavit, alleging that the sexual abuse occurred between November 2015 and December 2016.[7] E.S. turned fourteen on May 29, 2016. The State presented evidence that from the time N.H. was an infant either the victim's mother or grandparents would regularly bring N.H. to the house of E.S.'s mother, M.S., where E.S. also lived. The victim's grandmother testified that the original dates provided in support of the arrest warrant – November 2015 to March 2016 – were provided because that is when N.H. was visiting E.S.'s house. Her grandmother testified that during that time period, N.H. would go to E.S.'s house approximately once a week because M.S. would watch N.H. when her mother was studying or in classes. The testimony of both N.H.'s grandmother and M.S. indicated that N.H. was at the house of E.S. at least one time after E.S.'s fourteenth birthday.

After the CAC interview was played for the court, Dr. Hebert, who was admitted as an expert in forensic interviewing and counseling, was questioned about the challenges she faces when interviewing a five year old. She testified that children of the victim's age have trouble with sequencing. They also tend to be literal such

[7] The reason provided by the State in its brief for the expansion of the dates from March 2016 to December 2016 is that the victim's grandmother indicated that N.H. had visited E.S.'s house around Christmas and the New Year. However, this testimony was refuted at trial by the fact that N.H. was apparently in Alaska at that time. In any case, the victim's grandmother also testified that N.H. was at E.S.'s house on July 4, 2016 and that she recalled N.H. staying inside because she was afraid of the fireworks.

that questions must be asked in the exact manner that will allow them to respond. To illustrate a young child's level of understanding in regards to the wording of questions, Dr. Hebert recalled the victim becoming confused when the doctor attempted to confirm the victim's previous disclosures, asking, "Is it true that [E.S.] *asked* you to suck his missy?" The victim responded, "I don't know." Dr. Hebert immediately followed up with the more direct question of, "Is it true that you sucked [E.S.]'s missy?" At that point the victim stated, "Ahuh, I sucked it lots of times."

Dr. Hebert confirmed that, based on her training and experience, it was common for children to hesitate in initially disclosing a traumatic experience and that it was not unusual for children to refer to an abuser as "nice." She explained that the victim's initial disclosure that the abuse occurred "once" was normal due to a child victim's reluctance to disclose sexual abuse, knowing that it could potentially harm the abuser. After N.H. disclosed that the abuse occurred once, the victim looked up at Dr. Hebert to see her facial response, and only after Dr. Hebert met the disclosure with acceptance did N.H. further disclose that the abuse occurred "lots of times" and as many as "twenty times," Dr. Hebert explained.

The victim was still five years old at the time of the adjudication hearing. She ultimately testified that E.S. was not her friend, "[b]ecause he made me suck his mister."[8] When asked if E.S.'s "mister" touched any part of her body, she responded, "[m]y mouth." She explained that she had a "missy" instead of a "mister," defining a "missy" as "[s]omething that girls potty from." She stated that the incidents occurred in E.S.'s bedroom when only she and E.S. were present and the door was closed, and that she did it in exchange for playing with E.S.'s toys. She explained that the door was closed because E.S. did not want anyone else to see and stated that E.S. told her not to tell anyone. N.H. testified that E.S. put his mister in her mouth

[8] N.H. had at this point adjusted the use of "missy," explaining that a "mister" is something that boys "potty from."

"a lot" of times. When asked if it was more than ten times, she responded affirmatively, but when asked if it was more than twenty-one times, she stated, "[i]t was 21 times."[9] When asked what, if anything, her mother told her to say at the adjudication hearing, she replied "the truth."

E.S.'s only witness was his mother, M.S., who described herself as an "obnoxious mom" and asserted that her children have very little privacy in the house. She stated that E.S.'s room was located diagonally from her room and that the door to his room was usually kept open as he ran in and out. Whenever guests came over, however, she testified that E.S. would close his bedroom door because her daughters had many female visitors and E.S. did not want "a bunch of girls hanging out in his room." M.S. indicated that the victim was with her the whole time during the only visit in which N.H. was dropped off during the time period of the alleged abuse – which contradicted the State's evidence that N.H. was dropped off multiple times during the period in question. M.S. claimed that the victim visited M.S.'s house only three or four times total during the time period in question, which again contradicted the State's evidence that the victim visited M.S.'s house without her mother approximately once a week for the period provided in the arrest warrant affidavit.

M.S. also testified that she was a stay-at-home mom until July 5, 2016, at which time she began working Monday through Friday, from 8:00 a.m. to 5:00 or 5:30 p.m., away from home. She confirmed that at times N.H. would be at M.S.'s house when she returned from work. On cross-examination, M.S.'s testimony became increasingly inconsistent. Contrary to her initial testimony that N.H. was never present in the home without M.S. or the victim's mother, M.S. eventually testified that it was possible that the victim was at her home with E.S. when she or the victim's mother were not present, "[b]ut five other people were" (*i.e.* the five

[9] N.H. testified that she could count to twenty-one.

people other than M.S. who lived in M.S.'s house). At this point, M.S. added that E.S. would keep his door locked when N.H. was there and that the victim was not allowed in his room.

Prior to the adjudication hearing, the State filed a pretrial motion in limine seeking to exclude testimony of E.S.'s expert witness, Dr. Raphael Salcedo. The court, in granting the State's motion, explained that Dr. Salcedo was not permitted to view the CAC interview pursuant to R.S. 15:440.5[10] and *In re A.M.*, 08-2493, p. 3 (La. 11/21/08), 994 So. 2d 1277, 1279 (finding that the plain language of R.S. 15:440.5(C) prohibited an expert witness from viewing the videotaped statements of a "protected person" in preparation of trial). Because Dr. Salcedo admitted that he had viewed the video, the court excluded Dr. Salcedo's testimony due to the violation of R.S. 15:440.5.

The defense proffered Dr. Salcedo's testimony outside of the judge's presence. Dr. Salcedo was tendered as an expert in psychology and conducting

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[10] R.S. 15:440.5 provides in pertinent part:

> C. In a criminal prosecution, when the state intends to offer as evidence a copy of a videotaped oral statement of a protected person made pursuant to the provisions of this Subpart, the defendant, through his attorney only, may be provided a copy of the videotape if the court determines it necessary to prepare a proper defense. If the defendant's attorney is provided a copy of the videotaped statement by court order or by permission of the district attorney, only the following persons involved in preparing the defense of the instant charges shall be permitted to view the videotape: the attorney and his regularly employed staff, the defendant, the defense investigator designated to work on the case, the defense paralegal designated to work on the case, and other staff members of the attorney who are transcribing the videotaped oral statement. Other than a transcript of the videotaped oral statement, no copies of the videotape shall be made by any person, except for use as trial exhibits. The copy of the videotaped statement and any transcripts shall be securely retained by the defendant's attorney at all times and shall not be possessed, transferred, distributed, copied, or viewed by any unauthorized party. It shall be the affirmative duty of the defendant's attorney to return the videotape to the court immediately upon conclusion of the case, but in all cases prior to sentencing. A defendant who appears pro se in a criminal proceeding shall be allowed reasonable access to the videotape of a protected person only with an order of the court and under court-directed supervision. The tape shall be filed as part of the record under seal by the clerk of court for use in subsequent legal proceedings or appeals and shall be released only upon motion of the state or counsel of record with an order of court and in compliance with this Section. Any violation of this Subsection shall be punished as contempt of court. Any person who makes an unauthorized disclosure of the videotape or its contents may also be subject to liability for civil damages, including punitive damages.

forensic interviews. He testified that children are susceptible to suggestion and leading questions. Dr. Salcedo testified concerning the phenomena known as "false memory" and explained that forensic interviewing requires a significant amount of clinical training and has to be done "very, very carefully because of the problem of this imprinting of false memories in a child or even in an adult." When asked as to the reliance he would place on statements made by a very young child, Dr. Salcedo responded he would be "very, very careful" and would be "extremely skeptical" of a young child's allegations of sexual abuse. In spite of these statements, Dr. Salcedo stated that the issue of culpability is up to the trier of fact.

The judge ultimately adjudicated E.S. delinquent in violation of R.S. 14:42. The judge added that the forensic interview was "one of the better ones [he had] seen in [his] career" and that, after viewing N.H. on tape and in person, he was "utterly convinced of the truthfulness" of the allegations. Finding that E.S. was both thirteen and fourteen years old at the time of the offense, the judge ordered that E.S. be placed in secure care until the age of twenty-one and that he register as a sex offender after his release.

After his adjudication, E.S. challenged the application of Ch. C. art. 897.1 – which mandates secure confinement until the age of twenty-one for juveniles adjudicated delinquent of first degree rape – to his disposition because, he argued, (1) he was not fourteen at the time of the offense, and (2) the State did not give him notice that they would seek disposition pursuant to Ch. C. art. 897.1. The district court declined to sentence E.S. under Ch. C. art. 897.1 even though the court found that E.S. was both thirteen and fourteen years old at the time of the sexual abuse. The court reasoned that the State was required to specify in its petition that Ch. C. art. 897.1 would apply to the adjudication. The State sought supervisory review with the court of appeal, and the court of appeal granted its writ, finding that the language of Ch. C. art. 897.1 is mandatory and thus applied to E.S. *State in Interest of E.S.*,

17-1541 (La. App. 1 Cir. 11/7/17), 2017 WL 5172629, *writ denied, State in Interest of E.S.*, 17-1904 (La. 12/5/17), 231 So. 3d 19.[11]

The court of appeal affirmed E.S.'s adjudication and disposition, holding (1) there was sufficient evidence to convict E.S. of first degree rape under the *Jackson v. Virginia* standard[12] and sufficient evidence to prove that he was fourteen years old at the time of the offense, (2) the exclusion of Dr. Salcedo's testimony was not manifestly erroneous and did not violate E.S.'s due process rights, and (3) mandatory lifetime sex offender registration pursuant to R.S. 15:542 was not excessive punishment imposed in violation of La. Const. art. I, § 20.[13] *State in Interest of E. S.*, 18-0463 (La. App. 1 Cir. 9/21/18), 2018 WL 4523957. This Court granted E.S.'s application seeking review of the lower courts' rulings.

LAW AND ANALYSIS

We must first address numerous evidentiary issues presented by this matter before reaching E.S.'s argument that R.S. 15:542 violates the Eighth Amendment. As set forth below, we ultimately hold there was insufficient evidence to prove that E.S. was fourteen years old at the time of the offense, rendering R.S. 15:542 inapplicable and the Eighth Amendment question moot.[14]

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[11] J. Hughes concurred with the writ denial and provided the following reasons: "I concur because there will be an adequate remedy on appeal. However, I note the anomaly that while the trial court and the court of appeal both refer to the juvenile as being both thirteen and fourteen, the State's petition only charges one count."

[12] Finding that any rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979).

[13] E.S. did not contest the constitutionality of R.S. 15:542 under the Eighth Amendment in the lower court proceedings and instead only argued that his sentence was excessive.

[14] Even if we were to hold that R.S. 15:542 does apply to E.S., we would be compelled to deny E.S.'s constitutional argument. A constitutional challenge cannot be made for the first time before this Court. *State v. Hatton*, 07-2377, p. 14 (La. 07/01/08), 985 So. 2d 709, 719-20. E.S. concedes that he did not raise nor brief the constitutionality of juvenile sex offender registration pursuant to the Eighth Amendment in the lower courts.

Relative to the issue of constitutionality, the Attorney General makes two additional arguments: first, that the 22nd Judicial District Court was an improper venue because, he argues, any attempt to relieve a juvenile or defendant of registration requirements under R.S. 15:542 must be brought in the 19th Judicial District Court, *see* 15:544.1; second, that this case must be remanded to the district court for evidentiary proceedings due to the juvenile's failure to serve the Attorney General with its original pleading assailing the constitutionality of R.S. 15:542, *see* C.C.P. art. 1880.

Sufficiency of the Evidence – Adjudication

It is axiomatic that in a juvenile adjudication proceeding, as in any criminal trial, the State must prove beyond a reasonable doubt every element of the offense alleged in the petition. Ch. C. art. 883 ("In order for the court to adjudicate a child delinquent, the state must prove beyond a reasonable doubt that the child committed a delinquent act alleged in the petition."); *In Re Winship*, 397 U.S. 358, 365 (1970) ("The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child."); *State in the Interest of D.P.B.*, 02-1742, p. 4–5 (La. 5/20/03), 846 So. 2d 753, 756–57. The constitutional standard of review for juveniles is likewise identical to that of adults, *i.e.* the appellate court must determine whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find that the State proved all of the essential elements of the crime beyond a reasonable doubt. Ch. C. art. 883; *State ex rel. R.T.*, 00-0205, p. 2 (La. 2/21/01), 781 So. 2d 1239, 1241 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).[15]

In cases subsequent to *Jackson*, the United States Supreme Court has explained that the "any rational trier of fact" standard is not particularly demanding. *See, e.g.*, *Schlup v. Delo*, 513 U.S. 298, 330 (1985) ("The *Jackson* standard, which focuses on whether any rational juror could have convicted, looks to whether there is sufficient evidence which, if credited, could support the conviction."); *Coleman v. Johnson*, 566 U.S. 650, 656 (2012) ("[T]he only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality."); *Musacchio v. U.S.*, 136 S.Ct. 709, 715 (2016) ("Sufficiency review

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Because we find herein R.S. 15:542 is inapplicable to E.S., the Attorney General's notice and service arguments relative to that statute are pretermitted.

[15] This court must always first address whether there is sufficient evidence to convict or adjudicate "because the lack of sufficient evidence to sustain the conviction would entitle defendant to an acquittal under *Hudson v. Louisiana*." *State v. Crawford*, 14-2153, p. 18 (La. 11/16/16), 218 So. 3d 13, 25 (internal citations omitted).

essentially addresses whether the government's case was so lacking that it should not have even been submitted to the jury.") (internal quotations and citations omitted).

Louisiana Revised Statute 14:41(A) defines "rape" as the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent. "First degree rape is a rape committed ... where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed . . . [w]hen the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense." R.S. 14:42. First degree rape is a general intent crime. *See* R.S. 14:11; R.S. 14:42. General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. R.S. 14:10(2).

E.S.'s attack of the prosecution's evidence is two-fold: he asserts, first, that the testimony of N.H. is unreliable and, as such, the district court erred in relying on it, and, second, that there is insufficient corroborating evidence to support a finding that E.S. committed first degree rape. As to the unreliability of N.H.'s disclosures, E.S. cites to inconsistencies in N.H.'s statements related to (1) the number of times that the alleged sexual abuse occurred, and (2) to the fact that N.H. referred to E.S. as "nice" but also stated that he sexually abused her. He further highlights that Dr. Hebert asked direct questions – which E.S. argues were suggestive – in the CAC interview before N.H. repeated her initial disclosure about the sexual abuse or said anything negative about E.S. He likewise argues that N.H.'s disclosures at the adjudication hearing were unreliable because they were tainted by Dr. Hebert's suggestion in the CAC interview that the victim talk about E.S.

In the realm of testimony by child victims of sexual abuse, this Court has explained:

> Expert testimony can assist a trier of fact in understanding the significance of a child-witness's demeanor, inconsistent reports, delayed disclosure, reluctance to testify, and recantation. Veronica Serrato, Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses,* 68 B.U. L.Rev. 155, 156 (1988). An expert witness can explain to jurors that a child-witness's seemingly abnormal behavior-delayed reporting, inconsistent statements, and recantation-is in fact normal for children who have been sexually abused and can also dispel inaccurate perceptions held by jurors, allowing them to better assess a child-witness's testimony.

State v. Chauvin, 02-1188, p. 8–9 (La. 5/20/03), 846 So. 2d 697, 702–703 (internal citations omitted). In reference to the credibility of N.H.'s disclosures in the CAC interview, Dr. Hebert opined that N.H. understood the difference between the truth and a lie. She also testified, as stated above, that it is not unusual for a victim to refer to an abuser as "nice," nor is it uncommon for a victim of N.H.'s age to hesitate in disclosing abuse, which is why Dr. Hebert resorted to directing the conversation to E.S. once N.H. indicated she was growing tired of the interview. Finally, Dr. Hebert clarified that while some of N.H.'s statements were inconsistent on their face, they were not, in fact, indicative of untruthfulness or lack of credibility but instead demonstrative of normal behavior of a young victim of abuse.[16]

The trier of fact makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony of any witness. *State v. Mussall*, 523 So. 2d 1305, 1311 (La. 1988); *State v. Rosiere*, 488 So. 2d 965, 969 (La. 1986). This

[16] For example, Dr. Hebert opined that it was not inconsistent for N.H. to be hesitant to disclose the abuse or to initially say that it happened once and then to increase that number after Dr. Hebert met the victim's disclosure with acceptance. Dr. Hebert explained "[i]f you notice in the interview, she said, you know, she sucked [E.S.]'s missy once. She was down on the floor by the table. And she kind of looked up at me to see how I was going to respond. If anything in my facial expression, tone of voice, anything, had implied shock, disbelief, she would have probably stopped. That's what typically children will do." When Dr. Hebert did not respond with shock or disbelief and merely accepted these statements, saying "[o]k, so you just did it once," N.H. corrected "[a]ctually, I did it lots of times" and later stated the abuse occurred "twenty times." As stated above, Dr. Hebert also explained that because 5-year-old children are literal, it was not inconsistent for N.H. to say "I don't know" when asked "[i]s it true [E.S.] *asked* you to suck his missy?" because it may be that E.S. did not "ask" N.H. to do anything. When Dr. Hebert corrected the question and said "[d]id you suck [E.S.]'s missy?" N.H. responded unequivocally: "Ahuh, I sucked it lots of times."

Court "must recognize that the juvenile court judge observed the conduct and demeanor of the witnesses and was in the best position to determine credibility and weigh the evidence." *State ex rel. D.P.B.*, 846 So. 2d at 760. We therefore afford great deference to the trier of fact. *Id*.

Moreover, four- or five-year-old children are not by virtue of age alone incompetent to testify in Louisiana. *State v. Arnaud*, 412 So. 2d 1013, 1018 (La. 1982); *State v. Noble*, 342 So. 2d 170, 172 (La. 1977); *but cf. State v. Dykes*, 440 So. 2d 88, 92 (La. 1983) (three-year-old children "are not generally competent witnesses."); *State v. Wilson*, 109 La. 74, 33 So.85, 88 (1903) (on reh'g) (characterizing as "too extreme" the statement that "'to permit a child under three or even four years to be sworn and examined would be trifling with public justice,'" but finding trial court erred in qualifying four-year-old witness who was "ignorant and [did] not appear to have had any impression regarding the sanctity of an oath and of the sacredness of truth . . . [and] was even unaware of the purpose there was in bringing her to the courthouse to testify."). Louisiana no longer requires a trial court to expressly determine the competency of a witness under the age of twelve years when requested to do so by either the state or defendant, as formerly provided by R.S. 15:469.[17]

Ultimately, the district court judge was entitled to rely on Dr. Hebert's expert opinion in order to conclude that N.H. was telling the truth about the sexual abuse allegations regardless of her ostensibly inconsistent testimony and her initial reluctance to disclose the abuse. Here, N.H. consistently testified that E.S. instructed her to perform oral sex on him, and the district court found her testimony and the disclosures she made at the CAC interview to be credible. As the appellate court noted below, "the victim exhibited the ability to be truthful and correct any

[17] Repealed by 1988 La. Acts 515 enacting Code of Evidence.

misstatements" and "described the acts in detail from clearly identifying the body part to bluntly describing its taste." *State in the Interest of E.S.*, 2018 WL 4523957, at 5. Even assuming, *arguendo*, E.S. were to have successfully proved that the CAC interview was unreliable,[18] the district court was nonetheless entitled to make a credibility determination based on N.H.'s testimony at the adjudication hearing. Finally, while it is true that N.H. was not consistent as to the exact number of times the alleged sexual abuse occurred, she was unequivocal as to *whether* the abuse occurred,[19] and the State needed only prove that the offense occurred beyond a reasonable doubt *one* time.

E.S.'s second argument is that the State presented no medical, eyewitness, or other direct evidence to corroborate N.H.'s claims. Testimony of a sexual assault victim alone is sufficient to support a rape conviction, even if the State does not introduce medical, scientific, or physical evidence to prove that the defendant was the individual who committed the crime. *See State v. Rives*, 407 So. 2d 1195, 1997 (La. 1981) ("Despite the absence of scientific evidence of sexual intercourse, the testimony of the victim was sufficient to establish 'sexual penetration'"); *State v. Ponsell*, 33,543, p. 5 (La. App. 2 Cir. 8/23/00), 766 So. 2d 678, 682, *writ denied*, 00-2726 (La. 10/12/01), 799 So. 2d 490 (finding that testimony of the victim is sufficient even where no medical or physical evidence is introduced); *State v. Lilly*, 12-0008 (La. App. 1st Cir. 9/21/12), 111 So. 3d 45, 62, *writ denied*, 2012-2277 (La. 5/31/13), 118 So. 3d 386 (victim's testimony was sufficient even where contradicted by testimony of defendant); *see also State v. Ford*, 28,724 (La. App. 2 Cir. 10/30/96),

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[18] Under these circumstances, we do not find herein that Dr. Hebert's questions, such as "Tell me about [E.S.]" and "Did you say anything to your mom or [grandmother] about [E.S.]?", in light of Dr. Hebert's testimony, were suggestive but instead merely directed the conversation to E.S.

[19] Evidence in the record demonstrated that N.H. could count as high as "twenty-one" at the adjudication hearing and used the number "twenty" at the forensic interview, which preceded the adjudication hearing by several months, to indicate "several" or "many" (*e.g.* she also said she had been in school for "twenty days" and her dad had been in school for "twenty days"). Thus, the evidence does not indicate that N.H. was inconsistent; instead, she was consistently disclosing that the abuse occurred many times – as many times as she could count. *See*, *supra*, note [9].

682 So. 2d 847, 849–50 (finding that, absent 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.).[20]

It is true that in the instant case the only direct evidence of the sexual abuse was the testimony of N.H., but, as the foregoing jurisprudence indicates, a victim's testimony alone is sufficient to pass *Jackson* muster, even if there is contradictory evidence presented. *See, e.g.*, *Lilly*, 111 So. 3d at 62. It is notable in this case that the judge indicated that the forensic interview of N.H. was "one of the better ones [he had] seen over [his] career" and was thoroughly convinced that N.H. was being truthful in her testimony.[21] We defer to the district court judge as the factfinder to give great weight to victim's testimony, particularly in light of such express findings of credibility.

Furthermore, the victim's allegations *were corroborated* by the State's circumstantial evidence that E.S. and N.H. were in E.S.'s house – where N.H. alleged the abused occurred – as often as weekly without N.H.'s mother present.[22] Although

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[20] In *Chauvin*, *supra*, this court explained that child sexual abuse cases are difficult to prove because child sexual abuse often occurs in private and by a member of the victim's family, and physical evidence of the abuse is rare. 846 So. 2d at 702. "The problems with prosecuting child sexual abuse cases are increased by the fact that most children fail to report the abuse, and, if they do report, there is often a significant lapse in time between the actual occurrence and the ultimate reporting of the abusive incident by the child. Even then, the child may not include details in her revelation and often children recant or alter their allegations of abuse. *Id.* (citations omitted).

[21] Although the appellate review for sufficiency of the evidence of adjudication (*i.e.* the *Jackson* standard) is less onerous on the State – and as such we are not required to hold that the State proved its case beyond a reasonable doubt in order to affirm E.S.'s adjudication – we note that we have also viewed the CAC interview and find N.H.'s demeanor in disclosing the sexual abuse to be compelling. The reliability of her disclosures in the CAC interview are bolstered by the consistent testimony she provided at the adjudication hearing.

[22] Although M.S. testified that N.H. was never in E.S.'s room and that N.H. was only at her house once without N.H.'s mother, her testimony was internally inconsistent. Ultimately, the district court was in the best position to determine if M.S. was a credible witness such that her contradictory testimony should render the State's evidence insufficient. *Mussall*, *supra*. Clearly, the judge did not find her testimony credible and instead relied on the testimony of N.H.'s grandmother placing the victim in E.S.'s house on numerous occasions without the supervision of her mother. Similarly, the judge was better positioned to assess the credibility of M.S.'s claims that N.H. and E.S. were constantly supervised in her house. When pressed, M.S. even admitted – contrary to her previous statements – that there were times when E.S. and N.H. could have been at the house when she was not present.

the State's evidence was contradicted by the testimony of M.S., the district court could rationally accept the victim's statements as true and reject any contrary testimony by M.S. as false.

We find that, viewed in light most favorable to the prosecution, a rational trier of fact could have found that the victim's statements established that E.S. committed first degree rape by engaging in oral sex with N.H., who was under the age of thirteen. The district court was entitled to rely on the testimony of Dr. Hebert in finding the victim's statements to be credible, and we defer to the district court's determination of each witness's credibility. Additionally, although N.H.'s testimony is the only direct evidence of the offense, a victim's testimony alone is sufficient for purposes of a sufficiency of the evidence review pursuant to the *Jackson* standard. Accordingly, there is no merit to the juvenile's argument that the evidence is insufficient to support the adjudication for first degree rape.

Exclusion of Expert Testimony

Having established that there was sufficient evidence to adjudicate E.S., the next issue we must address is whether the exclusion of the testimony of Dr. Salcedo, E.S.'s expert witness, violated E.S.'s right to a fair trial, which includes the right to present a defense and to "compel the attendance of witnesses." La. Const. art. I, §16. E.S. does not contest that Dr. Salcedo viewed the CAC interview recording in violation of R.S. 15:440.5(C)[23] but instead argues that the district court erred in excluding Dr. Salcedo's testimony because (1) the district court was limited to the

[23] Louisiana Revised Statutes 15:440.1, *et. seq.*, addresses electronic recordings of "protected persons," which include a victim of a crime who is under the age of seventeen years. R.S. 15:440.2. The victim in this rape case was between three and four years old at the time of the offense and five at the time of the CAC interview. Thus, the victim is a protected person under the statute. *Id*. Under the plain terms of R.S. 15:440.5(C), only defense counsel and the defendant are permitted to view videotaped statements of a protected person in preparation for trial. *See*, *supra* note [10].

statutory remedies for the violation of R.S. 15:440.5(C), and (2) such remedies do not include exclusion of expert testimony.[24]

The State argues, however, that regardless of whether the district court erred in excluding Dr. Salcedo's testimony due to the violation of R.S. 15:440.5(C), this Court should affirm the exclusion of his testimony based on the court of appeal's reasoning – namely, that the proffered testimony should be excluded because it would have invaded the province of the factfinder.[25] Louisiana Code of Evidence article 704 provides:

> Testimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact. However, *in a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused.*

Id. (emphasis added).

Further, although an expert may testify if such testimony would assist the court in determining a fact at issue or to understand the evidence, *see* C.E. art. 702, the right to present a defense does not encompass the right to present expert testimony commenting directly on the credibility of a victim's testimony. *In re: A.M.*, 994 So. 2d at 1279–1280 (citing *State v. Foret*, 628 So. 2d 1116, 1130 (La. 1993)).

In the instant case, Dr. Salcedo generally noted the problem young children have with the ability to recall events and how they are highly susceptible to suggestiveness. Significantly, when asked whether he would necessarily deem

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[24] R.S. 15:440.5(C) specifically provides that any person in violation of its provisions is subject to a contempt citation, and "[a]ny person who makes an unauthorized disclosure of the videotape or its contents may also be subject to liability for civil damages, including punitive damages." *See also*, *In re: A.M.*, 994 So. 2d at 1279.

[25] This Court has generally permitted proponents of motions to offer additional reasons on appeal why the ruling should be sustained. *See State v. Butler*, 12-2359, p. 4 (La. 5/17/13), 117 So. 3d 87, 89; *see also* C.C.P. art. 2133(B) ("A party who does not seek modification, revision, or reversal of a judgment in an appellate court, including the supreme court, may assert, in support of the judgment, any argument supported by the record, although he has not appealed, answered the appeal, or applied for supervisory writs.").

information relayed to him by a four- or five-year old unreliable merely because of the child's age, Dr. Salcedo responded:

> Not necessarily. But that young an age, I would be very careful about running with that self report if that's all there is. I would be looking for something else. I would be looking for additional information witnesses, something else. Maybe some aberrant behavior on the part of the child. Something. If that's all I had, I would be very, very hesitant . . . I'm extremely skeptical of allegations that come up like that, from a child that young.

Thus, not only did Dr. Salcedo's testimony attack the veracity of the victim based on her age and lack of brain development, the inability of a child her age to sequence and recall events, and a high susceptibility to suggestiveness, but in the foregoing statement alone he calls doubt as to whether N.H. can be believed if other evidence does not corroborate her statements. For the foregoing reasons, the court of appeal found that "portions of the proffered testimony were, in effect, opinions of E.S.'s guilt or innocence." *State in the Interest of E.S.*, 2018 WL 4523957, at 17. We may not agree with such finding had Dr. Salcedo not also viewed the interview of N.H. in violation of R.S. 15:440.5(C), which enabled him to direct his testimony at criticizing what he witnessed. Taking these facts together, we affirm the court of appeal's holding that Dr. Salcedo's testimony violated C.E. 704 and therefore affirm the district court's exclusion of Dr. Salcedo's testimony.[26]

[26] To be clear, because of the unique facts of this case it is unnecessary for this Court to resolve the question of whether the violation of R.S. 15:440.5(C), alone, is sufficient legal justification for exclusion of expert testimony, and we therefore decline to do so.

Sufficiency of Evidence – Age

E.S. also challenges whether there was sufficient evidence that he was fourteen years old at the time of the offense. The determination of E.S.'s age is relevant not to his guilt or innocence but instead to his disposition, as both Ch. C. art. 897.1 and R.S. 15:542 provide mandatory dispositions and statutory requirements, respectively, for persons who have reached the age of fourteen at the time of committing first degree rape.

Children's Code article 897.1(B) provides:

> B. After adjudication of a felony-grade delinquent act based upon a violation of R.S. 14:42, first degree rape, or R.S. 14:44, aggravated kidnapping, the court *shall* commit the child who is fourteen years or older at the time of the commission of the offense to the custody of the Department of Public Safety and Corrections to be confined in secure placement until the child attains the age of twenty-one years without benefit of probation or suspension of imposition or execution of sentence.

(emphasis added).

Thus, a juvenile adjudicated delinquent of first degree rape in violation of R.S. 14:42 who was fourteen years old at the time of the offense faces a mandatory sentence of confinement in secure care until the age of twenty-one. *Id*.

Similarly, Revised Statutes 15:542 provides in pertinent part:

> A. The following persons *shall* be required to register and provide notification as a sex offender or child predator in accordance with the provisions of this Chapter:
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> ***
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> (3) Any juvenile, who has attained the age of fourteen years at the time of commission of the offense, who has been adjudicated delinquent based upon the perpetration, attempted perpetration, or conspiracy to commit any of the following offenses:
>
> (a) Aggravated or first degree rape (R.S. 14:42) . . .

(emphasis added).

And relative to the duration of registration, R.S. 15:544(B)(2)(b) provides:

> Any of the following persons required to register pursuant to this Chapter shall register and provide notification for the duration of their lifetime, even if granted a first offender pardon, unless the underlying conviction is reversed, set aside, or vacated, except for those convictions that were reversed, set, aside, or vacated pursuant to Code of Criminal Procedure Article 893 or 894, or a similar provision of federal law or law from another state or military jurisdiction:
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> ***
>
> (b) A juvenile adjudicated for the enumerated offenses in R.S. 15:542(A)(3).

Thus, the statute mandates that when a district court adjudicates a fourteen-year-old juvenile delinquent of first degree rape, the disposition of such juvenile must include lifetime sex offender registration.

Although the parties appear to be in agreement concerning the State's burden of proof with respect to the juvenile's age – that the State was required to prove such a fact beyond a reasonable doubt, and that this Court will review a finding of guilt under the *Jackson* standard for sufficiency of the evidence – this Court has yet to opine as to the applicable burden of proof and corresponding standard of review on appeal for the element of age under Ch. C. art. 897.1 and R.S. 15:542.

Given the *de minimus* evidence presented, however, we find the State failed to meet its burden under *any* standard of review to prove that the district court reasonably found that E.S. was fourteen years old when he raped N.H. The record is completely devoid of any concrete evidence establishing when the abuse happened except that it clearly occurred before February 2017 when N.H. made the initial disclosure. The State did present evidence, based on the testimony of M.S. and the victim's grandmother, that N.H. visited E.S.'s house after E.S. had turned fourteen years old. However, the State produced no evidence as to *when* the abuse occurred. N.H. did not testify as to any specific dates or give any information that would identify a season or holiday, let alone a specific date, on which the abuse occurred. Likewise, she was never asked whether the abuse occurred every time she visited

E.S.'s home. Though the victim first reported the abuse to her grandfather in February 2017, there was no attempt to establish how recently the abuse had occurred.

To be clear, as discussed in depth above, the record supports a finding that E.S. abused N.H. and did so at least once. Thus, the evidence supports two general conclusions: (1) E.S. raped N.H. at least on one occasion; and (2) N.H. visited E.S.'s home after he turned fourteen years old. Making the quantum leap from those two conclusions, however, to infer a third conclusion that E.S. must have therefore committed at least one act of rape beyond his fourteenth birthday is not supported by the record. As such, we find the State has failed to present sufficient evidence that E.S. was fourteen years of age at the time of the offense. Having thus concluded that lifetime sex offender registration pursuant to R.S. 15:542 is inapplicable to this case, we are unable to reach the constitutional issue for which we granted the juvenile's writ.

DECREE

Accordingly, we find that there was insufficient evidence for the district court's determination that E.S. was fourteen at the time of the offense in this matter. We therefore affirm the court of appeal's finding that that there was sufficient evidence to adjudicate E.S. delinquent, reverse the court of appeal's finding that there was sufficient evidence to establish E.S.'s age at the time of the offense, vacate the disposition, and remand to the district court for redisposition.

AFFIRMED IN PART, REVERSED IN PART, DISPOSITION VACATED, AND REMANDED FOR REDISPOSITION.

10/22/19

SUPREME COURT OF LOUISIANA

No. 2018-CK-01763

STATE OF LOUISIANA IN THE INTEREST OF E.S.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIRST CIRCUIT, PARISH OF ST. TAMMANY

WEIMER, J., concurs in the result.

I respectfully concur in the result in this case. I write separately to address one issue in which my analysis departs from that of the majority. That issue concerns the admissibility of the testimony of defendant's expert witness, Dr. Raphael Salcedo. Dr. Salcedo's testimony was excluded by the juvenile court because, in preparing to testify, Dr. Salcedo was given a videotape of the interview of the victim (a protected person) by defense counsel, a violation of La. R.S. 15:440.5(C).[1]

Given that the state was allowed to introduce expert testimony from Dr. Barbara Hebert to bolster the credibility of the victim's testimony, I find the denial of a reciprocal right to the defendant to be problematic, especially given Dr. Salcedo's statement in his proffered testimony that, while he would be extremely skeptical of allegations from a 4 to 5-year-old child, "the issue of the credibility here is entirely up to the trier of fact. I'm not here to claim any expertise on matters that are the proper purview of the trier of fact."

Thus, I believe that the complete exclusion of Dr. Salcedo's testimony in this case was erroneous. A review of Dr. Salcedo's proffered testimony reveals that

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[1] There is no authority in La. R.S. 15:440.5 that would permit a court to exclude testimony solely because an improper party viewed a child's forensic video. Rather, the statute itself provides the remedies for its violation. La. R.S. 15:440.5(C). Thus, to the extent the juvenile court's ruling is based on La. R.S. 15:440.5, the court erred in excluding Dr. Salcedo's testimony.

portions of his testimony clearly address permissible areas of inquiry and do not touch on the impermissible issue of credibility of the victim. Those portions should have been admissible. Nevertheless, after reviewing Dr. Salcedo's proffered testimony in its entirety, I have come to the conclusion that, under the particular facts of this case, its exclusion was harmless error.

Dr. Salcedo offered generalized testimony addressing the susceptibility of children to suggestion and leading questions and the problems young children have with sequencing. These issues were effectively explored by E.S.'s counsel on cross-examination of Dr. Hebert. Moreover, even considering Dr. Salcedo's testimony, the testimony of the victim, which the juvenile judge accepted as credible, was consistent regarding the occurrence of the rape and is, in and of itself, sufficient to sustain E.S.'s conviction. See **State v. Rives**, 407 So.2d 1195, 1197 (La. 1981).