NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA IN THE INTEREST OF J.T.

COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

02-KA-256

APPEAL FROM JUVENILE COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA,
NUMBER 2000 JU 1592, DIVISION "C,"
HONORABLE RUCHE J. MARINO, PRO TEMP JUDGE, PRESIDING.

JULY 30, 2002

WALTER J. ROTHSCHILD
JUDGE

Panel composed of Judges Edward A. Dufresne, Jr.
Sol Gothard and Walter J. Rothschild.

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REVERSED AND REMANDED

On December 4, 2000, the Jefferson Parish District Attorney filed a petition alleging that the juvenile, J.T.[1], was delinquent for committing forcible rape upon D.R.[2], a violation of LSA-R.S. 14:42.1.[3] The juvenile denied the allegations of the petition on December 21, 2000. On May 30, 2001, a joint stipulation of evidence and reports was filed. On that same date, the case proceeded before the juvenile court judge who adjudicated J.T. delinquent of forcible rape. The court ordered the Office of Youth Development to perform a predispositional investigation. On July 12, 2001, the court conducted a disposition hearing and

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[1]Pursuant to the requirements of confidentiality of juvenile proceedings as set for in La. Ch.C. art. 412, the juvenile herein is referred to by initials only. The petition reflects that J.T.'s date of birth is April 22, 1988. However, J.T. stated in court, on May 30, 2001, that his date of birth was April 22, 1986. On July 12, 2001, J.T. stated in court that his date of birth was April 23, 1986.

[2]The victim's initials, D.R., will be used throughout this opinion because he is also a juvenile. D.R.'s date of birth is February 7, 1988. Therefore, D.R. was 12-years-old at the time the alleged offense was committed on or about November 26, 2000.

[3]The petition also alleges that the juvenile was delinquent for committing sexual battery upon Corey Brooks, a juvenile, in violation of LSA-R.S. 14:43.1. The petition was dismissed/abandoned by the state since Corey Brooks refused to appear, and the district attorney's office was unable to have the Office of Community Services or the Office of Youth Development transport the minor. This appeal pertains only to the alleged offense against D.R.

committed the juvenile to the Department of Public Safety and Corrections/Correctional Center for Youth (DPSC/CCY) for a period of eight months. J.T. filed a motion for appeal on July 27, 2001, and he now asserts one assignment of error.

FACTS

The following facts were elicited at the adjudication hearing:

D.R., who was called as a witness by the state, testified that on November 26, 2000, he was in custody at the Bridge City Correctional Institute because he had committed a robbery. He testified that, on that date, as he was using the bathroom in a dormitory, J.T. came in and said, "Give me some butt or I'm going to beat you up and take it." D.R. said, "No, I don't get down like that." D.R. testified that he meant that he didn't have sex with other boys. D.R. testified that, as he got up to wipe his buttocks, J.T. ran into the bathroom and rushed into D.R. At that point, D.R.'s clothes were off. J.T. tried to get D.R. onto the floor, but D.R. wouldn't let him.

D.R. tried to tell J.T. to get off of him, but J.T. just stood up and had sex with him. D.R. testified that J.T. put his penis halfway into his buttocks. D.R. told J.T. to get off of him, and then T.F.[4], another juvenile, walked in. J.T. stopped what he was doing, and D.R. put his clothes on and went back into the day room. D.R. did not tell anybody what had happened because he was afraid that J.T. would beat him up. D.R. testified that he had had problems with J.T. before this incident. D.R. did not give J.T. permission to have sex with him. D.R. talked to Mr. Camese, the investigator, and told him what J.T. had done. D.R. did not voluntarily go and tell anyone about this incident. D.R. testified that he was not trading candy with J.T. for sex. D.R. stated that he had sex with J.T.

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[4]The witness' initials, T.F., will be used throughout this opinion because he is a juvenile.

because J.T. forced him to. D.R. testified that, when T.F. walked in, D.R. was struggling with J.T. and trying to push him away with his elbows.

The juvenile and the state stipulated the following into evidence at the adjudication hearing: Louisiana Technical Institute (LTI) investigation report dated December 4, 2000, medical records of D.R., statements of Sergeant Wilane Hall dated November 28, 2000 and November 30, 2000, statements of T.F. dated November 27, 2000 and November 28, 2000, statement of Sergeant Lance Daniels dated November 30, 2000, and JPSO Photos Item No. K-22491-00.[5]

D.R.'s medical records from Medical Center of Louisiana at New Orleans dated November 27, 2000 indicate that D.R., age 12, was in custody at Bridge City Correctional Center when another inmate, J.T., age 14, walked in and told D.R. "I want some ass and I'm going to beat you up everyday." D.R. stated that J.T. meant he would beat up D.R. everyday if D.R. did not allow J.T. to perform anal intercourse on D.R. D.R. stated that, "he tried to throw me on the ground, but he couldn't, so he did it standing up." D.R. stated that J.R.'s penis was in his anus. D.R. said the incident was interrupted when T.F. walked in. D.R. said he allowed it to occur due to the threat that he would be beaten up everyday. The medical exam revealed a tear in the anus at the 6 o'clock position.

T.F., in his statement dated November 27, 2000 indicated that he didn't see J.T. and D.R. having sex. T.F. saw D.R. and J.T. standing up and urinating in the bathroom one time. One of them was standing by the urinal and one was standing by the toilet. T.F. said they didn't have their pants pulled down, and J.T. was not standing behind D.R. T.F. stated that they both looked at him "kinda funny," so it was possible that they could have been doing something. He said

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[5]The reports and statements involve the claims of both D.R. and C.B. against J.T.; however, only the matters relating to D.R. will be discussed here.

that he got permission to use the bathroom from Ms. Hall. T.F. stated that J.T. owed D.R. a pack of skittles.

T.F., in his statement dated November 28, 2000, indicated that he was in King Hall dormitory on the Sunday in question at 10:00 a.m. He stated that he was in the day room in King Hall writing letters on one of the four tables. T.F. said that there was a television in the room, and that other juveniles, including D.R. and J.T., and sergeants were in there as well. T.F. stated that he went into the bathroom and saw J.T. with his erect penis in D.R.'s buttocks. D.R.'s and J.T.'s pants were down to their ankles. T.F. stated that D.R. was not moving around, trying to push, putting up a struggle or screaming; he looked like he was enjoying himself. D.R.'s hands were hanging straight down. When J.T. and D.R. saw T.F., they stopped what they were doing and turned around and pretended like they were urinating. He saw them for about four or five seconds. T.F. didn't tell anyone what he saw because he didn't want to be a snitch and get himself into trouble. After T.F. left the bathroom, he went back to the day room and finished writing his letter. D.R. and J.T. came back into the day room and went to the corner of the room where the four tables were. T.F. stated that D.R. and J.T. were talking and looked happy.

Sergeant Lance Daniels, in his statement dated November 30, 2000, stated that he was in charge of the dormitory on the Sunday in question. Major Hyatt told him that one boy said he was in the big bathroom and that he had had anal sex in there with another boy, and that a third boy came in and saw them. Sergeant Daniels indicated that it would have been impossible for the three boys to be in the big bathroom at 10:00 a.m. on Sunday morning because that was when the boys go to Bible study. He said that he only allowed one boy at a time to go to the big bathroom, and one to go to the little bathroom. He stated that there were never two boys going to one of the bathrooms at the same time.

Sergeant Daniels said that he monitored the dormitory and handed out toilet paper to the boys. Sergeant Daniels stated that J.T. and D.R. did not have sexual intercourse because it wasn't reported. He said that when he allows a boy to go to the bathroom, the boy takes his shirt, throws it over the door and closes the door. That lets others know someone is in there, and it keeps the door closed. Sergeant Daniels said that one of the boys could have sneaked into the bathroom without him seeing it.

Sergeant Wilane Hall, in her statement dated November 28, 2000, stated that she worked the day shift on the Sunday in question. She said that Sergeant Daniels was in charge of the bathroom lines. Sergeant Hall stated that the boys would line up and go one at a time to urinate and get water. She said that she and Sergeant Daniels ran the line after breakfast and after lunch. After that Sergeant Daniels would run another line. Sergeant Hall said that there were no problems with the boys that day. She stated that she was in the back of the dorm and that Sergeant Daniels was in the front of the dorm. Sergeant Hall said she didn't remember any of the boys asking her that day if they could go to the bathroom. She saw D.R. that day, and he acted like nothing was wrong. Sergeant Hall couldn't understand why D.R. didn't tell her what had happened. She never had any problems with J.T. She didn't understand how J.T. could have done this to D.R., because D.R. would have fought him.

Sergeant Wilane Hall, in her statement dated November 30, 2000, stated that the boys asked her if they could go to the bathroom, and she said "yes," but that they had to check in with Sergeant Daniels first. She didn't see boys going to use both bathrooms at the same time on the Sunday in question. Sergeant Hall couldn't explain why four boys were in the bathroom at the same time on that Sunday. Some of the boys told Sergeant Hall that D.R. had lied, that J.T. didn't rape him, and that D.R. had sex with J.T. for the skittles. She said that she also

heard that D.R. and J.T. had done this before. Sergeant Hall stated she had heard that D.R. had sex with J.T. willingly.

Lieutenant Eddie Camese conducted an investigation into the sexual abuse allegations of D.R. He interviewed numerous people, including D.R., J.T., Sergeants Daniels and Hall, Ms. T. Hammond, MD - psychiatrist, Sergeant Stephanie Jefferson, Nurse Doris Carney, Major Ned Tolliver, Nurse Mary Southerland, Ms. Doris Duckett, Detective Broussard, Lieutenant Monie, Major Hyatt and T.F. Lt. Camese concluded in his investigation report, dated December 4, 2000, that J.T. abused D.R. D.R. stated, among other things during the investigation, that the encounter with J.T. in the bathroom lasted a minute or so. J.T. stated to investigators that he had sex with D.R. When asked by Major Hyatt if J.T. and D.R. were doing something children shouldn't do or whether he raped D.R. by force, J.T. said they were doing something children shouldn't do.

After the adjudication hearing, the juvenile court judge stated his findings in pertinent part:

> the Statue [sic] talks about forcible rape when there's intercourse and of course the man had testified that this had happened and it says when the victim is presented [sic] from resistance [sic] the act by force of threats of physical violence under the circumstances where the victim reasonable [sic] believes that such resistance would not prevent the rape. Now, we're not dealing with the, ah, God Father tapes in that kind of situation where we have people threaten one and [sic] another with shooting someone, or that type of violence. What we are dealing [sic] in a situation where youngsters are placed into an environment and are being, are being, ah, discipline [sic] as a result of some type of, ah, violation of law. And for being discipline [sic] they're in the this [sic] institution and when a person who's in there is told by another one with a force of [sic] threat of physical violence, ah, this is a type of circumstances [sic] which, which brings, ah, this person to fear, to even fear for his life or fear of saying the truthful this other [sic], even after the situation has happened. Because the victim I think even after the, [sic] indicated to the psychiatrist, ah, that, that he denied it, then he said it happened and he denied it to different people and I think the end result was that the people who were at the, ah, LTI said that it was substantiated, from [sic] basically what we have. So, here we have, we have the testimony of, of, what the man says happened to him and we have the situation at the, ah, on the other side of the

> fence, ah, and of course he doesn't have to say so, but I know the defendant's saying he didn't do it. I understand that. But we [sic] the other witness who comes in and we're talking about this guy that we talked about before, this T.F. and, ah, he says different things, but of course I don't think that T.F. testified what he saw and he saw that, ah, what was happening and he saw that, ah, this young man's penis was erect and it was in the rear end of this other person and argument is made is that, ah, this was, when he saw it, it was consent. I don't know how anybody can come to a conclusion and see that and saying it's consensual when this is happening under a situations [sic] of what's happening. Because if there had been, if it had been consensual I'm sure that, ah, after he left this way, he wouldn't of, ah, ah, made some of the statements to the police in there and some of the statements that something wrong going on [sic], so basically, ah, the Statue [sic] requires beyond a reasonable doubt and I'm satisfied that the State has proven this beyond a reasonable doubt and I'm going to find you guilty of forcible rape. That's my analysis of, I know you don't agree with it, but you know.

DISCUSSION

By his sole assignment of error, the juvenile argues that the evidence presented at the adjudication hearing was legally insufficient to adjudicate him delinquent on the charge of forcible rape. He contends that the state failed to prove that the victim did not consent to the sexual act. The juvenile claims the state failed to prove that the victim was prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believed that such resistance would not prevent the rape. In addition, the juvenile claims that the trial court erred by finding that the sex could not be considered consensual because it occurred in a correctional facility under threat of violence.

In State v. Wallace, 00-1745 (La. App. 5 Cir. 5/17/01), 788 So.2d 578, this Court set forth the law regarding sufficiency of the evidence and forcible rape:

> The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction 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, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560 (1979).
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> "It is not the function of an appellate court to assess credibility or reweigh the evidence." State v. Rosiere, 488 So.2d 965, 968 (La.1986). It is the role of the fact-finder to weigh the respective

> credibilities of the witnesses, and the appellate court will not second-guess the credibility determinations of the trier of fact beyond making sufficiency evaluations under the Jackson standard of review. State ex rel. Graffagnino v. King, 436 So.2d 559, 563 (1983). In the absence of internal contradiction or irreconcilable conflicts with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a conviction. State v. Stec, 99-633, p. 3 (La. App. 5 Cir. 11/30/99), 749 So.2d 784, 787.
>
> Louisiana's definition of rape includes the act of anal sexual intercourse with a male, when the act is committed without the person's lawful consent. LSA-R.S. 14:41(A). "Emission is not necessary and any sexual penetration . . . , however slight is sufficient to complete the crime." LSA-R.S. 14:41(B). The crime of forcible rape occurs when the sexual intercourse is deemed to be without the victim's lawful consent "because it is committed when the victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape." LSA-R.S. 14:42.1(A)(1).
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> Thus, the elements of forcible rape are (1) anal or vaginal sexual intercourse regardless of degree of penetration; (2) lack of consent of the victim; (3) a victim who was prevented from resisting by force or threat of physical violence; and (4) a victim who reasonably believed that resistance would not prevent the rape. State v. Alberto, 95-540 at p. 9 (La. App. 5 Cir. 11/28/95), 665 So.2d 614, 621-622, writ denied, 95-1677 (La.3/22/96), 669 So.2d 1222 and 96-0041 (La.3/29/96), 670 So.2d 1237.

State v. Wallace, 788 So.2d at 584.[6]

In juvenile proceedings the scope of review of this court extends to both law and fact. Article 5, Section 10, Louisiana Constitution of 1974; State in Interest of Batiste, 367 So.2d 784 (La. 1979). Therefore, in considering appellant's contention that the state did not prove his guilty beyond a reasonable doubt, we must examine the record to determine whether the trial judge was clearly wrong in his finding that the State met its burden.

The state's burden of proof in a delinquency proceeding is the same as in a criminal proceeding against an adult, to prove beyond a reasonable doubt every element of the offense alleged in the petition. La. Ch. C. art. 883. To support

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[6]A writ was filed with the Louisiana Supreme Court on June 21, 2001 (2001-KO-1849); however, no action has been taken as of this writing.

J.T.'s conviction, the state was required to prove that the victim was prevented from resisting by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape. La. R.S. 14:42.1A(1).

At the adjudication hearing, D.R. testified that J.T. came into the bathroom and said, "Give me some butt or I'm going to beat you up and take it." D.R. testified that he told J.T., "No, I don't get down like that." D.R. testified that J.T. rushed into the bathroom and tried to get D.R. onto the floor, but D.R. wouldn't allow it. He stated that he had sex with J.T. because J.T. forced him to. D.R. also testified that he struggled with J.T. and tried to push him away with his elbows during the incident. J.T. indicated in his statement to investigators that he had anal sex with D.R. When asked by Major Hyatt if J.T. and D.R. were doing something children shouldn't do or whether he raped D.R. by force, J.T. said that they were doing something children shouldn't do. T.F. indicated in his statement to investigators that he walked in when J.T. and D.R. were having sex, that D.R. was not struggling, and that it looked like D.R. was enjoying himself.

In its oral reasons for judgment, the trial court stated that the environment of a penal institution where this act occurred creates the type of circumstances which causes a person to fear for his life or to fear stating the truth. On this basis, the trial court found the evidence sufficient to support the charge of forcible rape. However, there is nothing in the law or jurisprudence to support the trial court's findings that the requirement of inability to resist is satisfied because the offense took place in a penal institution where the victim is necessarily prevented from resisting.

Although the state in brief relies on the case of In Interest of Thomas, 395 So.2d 912 (La. App. 2 Cir. 1981), writ denied, we find that case to be distinguishable from the facts of the present case. In that case, an adjudication of forcible rape was affirmed, and the appellate court noted the fact that the offense

took place in an institutional setting in considering the victim's perception of the futility of resistance. However, in that case, three fellow inmates confronted the victim in the bathroom of the juvenile facility and demanded sex. Two of the inmates were larger than the victim and two inmates held the victim's arms while the third inmate perpetrated the offense. The victim in that case immediately reported the incident to the appropriate authorities. Further, the victim testified that he experienced prior problems with physical abuse by two of the inmates who participated in this crime.

In the present case, there was no significant evidence of resistance. D.R. did not voluntarily report the incident. The medical records in evidence indicate that D.R. said he allowed the sexual act to occur due to the threat that he would be beaten up every day. However, there was no evidence presented that D.R. reasonably perceived the threat as credible, and there was no evidence that J.T. had struck the victim prior to this incident. Further, D.R. did not testify that he reasonably believed that resistance would not prevent the rape.

J.T. suggested in his statement to investigators that he did not force D.R. to have anal sex. There was no testimony that defendant used violence on the victim - he did not beat or strike the victim, and he did not hold him down. There was no evidence presented that J. T. was larger than D.R., or that J.T. had the ability to act on his alleged threat to beat up D.R. every day.

Further, the testimony of the eyewitness to this offense did not support the state's claim that the victim resisted or was prevented by force or threats from resisting. T.F. stated that he walked in while J.T. and D.R. were having sex, that D.R. was not struggling, and that D.R. looked like he was enjoying himself.

Viewing the evidence in a light most favorable to the prosecution, we find that the state failed to prove all of the essential elements of forcible rape beyond a reasonable doubt. Our review of the record indicates that sufficient evidence

was not produced to prove the element of forcible rape that the victim resisted or was prevented from resisting because of a threat of force or violence.

When the evidence produced by the state does not support the conviction, the court is not required to discharge the defendant if the evidence supports a conviction for a legislatively authorized lesser and included grade of the offense. See: La. C.Cr.P. art. 821. State v. Williams, 610 So.2d 129 (La. 1992); State v. Bay, 529 So.2d 845 (La. 1988); State v. Byrd, 385 So.2d 248 (La. 1980). The proper procedure is for this court to order an entry of a judgment of guilty to the lesser and included grade of the offense and for re-sentencing in accordance with the judgment. State in Interest of B.J., 617 So.2d 238, 242 (La. App. 5 Cir. 1993); State v. Williams, supra.

According to La. C.Cr.P. art. 814(10), the applicable responsive verdicts to forcible rape are: guilty of simple rape (a violation of La. R.S. 14:43), and guilty of sexual battery (a violation of La. R.S. 14:43.1). Both of these offenses are legislatively authorized lesser and included grades of the charged offense. La. C.Cr.P. art. 821. However, the crime of simple rape also requires an incapacity to resist which was not proven in this case. La. R.S. 14:43.

La. R.S. 14:43.1 defines sexual battery, in pertinent part, as the intentional touching of the genitals of a person using any instrumentality or body part of the offender. The State need not prove the offender used force or compulsion to prove the offense of sexual battery. Rather, this statute requires that the offender act without the consent of the victim. After a careful review of the record in this case, we conclude that the evidence presented in this case supports an adjudication of the crime of sexual battery.

In conclusion, we find insufficient evidence to support J. T.'s conviction for forcible rape. However, we find sufficient evidence to support a conviction for the lesser and included offense of sexual battery, a legislatively authorized responsive verdict. We must therefore remand the matter with a order to the

juvenile court to enter an adjudication for the lesser and included grade of the charged offense.

ERROR PATENT DISCUSSION

In State in the Interest of C.D., 95-160 (La. App. 5 Cir. 6/28/95), 658 So.2d 39, 41, this Court noted that the Louisiana Children's Code is silent as to whether a juvenile criminal proceeding is entitled to an error patent review on appeal. This Court further noted that, according to LSA-Ch.C. art. 104, the Louisiana Code of Criminal Procedure governs in matters not provided for in the Children's Code. Thus, the Court concluded that "we are mandated by LSA-C.Cr.P. art. 920 to conduct an error patent review despite the fact that defense counsel did not request it." Id. Therefore, in the instant case, the record was reviewed for errors patent, according to LSA-C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). The review reveals one error patent in this case.

The trial judge did not inform juvenile of the prescriptive period for seeking post-conviction relief as mandated by LSA-C.Cr.P. art. 930.8 which provides that a court shall not consider an application for post-conviction relief, including applications which seek an out-of-time appeal, if the application is filed more than two years after the judgment of the conviction and sentence become final.

On remand, the trial court is instructed to inform the juvenile of the correct prescriptive period for applying for post-conviction relief. La. C.Cr.P. art. 930.8; State ex rel. Z.S., 01-1099, (La. App. 5 Cir. 2/26/02), 811 So.2d 1003.

CONCLUSION

Accordingly, for the reasons assigned herein, we reverse J.T.'s adjudication as a juvenile delinquent to the extent that it reflects the adjudication for forcible rape. We remand to the trial court for an adjudication and appropriate disposition based on an adjudication of the crime of sexual battery.

REVERSED AND REMANDED

Court of Appeal

FIFTH CIRCUIT

STATE OF LOUISIANA

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I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY JULY 30, 2002
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