NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1820

STATE OF LOUISIANA

VERSUS

JAMES DUNN, SR.

Judgment Rendered: June 7, 2013

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT,
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 04-09-0903

HONORABLE RICHARD D. ANDERSON, JUDGE

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

McDONALD, J.

The defendant, James Dunn, Sr., was charged by grand jury indictment with one count of aggravated rape (count I), a violation of La. R.S. 14:42; and one count of second degree kidnapping (count II), a violation of La. R.S. 14:44.1, and pled not guilty on both counts. Following a jury trial, he was found guilty on count I of the lesser responsive offense of forcible rape, a violation of La. R.S. 14:42.1; and on count II, he was found guilty as charged. On each count, he was sentenced to twenty years at hard labor, with the first two years of each sentence to be served without benefit of probation, parole, or suspension of sentence. The court ordered the sentences to run concurrently with each other, but consecutively to any other sentences the defendant was serving. He now appeals, contending: the evidence was insufficient; the trial court erred in allowing testimony concerning the defendant's prior drug use; the trial court erred in excluding the police report and refusing to allow it to be profferred; and the trial court erred in allowing the playing of the defendant's telephone call to the victim after the incident. For the following reasons, we affirm the convictions and sentences.

FACTS

The victim, D.G.,[1] testified she was married to the defendant between May 13, 2005 and February 2010, and they had two children together. She stated the defendant "went back out on crack" beginning in October 2007. She indicated the defendant would disappear for a week or two, and then come back to the family home. He would tell her that he was tired, "had been out there working for drugs," and needed food and a bath. The victim stated when the defendant was using drugs, he was "more to himself," angry, and depressed. Additionally, he would sell anything in the house he could carry, such as food from the freezer, alcohol, the

[1] The victim is referenced herein only by her initials. See La. R.S. 46:1844(W). The indictment referenced her as "D.D." At trial, however, she indicated she had remarried since the offenses and used her new married name.

children's toys, the microwave, the television, and the stereo. According to the victim, the defendant also sold his truck for drugs, and she had to buy it back.

In January 2008, the victim became involved in a relationship with Gregory Griggs. In February 2008, she returned home after being out with a female friend, and found the defendant on the couch with a knife. He asked her if she had brought the police with her, because he had left her a voicemail stating "for [the victim] to come home [she] had better bring the police with [her] because [the defendant] was going to kill [her] and then kill himself." Less than a week later, she moved out of the family home with the children. She testified that after the defendant began using drugs, she no longer had sexual relations with him. According to the victim, on February 22, 2008, the defendant asked her to have sex with him. She refused, and he masturbated in front of her.

The victim testified the defendant called her on March 16, 2008, the birthday of her daughter with the defendant. The defendant's birthday was on March 18, and he requested that the victim and their children go out to eat with him and spend the day in the park with him on his birthday. The victim refused because she did not want to lose a day of work, did not want the children to be absent from school, and did not want "to fund the excursion." The defendant cursed her.

According to the victim, on March 17, 2008, at approximately 6:00 a.m., upon returning to her Ford Expedition after taking the children to the nursery operated by the defendant's mother, she found the defendant in the rear of the vehicle. The victim told him, "Look, I don't have time for this this morning. I don't have time for this. I'm getting ready to go to work. I have to leave. Just get out of the truck." The defendant replied, " you think I'm playing with you? I'm not playing with you. You around here calling me a pussy ass n____r or whatever." The defendant "pulled up a gun," covered by a white towel, and stated, "Don't you see this in my hand? Do you see what I have in my hand? This is a gun. You're going to do what I say do."

The victim started crying and did not know what to do. The defendant ordered her to "[b]ack out and drive." The defendant lowered his gun and held it to the victim's side while she drove. The victim slowed as she passed a police station on Scenic Highway, and the defendant put the gun to her neck, stating, "Don't get any crazy ideas. Don't slow down. Just keep going. Just keep going." He directed her to the parking lot of the Palisades Apartments, where he had worked as a maintenance man. Thereafter, he ordered the victim to "take one pants leg out." He removed the painter's jumpsuit he was wearing. He then ordered the victim to "raise [her] butt and put [her] butt on the middle piece of the console." The victim told the defendant to stop, but he put his penis in her vagina as she cried. Thereafter, the defendant stated, "I guess you're going to tell on me now. You're going to call the police now." The victim told the defendant she would not call the police. She testified she told him she would not call the police because he still had the gun, they were parked by some dumpsters, and she "didn't know what else he was going to do." The defendant ordered the victim to drive back, and she drove him back to the area of the nursery. He exited the vehicle and asked the victim if she was going to call the police. She answered negatively, and he stated, "Well, if you don't call the police, nothing will happen to you." According to the victim, the defendant forgot his belt in her vehicle.

The defendant also testified at trial. He blamed the victim's infidelity for the failure of their marriage and for his drug use. In regard to the incident, he claimed, beginning on March 7, 2008, he had persistently tried to meet the victim to try to reconcile their marriage. He stated every time they left each other or saw each other, they would embrace. According to the defendant, the victim agreed to meet him on the day of the incident and dropped off the children early at the nursery. He stated he sat in the passenger seat of the Expedition, and the victim saw him as she entered the vehicle. He claimed she drove him to the apartments and he told her, "Well, look, I

know if we make love... we probably can, you know, get back together." According to the defendant, the victim gave him oral sex, and then he "got up on top of her." He claimed "she willing it, feeling it, was wanting to be with me." The defendant stated the victim became angry when he asked, "You still seeing that n____r." He claimed he called her a "B" and "Ho," and she started crying. He stated he became angry with the victim and told her to park his vehicle at his mother's house and to get whatever was in his name out of his name. He claimed the victim stated, "I'll fix it where you never see them again."

The defense theory at trial was that the victim lied about the defendant kidnapping and raping her as part of a conspiracy with Gregory Griggs to "eliminate [the defendant] from the picture" so that they could get married.

SUFFICIENCY OF THE EVIDENCE

In assignment of error "A," the defendant contends the jury verdicts are contrary to the law and the evidence. In assignment of error "B," he contends the jury verdicts are not supported by sufficient evidence to find him guilty of forcible rape and/or second degree kidnapping. He argues no forensic or scientific evidence establishes that a forcible rape occurred and there was no torn clothing, physical trauma, or any other indication that force existed. Additionally, he argues the victim's account of the incident at trial was not the same as the account recorded in the police report, and thus her testimony was "contradictory."

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable

hypothesis of innocence is excluded. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 730 So.2d at 487.

As pertinent here, rape "is the act of ... vaginal sexual intercourse with a ... female person committed without the person's lawful consent." La. R.S. 14:41(A). "Emission is not necessary, and any sexual penetration, when the rape involves vaginal ... intercourse, however slight, is sufficient to complete the crime." La. R.S. 14:41(B). Forcible rape is rape committed "when the ... vaginal sexual intercourse is deemed to be without the lawful consent of the victim" because it is committed under any one or more of the following circumstances: "(1) 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." La. R.S. 14:42.1(A).

As pertinent here, second degree kidnapping is the forcible seizing and carrying of any person from one place to another wherein the victim is physically injured or sexually abused. La. R.S. 14:44.1(A)(3) & (B)(1).

Initially we note, the defendant claims the victim's testimony at trial was "contradictory" to the account recorded in the police report. However, the police report or initial investigative report was properly held inadmissible at trial. See La. Code Evid. art. 803(8)(b)(i); see **State v. Casey**, 99-0023 (La. 1/26/00), 775 So.2d

1022, 1031, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000).

After a thorough review of the record, we are convinced that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of those reasonable hypotheses of innocence raised by the defendant at trial, all of the elements of forcible rape and second degree kidnapping and the defendant's identity as the perpetrator of those offenses against the victim. The verdicts rendered against the defendant indicates the jury rejected the defendant's claims that the victim consented to driving him to the Palisades Apartments for consensual sex. When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984). No such hypothesis exists in the instant case. Further, the verdicts rendered indicate the jury accepted the victim's testimony and rejected the defendant's testimony. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The testimony of the victim alone is sufficient to prove the elements of the offense. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **State v. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Additionally, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility

of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

These assignments of error are without merit.

PRIOR DRUG USE OF THE DEFENDANT; DENIAL OF PROFFER

In assignment of error "C," the defendant contends the trial court committed error of law by allowing testimony concerning his prior drug use. In assignment of error "D," he contends the trial court committed error of law in excluding the police report and in refusing to let him proffer the report. He combines the assignments of error for argument.

PRIOR DRUG USAGE OF THE DEFENDANT

In assignment of error "C," the defendant argues the victim's testimony concerning his drug use was "not related to any particular issue in this case and merely served to characterize the defendant as a bad person capable of anything."

Prior to trial, the State gave notice of its intent to use evidence of other crimes, acts, or wrongs against the defendant at trial, including the acts which "demonstrated [the victim's] knowledge of the defendant's addiction." Following hearings, the trial court denied the State's motion to use the other crimes, acts, or wrongs evidence. Thereafter, this court denied the State's application for supervisory relief. **State v. Dunn**, 2010-1328 (La. App. 1st Cir. 9/9/10) (unpublished writ action.). The Louisiana Supreme Court granted supervisory relief to the State, holding:

> Writ granted. . . . The testimony of the alleged victim in the hearing held on October 13, 2009, regarding her relationship with the defendant and his actions during that relationship, satisfies the requirements of La. [Code Evid.] art. 404(B) and is admissible at his trial. *See State v. Rose*, 2006-0402 (La.2/22/07), 949 So.2d 1236, and *State v. Welch*, 615 So.2d 300 (La.1993).

State v. Dunn, 2010-2287 (La. 11/12/10), 49 So.3d 876 (unpublished writ action).

At trial, the defendant objected to the relevance of the victim's testimony concerning his consumption of narcotics, and the trial court overruled the objection.

Rose, 949 So.2d at 1237, involved the issue of the admissibility of other crimes evidence (the defendant's earlier conviction for manslaughter of his former wife, convictions for violence perpetrated against his former wife, and his arrest for domestic violence against his wife) in a defendant's trial for the second degree murder of his wife. The court in **Rose** held:

> We conclude the evidence of other crimes is highly probative to show defendant's identity, pattern, system and motive, and his vicious attitude toward women with whom he shares a close personal relationship. We further conclude the other crimes evidence is not unduly or unfairly prejudicial and that its probative value outweighs its prejudicial effect.

Id.

Welch involved the issue of the admissibility of other crimes evidence (prior threats by the defendant against the victim and her fiancé) in a defendant's trial for the aggravated battery of his former girlfriend. **Welch**, 615 So.2d at 301. The court in **Welch** found:

> In this case, the state could not place the circumstances of the offense in their proper context without reference to the nature of the relationship existing between the victim and the defendant. Without that evidence, which included prior acts of violence or threatened violence by both parties (defendant claimed that the victim had previously attacked him with a knife), the jury would have lacked the context in which to evaluate the victim's testimony about what otherwise appeared to be a gratuitous attack by the defendant.

Welch, 615 So.2d at 303.

A trial judge is not at liberty to ignore the controlling jurisprudence of superior courts. See **State v. Bertrand**, 2008-2215 (La. 3/17/09), 6 So.3d 738, 743.

Assignment of error "C" is without merit.

DENIAL OF PROFFER

In assignment of error "D," the defendant argues the trial court erred in refusing to allow him to introduce the police report into evidence, and erred in refusing to allow him to proffer the report.

As noted in our discussion of assignment of error "A," the police report or initial investigative report was properly held inadmissible at trial.

Error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected, and when the ruling is one excluding evidence, the substance of the evidence was made known to the court by counsel. La. Code Evid. art. 103(A)(2). Additionally, the defendant cites **State v. Adams**, 550 So.2d 595 (La. 1989). Therein, in a concurring opinion, referencing the law in effect prior to the adoption of the Louisiana Code of Evidence, Justice Dennis noted, "it is well settled that when an offer of proof is proper, the trial court must permit it to be made." **Adams**, 550 So.2d at 599. Justice Dennis also noted the failure to allow a formal proffer could be harmless when the substance of the proffer is made known to the court by counsel. **Id.**

In the instant case, the trial court denied the defendant's request to make a proffer of the police report out of the presence of the jury. In questioning the author of the report, Baton Rouge City Police Department Officer, Tafari Beard, defense counsel established that the report contained a brief description by the victim of how the alleged rape occurred. Additionally, defense counsel cross-examined the victim concerning her account of the rape at trial and what she had "[told] the police" and what was "in the police report." Accordingly refusing to allow the proffer was harmless error, if error at all. See La. Code Crim. P. art. 921.

Assignment of error "D" is without merit.

TELEPHONE CALL FROM DEFENDANT TO VICTIM

In assignment of error "E," the defendant contends the trial court committed error of law in allowing the playing of the defendant's telephone call to the victim after his arrest.

Prior to trial, the defendant moved to suppress his March 18, 2008 telephone call to the victim from prison. He claimed the telephone call was not a confession and contained no reference to the alleged rape. Following a hearing, the motion was denied. The call was played at trial over defense objection that, "We don't believe that it depicts what the State alleges it does."

The telephone call begins with the defendant stating "I'm sorry D." He then asks for "momma's" phone number. The victim gives the defendant the phone number, and then interrupts him as he states, "Look. Look [victim's first name], don't you know I." She tells him he had no right. He replied, "I know I didn't." He then states, "You know I didn't have no gun." The victim replies, "Yes you did have a f____ gun." The defendant claims he had a "torch handle."

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. La. Code Evid. art. 401. All relevant evidence is admissible, except as otherwise provided by positive law. Evidence that is not relevant is not admissible. La. Code Evid. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or waste of time. La. Code Evid. art. 403.

There was no error in the admission of the challenged evidence. The telephone call was the defendant's own statement offered against him, and was not hearsay. See La. Code Evid. art. 801(D)(2)(a). Further, the prejudicial effect to the defendant from the challenged evidence did not rise to the level of undue or unfair prejudice when balanced against the probative value of the evidence. The

defendant claimed the victim voluntarily drove him to the Palisades Apartments to have sex with him. The victim claimed the defendant forced her to the apartments at gunpoint and then raped her at gunpoint. Thus, the defendant's apology to the victim and denial that he had a gun shortly after the incident were highly probative. The prejudice to the defendant from the telephone call was mitigated by his testimony at trial, in which he claimed his apology in the telephone call was for "a uptight conversation" and for putting his hands in the victim's face during the incident.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.