

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2001-KA-1665**
VERSUS * **COURT OF APPEAL**
DERRICK HAMPTON * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 395-340, SECTION "L"
Honorable Terry Alarcon, Judge
* * * * *
Chief Judge William H. Byrnes III
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(Court composed of Chief Judge William H. Byrnes III, Judge Steven R. Plotkin, Judge James F. McKay III)

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CONVICTION AFFIRMED; SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING

On February 2, 1998, defendant, Derrick Hampton, was charged by bill of information with forcible rape in violation of La. R.S. 14:42.1. A jury found the defendant guilty as charged on July 27, 1999. On August 2, 1999, the defendant filed a motion for new trial. The trial court denied defendant's motion. The defendant waived delays, and the trial court sentenced the defendant to serve fifteen years at hard labor. On the same date, the State filed a multiple bill of information alleging defendant to be a second felony offender. The defendant pled guilty to the multiple bill of information on January 11, 2000. The trial court adjudicated the defendant to be a second felony offender, vacated the prior sentence and resentenced the defendant to serve twenty years at hard labor. The trial court granted defendant an out of time appeal on August 7, 2001.

STATEMENT OF FACT

Officer Donnie Watson responded to a call on Clara Street in the early morning hours of December 3, 1997. The officer met with the victim, K.R., who stated that she had been raped. The victim told the officer that she

knew the perpetrator and gave the officer the defendant's name and address. The officer located the defendant and arrested him. Officer Watson then turned over the investigation to the rape detective.

Madelyn Collins, a criminalist with the New Orleans Police Department Crime Lab, testified that she tested the victim's clothing for evidence of hair, blood and/or seminal fluid. She stated that she found seminal fluid and hair on the victim's jeans. The seminal fluid was found on one of the outer exterior sides of the jeans' legs.

Sergeant Adele Bonura, of the Sex Crimes Unit, testified that she supervised Detective Christopher Culotta in his investigation of this offense. Detective Culotta was unavailable for trial. Sergeant Bonura testified that she obtained the following account of the incident from Detective Culotta: The victim told Detective Culotta that the defendant asked her to take a ride with him to a gas station. However, instead of going to a gas station, the defendant stopped somewhere near College Court. The defendant told the victim that he wanted to have sex with her. She stated that she did not want to do so. A struggle ensued and he forced her to have sexual intercourse with him. The victim stated that the defendant used a condom but was not able to complete the act. He pulled out of her and ejaculated on her clothing.

Sergeant Bonura testified that a search warrant was obtained for the

defendant's vehicle. Photographs were taken of the vehicle. A condom was found in the vehicle.

Patricia Daniels, a forensic serologist with the New Orleans Police Department Crime Lab, testified that she examined the rape kit from the victim. She stated that no seminal fluid or sperm were found.

The victim, K.R., testified that around midnight on December 3, 1997, she was asleep at home when the defendant went to her house and asked her to go to the store with him. The victim agreed to take the ride. However, they never made it to the store. The defendant stopped in the 2500 block of College Court and asked the victim for a kiss. She refused. The defendant then asked if she would give him a hug. K.R. gave the defendant a hug. The defendant held her tightly and raised her shirt. He kissed her on the chest. K.R. stated that she was scared and tried to get away by moving to the back seat of the vehicle. She attempted to open the back door but the door would not open. The defendant got into the back and pulled her down. The defendant pulled down her pants and underwear. He then took off his clothes and penetrated her. K.R. jumped and tried to get into the front seat of the car. She tried to get out of the car. The defendant caught her and held her hands down. He penetrated her again. She was struggling with the defendant. The defendant was sitting on top of her. He asked her to help

him “get off.” She refused. He did it himself and ejaculated on her clothing. The defendant told her that he loved her and wanted her virginity. The defendant then drove off. K.R. stated that she jumped out of the car at the intersection of Washington and Broad and walked home. When K.R. got home, she called a friend who came and picked up her. She went to the friend’s house and called the COPE line. K.R. then went home and told her mother. She went to the hospital and was examined by a physician. K.R. stated that she knew the defendant from the neighborhood. She denied having a relationship with or dating the defendant. K.R. identified the defendant at trial as the person who raped her.

Dr. Mark Sheffer, an emergency room physician at Charity Hospital, examined the victim shortly after the rape. The physician observed mild erythema (redness) on the victim’s wrists. Dr. Sheffer indicated that the marks were consistent with someone holding the victim’s wrists down. The examination also revealed redness and mild abrasions in the internal aspect of the vagina. There were copious secretions in the vagina and at the opening of the vagina. Dr. Sheffer stated that the victim was upset, depressed and tearful.

Derrick Hampton testified that he did not rape the victim. He stated that they did not have sexual intercourse but that the victim willingly “got

him off.” The defendant admitted to prior convictions for trespassing and possession of stolen property. The defendant testified he and the victim had been dating but she broke up with him when she found out that he was dating other girls. At approximately 10:30 p.m. on December 3, 1997, the victim called him and invited him to her house. The defendant went to the victim’s house and they watched television for approximately one hour. The victim then suggested that they go for a ride. They drove to College Court. The victim suggested that they have sex. The defendant took out a condom and put it on. The victim told the defendant to stop. She took the condom off of the defendant. They kissed for a while and the victim told the defendant that she would “get him off.” The victim wiped the defendant’s sperm on her jeans. The defendant denied threatening the victim. He denied telling the victim that he loved her. The defendant told the victim that he would drive her home but she told him to drop her off at the intersection of Washington and Claiborne and she would walk home.

ERRORS PATENT

A review of the record for errors patent reveals an error in the defendant’s sentencing. After adjudicating the defendant to be a second felony offender, the trial court vacated the prior sentence and resentenced the defendant to serve twenty years at hard labor. However, La. R.S. 14:42.1

requires that “at least two years of the sentence imposed shall be without benefit of probation, parole or suspension of sentence.” As the sentence imposed by the trial court was illegally lenient, it must be vacated and the matter remanded for resentencing.

In State v. Williams, 2000-1725 (La. 11/29/2001), 800 So.2d 790, the Louisiana Supreme Court affirmed the appellate court’s decision to vacate an illegally lenient sentence imposed by the trial court and remand the case for resentencing in accordance with the statutory provisions although the State had not objected to the illegally lenient sentence:

[T]he authority of the appellate court to recognize sentencing error arises in part from the self-activating provisions of La. Rev. Stat. Ann. § 15:301.1(A) (i.e., the failure to impose sentence without benefit of parole, probation, or suspension of sentence) and under La. Code Crim. Proc. Ann. art. 882 (the sentencing errors other than those which fall under La. Rev. Stat. Ann. §15:301.1(A). Under the provisions of article 882, “a[n] illegal sentence may be corrected *at any time* by . . . an appellate court on review.”

State v. Williams, 2000-1725, p.16, 800 So.2d at 802.

Although La. R.S. 15:301.1 provides that penalties under the criminal statutes are self-activating (i.e., “each sentence which is imposed under the provisions of that statute shall be deemed to contain the provisions relating to the service of that sentence without benefit of probation, parole, or

suspension of sentence.”) when the trial court fails to state that the sentence is to be served without benefits, the Supreme Court acknowledged that an appellate court may, on occasion, remand for resentencing. The Supreme Court recognized that the appellate court in Williams was justified in remanding the matter for resentencing as “an element of sentencing discretion existed as regards the length of sentence served without benefit of parole, probation or suspension of sentence.” State v. Williams, 2000-1725, p.15, 800 So.2d 801.

Accordingly, the defendant’s sentence must be vacated and the matter remanded for resentencing.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant contends that the State failed to produce sufficient evidence to support his conviction for forcible rape.

The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); State v. Rosiere, 488 So.2d 965 (La. 1986). The reviewing court is to consider the record as a whole and not just the

evidence most favorable to the prosecution; and if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So.2d 1305 (La. 1988). Additionally, the reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Id.

In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La. 1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La. 1987).

La. R.S. 14:41 defines rape as an act of anal or vaginal intercourse with a male or female person committed without the person's consent; and,

emission is not necessary and any sexual penetration, vaginal or anal, however slight, is sufficient to complete the crime. The essential elements of forcible rape are: (1) an act of vaginal or anal intercourse; (2) without the lawful consent of the victim; (3) where 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)(1); State v. Atkins, 97-1278 (La. App. 4 Cir. 5/27/98), 713 So.2d 1168.

The defendant contends that the victim's testimony was not sufficient to prove beyond a reasonable doubt that he committed forcible rape. The testimony of the victim alone is sufficient to establish the elements of the offense of forcible rape, even where the State does not introduce medical, scientific, or physical evidence to prove the commission of the offense by the defendant. State v. Lewis, 97-2854 (La. App. 4 Cir. 5/19/99), 736 So.2d 1004, 1023; State v. Johnson, 98-1017 (La. App. 5 Cir. 3/30/99), 735 So.2d 105, 108; State v. Ingram, 29,172, p. 10 (La. App. 2 Cir. 1/24/97), 688 So.2d 657, 664. Furthermore, credibility determinations, as well as the weight to be attributed to the evidence, are soundly within the province of the jury's trial function. State v. Brumfield, 93-2404, pp. 5-6 (La. App. 4 Cir. 6/15/94), 639 So.2d 312, 316. The determination of the weight of the

evidence is a question of fact that rests with the trier of fact, who may accept or reject, in whole or in part, the testimony of any witness. State v. Silman, 95-0154, p. 12 (La. 11/27/95), 663 So.2d 27, 35.

In the present case, the victim testified that the defendant forced her to have sexual intercourse with him. When she attempted to escape, he held her down and sat on her. The victim stated that the defendant penetrated her at least two times. When the defendant could not ejaculate inside the victim, he “got himself off” and ejaculated on the victim’s clothing. Madelyn Collins, a criminalist with the Crime Lab, testified that seminal fluid was found on the victim’s jeans. Dr. Sheffer, the emergency room physician who examined the victim, stated that she had red marks on her wrists which was indicative of someone forcibly holding the victim’s wrists down. Dr. Sheffer also testified that there were mild abrasions in the internal aspect of the vagina as well as copious secretions in the vagina and at the opening of the vagina.

Viewing the evidence in the light most favorable to the prosecution, the State produced sufficient evidence to sustain the defendant’s conviction. The jury chose to accept the testimony of the victim over that of the defendant. In addition, Dr. Sheffer’s testimony concerning the results of his examination of the victim supports the victim’s allegations that the

defendant held her down forcibly and penetrated her.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

The defendant also argues that the trial court abused its discretion when it qualified Madelyn Collins as an expert in the identification of seminal fluid.

In State v. Lewis, 95-0209 (La. App. 4 Cir. 4/13/95), 654 So.2d 761, this court held that trial judges have great latitude in deciding whether a prospective expert has the competence, background, and experience to qualify as an expert. The court further stated that the trial courts are vested with great discretion in determining the competency of an expert witness, and the rulings on the qualification of a witness as an expert will not be disturbed unless there was an abuse of discretion.

In the case at bar, the defendant argues that the trial court abused its discretion when it qualified Madelyn Collins as an expert in the identification of seminal fluid. Ms. Collins testified that she was employed by the New Orleans Police Department Crime Lab as a criminalist. Her duties included the analysis of evidence for the existence and identification

of hair, blood, and seminal fluid. Ms. Collins stated that she had been employed with the Crime Lab for three years. She had a Bachelor of Science degree in biology with a minor in chemistry. She has participated in seminars concerning the investigation of crime scenes and DNA. She received certifications in the investigation of crime scenes and DNA. Ms. Collins stated that she had been qualified as an expert in Sections “G” and “B” of the Criminal District Court for the Parish of Orleans.

It does not appear that the trial court abused its discretion in qualifying Ms. Collins as an expert in the identification of seminal fluid. Ms. Collins conducts such tests on a daily basis and has done so for over three years. She has already been qualified in two other sections of Criminal District Court. Accordingly, this assignment is without merit.

For the foregoing reasons, defendant’s conviction is affirmed. The defendant’s sentence is vacated and the matter remanded for resentencing.

**CONVICTION AFFIRMED; SENTENCE VACATED AND CASE
REMANDED FOR RESENTENCING**

