NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 0417

STATE OF LOUISIANA

VERSUS

ANGELO MITCHELL

Judgment rendered November 3, 2006.

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 06-03-0620
Honorable Richard Anderson, Judge

* * * * * *

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ANGELO MITCHELL

* * * * * *

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

PETTIGREW, J.

Defendant, Angelo Mitchell, was charged by bill of information with one count of forcible rape, a violation of La. R.S. 14:42.1. Defendant entered a plea of not guilty and was tried before a jury. The jury could not reach a verdict. The bill of information was subsequently amended to add one count of possession with intent to distribute cocaine, a violation of La. R. S. 40:967. Defendant was tried before a jury for a second time. The jury found defendant guilty of the lesser-included offense of simple rape and guilty of possession with intent to distribute cocaine.

Defendant was originally sentenced to twenty-five years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence for his simple rape conviction, and twenty-five years imprisonment for the possession with intent to distribute cocaine conviction, with two years to be served without the benefit of probation, parole, or suspension of sentence.

The State instituted habitual offender proceedings seeking to enhance the penalty for defendant's simple rape conviction. After a hearing, the trial court determined that defendant was a third-felony habitual offender. The trial court vacated his previous sentence for simple rape and sentenced him to thirty-one years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence for his adjudication as a habitual offender.

Defendant appeals. We affirm the convictions, habitual offender adjudication, and sentences.

FACTS

At approximately 10:00 p.m. on the evening of February 14, 2003, K.G., the twenty-three year-old victim, met several friends at a club called Nite Life located off Corporate Boulevard in Baton Rouge. During the course of the evening, K.G. visited with friends and consumed five beers and several Kamikaze shots. K.G. described herself as drunk, but not to the point where she was falling down. K.G. testified that she sometimes used cocaine and on that night she decided to try to get some. K.G. usually obtained

cocaine from her friend Ron, but he was not at the club that night, so she began looking elsewhere.

K.G. saw her friend Dustin talking to the defendant and later learned that Dustin had purchased some cocaine from defendant. K.G. did not know the defendant, but approached him and inquired whether he had any cocaine. According to K.G., defendant told her he had more cocaine, but that it was in his room at the Corporate Inn located directly across the street from the club.

K.G. knew that her friend Ron had stayed at the Corporate Inn during the past week and assumed that defendant and Ron knew each other. K.G. asked defendant if he knew Ron and defendant claimed he did. K.G. called Ron on her cell phone and handed the phone to defendant. Unbeknownst to K.G. at the time, defendant and Ron did not know each other and Ron actually hung up on defendant right after K.G. handed him the phone.

K.G. then accompanied defendant across the street to his hotel room. Once they entered his room, K.G. sat at the desk and defendant turned on some music. According to K.G., defendant then took out the cocaine and allowed K.G. to do several lines while he used her cell phone to call his girlfriend. At no time did defendant separate any cocaine into another bag, nor did he request payment for the cocaine K.G. had ingested. K.G. testified that she snorted a total of five lines of cocaine while in defendant's hotel room.

Following his phone call to his girlfriend, defendant asked K.G. to spend the night with him. K.G. declined and indicated that they needed to leave because she was going to a party with her friends after the club closed. Defendant had been invited to the party also. Defendant walked into the bathroom to call his girlfriend a second time. When he returned, he asked K.G. several more times to spend the night with him. Defendant stated that she did not have to have sex with him and that he just wanted her to lie down with him. K.G. again refused.

Defendant entered the bathroom with K.G.'s cell phone again. When he returned, he had removed the battery. Defendant sat on the bed and asked her to stay, and he then told K.G. she was staying because she did not have a choice. Defendant then placed

K.G.'s cell phone and battery under the bed. K.G. indicated that defendant had been very nice until this point. When K.G. told defendant that he did not have to do this, he responded that she could either, "[g]o with it and enjoy it," or that it would be the worst experience of her life.

K.G. testified that she began to cry and defendant lifted her over to the bed and asked her to take off her clothes. K.G. removed her boots and defendant removed all of her clothing. Defendant then told her to perform oral sex on him. Defendant ejaculated into her mouth, and K.G. vomited on the floor. Defendant then made K.G. perform oral sex on him again. At one point K.G. tried to deter defendant by telling him that she was having her menstrual cycle, but defendant removed her tampon and threw it on the floor.

Defendant then made K.G. lie on the bed on her stomach. Defendant put on a condom and vaginally raped K.G. He briefly stopped, removed the condom, and proceeded to continue raping her. When he finished, defendant laid on top of her.

Defendant allowed K.G. to get dressed after she asked if it was all right. Defendant then told her that she should be more careful when she goes out, because people can take advantage of her and that he could have killed her.

Defendant then offered K.G. a cigarette, which they shared. K.G. testified that she was afraid to anger defendant, so after they finished smoking she asked if she could leave. Defendant agreed to let her go, but asked for her cell phone number, which he dialed on the hotel phone as she gave it to him to ensure she was giving him the correct number.

Defendant then walked K.G. back to her car, which was in the parking lot outside of the club, gave her a hug, and returned to the hotel. Knowing her friends were still inside the club, K.G. knocked on the door and was let in by one of her friends. Once inside, she collapsed on the floor and told her friend Cheryl what had happened. A short time later, K.G.'s cell phone rang and she made Cheryl answer it and pretend to be her. Cheryl spoke with defendant and asked him for his room number. Defendant gave Cheryl a room number that did not exist.

Despite being urged by her friends to go to the hospital and the police, K.G. refused out of fear that she and her friends would get in trouble because of their connection to cocaine. As daylight approached, Cheryl followed K.G. home, and then left. Later that day, K.G. called the Rape Crisis Center, but was told to call Sex Crimes at the Police Department. Sometime later the same day, K.G. called the police and met with Corporal Robert Arnett of the Baton Rouge City Police, who came to her home to interview her.

Corporal Arnett testified that K.G. told him she voluntarily left the club with defendant to purchase cocaine. According to Corporal Arnett, K.G. was very emotional and crying and did not want to go to the hospital. Corporal Arnett wrote a report that was later given to Detective Patrick Martinez of the Sex Crimes Division.

On March 11, 2003, Detective Martinez contacted K.G., who provided details of the incident to him. K.G. accompanied Detective Martinez to the Corporate Inn. While at the Corporate Inn, Detective Martinez spoke with the clerk, who was familiar with the defendant. Detective Martinez obtained defendant's full name, his room number, and the phone records of his room showing the two calls to K.G.'s cell phone.

Using this information, Detective Martinez prepared a photographic lineup for K.G. to view. K.G. identified defendant's picture as the man who raped her. Detective Martinez obtained an arrest warrant for defendant; and on March 28, 2003, defendant was arrested. Following his arrest, defendant denied raping K.G. and told the police that K.G. had consented to have sex in exchange for cocaine.

Cheryl Monroe and Brad Cozier, who were at Nite Life when K.G. returned, following the incident with defendant, testified at trial. Both Monroe and Cozier testified that when K.G. reentered the bar she was visibly upset and crying. They advised her to go to the hospital, but K.G. refused.

During trial, the State presented testimony from Christina Taylor, who worked with defendant at her family's business, TWR Racing Products, in Alexandria, during 2001. According to Taylor, she and defendant had become friends while he worked there on a work-release program. One day in April 2001, when Taylor was writing down some things

just before she was about to meet her boyfriend for lunch, defendant asked her what she was doing. When she replied that she was about to leave to meet her boyfriend, defendant said, "No, you're not." He then slammed her against a machine and pushed her down on a stool.

According to Taylor, defendant then unzipped his pants right in front of her face and tried to make her perform oral sex on him. When Taylor refused, defendant picked her up and slung her against a wall. Defendant then pushed her down and while holding her arms, tried to pull her clothes off, while calling her a bitch and a slut. After a brief struggle, Taylor was able to escape to the bathroom. Taylor did not tell her boyfriend what happened, nor did she immediately call the police, because she was embarrassed.

When Taylor returned from lunch, she saw defendant, who taunted her for the rest of the day. Taylor later learned defendant was to be laid off that day. Taylor later told her father what happened, and he called the police. Taylor said she eventually dropped the charges against defendant because she did not want to go through the ordeal. According to Taylor, defendant had been calling and harassing her every day since the incident.

Defendant testified at trial. Defendant initially addressed Taylor's allegations by saying that he and Taylor had developed a relationship and had been "fooling around" for some time before the incident Taylor described. According to defendant, Taylor's father might be prejudiced against him because he was black, so they kept their relationship a secret.

Defendant testified that on his last day of work for Taylor's father, he and Taylor had been kissing and hugging, and, as they parted from an embrace, another employee saw them. Taylor then left for lunch with her boyfriend and never brought defendant lunch for which he had given her money. Defendant testified that when Taylor returned, he asked her about his lunch, but that Taylor would not answer him and was acting unusual. Defendant said he was laid off later that day.

Defendant admitted he tried to call Taylor every day after his arrest, and eventually, wrote Taylor's father a letter filled with things about the business and Taylor's

family that he could have only learned from Taylor herself. Defendant claimed he wrote this letter so Taylor's father would know that he never tried to rape Taylor, but that there was a consensual relationship between them. Defendant claimed that one week after he sent the letter to Taylor's father, the charges against him were dismissed.

Following his release from prison, defendant obtained a job at the Corporate Inn in Baton Rouge, in January 2003. Defendant performed maintenance chores, and as part of his compensation, a room at the hotel was provided to him. According to defendant, he had cashed a check from the IRS just before February 14, 2003, and had approximately $4,000 in cash, which he kept on the desk in his room.

Defendant testified that on the night of February 14, 2003, he went over to Nite Life around 11:00. While there, he bumped into K.G., and they talked and he bought her a drink. Defendant asked K.G. what she was doing later that night, and she told him she was not doing anything. Defendant invited her to his room to spend the night, but K.G. declined. After defendant asked her to spend the night with him a second time, K.G. told him she was going to spend the night with Brad, who worked at the club.

Defendant testified that he asked K.G. a third time to spend the night with him, and K.G. then asked him if he could get her some cocaine. Defendant asked K.G. if he got her some cocaine, would she spend the night with him and K.G. agreed. Defendant then bought cocaine from a "dude" in the club and found K.G. to let her know that he had gotten the cocaine. According to defendant, K.G. left the club with him around 1:00 a.m. and they went to his hotel room.

Defendant testified that once they entered his hotel room, he took off his shirt because something had been spilled on it. Defendant said he was on the bed, while K.G. sat at the desk, and they talked and listened to music. Defendant stated he had gotten crack cocaine, and he used K.G.'s i.d. and broke it up on the desk. Defendant estimated the rock of crack cocaine was broken into approximately five or six lines. At some point defendant removed his pants, and lay on the bed in only his underwear, socks, and a t-shirt.

After K.G. snorted her second line of cocaine, defendant asked her if she wanted to get in the bed and she agreed. Defendant said he turned the lights off and K.G. performed oral sex on him. Defendant denied he forced K.G. to do anything. After K.G. performed oral sex on him, she snorted another line of cocaine, while defendant went to the lobby to get a soda. Defendant testified that while K.G. was in his room, her phone had been constantly ringing, but she never answered it.

When defendant returned to the room, he found K.G. "playing in the coke." After he had been in the room awhile and they smoked a cigarette together, defendant retrieved a condom and asked K.G. if she was ready. K.G. told him "Yeah," they undressed, and K.G. put the condom on him. At one point there was a knock at the door by two of defendant's relatives, but he "ran them off." According to defendant, he and K.G. had sex for ten to fifteen minutes after which K.G. dressed and he lay on the bed watching television. Defendant denied that K.G. ever vomited; that he removed the condom during intercourse; or that K.G. had a tampon. Defendant further denied that K.G. told him to stop and maintained that the sex was consensual in exchange for cocaine.

Defendant testified that after they had sex, K.G. asked him to walk across the street and he agreed. When he walked her out to her car, K.G. called her friends and found out they were still inside the bar. Defendant stated that K.G. asked him if he was going to be at the club the next weekend, and he told her he did not know. Defendant testified he next went to Waffle House for breakfast and then called K.G. to make sure she got home all right. Defendant admitted that he used K.G.'s phone to call his girlfriend prior to having intercourse with K.G., but denied that he removed the battery.

SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to support his conviction for simple rape.[1] Specifically, he argues the State failed to prove he knew or should have known that K.G. was intoxicated to the point that she was legally incapable of

[1] This issue is presented through both a counseled brief and pro se brief.

consenting to sexual intercourse. Defendant additionally argues that the evidence does not support the offense charged, forcible rape.

At the outset we note that absent a contemporaneous objection to the trial court's instructions on a responsive verdict, a defendant cannot complain if the jury returns a legislatively approved responsive verdict, even if there is insufficient evidence to support such a verdict, provided that the evidence is sufficient to support the charged offense. In such a case, a jury has the right to "compromise" between the charged offense and a verdict of not guilty. Jurors may return a "compromise" verdict for whatever reason they deem to be fair, so long as the evidence is sufficient to sustain a conviction for the charged offense. **State v. Odom**, 2003-1772, p. 7, (La. App. 1 Cir. 4/2/04), 878 So.2d 582, 588, writ denied, 2004-1105 (La. 10/8/04), 883 So.2d 1026.

In the present case, the trial court's instructions to the jury were not made a part of the record because there were no objections to the instructions. We note simple rape was included on the verdict sheet. Simple rape is a legislatively approved responsive verdict to the offense of forcible rape. Considering the lack of objections to the jury charges, we presume that simple rape was included in the trial court's instructions to the jury.

The record contains no indication that defendant objected to the inclusion of simple rape as a responsive verdict. However, our review of the record is not limited to whether the evidence supports the conviction for simple rape. Rather, in light of the possibility of a compromise verdict, our review must include whether the evidence supports the charged offense of forcible rape.

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 the crime beyond a reasonable doubt. La. Code Crim. P. art. 821; **State v. Odom**, 2003-1772 at 5-6, 878 So.2d at 587.

Rape is defined as "the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent." La. R.S. 14:41(A). *Forcible rape* is defined in La. R.S. 14:42.1 as:

> A. Forcible rape is rape committed when the anal, oral, or vaginal sexual intercourse is seemed 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.
>
> (2) When the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by a narcotic or anesthetic agent or other controlled dangerous substance administered by the offender and without the knowledge of the victim.

In a forcible rape the victim is not required to actually resist. It is necessary only that the victim be prevented from resisting either from (1) force or (2) threats of physical violence justifying the victim in believing that resistance will not prevent the rape. All that is required is a reasonable belief. See **State v. Brown**, 546 So.2d 1265, 1273-1274 (La. App. 1 Cir. 1989). A victim's testimony alone can establish the elements of forcible rape. See **State v. Savario**, 97-2614, p. 8 (La. App. 1 Cir 11/6/98), 721 So.2d 1084, 1089, writ denied, 98-3032 (La. 4/1/99), 741 So.2d 1280.

As the trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. Furthermore, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witness, the matter is one of the weight of the evidence, not its sufficiency. **State v. Probst**, 623 So.2d 79, 83 (La. App. 1 Cir.), writ denied, 629 So.2d 1167 (La. 1993).

In the present case, both K.G. and defendant testified that the sexual intercourse that occurred between them was in defendant's hotel room. The sole issue was whether K.G. consented to the activity as defendant claimed. Accordingly, the issue of consent hinged on the determination of the credibility of witnesses.

The jury's determination that defendant was guilty of simple rape indicates that it found K.G.'s testimony that she did not consent to sexual intercourse to be more credible than defendant's testimony claiming K.G. consented. K.G.'s testimony indicated that

defendant's demeanor changed after she declined several invitations to spend the night with him. K.G. testified that defendant told her, "Either, you know, you can go with it and enjoy it, or it will be the worst experience of your life." When viewed in the light most favorable to the prosecution, this clearly indicates K.G.'s belief that any resistance on her part would not have prevented the rape was reasonable.

After reviewing the record and applying the standard of review incorporated in Article 821, we find there is sufficient evidence to support a conviction for forcible rape, which was the charged offense. However, considering the jury returned a responsive verdict of simple rape, we accept that such a verdict was, in fact, a compromise verdict. As stated earlier, jurors may return a compromise verdict for whatever reason they deem to be fair, so long as the evidence is sufficient to sustain a conviction for the charged offense. **State v. Odom**, 2003-1772 at 7, 878 So.2d at 588.

Finally, we note that defendant's conviction was based solely on the jury's determination that K.G. did not consent to sexual intercourse. This determination rested solely on the acceptance of K.G.'s testimony and the rejection of defendant's testimony. Because this conviction is based on a credibility determination, such a decision cannot be overturned on appeal. This assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that he received ineffective assistance of counsel because his attorney at his first trial failed to advise him that his testimony would enable the State to charge him with an additional crime. Following the first trial on the charge of forcible rape wherein the jury was unable to reach a verdict, the State amended the bill of information to add the charge of possession of cocaine with intent to distribute. Defendant's allegations are based on what he told the court during a motion to suppress his testimony from his first trial.

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing

may be conducted.[2] However, where the record discloses evidence needed to decide the issue of ineffective assistance of counsel and that issue was raised by assignment of error on appeal, the issue may be addressed in the interest of judicial economy. **State v. Dilosa**, 2001-0024, p. 11 (La. App. 1 Cir. 5/9/03), 849 So.2d 657, 668, writ denied, 2003-1601 (La. 12/12/03), 860 So.2d 1153.

In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two-part test for review of a convicted defendant's claim that his counsel's assistance was so defective as to require reversal of a conviction. First, the defendant must show that counsel's performance is deficient. Second, the defendant must show that this deficient performance prejudiced the defense.

In the present case, defendant's argument is based solely on his own account of what his defense counsel told him prior to testifying. Defendant's allegations clearly question trial strategy and preparation put forth by his trial counsel. Such issues can only be resolved on evidentiary findings regarding what, specifically, his trial counsel informed him of prior to waiving his right against self-incrimination and taking the stand in his own defense. This issue cannot be resolved by this court on appellate review and should be asserted through an application for post-conviction relief. See **State v. Dilosa**, 2001-0024 at 12, 849 So.2d at 668. Accordingly, this assignment of error is not subject to appellate review.

CONCLUSION

For the above and foregoing reasons, we affirm defendant's convictions, habitual offender adjudication, and sentences.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.

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[2] The defendant would have to satisfy the requirements of La. Code Crim. P. art. 924, et seq., in order to receive such a hearing.