NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0571

STATE OF LOUISIANA

VERSUS

FRANCIS E. REED, JR.

DATE OF JUDGMENT: OCT 29 2010

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 428741, DIV. D, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE PETER J. GARCIA, JUDGE

* * * * * *

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Francis E. Reed, Jr.

* * * * * *

BEFORE: KUHN, PETTIGREW, AND KLINE, JJ,[1]

J Kline, concurs

Disposition: CONVICTIONS AFFIRMED. SENTENCES AMENDED TO PROVIDE THAT THEY BE SERVED AT HARD LABOR AND, AS AMENDED, AFFIRMED.

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[1] The Honorable William F. Kline, Jr. is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

KUHN, J.

Defendant, Francis E. Reed, Jr., was charged by grand jury indictment with aggravated rape of K.P. on or between July 25, 2000 and May 6, 2005, a violation of La. R.S. 14:42 (Count 1); and aggravated rape of K.P. on or between November 26, 2000 and November 26, 2004, a violation of La. R.S. 14:42 (Count 2). Defendant pled not guilty and, following a jury trial, was found guilty as charged on both counts. For each count, defendant was sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence, with the sentences to run concurrently. Defendant now appeals designating one assignment of error. We affirm the convictions, amend the sentences, and affirm as amended.

FACTS

Defendant and his wife, Sonja Reed, were married in 1998. Sonja had two daughters from a previous marriage, K.P. (hereinafter "K.P.1"), born November 26, 1991, and her younger sister, K.P. (hereinafter "K.P.2"), born July 25, 1993.[2] The family lived in Covington. In 2005, K.P.2 wrote to her friend a note that suggested defendant was sexually abusing K.P.2 and her sister, K.P.1. K.P.2's friend gave the note to her mother's fiancé who, in turn, contacted the Office of Community Services (OCS).

Luanne Mayfield, with the OCS in St. Tammany Parish, and Detective Rachel Smith, with the St. Tammany Parish Sheriff's Office, investigated the allegations of abuse. Mayfield testified at trial that K.P.2 told her she and her sister had been sexually abused by defendant. Defendant orally and

[2] In the indictment, Count 1 refers to K.P.2 and Count 2 refers to K.P.1.

vaginally raped both girls, and they were forced to perform oral sex on defendant. According to K.P.2, the abuse lasted for about four years. Detective Smith testified at trial that K.P.2 gave her essentially the same account of sexual abuse that she had given to Mayfield.

A month after the initial allegations of abuse, the girls were taken to Children's Hospital in New Orleans, where they underwent full physical examinations. The results of the examinations were normal. Given the time between the initial report of abuse and the medical examinations, Dr. Adriana Jamis, with the Children's Hospital, testified at trial that she would expect to see a normal examination. Subsequently, both girls were interviewed at the Children's Advocacy Center (CAC) in Covington. The information the girls provided at these interviews regarding defendant's sexual abuse of them was consistent with the testimony they provided at trial.

K.P.2 testified at trial that when she was seven or eight years old, defendant forced her to perform oral sex on him. On other occasions, defendant engaged in vaginal intercourse with K.P.2 and performed oral sex on her. K.P.2 testified that for four or five years, some sexual act occurred between her and defendant at least three times a week. K.P.2 also remembered on one occasion seeing defendant rape her sister.

K.P.1 testified at trial that when she was in the third grade, defendant performed oral sex on her. Subsequently, defendant began engaging in vaginal intercourse with K.P.1. She also performed oral sex on defendant. K.P.1 testified defendant performed some sexual act on her about three times a week. When asked about the first time she realized defendant was also abusing her sister, K.P.1

testified, "It was the first and only time I said no to him to the abuse, and he said, well, if I'm not going to get it from you, I'll get it from somebody else, and he went to my sister's room." On one occasion, defendant forced K.P.1 to perform oral sex on K.P.2. K.P.1's sexual abuse by defendant continued until the end of K.P.1's seventh-grade year.

Defendant testified at trial. He denied all of the allegations of sexual abuse. Defendant had two convictions for distribution of cocaine and spent three and one-half years in prison.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant asserts the trial court erred in holding defense counsel in contempt of court in the presence of the jury. Specifically, defendant contends that, pursuant to La. C.Cr.P. art. 22, the trial court failed to provide defense counsel with an opportunity to be heard orally by way of defense or mitigation, and failed to render an order reciting the facts constituting the contempt, and that the trial court's error adversely affected his right to a fair trial.

During the prosecutor's redirect examination of Stephi King, the trial court found defense counsel in contempt. Following is the relevant colloquy:

> Q. Now, had you decided because [K.P.1] had a tear in her eye and a big shirt that sexual abuse was going on?
>
> A. I wasn't sure.
>
> BY MR. EDWARD LARVADAIN [defense counsel]:
>
> I'm going to object to that question. She's leading the witness now.
>
> BY THE COURT:

Sustained.

BY MR. EDWARD LARVADAIN:

At least I got one.

BY THE COURT:

Counsel, look at me. Mr. Larvadain, if you make another comment like that again, I'm going to hold you in contempt. Do you understand?

BY MR. EDWARD LARVADAIN:

Yes, sir, but I want you to know, Judge --

BY THE COURT:

No. I want you to be quiet and have a seat.

BY MR. EDWARD LARVADAIN:

I'm going to take my seat, but I see something I don't like.

BY THE COURT:

Now you're in contempt, and I fine you $50. Sit down.

BY MS. KNIGHT [prosecutor]:

Thank you, Your Honor.

EXAMINATION BY MS. KNIGHT:

Q. Ms. King, let's go back a little bit. You said you were in 6th grade when this went on?

A court "has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt." La. C.Cr.P. art. 17. A direct contempt of court is one committed in the immediate view and presence of the court and of which it has personal knowledge.

A direct contempt includes contumacious, insolent, or disorderly behavior toward the judge, tending to interrupt or interfere with the business of the court or to impair its dignity or respect for its authority. La. C.Cr.P. art. 21(5).

La. C.Cr.P. art. 22 provides:

> A person who has committed a direct contempt of court may be found guilty and punished therefor by the court without any trial, after affording him an opportunity to be heard orally by way of defense or mitigation. The court shall render an order reciting the facts constituting the contempt, adjudging the person guilty thereof, and specifying the punishment imposed.

We find that the trial court did not err in immediately addressing defense counsel's recalcitrance and finding him in contempt. Such contempt directed at the trial court in its presence rendered any defense by defense counsel unnecessary. Direct contempt is decided summarily without trial. The summary procedure allows immediate vindication of the court's authority. ***State v. Watson***, 465 So.2d 685, 687 (La. 1985). In ***Watson***, 465 So.2d at 687, the Louisiana Supreme Court stated:

> ***In re Oliver***, 333 U.S. 257, [275], 68 S.Ct. 499, [508-09], 92 L.Ed. 682 (1948)[,] discusses the due process limitations on summary contempt procedures:
>
> "Except for a narrowly limited category of contempts, due process of law as explained in [***Cooke v. United States***, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925),] requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public."

Moreover, even had it been error for the trial court to have failed to afford defense counsel an opportunity to be heard by way of defense or mitigation, or to render an order reciting the facts constituting the contempt, such error would have had no effect on defendant's guilty verdicts. In his brief, defendant suggests the trial court's remarks to defense counsel in front of the jury predisposed the jury to voting guilty. Defendant asserts that the issue is whether the trial court's "summarily holding defense counsel in contempt and punishing him in front of the jury could have denied [him] a fair trial by leading the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor." Further, according to defendant, had the trial court adhered to the procedures mandated by Article 22, the mandated hearing "may have made it apparent to the trial [court] that it ought not [to] have been conducted in front of the jury."

Essential to the concept of a fair trial is the requirement of complete neutrality on the part of the presiding judge. A trial judge's disparaging remarks or intemperate criticism of defense counsel may constitute reversible error when such remarks adversely influence and prejudice the jury against the defendant. In order to constitute reversible error, however, the effect of the improper comments must be such as to have influenced the jury and contributed to the verdict. ***State v. Johnson***, 438 So.2d 1091, 1101-02 (La. 1983).

In this case, defendant has not shown, and nothing in the record suggests, how the trial court's contempt finding of defense counsel in any way influenced the jury's verdicts. The trial court's comments to defense counsel or handling of the situation in the presence of the jury did not rise to such a level as to endanger the defendant's right to a fair and impartial trial. See ***State v. Glynn***, 94-0332, p.

24 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1306, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464; see also ***Johnson***, 438 So.2d at 1102.

Accordingly, the assignment of error is without merit.

SENTENCING ERROR

Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. La. R.S. 14:42(D)(1). In sentencing defendant, the trial court failed to provide that the sentences were to be served at hard labor.[3] Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the proceedings without inspection of the evidence, La. C.Cr.P. art. 920(2) authorizes consideration of such an error on appeal. Further, La. C.Cr.P. art. 882(A) authorizes correction by the appellate court.[4] We find that correction of these illegally lenient sentences does not involve the exercise of sentencing discretion and, as such, there is no reason why this court should not simply amend the sentences. See ***State v. Price***, 05-2514, p. 22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 124-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277. Accordingly, since sentences at hard labor were the only sentences that could be imposed, we correct the sentences by providing that they be served at hard labor.

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[3] The minutes reflect the trial court sentenced defendant to hard labor for both the aggravated rape convictions. When there is a discrepancy between the minutes and the transcript, the transcript prevails. ***State v. Lynch***, 441 So.2d 732, 734 (La. 1983).

[4] An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. La. C.Cr.P. art. 882(A).

DECREE

For these reasons, the convictions are affirmed. We amend the sentences to provide that they be served at hard labor. As amended, the sentences imposed against Francis E. Reed, Jr. are affirmed.

CONVICTIONS AFFIRMED. SENTENCES AMENDED TO PROVIDE THAT THEY BE SERVED AT HARD LABOR AND, AS AMENDED, AFFIRMED.