NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0298

STATE OF LOUISIANA

VERSUS

TORIANO Z. KELLY

On Appeal from the 21st Judicial District Court
Parish of Tangipahoa, Louisiana
Docket No. 903,397, Division "A"
Honorable Wayne Ray Chutz, Judge Presiding

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Toriano Z. Kelly

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered November 9, 2011

PARRO, J.

The defendant, Toriano Z. Kelly, was charged by grand jury indictment with one count of forcible rape (count 1), a violation of LSA-R.S. 14:42.1, and one count of aggravated burglary (count 2), a violation of LSA-R.S. 14:60, and he pled not guilty on both counts. Following a jury trial on count 1, he was found guilty as charged.[1] He moved to arrest the judgment, for a new trial, and for a post-verdict judgment of acquittal, but the motions were denied. He was sentenced to forty years of imprisonment at hard labor, with two years of the sentence to be served without benefit of probation, parole, or suspension of sentence. He moved for reconsideration of sentence, but the motion was denied. He now appeals, designating the following assignments of error:

1. The State of Louisiana violated the Equal Protection Clause and **Batson v. Kentucky** when it removed all of the prospective African-American men from the jury.

2. The trial court erred in failing to remove a juror for cause when the juror could not presume the defendant innocent.

3. The State of Louisiana did not provide sufficient evidence to meet its burden to prove all of the elements of forcible rape beyond a reasonable doubt pursuant to **Jackson v. Virginia**.

4. A forty-year sentence at hard labor is excessive under the circumstances of this case and considering the defendant's background.

For the following reasons, we affirm the conviction, vacate the sentence, and remand for resentencing.

FACTS

The victim, A.S.,[2] testified at trial. She was nineteen years old at the time of her testimony.[3] She was a college student, studying chemical engineering. The incident occurred on August 27, 2009, at her home in Independence, Louisiana. On that day, she

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[1] Count 2 was dismissed prior to jury deliberations.

[2] The victim is referenced only by her initials. See LSA-R.S. 46:1844(W).

[3] October 27, 2010, was the date of her testimony.

woke up at approximately 6:30 a.m. to get her younger brother ready for school and to take him to the bus stop by 7:30 a.m., because her parents had already gone to work. As she put her brother on his school bus, she saw a man running up and down the street. According to the victim, she did not know the man's name, but had seen him approximately three other times while putting her brother on his bus. She denied ever having had a conversation with the man. After putting her brother on his bus, the victim returned home, where she was alone, and rested for two or three hours. She then watched television, but was disturbed by her dog barking. She took the dog outside, tied his leash to a tree, and went back into her home. Approximately thirty minutes later, she heard her dog barking and went outside to get him.

According to the victim, as she was taking her dog back inside her home, the man she had seen earlier came up behind her and grabbed her. She saw his reflection in the mirrors by the entrance to her home. The victim told the man to stop, and tried to get away from him, but he dragged her to the couch. He threw her onto the couch, and she kicked her legs and continued to yell "stop." He held her arms down on the couch. He then moved one of his hands to her neck and used his other hand to unzip his pants. The victim was afraid the man was going to kill her. He pulled his "private part" out and tried to put it in the victim's mouth, but she kept her mouth closed and moved her head. The man pulled the victim's shorts and underwear off, as she kicked him. He got on top of her and put his "private part" inside of her vagina. The victim screamed louder from the pain, and the man covered her face with a pillow from the couch. The victim thought the man was going to suffocate her. The man told the victim, "You wanted this[.] I could see how you have been looking at me[.]" The man then left "like nothing happened." The victim testified she never gave the man permission to enter her home. She also stated she never gave him any indication she wanted to have sex with him. She denied telling him she was stripper, denied talking to him about a "lap dance," and denied performing a "lap dance" for him.

After the incident, the victim locked her door, put her clothes back on, and took a

bath because she felt "nasty and disgusting." Initially, she was not going to report the offense because she felt ashamed. However, approximately five minutes after the victim's bath, one of her friends called her and "could tell that something was wrong with [the victim]." Thereafter, the victim reported the incident to her mother, and then to the police. The police arrived at the scene approximately five to ten minutes later. While the victim was describing the man to the police, the defendant exited the house across the street and approached her. She identified him as her assailant at the scene and in court.

The defendant also testified at trial. He indicated he was living across the street from the victim's home at the time of the incident, but did not know anyone in the victim's family and had met her only a few days before the incident. He claimed he was in town planning a bachelor party for his cousin. He claimed he jogged in the mornings and in the evenings. He claimed he saw the victim outside on Tuesday, Wednesday, and Thursday mornings, and on Wednesday afternoon. He claimed he spoke to the victim every day he saw her, and the conversations became longer. He claimed he spoke to the victim on the day of the incident because he was having difficulty arranging for dancers for the bachelor party and he wanted to see if the victim would come to the party with some of her friends. He claimed the victim invited him into her home. He claimed he told the victim he was looking for dancers and asked her if she would be interested. He claimed he and the victim began talking, which led to touching, which led to kissing, and then the victim gave him a "lap dance." He claimed his and the victim's clothes came "down or off" during the lap dance, and thereafter, he went home. He denied the victim ever told him to stop. He claimed he and the victim had consensual sex. He conceded that, in a prior written statement, he had indicated he rang the door bell on the victim's home and then she invited him into the home.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 3, the defendant argues the evidence was insufficient to support the conviction because the victim's testimony conflicted with the testimony of the investigating officer and the examining doctor. He also argues the state

failed to prove that he overcame the victim's resistance with "threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape."

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the 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 that the state proved the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see also LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). When circumstantial evidence is used to prove the commission of an offense, LSA-R.S. 15:438 requires that, assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. See **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, and 00-0895 (La. 11/17/00), 773 So.2d 732.

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 ... committed without the person's lawful consent." LSA-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." LSA-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: "[w]hen 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).

Tangipahoa Parish Sheriff's Office Assistant Chief Phillip David Ritter, Jr., responded to the report of the rape. He found the victim crying and in a fetal position. She indicated she had been raped and the assailant had left and gone across the street. Shortly thereafter, the defendant approached Asst. Chief Ritter, and the victim identified him as the assailant. The defendant was then arrested.

The defendant argues the victim's testimony conflicted with Asst. Chief Ritter's initial investigative report, which stated, "Upon my arrival I spoke to _____ who stated that she was [forcibly] raped. She then stated that Toriano Z. Kelly ... forced his way into the house and raped her. She also stated that he lived across the street." The defendant argues, "[o]nly one person could have given Deputy Ritter Mr. Kelly's name. Deputy Ritter testified the first person he spoke to was [the victim]."

At the outset, we note that the defendant relies on an initial investigative report, which was inadmissible at trial. See LSA-C.E. art. 803(8)(b)(i). Further, his claim that the report proves that the victim knew the defendant's name, knew where he lived, and thus, had spoken to him is speculative. The report was prepared after Asst. Chief Ritter had investigated the offense and after the defendant had been arrested. The identity of the defendant was certainly not a secret at this point, and Asst. Chief Ritter could have obtained the defendant's name from someone other than the victim. In his testimony at trial, Asst. Chief Ritter did not indicate that the victim knew the defendant's name or where he lived.

The defendant also argues that the victim's testimony that "she was violently and physically attacked" conflicted with the testimony of Dr. Harlan, because he found no signs of trauma or injury to the victim.

Dr. Michael Harlan of North Oaks Medical Center testified he conducted a rape

exam on the victim on the day of the offense and found no evidence of trauma, which he defined as cuts or bruises. Contrary to the defendant's argument, the victim did not testify "she was violently and physically attacked." Rather she testified she was grabbed from behind, dragged to the couch, and held down and raped. The victim never claimed she was cut or beaten during the incident. Thus, her testimony was not inconsistent with the testimony of Dr. Harlan.

We also reject the defendant's argument that the state had to prove that the victim was prevented from resisting the rape by "threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape." Proof that the victim was prevented from resisting the rape by "***force*** or threats of physical violence" is sufficient. See LSA-R.S. 14:42.1(A)(1) (emphasis added).

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 every reasonable hypothesis of innocence, all of the elements of forcible rape and the defendant's identity as the perpetrator of that offense against the victim. The verdict returned against the defendant indicates the jury rejected the defendant's claims of 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 verdict rendered indicates 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**, 06-0207 (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. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

BATSON

In assignment of error number 1, the defendant argues the trial court erred in overruling his objections under **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), to the state's use of peremptory challenges against African-American prospective jurors, namely, Famalda Frazier, David Sims, Obie Johnson, Jr., Charles Freeman, and Freddie Rogers.

Batson, 476 U.S. at 96, 106 S.Ct. at 1723, held that an equal protection violation occurs if a party exercises a peremptory challenge to exclude a prospective juror on the basis of a person's race. **Batson**, 476 U.S. at 96, 106 S.Ct. at 1723; see also LSA-C.Cr.P. art. 795(C)-(E). If the defendant makes a prima facie showing of discriminatory strikes, the burden shifts to the state to offer racially-neutral explanations for the challenged members. The neutral explanation must be one which is clear, reasonable, specific, legitimate, and related to the particular case at bar. If the race-neutral explanation is tendered, the trial court must decide, in step three of the **Batson** analysis, whether the defendant has proven purposeful discrimination. A reviewing court owes the district judge's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. **State v. Elie**, 05-1569 (La. 7/10/06), 936 So.2d 791,

795.

The **Batson** explanation does not need to be persuasive, and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race neutral. The ultimate burden of persuasion remains on the party raising the challenge to prove purposeful discrimination. **Elie**, 936 So.2d at 795-96.

In order to satisfy **Batson's** first step, a moving party need only produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. **Elie**, 936 So.2d at 796. **Batson's** admonition to consider all relevant circumstances in addressing the question of discriminatory intent requires close scrutiny of the challenged strikes when compared with the treatment of panel members who expressed similar views or shared similar circumstances in their backgrounds. The one relevant circumstance for a trial judge to consider is whether the state articulated verifiable and legitimate explanations for striking other minority jurors. **Id.** The failure of one or more of the state's articulated reasons for striking a prospective juror does not compel a trial judge to find that the state's remaining articulated race-neutral reasons necessarily cloaked discriminatory intent. **Id.**

During voir dire, the state asked Famalda Frazier how he knew when someone was telling the truth. Frazier replied, "Sometimes you wouldn't know – you would have to --." David Sims did not make any disclosures concerning outstanding charges or prior convictions against him. Also during voir dire, the state asked Obie Johnson, Jr., to imagine he worked at a bank. The state asked him to imagine that two people, a driver and a passenger, had guns in a car at the bank. The state asked Johnson, if the driver told him to give him the money from the bank and then handed the money over to the passenger, and then both the driver and the passenger confessed to the crime, but at trial, Johnson confused where the driver and the passenger were sitting in the car, would there be reasonable doubt in the case. Johnson answered affirmatively. Charles Freeman stated he knew defense counsel Williams because he went to church with her mother. Additionally, Freeman disclosed that his brother had been arrested for bank robbery.

Freddie Rogers did not make any disclosures concerning outstanding charges or prior arrests.

During jury selection, the state used eleven peremptory challenges in the selection of the twelve-person jury and two alternates. The defense argued the state had struck all the African-American men from the jury, specifically, Famalda Frazier, David Sims, Obie Johnson, Jr., Charles Freeman, and Freddie Rogers. The court noted that all of the referenced prospective jurors were African-American men, and asked the state if it could provide reasons for its use of peremptory challenges against them. The state argued it felt that, even if Frazier were convinced he believed the victim, he could not vote solely on the victim's testimony; he would need additional evidence. The state argued Sims had failed to disclose that he had outstanding charges and had been convicted in Tangipahoa Parish. In regard to Johnson, the state argued it had given him a hypothetical concerning reasonable doubt and it felt that he was confused as to whether or not the state had to prove its case beyond every shadow of a doubt or just strictly based upon reasonable doubt. Additionally, the state noted Johnson had failed to disclose he had an outstanding attachment from 2003. In regard to Freeman, the state noted he had indicated he was personal friends with defense counsel Williams's mother. Additionally, the state argued Freeman had disclosed that his brother had been arrested for bank robbery, and the state felt he would be prejudiced against its case because his family member was prosecuted by the state. In regard to Rogers, the state argued it had asked whether or not everyone could accept circumstantial evidence in place of direct evidence, and Rogers had failed to gesture his head in an affirmative. Additionally, the state argued Rogers had an outstanding "failure to appear," and had failed to disclose a prior arrest.

Defense counsel Williams argued, in regard to Rogers' failure to appear, the state should have taken action against him earlier. In regard to Freeman, defense counsel Williams argued Freeman must have been mistaken about knowing counsel's mother because her mother lived in Mississippi, and thus, Freeman could not have gone to church with her.

The court found the reasons articulated by the state for its peremptory challenges against the prospective jurors at issue were reasonable, and denied the **Batson** challenges. The trial court's conclusion that the state did not have discriminatory intent in exercising peremptory challenges against Famalda Frazier, David Sims, Obie Johnson, Jr., Charles Freeman, and Freddie Rogers was not clearly erroneous. Discriminatory intent was not inherent in the explanations offered by the state for its peremptory challenges against these men, and the defense failed to prove purposeful discrimination.

This assignment of error is without merit.

CHALLENGE FOR CAUSE

In assignment of error number 2, the defendant argues the trial court erred in denying the challenge for cause against prospective juror Pamela Abelseth because she could not presume the defendant innocent.

The state or the defendant may challenge a juror for cause on the ground that the juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence. LSA-C.Cr.P. art. 797(2). The state or the defendant may also challenge a juror for cause on the ground that the juror will not accept the law as given to him by the court. LSA-C.Cr.P. art. 797(4). A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the prospective juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to the law reasonably may be inferred. However, the trial court is vested with broad discretion in ruling on a challenge for cause; its ruling will not be disturbed on appeal absent a showing of an abuse of discretion. **State v. Henderson**, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 754, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235.

In order for a defendant to prove reversible error warranting reversal of both his conviction and sentence, he need only show the following: (1) erroneous denial of a

challenge for cause; and (2) use of all his peremptory challenges. Prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all his peremptory challenges.[4] An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. **State v. Taylor**, 03-1834 (La. 5/25/04), 875 So.2d 58, 62. However, a trial judge's refusal to excuse a prospective juror for cause is not an abuse of his discretion, notwithstanding that the juror has voiced an opinion seemingly prejudicial to the defense, when subsequently, on further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. **Taylor**, 875 So.2d at 63.

The voir dire transcript in the instant case indicates that the defense used ten of its twelve peremptory challenges in selecting the first twelve jurors, was then granted an additional peremptory challenge to use in the selection of the alternate jurors, and exercised that peremptory challenge to excuse Abelseth. No alternate jurors were needed to replace any of the original twelve jurors during the trial. Thus, the presumption of prejudice from the wrongful denial, if any, of the challenge for cause against Abelseth was rebutted in this case.

Moreover, the challenge for cause against Abelseth was not wrongfully denied. During voir dire, the following colloquy occurred between the defense and Abelseth:

> [Defense]: Does anyone else feel the same way, they are just not comfortable for whatever reason?
>
> [Defense]: Ms. Abelseth, you are not comfortable?
>
> [Abelseth]: I just don't really know if I could – how do I want to say it, if I could just be – you know, be bias and just –
>
> [Defense]: So you don't know that you would be able to presume him innocent?
>
> [Abelseth]: Exactly.
>
> [Defense]: You think you may be a little bias or you [maybe] favor the

[4] The rule is now different at the federal level. See **United States v. Martinez-Salazar**, 528 U.S. 304, 316-17, 120 S.Ct. 774, 782, 145 L.Ed.2d 792 (2000) (exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from trial court's erroneous denial of a cause challenge).

victim?

[Abelseth]: Just – yeah, just – I have to be honest, you know.

[Defense]: That is all we want, and that is the State and myself, we definitely would rather someone be honest, and that is why we ask.

[Abelseth]: Yeah, and I would hate to think that I made the wrong choice or made the wrong decision or made the wrong call and that is how I feel, you know, I don't know if –

[Defense]: You don't know if you can separate your personal feelings from what the accusations are in this case?

[Abelseth]: Exactly.

Thereafter, the trial court questioned Abelseth as follows:

[Court]: [T]he last question that was asked or at least there was a statement more or less made, that I understand you may have a bias and an assumption, that when the question was asked whether you would like to have someone if you had a trial, such as yourself sit as a juror and the assumption was, I will assume that you don't. ... . I want you to understand the function of a juror is to determine whether the State has proven each and every element of the offense necessary beyond a reasonable doubt. Okay? And while I will give you a better definition of it later, let it suffice for the time being ..., a reasonable doubt is a doubt for which you can articulate a reason. I have a doubt because, and you can articulate some reason. Okay? Now, that is the function that a juror should serve, has the State proven each and every element necessary to constitute guilt beyond a reasonable doubt[;] and when I talk about bringing a bias in, what I am talking about is do you come in with some preconceived notion or bias to where that preconceived notion or bias will prevent you from determining whether or not the State has proven each and every element beyond a reasonable doubt, whether it is in favor of the defendant or against the defendant. So when I ask you if you can accept the law, I am going to tell you what the law is, and I pretty much ask everybody just in general can you accept the law, and in order to serve as a juror you are going to have to accept the law[;] and then it will be your function as a juror to determine what the facts are based upon the evidence that is presented[;] and then apply those facts to the law that I have given to you and make a determination as to whether or not the State has or has not proven what it needs to prove. Okay?

. . .

[Court]: Okay. And Mrs. Abelseth, can you do that?

[Abelseth]: Yes, Sir.

The trial court did not abuse its broad discretion in denying the challenge for cause against Abelseth. She demonstrated a willingness and ability to decide the case impartially according to the law and the evidence, and her responses as a whole did not

reveal facts from which bias, prejudice, or inability to render a verdict according to the law could reasonably be inferred.

This assignment of error is without merit.

REVIEW FOR ERROR

In assignment of error number 4, the defendant argues the forty-year sentence imposed on him is excessive considering his background and the circumstances of the case. We note error under LSA-C.Cr.P. art. 920(2) which causes us to pretermit consideration of this assignment of error.

This court routinely reviews the record for error under LSA-C.Cr.P. art. 920(2), whether or not such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. In the instant case, the trial court failed to wait twenty-four hours after denying the motions for new trial and in arrest of judgment before imposing sentence. See LSA-C.Cr.P. art. 873. The defendant did not waive the delay and has appealed the sentence received. He did not receive a mandatory sentence. Under these circumstances, we must vacate the sentence and remand for resentencing. See **State v. Augustine**, 555 So.2d 1331, 1333-35 (La. 1990); **State v. Parry**, 07-1972 (La. App. 1st Cir. 3/26/08), 985 So.2d 771, 777.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED WITH INSTRUCTIONS.