NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 2025

STATE OF LOUISIANA

VERSUS

TROY ANTHONY LeBOUEF

Judgment Rendered: JUN 14 2012

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On Appeal from the Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Docket No. 571,369

Honorable David Arceneaux, Judge Presiding

* * * * * *

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

McCLENDON, J.

Defendant, Troy Anthony LeBouef, was indicted by a grand jury on one count of aggravated rape of a female under the age of thirteen years, a violation of LSA-R.S. 14:42A(4). Defendant entered a plea of not guilty. Following a jury trial, he was found guilty as charged. He moved for a post-verdict judgment of acquittal and for a new trial, both of which were denied. Defendant was then sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. He moved for reconsideration of sentence, which was denied. Defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

The victim, M.V.[1], was about four years old at the time she accused defendant of sexual abuse. M.V., her older sister A.P., and their mother temporarily lived in the same house on Raymond St., in Houma, with defendant and his girlfriend, Cheri LeBouef. M.V.'s mother and Cheri were friends, and when the mother was working she would leave her daughters in Cheri's care. Even after moving out of the house, M.V.'s mother would still take her and A.P. to defendant's house where defendant and Cheri would babysit the children, sometimes overnight or for the entire weekend. Defendant testified that he practically raised M.V. since she was a baby, and that he and Cheri would take M.V. with them on vacations and to their family gatherings.

Defendant and Cheri would often babysit other children in their home, including Cheri's niece, K.P. Sometimes the children would stay overnight. During overnight stays, M.V. would usually sleep in the same bed as defendant and Cheri, and the other children, including A.P. and K.P., would usually sleep on the couches or on the floor in the living room.

M.V. first told her grandmother about the sexual abuse, and then M.V.'s mother contacted the police, who began an investigation. M.V. was interviewed by Dawn Buquet, a forensic interviewer at the Terrebonne Children's Advocacy

[1] In accordance with La. R.S. 46:1844W, the victims herein are referenced only by their initials.

Center. In that interview, which was recorded and played for the jury, M.V. told Buquet that one night, when she was in the same bed as defendant and Cheri, defendant told her to go under the covers and touch his penis and that he put it in her mouth. M.V. also testified to this at the trial.

Immediately prior to his arrest, defendant spoke to Detective Keith Breaux of the Houma Police Department, who was investigating M.V.'s sexual abuse claim, and admitted that M.V. did have his penis in her mouth one night while she was in the same bed as he and Cheri. Defendant's interview was recorded, and the tape was played for the jury. Defendant also repeated the admission at trial. However, defendant alleged that M.V. acted on her own without his prompting, that he did not realize it was M.V. at first because he thought it was Cheri, and that he fussed at M.V. for her actions. He testified that M.V. told him at the time that "T-Roy had let her do that." There was some testimony at trial, including from Detective Rosylynn Morris, a criminal detective with the Terrebonne Parish Sheriff's Office, that M.V. had made very similar sexual abuse allegations against another man. That individual was her mother's boyfriend, who went by the nickname "T-Roy." There was other testimony at trial that M.V. knew the difference between defendant "Troy" and "T-Roy." M.V. also identified defendant as the man who sexually molested her, both at the trial and during her taped interview with Buquet.

Pursuant to LSA-C.E. art. 412.2, the State introduced evidence of defendant's commission of another crime, wrong, or act that indicated a lustful disposition toward children. A.P. and K.P. testified at trial that defendant had sexually molested them when they were younger than thirteen years old. A.P. testified that when she was about eleven years old, at a time when she was at the house on Raymond St., defendant put his hand in her underwear and rubbed her vagina. She testified that this only happened one time. K.P. testified that when she was about twelve or thirteen years old, while she was staying overnight at the house on Raymond St., defendant came to her while she was asleep in the living room and that he touched her vagina, made her touch his

penis, and attempted to have sex with her. She testified that this happened multiple times. Defendant denied the allegations made by A.P. and K.P.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1 – Juror Challenge for Cause

In his first assignment of error, defendant argues that the trial court abused its discretion in denying a defense challenge for cause properly asserted against a prospective juror, Mr. Simon Tarr, who never unequivocally abandoned his strong bias in favor of the prosecution. After the trial judge denied the challenge for cause, defendant used a peremptory challenge to remove Mr. Tarr. The record is clear that defendant objected to the trial judge's denial of the challenge for cause and that by the end of voir dire, defendant had exhausted all of his peremptory challenges.

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination and to the exercise of peremptory challenges. LSA-Const. art. I, §17A. The purpose of voir dire examination is to determine prospective jurors' qualifications by testing their competency and impartiality and discovering bases for intelligent exercise of cause and peremptory challenges. **State v. Burton**, 464 So.2d 421, 425 (La.App. 1 Cir.), writ denied, 468 So.2d 570 (La. 1985). A trial court is accorded great discretion in determining whether to seat or reject a juror for cause, and such rulings will not be disturbed unless a review of the voir dire as a whole indicates an abuse of that discretion. A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to law may be reasonably implied. **State v. Martin**, 558 So.2d 654, 658 (La.App. 1 Cir.), writ denied, 564 So.2d 318 (La. 1990). However, a trial court's ruling on a motion to strike jurors for cause is afforded broad discretion because of the court's ability to get a first-person impression of prospective jurors during voir dire. **State v. Brown**, 05-1676, p. 5 (La.App. 1 Cir. 5/5/06), 935 So.2d 211, 214, writ denied, 06-1586 (La. 1/8/07), 948 So.2d 121.

Prejudice is presumed when a trial court erroneously denies a challenge for cause and the defendant ultimately exhausts his peremptory challenges. This is because an erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. **State v. Kang**, 02-2812, p. 3 (La. 10/21/03), 859 So.2d 649, 651-52. To prove there has been an error warranting reversal of a conviction, a defendant need only show: (1) the trial court's erroneous denial of a challenge for cause; and (2) the use of all his peremptory challenges. **Kang**, 02-2812 at p. 3, 859 So.2d at 652. Since the defendant in this case exhausted all of his peremptory challenges, we need only consider the issue of whether the trial judge erroneously denied defendant's challenge for cause as to Tarr.

Louisiana Code of Criminal Procedure article 797 provides, in pertinent part:

> The state or the defendant may challenge a juror for cause on the ground that:
>
> * * *
>
> (2) 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;
>
> * * *
>
> (4) The juror will not accept the law as given to him by the court[.]

Defendant argues that the trial court erred in denying the challenge for cause against prospective juror Mr. Tarr because he never unequivocally abandoned his strong bias toward the prosecution. At the time of the voir dire, Mr. Tarr was 44 years old, was a commercial driver for Oceaneering International, and his wife worked for the Families In Need of Services (FINS) Department in Thibodaux. He was also the father of two young daughters, one of whom was 6 years old. He volunteered that he did not think he qualified to be a juror in this case because he thought he would be biased in favor of the State. Specifically, Mr. Tarr told the court:

Mr. Tarr: I'm sorry, I don't --

[Prosecutor]: Yes, sir.

Mr. Tarr: -- I don't think I qualify.

[Prosecutor]: And Mr. Rhodes? I'm sorry, Mr. Tarr.

Mr. Tarr: I think I would be biased towards the State's case. I have two daughters, one is six, and for his benefit I don't think I could --

[Prosecutor]: So you --

Mr. Tarr: -- necessarily be fair because obviously for you guys to bring it this far you believe that he is guilty. And I'm an advocate for children. You know, my wife works with youths in Thibodaux. And honestly, I don't know if I can separate this on this particular instance.

[Prosecutor]: ... So what you are telling me Mr. --

Mr. Tarr: Tarr.

[Prosecutor]: -- Mr. Tarr is that because you have younger children and because of your wife's involvement with children you will not be able to set that aside and listen to only the facts that is [sic] presented in this case?

[Tarr]: That is absolutely correct.

[Prosecutor]: Okay. You would not be able to set those things aside?

Mr. Tarr: No, sir.

Later, the trial court attempted to rehabilitate Mr. Tarr. The following colloquy occurred between the court and Mr. Tarr:

The Court: All right. You indicated that you -- you might have some difficulty setting aside the sympathy that you have for children in making a decision in this case. If you were selected as a juror in this case and after you heard all of the evidence you were not convinced beyond a reasonable doubt that the defendant was guilty, would you vote to find him guilty because of the sympathy you have for children?

Mr. Tarr: No.

The Court: Don't you think you are capable of separating the sympathy that you have for children from your obligation to follow the law as I give it to you, weigh the evidence and render a decision based on the evidence in this case? Don't you think you can do that?

Mr. Tarr: Well, that was something I was thinking about with respect to the law, you know, and the fairness to the system, you know, you almost to – but when it comes to children where they

can't, you know, protect themselves or do something like that, it just makes it really hard for me.

The Court: Well, you haven't heard any of the evidence in this case. You haven't seen any of the witnesses. You haven't heard anything that they have had to say. I am just concerned that frankly a man with two years of college would have some difficulty -- and a man with children of his own would have some difficulty putting aside his personal feelings of sympathy for children when he has to carefully consider the testimony that those children might give in making a decision that could have such serious consequences in a case like this one. You don't think you could do that? And quite frankly, you impress me as one who could do it easily, but you seem to think you can't, that's why I am questioning you.

Mr. Tarr: Well, you know the way you are talking to me and the way you put it, yes, I could I guess.

Immediately after this dialogue with Mr. Tarr, the trial court questioned another prospective juror, Nichol Sevin[2], who had expressed similar doubts about her ability to be impartial when the case involved young children. The court observed that she seemed "a little emotional when they talk about these children." Ms. Sevin indicated that the issue of children would be difficult for her, saying "I don't know anything about it, it was the thing about a child. I can listen to it and it's going to hurt me." Thereafter, the trial court stated:

The Court: Well -- and listen I understand that it would be emotional. Frankly, I would be worried if I had a jury full of people who had no emotion. I might be more worried about that than a jury that has some people who feel some emotion. I fully expect you to have some emotion. And you might be surprised at the emotions that you experience either way in this case once the evidence comes out. My question is -- and I will tell you when the case is over one of the instructions that I am going to give you, if you are selected for the jury -- and this is as much for you, Ms. Sevin, as it is for you, Mr. Tarr, one of the instructions that I am going to give you is that you cannot decide this case based on passion, or sympathy, or prejudice, none of that enters into the decision. You have to make the decision based on the evidence, and only the evidence, and obviously your view of the evidence. Do you think that you could weigh the evidence and render a decision based on that evidence without letting sympathy for either side, or passion for either side, or prejudice for either side, if any of it exists, from entering into that decision. Do you think you could do that?

Ms. Sevin: I don't know until I get to that point.

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[2] Nichol Sevin was 25 years old and though she did not have any children, she did have two young nieces.

> The Court: All right. How about you, Mr. Tarr, do you think you could do that?
>
> Mr. Tarr: Yes, sir.

Defendant challenged Mr. Tarr for cause on the grounds that, despite the trial court's attempt to rehabilitate him, it seemed clear from the "get-go" that both he and his wife were self-described "child advocates." Further, defendant argued that Mr. Tarr did not seem to convey that he could render a fair verdict, that he came in with "tunnel vision" and as soon as he heard about the case he "locked in." The trial court denied the challenge for cause, explaining:

> The Court: All right. Well, Mr. Tarr's final word on the subject was that he could make a decision weighing the evidence, and he could put aside any personal feelings he might have insofar as sympathy for children, to whatever extent that might play out in this case, I don't know, but I am satisfied he is an educated man with children of his own and he confirmed to me in the end that yes, he could follow the instructions, so I am going to -- I am going to deny that challenge for cause.

Immediately after this, defendant challenged Ms. Sevin for cause, for the same reasons as Mr. Tarr. The trial court granted this challenge, explaining:

> The Court: All right. I will grant the challenge for cause. Ms. Sevin does not appear to me to be as well-equipped to do what is asked of her as Mr. Tarr. In fact, Ms. Sevin was crying during the questioning. I think for her to keep in control of her emotions in this case is going to be more difficult. Something Mr. Tarr could do fairly easily, I think Ms. Sevin would have trouble doing, so I will grant that challenge for cause.

A prospective juror's seemingly prejudicial response is not grounds for an automatic challenge for cause, and a trial court's refusal to excuse him on the grounds of impartiality is not an abuse of discretion, if after further questioning the potential juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence. **Kang**, 02-2812 at p. 5, 859 So.2d at 653. Additionally, the trial court is vested with broad discretion in ruling on challenges for cause, and only where it appears, upon review of the voir dire examination as a whole, that the court's exercise of that discretion has been arbitrary or unreasonable, resulting in prejudice to the accused, will the ruling of the trial judge be reversed. **State v. Lee**, 93-2810, p. 9 (La. 5/23/94), 637 So.2d 102, 108. This is necessarily so because the trial court has the benefit of

seeing the facial expressions and hearing the vocal intonations of the members of the jury venire as they respond to questioning by the parties' attorneys. Such expressions and intonations are not readily apparent at the appellate level where a review is based on a cold record. **Id.**

In this case, although Mr. Tarr initially expressed doubts about his ability to be an impartial juror, the trial court rehabilitated Mr. Tarr to its satisfaction. The trial court spoke directly with Mr. Tarr and specifically questioned his ability to consider the evidence separate from his sympathies towards children. On that point, Mr. Tarr responded unequivocally, "Yes, sir." This response, as well as the previous exchanges with the trial court, apparently convinced it that Mr. Tarr was sincere in his belief that he could be unbiased, despite his initial misgivings. Although Mr. Tarr's early statements appeared to raise questions regarding his ability to be impartial, the trial court had the benefit of observing his demeanor and hearing his responses firsthand and was, therefore, in a better position to determine whether he would be fair and impartial in this case. See **State v. Dorsey**, 10-0216, p. 28 (La. 9/7/11), 74 So.3d 603, 625, cert denied, __ U.S. __, 132 S.Ct. 1859, __ L.Ed.2d. __ (2012). It is significant that the trial court compared Mr. Tarr and another prospective juror, Ms. Sevin, and recognized that, in her case, emotions were uncontrollable and she would be unable to separate her sympathies from the evidence presented. However, Mr. Tarr was different, as the trial court believed that he was able to keep control of his emotions "fairly easily." The totality of Mr. Tarr's responses demonstrated a willingness and ability to decide the case impartially according to the law and the evidence, and his responses as a whole did not reveal facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred. Thus, after a review of the record of voir dire as a whole, it is clear that the trial court did not abuse its broad discretion in denying defendant's challenge for cause as to prospective juror Mr. Tarr.

This assignment of error is without merit.

Assignment of Error No. 2 – Ineffective Assistance of Counsel

In his second assignment of error, defendant argues that he was denied the effective assistance of counsel because his attorney failed to object to hearsay testimony, elicited by the prosecution, that defendant had sex with a drunken woman while she was passed out. Defendant faults his trial counsel for allowing the introduction of this testimony regarding an other crime committed or alleged to have been committed by defendant as to which evidence was not admissible – in this case, simple rape or attempted simple rape – without timely objecting, requesting a mistrial or even seeking an admonition to the jury.

At the outset, we note that 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. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. **State v. Carter**, 96-0337, p. 10 (La.App. 1 Cir. 11/8/96), 684 So.2d 432, 438.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, §13 of the Louisiana Constitution. A claim of ineffectiveness is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d. 674 (1984). The defendant must show that: (1) his attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment, and (2) the deficiency prejudiced the defendant, which requires a showing that the errors were so serious that the defendant was deprived of a fair trial. The defendant must prove actual prejudice before relief will be granted. **State v. Serigny**, 610 So.2d 857, 859-60 (La.App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993). It is not sufficient for a defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show

that, but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. **State v. McMillan**, 09-2094, p. 6 (La.App. 1 Cir. 7/1/10), 43 So.3d 297, 302, writ denied, 10-1779 (La. 2/4/11), 57 So.3d 309. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **Serigny**, 610 So.2d at 860.

At trial, defense counsel cross-examined Detective Breaux, the Houma Police Department detective who investigated the sexual abuse claim involving M.V. and defendant. Defense counsel asked Detective Breaux to read aloud for the jury a statement taken from Cheri LeBouef, defendant's ex-girlfriend. This statement was prepared by Detective Breaux in connection with a January 28, 2010 interview with Cheri, which the detective conducted during the course of the investigation. The latter part of this statement said: "Me and Troy split-up about one month ago due to me catching him coming out of my roommate['s] ... bedroom when she was passed out drunk. I questioned him about it and he said that he was checking on her to see if she was throwing up." On redirect, the prosecutor asked Detective Breaux if he had discussed this further with Cheri, and the detective indicated he had. The prosecutor then remarked "Did she indicate if she thought he was having sex with a passed out woman who was drunk?" to which the detective responded "Yes, sir." Defense counsel remained silent. Later, on cross-examination, the prosecutor asked Cheri to explain the reason for her split with defendant, at which point she gave a lengthier account of the incident involving the roommate. The colloquy between the prosecutor and the witness was as follows:

> [Prosecutor]: Okay. Are you still dating this man [the defendant] today?
>
> [Cheri LeBouef]: No.
>
> [Prosecutor]: When did y'all split?
>
> [Cheri LeBouef]: The beginning of this year, January --
>
> [Prosecutor]: Why did you split?

[Cheri LeBouef]: Well, we had went out for a night of partying. We came home with my roommate, [who] is a female. She was sick, throwing up from being drunk. I put her to bed. We went to bed. About fifteen minutes later Troy gets out of the bed. So about forty-five minutes passed, he wasn't there, he didn't come back. So I got out of the bed, went downstairs looking for him. I didn't see him downstairs. And as I am coming back up the stairs, which our stairs make like a u-turn -- so as I'm coming up the first part I hear [my roommate's] door open and close and when I get to the second part I see Troy going around the corner. He'd just come out of her bedroom. I didn't tell him anything that night. The next morning I went and woke up [my roommate] and asked her if she remembered anything because I saw him coming out of her room. And that's when she said yes, she remembers pushing him off of her, that he was trying to seduce her while she was asleep -- well, passed out drunk.

[Prosecutor]: All right. That's what told --

[Cheri LeBouef]: And that's when I asked him to leave the house.

[Prosecutor]: That is what you told Detective Breaux in your report, in your statement?

[Cheri LeBouef]: Yes.

[Prosecutor]: So this -- this occurred with this other woman while you were asleep?

[Cheri LeBouef]: Well, he thought I was asleep.

[Prosecutor]: He thought you were asleep?

[Cheri LeBouef]: Right.

[Prosecutor]: So he thought you were sleeping and he went and prey on someone who --

[Defense counsel]: Objection, Your Honor. She doesn't know that --

[Court]: Sustained.

[Prosecutor]: So you -- he thought you were --

[Court]: Sustained.

[Prosecutor]: --asleep --

[Court]: Sustained.

Later in the trial, during direct examination, defendant explained that he had gone into the roommate's room out of concern when he heard her violently throwing up. He said that he had a half-brother who had died because he vomited in his sleep, so he only went in the roommate's room to check on her,

and that he never tried to do anything of a sexual nature to her. During cross-examination of defendant, the prosecutor raised the issue one last time and asked defendant, "You went in to take advantage of [the roommate] didn't you?" Defendant denied it. The prosecutor attempted to make a credibility argument against defendant, drawing out that defendant claimed that the roommate, M.V., A.P., K.P., and Detective Breaux were all lying about him. Again, defense counsel remained silent.

Under the two-part test articulated in **Strickland**, we need not consider whether the defense attorney's performance was deficient when he allowed the comments about defendant having sex with a passed-out-drunk woman to come out before the jury without an objection or request for mistrial or admonition. This is because even if the prosecutor's comments and questioning did reference or elicit evidence of simple rape or attempted simple rape and defendant's counsel was deficient for failing to object on those grounds, defendant still fails to meet the second prong of **Strickland**, a showing that counsel's failure so prejudiced defendant that he was denied a fair trial. A review of the record shows that there was an abundance of evidence at the trial to allow the jury to reach a finding of guilt of aggravated rape. The victim, M.V., testified at the trial about defendant's actions, and her testimony was consistent with her taped interview at the Terrebonne Children's Advocacy Center. Two other alleged victims, A.P. and K.P., testified at the trial that defendant sexually molested them. Detective Keith Breaux testified about his interview of defendant, and the videotape of that interview was played for the jury, in which defendant admitted to the accusations against him. Finally, defendant himself testified at trial and admitted that M.V., the victim who was four years old at the time, had his penis in her mouth.

We find that there was overwhelming evidence introduced at trial to support the unanimous guilty verdict. Accordingly, we conclude that even if defendant successfully showed that his counsel was deficient, he has failed to

show that that deficient performance prejudiced his defense such that the outcome of the trial would have been different.

This assignment of error is without merit.

CONCLUSION

For all of the above and foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.