NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 KA 0611

STATE OF LOUISIANA

VERSUS

TAM Q. LE

Judgment Rendered: NOV 04 2013

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket Number #506845, Division "F"

Honorable Martin E. Coady, Judge Presiding

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Walter P. Reed District Attorney Covington, LA	Counsel for Plaintiff/Appellee State of Louisiana
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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

GUIDRY, J.

The defendant, Tam Q. Le, was charged by amended grand jury indictment with two counts of aggravated rape, violations of La. R.S. 14:42, and pled not guilty on both counts. Following a jury trial, he was found guilty as charged on both counts, with ten of twelve jurors voting guilty. On each count, he was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The trial court ordered the sentences to run concurrently. The defendant moved for reconsideration of sentence, but the trial court denied the motion. The defendant now appeals, contending: the trial court erred in allowing the case detective to offer opinion evidence concerning the credibility of the victims and the defendant; the trial court erred in allowing the presentation of other crimes evidence; the trial court erred in giving an Allen[1] charge to the jury; the proceedings were defective, because the jury returned less than unanimous verdicts; and the trial court erred in imposing unconstitutionally excessive sentences. For the following reasons, we affirm the convictions and sentences on counts one and two.

FACTS

The victim of count one, N.N.V., was twelve years old at the time of her testimony at trial on October 30, 2012.[2] She indicated that when her mother was in Vietnam, the defendant, her stepfather, tried "to put his private part into mine." She stated the incident happened after she fell asleep while watching a movie in her mother's room. According to N.N.V., when she woke up during the night, her shorts "were gone," and the defendant was on top of her. She picked up her shorts and ran to her room.

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1 Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed.528 (1896).

The State also played a recording of the February 22, 2011 interview of N.N.V. N.N.V. discussed the incident she had testified about and used sketches of an adult male and a female child to indicate the defendant had tried to put his penis in her vagina. She stated that incident occurred when she was eight or nine years old. He told N.N.V. not to tell her mother what he had done.

The victim of count two, N.D.V., testified her date of birth was October 18, 2000. She indicated the defendant licked her vagina while her mother was in Vietnam. She also indicated the defendant had put his hand in her vagina. She stated the incidents occurred when she was sleeping with the defendant.

The State also played a recording of the February 22, 2011 interview of N.D.V. N.D.V. used a sketch of a female child to indicate the defendant had licked her vagina. She stated that when she was eight or nine years old, the defendant had called her into her mother's room and told her to lie on the bed. He then took her pants and underwear off, pulled her vaginal lips apart, and licked her vagina. N.D.V. stated the incidents involving the defendant putting his hand into her pants occurred in the living room while her mother was using the computer in her room. In regard to those incidents, N.D.V. stated that, on two or three occasions, the defendant put his hand in her pants and touched or rubbed her vagina after telling her to sit in his lap.

The mother of the victims testified that she had been married to the defendant and had lived with him in Slidell in 2008 and 2009. They had one child together (a son). They separated on January 15, 2009, and divorced on December 13, 2010. On January 15, 2009, she returned from Vietnam, told the defendant she had an affair while there, and she no longer wanted to stay with him. She did not learn of the victims' allegations against the defendant until she was contacted by their school counselor on February 8, 2011. At that time, she was married to

someone other than the defendant, and had a son with her new husband. She denied "put[ting] [the victims] up to lying about [the defendant]."

The defendant testified he had never committed any crime in his life and denied molesting the victims. He indicated the victims' mother went to Vietnam between December of 2008 and January of 2009 to get an "extra facial license." He claimed their relationship deteriorated, because she kept talking to the man with whom she had an affair in Vietnam. He stated she was arrested for assaulting him and told him, "I am going to get you when everything done."

IMPROPER TESTIMONY

In assignment of error number 1, the defendant argues the trial court erred in allowing Slidell Police Department Detective Brian Nicaud to "more or less" provide an expert opinion concerning the veracity of the victims, based on his years of experience. He argues that Detective Nicaud improperly gave opinion testimony concerning: the mother's demeanor being consistent with a person receiving "devastating news"; Vietnamese culture frowning on reporting these kinds of cases; believing the victims had provided consistent testimony and had given "100% truth"; and, although the defendant denied culpability, the defendant's statement confirming Detective Nicaud's belief that an arrest was justified.

La. C.E. art. 702 addresses the admissibility of expert testimony and provides, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Notably, the Louisiana Supreme Court has placed limitations on this codal provision in that, "[e]xpert testimony, while not limited to matters of science, art or skill, cannot invade the field of common

knowledge, experience and education of men." State v. Young, 09-1177, p. 8 (La. 4/5/10), 35 So.3d 1042, 1046-47, cert. denied, ___ U.S. ___, 131 S.Ct. 597, 178 L.Ed.2d 434 (2010).

Testimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact. However, in a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused. La. C.E. art. 704. Additionally, expert assessment of witness credibility is improper. State v. Foret, 628 S.2d 1116, 1130 (La. 1993).

Initially, we note Detective Nicaud was neither offered, nor accepted, as an expert witness in this case. He indicated he had worked for the Slidell Police Department for twenty-two years and investigated the instant case. He testified without objection that the demeanor of the victims' mother was "very soft spoken and consistent with a mother that just learned some, you know, devastating news, but she was a little apprehensive." He also testified without objection that she was apprehensive, "just, you know, by what she spoke to me and me asking her questions as far as her culture, this is not something that is reported. It is a disgrace and so, she was a little apprehensive and she even admitted herself that if the school did not notify her and she had learned this information ahead of time she would have dealt with this in the family unit." In response to a State question if there were "other things" consistent with what you have found in your experience with child abuse, he replied, without objection, "[y]es. It was consistent." In response to a State question, "[i]f you had believed that the children were lying to you and that the mother had put them up to it, would you have obtained that arrest warrant?," he replied, without objection, "[n]o." In response to a State question, "[a]fter your interview with the

defendant, did that change your mind in any way about the status of the case?," he replied, without objection, "[c]onfirmed it."

The defense cross-examined Detective Nicaud concerning why he had not interviewed the parents of the victims' mother. Detective Nicaud replied they were in Vietnam when the allegations were made. The defense asked Detective Nicaud if he had a phone number for the grandparents and, without objection, he replied:

> They would be home in about a month and I was very confident that what the girls said and what [the victims' mother] said that what they said happened, based on my investigation, the initial report from the officer and which is our protocol to do a forensic interview. We did a forensic interview. It was my understanding from my experience and my years of investigations on the Slidell Police Department I felt those girls were telling me one-hundred percent the truth.

The defendant failed to object to the challenged testimony. Accordingly, he failed to preserve the issue of Detective Nicaud's improper testimony, if any, for review. See La. C.E. art. 103(A)(1) ("Error may not be predicated upon a ruling which admits ... evidence unless a substantial right of the party is affected, and ... a timely objection ... appears of record, stating the specific ground of objection"); La. C. Cr. P. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence"). The grounds for objection must be sufficiently brought to the court's attention to allow it the opportunity to make the proper ruling and prevent or cure any error. See State v. Trahan, 93-1116, p. 16 (La. App. 1st Cir. 5/20/94), 637 So.2d 694, 704.

This assignment of error is without merit.

OTHER CRIMES EVIDENCE

In assignment of error number 2, the defendant argues the trial court erred in allowing the prosecution's presentation of "other crimes evidence" not previously ruled admissible and failed to provide a limiting instruction to the jury.

It is well settled that courts may not admit evidence of other crimes to show the defendant as a man of bad character who has acted in conformity with his bad character. See La. C.E. art. 404(B)(1). Evidence of other crimes, wrongs, or acts committed by the defendant is generally inadmissible because of the substantial risk of grave prejudice to the defendant. However, the State may introduce evidence of other crimes, wrongs, or acts if it establishes an independent and relevant reason, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. La. C.E. art. 404(B)(1). Upon request by the accused, the State must provide the defendant with notice and a hearing before trial if it intends to offer such evidence. Even when the other crimes evidence is offered for a purpose allowed under Article 404(B)(1), the evidence is not admissible unless it tends to prove a material fact at issue or to rebut a defendant's defense. The State also bears the burden of proving that the defendant committed the other crimes, wrongs, or acts. State v. Rose, 06-0402, p. 12 (La. 2/22/07), 949 So.2d 1236, 1243.

Any inculpatory evidence is "prejudicial" to a defendant, especially when it is "probative" to a high degree. State v. Germain, 433 So.2d 110, 118 (La. 1983). As used in the balancing test, "prejudicial" limits the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial. Id; see also Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). Rose, 06-0402 at p. 13, 949 So.2d at 1244.

On direct examination, the defendant testified he treated the victims "just like my kid." He claimed he moved them to Chalmette to provide them with better

schools. He also claimed he used money from damages to his house caused by Hurricane Katrina to have a house in Slidell so the victims could have a better education than if they lived in New Orleans. On cross-examination, the State asked the defendant if he was having financial problems around the time of the allegations, and if he had ever had financial problems. The defendant answered, "I never have bad money problems." The State also asked the defendant if he had owned property in Jefferson Parish, and he replied, "[n]o."

On direct examination of the mother of the victims, the State asked if she was aware the defendant had declared bankruptcy. The defense objected, arguing, "that has nothing to do with this case." At a bench conference, the State indicated the defendant had testified he never had property on the west bank, never had problems with the property, and never in his life had money problems. The defense questioned the relevance of the evidence. The trial court ruled the evidence was not relevant to the particulars of the charge, but was relevant to the defendant's veracity, and noted the defense had failed to object when the defendant was questioned about whether he had any financial troubles. Thereafter, the State asked the mother of the victims if it was true the defendant had declared bankruptcy. She replied, "I don't recall that." The State showed her a document supporting its claim and asked if the document reflected the defendant had declared bankruptcy, would she have any reason to doubt the document. She replied, "[i]f that's what it says it is then it is."

Initially, we note evidence the defendant had filed for bankruptcy protection was not "other crimes evidence." Further, the trial court did not abuse its discretion in allowing the challenged evidence. The evidence was properly admitted to contradict the defendant's testimony that he "never [had] bad money problems." Except as otherwise provided by legislation, extrinsic evidence contradicting a witness's testimony is admissible when offered solely to attack the credibility of a

witness, unless the court determines that the probative value of the evidence on the issue of credibility is substantially outweighed by the risks of undue consumption of time, confusion of the issues, or unfair prejudice. La. C.E. art. 607(D)(2).

We also note that the defense failed to request a limiting instruction concerning the challenged evidence. A party may not assign as error the failure to give a jury charge unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error. The nature of the objection and grounds therefore shall be stated at the time of objection. La. C. Cr. P. art. 801(C).

This assignment of error is without merit.

ALLEN CHARGE

In assignment of error number 3, the defendant argues the trial court erred in providing an Allen charge to the jury when they advised they were deadlocked.

An Allen charge is an instruction acknowledged to be calculated to dynamite jury deadlocks and achieve jury unanimity. State v. Nicholson, 315 So.2d 639, 641 (La. 1975). Such a charge, and any coercive modification thereof, is banned in the courts of Louisiana. Id. An Allen charge emphasizes that the jury has a duty to decide the matter at hand, which implies that the trial judge will not accept a mistrial in the case. Additionally, when the duty to reach a verdict is coupled with the trial court's admonition that those in the minority should reconsider their position, there exists an almost overwhelming pressure to conform to the majority's view. State v. Washington, 93-2221, p. 11 (La. App. 1st Cir. 11/10/94), 646 So.2d 448, 454-55.

In the instant case, on October 31, 2012, at 1:03 p.m., the jury retired for lunch and deliberation. They returned to the courtroom at 2:25 p.m. and requested transcripts of the forensic interviews, the letter that the victim of count one wrote to her teacher, and a description of lesser charges. The trial court advised the jury they

could not be provided with the requested transcripts or letter, but recharged them on the lesser charges. The jury returned to the courtroom at 4:00 p.m. with a note indicating they were "currently hung."

The trial court instructed them as follows:

> I have indicated to counsel that your second note came out, it reading currently hung, not disclosing the number you put, that's not appropriate for me to do. All I can ask you is it has been a few day[s] trial. It is a serious matter. You went in around 1:00, you have had lunch, you have been at it a few hours. I would ask you to please go back and consult with one another again, consider each other[']s views, discuss the evidence with the objective of reaching a just verdict. Again, of course, you have to decide the case for yourself, but you have to be open to a discussion with your fellow jurors with the objective of reaching a just verdict.
>
> So, I ask you to please go back and give it another try.
>
> Thank you.

The defense objected to the instruction, stating it was "close to an Allen charge," and the court noted the objection, but stated, "I don't believe it is anywhere near an Allen charge." Thereafter, the jury returned to the courtroom at 7:00 p.m. and returned a verdict.

The trial court did not give a prohibited Allen charge in this matter. The court did not admonish the minority members of the jury to reexamine the reasonableness of their opinion or adherence to their original convictions. Nor did the court state that it would not accept a mistrial. The charge does not appear coercive in its total context and does not rise to an Allen/Nicholson level. It was not so fundamentally unfair that it deprived the defendant of due process. The court merely recognized the jury had only been deliberating for a few hours and asked the jurors to consult with one another again, consider each other's views, and discuss the evidence with the objective of reaching a just verdict. Indeed, the note from the jury stated they were

"currently hung," and thus, it was logical to conclude that further deliberations might result in their arriving at a verdict.

This assignment of error is without merit.

CONSTITUTIONALITY OF NON-UNANIMOUS VERDICTS

In assignment of error number 4, the defendant argues the proceedings were defective because the jury returned less than unanimous verdicts.

The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case, the motion shall be denied, no matter upon what allegations it is grounded. La. C. Cr. P. art. 851. The trial court's denial of a motion for new trial will not be disturbed absent a clear abuse of discretion. State v. Maize, 94-0736, p. 28 (La. App. 1st Cir. 5/5/95), 655 So.2d 500, 517, writ denied, 95-1894 (La. 12/15/95), 664 So.2d 451.

Prior to sentencing, the defendant moved for a new trial, arguing, inter alia, his convictions by "10-2 verdict[s]" were inconsistent with our legal history and violated his Sixth Amendment and procedural due process rights. Following a hearing, the motion was denied.

There was no clear abuse of discretion in the denial of the motion for new trial. The provisions of La. Const. art. I, §17(A) and La. C. Cr. P. art. 782(A) are constitutional and do not violate the Fifth, Sixth, and Fourteenth Amendments. State v. Bertrand, 08-2215 and 08-2311, p. 8 (La. 3/17/09), 6 So.3d 738, 743; State v. Jones, 09-0751, p. 11 (La. App. 1st Cir. 10/23/09), 29 So.3d 533, 540. There is no authority to the contrary. Accordingly, the trial court was not, and we are not, at liberty to ignore the controlling jurisprudence of superior courts on this issue. See Bertrand, 08-2215 and 08-2311 at p. 8, 6 So.3d at 743.

This assignment of error is without merit.

EXCESSIVE SENTENCES

In assignment of error number 5, the defendant argues the mandatory life sentences imposed upon him were unconstitutionally excessive, because he was a law abiding citizen prior to the instant offenses; because the factual allegations proffered by the prosecution render application of a life sentence overly broad; because plea negotiations indicated the State "was comfortable" with sentences less than life in this matter; and because the defendant maintained stable employment and honored his bail obligation.

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. State v. Hurst, 99-2868, p. 10 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962.

In State v. Dorthey, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the Habitual Offender Law makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounts to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion

to the severity of the crime," he is duty bound to reduce the sentence to one that would not be constitutionally excessive.

However, the holding in Dorthey was made only after, and in light of, express recognition by the court that, "the determination and definition of acts which are punishable as crimes is purely a legislative function. It is the Legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional." Dorthey, 623 So.2d at 1278 (citations omitted).[3]

In State v. Johnson, 97-1906 (La. 3/4/98), 709 So.2d 672, the Louisiana Supreme Court reexamined the issue of when Dorthey permits a downward departure from the mandatory minimum sentences in the Habitual Offender Law. The court held that to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

Johnson, 97-1906 at p. 8, 709 So.2d at 676.

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). Following the denial of post-trial motions, the defense waived sentencing delays, and the court sentenced the defendant, on counts I and II, on each count, to life imprisonment at hard labor without benefit of

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[3] The sentencing review principles espoused in Dorthey were not restricted in application to the mandatory minimum penalties provided by La. R.S. 15:529.1. State v. Henderson, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 760 n.5, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235.

probation, parole, or suspension of sentence. The trial court ordered the sentences to run concurrently.

The defendant failed to clearly and convincingly show that, because of unusual circumstances, he was a victim of the legislature's failure to assign sentences that were meaningfully tailored to his culpability, the gravity of the offenses, and the circumstances of the case. Accordingly, there was no reason for the trial court to deviate from the provisions of La. R.S. 14:42(D)(1) in sentencing him. Additionally, the sentences imposed were not grossly disproportionate to the severity of the offenses, and thus, were not unconstitutionally excessive.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED ON COUNTS ONE AND TWO.