NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 0755

STATE OF LOUISIANA

VERSUS

BOBBY WEATHERTON

DATE OF JUDGMENT: DEC 2 7 2013

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
NUMBER 24,715, DIVISION E, PARISH OF ASCENSION
STATE OF LOUISIANA

HONORABLE ALVIN TURNER, JR., JUDGE

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

KUHN, J.,

Defendant, Bobby Weatherton, was charged by grand jury indictment with aggravated rape, a violation of La. R.S. 14:42 (count one), and second degree kidnapping, a violation of La. R.S. 14:44.1 (count two). He pled not guilty. After a jury trial, defendant was found guilty as charged on both counts.[1] He filed a motion for new trial, which the trial court denied. On count one, the trial court sentenced defendant to the mandatory term of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. On count two, the trial court sentenced defendant to forty years at hard labor, without benefit of parole, probation, or suspension of sentence. The trial court ordered that the sentences be served consecutively.[2] Defendant now appeals, alleging four assignments of error. For the following reasons, we affirm defendant's convictions and sentences.

FACTS

On February 23, 2007, D.M.,[3] the victim, was living at the Budget Motel in Ascension Parish. She had previously met defendant while she was living at the C'est Bon Motel in Prairieville, where defendant lived and worked. D.M. knew defendant as a friend who would occasionally provide her with cocaine. In addition, D.M. sometimes did work for defendant's leatherworking business.

On the evening of February 23, 2007, defendant went to D.M.'s motel room to bring her dinner. He returned later that night to pick her up so that they could go to his motel room to smoke crack. D.M. stayed at defendant's room for several hours while they smoked crack cocaine and conversed. Around midnight, defendant asked D.M. if she wanted to take a ride to go get more cocaine. She said yes, and they got into defendant's car and began to drive toward St. Gabriel.

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[1] Defendant was tried on these charges previously, but that earlier proceeding ended in a mistrial.

[2] The state filed a habitual offender bill of information alleging that defendant had committed three prior felony offenses. However, the record does not reflect any proceedings in connection with this habitual offender bill of information.

[3] In accordance with La. R.S. 46:1844(W), the victim herein is referenced only by her initials.

As defendant drove, D.M. noticed that his demeanor changed. He grew cold and stopped talking. Defendant pulled his car into a small, wooded driveway off of a road near the river and told D.M. that his seller would meet them there. As they waited, defendant told D.M. that she could smoke the remaining crack cocaine if she desired. Nervous because of defendant's change in demeanor, D.M. declined. Soon thereafter, defendant reached over and slapped D.M. in her face. He then grabbed her head and forced her to perform oral sex on him. As she did so, defendant reached into the backseat of his car, grabbed a wire or cord, and attempted to wrap it around D.M.'s neck. D.M. resisted and fought to get away from defendant. She was eventually successful in escaping through the passenger-side window.

Defendant exited the car and again attacked D.M. by hitting and kicking her. He dragged D.M. by her hair to a nearby field, where another scuffle ensued. During that scuffle, D.M. was knocked unconscious. When she woke up, defendant had already removed her boots, and he was in the process of removing her pants. Defendant then proceeded to vaginally rape D.M. Afterward, he hogtied D.M.'s hands and feet with a sweater, a belt, and shoestrings. He punched D.M. in the back of her head and again began to choke her. When D.M. pretended to be dead, defendant stopped choking her and walked back to his car.

When D.M. saw a light go on in the car, she struggled to free herself from her bindings. She successfully freed her feet and immediately stood up and ran toward the lights of a nearby chemical plant. D.M. traversed woods, a barbed wire fence, and a canal before she was able to reach a call box outside of the Louis Dreyfus chemical plant in Geismar. There, she convinced an employee to let her inside and to call the police. The employee also cut the bindings from D.M.'s hands.

Ascension Parish Sheriff's Officers arrived at the plant and transported D.M. to St. Elizabeth's Hospital. There, the attending nurse and emergency room physician noted extensive injuries to D.M.'s body, including bruising, scratches, and strangulation marks. In addition, the emergency room physician performed a rape kit examination on D.M., and the collected specimens were given to the police.

At the hospital, D.M. described her attacker to the responding deputies as a bald black man named "Bobby," who lived at the C'est Bon Motel. From that information, they were able to ascertain defendant's full name. Detective Glen Luna later arrived at the hospital and presented D.M. with a photographic lineup. She immediately and unequivocally identified defendant as her assailant.

With the assistance of law enforcement officers from another jurisdiction, Detective Luna was able to locate defendant's car in Shreveport within a few days. However, he could not locate defendant for nearly a year. On February 23, 2008, defendant's face was published on America's Most Wanted. The next day, he turned himself in to authorities at a federal courthouse in Memphis, Tennessee. When defendant was returned to Louisiana, Detective Luna secured a warrant for his DNA. He collected a buccal reference sample and sent it to the Louisiana State Police Crime Laboratory for comparison. A comparison of that reference sample to the sperm sample from D.M.'s rape kit examination revealed a 1-in-196 billion chance that the sperm came from someone other than defendant. Defendant was subsequently indicted with aggravated rape and second degree kidnapping.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In two related assignments of error, defendant argues that La. Const. art. I, § 17(A), which allows for non-unanimous jury verdicts, violates the right to a jury trial and the right to equal protection of the laws guaranteed by the Sixth and

Fourteenth Amendments of the United States Constitution.[4] Specifically, defendant argues that the enactment of its source provision in the Louisiana Constitution of 1898 was motivated by an express and overt desire to discriminate on account of race.

Aggravated rape and second degree kidnapping are both offenses whose punishments are necessarily at hard labor. See La. R.S. 14:42(D)(1) & 14:44.1(C). Both La. Const. art. I, § 17(A) and La. C.Cr.P. art 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a non-unanimous jury does not violate the right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See ***Apodaca v. Oregon***, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); ***State v. Belgard***, 410 So.2d 720, 726-27 (La. 1982); ***State v. Shanks***, 97-1885 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 164-65.

This Court and the Louisiana Supreme Court have previously rejected the argument raised in defendant's assignments of error. See ***State v. Bertrand***, 08-2215 (La. 3/17/09), 6 So.3d 738, 742-43; ***State v. Smith***, 06-0820 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 07-0211 (La. 9/28/07), 964 So.2d 352. In ***Bertrand***, the Louisiana Supreme Court specifically found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments.[5] Moreover, the ***Bertrand*** court rejected the argument that non-unanimous jury verdicts have an insidious racial component and pointed out that a majority of the United States Supreme Court also

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[4] Defendant raised this issue in the trial court by objecting to the inclusion of a jury instruction regarding non-unanimous jury verdicts.

[5] In ***Bertrand***, the court only considered Article 782, while the defendant in the instant case attacks Article I, § 17A itself. We find this approach to be a distinction without a difference because Article 782 closely tracks the language of Article I, § 17A.

rejected that argument in ***Apodaca***.[6] Although ***Apodaca*** was a plurality rather than a majority decision, the United States Supreme Court has cited or discussed the opinion various times since its issuance and, on each of these occasions, it is apparent that its holding as to non-unanimous jury verdicts represents well-settled law. ***Bertrand***, 6 So.3d at 742-43. Thus, La. Const. art. I, § 17(A) and La. C.Cr.P. art. 782(A) are not unconstitutional and, therefore, not in violation of defendant's federal constitutional rights.

Accordingly, these assignments of error are without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In his third assignment of error, defendant argues that the trial court abused its discretion in refusing to allow his appointed counsel to withdraw from the case, where they expressed a concern for their own safety. Defendant contends that this concern gave rise to a conflict of interest, hindering his ability to receive a fair trial.

In a criminal proceeding, an accused is guaranteed the right of assistance of counsel for his defense. See U.S. Const. Amend. VI; La. Const. art. I, § 13. When a conflict of interest claim is raised before trial, a trial judge is required either to appoint separate counsel or to take adequate steps to ascertain whether the risk of a conflict of interest is too remote to warrant separate counsel. See ***Holloway v. Arkansas***, 435 U.S. 475, 484, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426 (1978); see also ***State v. Jones***, 96-1581 (La. App. 3d Cir. 6/4/97), 696 So.2d 240, 246. According to the Louisiana Rules of Professional Conduct, a concurrent conflict of interest exists if there is a significant risk that the representation of a client will be materially limited by a personal interest of the lawyer. See Louisiana Rules of Professional Conduct, Rule 1.7(a)(2).

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[6] ***Apodaca*** involved a challenge to the non-unanimous jury verdict provision of Oregon's state constitution. ***Johnson v. Louisiana***, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), decided with ***Apodaca***, also upheld Louisiana's then-existing constitutional and statutory provisions allowing nine-to-three jury verdicts.

A few weeks prior to the beginning of defendant's instant trial, his defense counsel filed a motion to withdraw as counsel, asking the trial court that they be relieved from representing defendant at trial. Defense counsel alleged that prior to defendant's first trial in March 2011, defendant attempted to attack one of the attorneys, Susan Jones, during a meeting at the parish jail. They further stated that on February 22, 2012, following a hearing on a pro se motion, defendant attempted to attack his other attorney, Blaine Hebert, before being restrained by several deputies. In addition, they indicated that defendant had filed a federal lawsuit against several people, including Ms. Jones, and that he had filed numerous pro se motions alleging that Ms. Jones and Mr. Hebert were ineffective in representing him.

At a hearing on the motion to withdraw, defense counsel argued that their primary conflict of interest was a concern for their own safety, in light of defendant's attempts to physically harm them. However, the trial court pointed out that both attorneys had vigorously represented defendant at his March 2011 trial that ended in a mistrial, even after defendant's initial attempt to attack Ms. Jones. The court also noted that defendant had gone through several attorneys prior to Ms. Jones and Mr. Hebert. Further, the trial court indicated that, to alleviate counsel's safety concerns, it would place a human barrier between counsel and defendant if necessary.[7] Finally, defendant stated on the record that he would not be disruptive or violent throughout his trial. In light of all of the above considerations, the trial court denied the motion to withdraw.

While a defendant has the right to counsel of his choice under La. C.Cr.P. art. 515, that right cannot be manipulated to obstruct the orderly procedure of the courts and cannot be used to interfere with the fair administration of justice. See ***State v. Johnson***, 389 So.2d 1302, 1304 (La. 1980). The decision as to whether to

[7] The record does not reflect whether or not this measure was actually taken.

allow an attorney who is competent and familiar with the case to withdraw as counsel of record is ordinarily a matter within the sound discretion of the trial judge. ***State v. Finley***, 341 So.2d 381, 383 (La. 1976).

In the instant case, the defense attorneys' primary argument in alleging a conflict of interest was concern for their own safety. However, the trial judge recognized that they ably represented defendant in his earlier trial despite the occurrence of one of the alleged attempted attacks by defendant. Further, the trial judge appeared to be concerned with the possibility that defendant would continually cause future disruptions to create similar conflicts with any newly-appointed defense counsel in an attempt to forestall his trial. Lastly, the trial judge noted his willingness to take appropriate steps to ensure the safety of both defense counsel throughout the trial. After a careful review of the record and in light of these facts, we cannot say that the trial court abused its discretion in denying the motion to withdraw.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER FOUR

In his final assignment of error, defendant alleges that the trial court abused its discretion in allowing the state to introduce evidence of his prior conviction for forcible rape. Defendant contends that the facts of that case were more prejudicial to his ability to have a fair trial than they were probative of the facts of the instant case.

When an accused is charged with a crime involving sexually assaultive behavior, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior may be admissible and considered for its bearing on any matter to which it is relevant, subject to the balancing test in La. C.E. art. 403. See La. C.E. art. 412.2(A). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. La. C.E. art. 403. When the state intends to offer evidence under the provisions of La. C.E. art. 412.2, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes. See La. C. E. art. 412.2(B).

Sometime prior to March 6, 2012, the state filed a notice of its intent to introduce at trial evidence of defendant's prior forcible rape conviction.[8] At the March 6, 2012 motion hearing, defense counsel argued that the state's notice of its intent to introduce evidence of this crime was untimely, as trial was less than three weeks away. After argument, the trial court took this matter under advisement, and it later issued a ruling allowing the state to introduce this evidence.

On appeal, defendant renews his argument regarding the timeliness of the state's notice. He also argues that introduction of this evidence created a "substantial likelihood" that the jury would convict him of the instant offenses due to his commission of the previous crime.

At trial, S.E., defendant's previous victim, testified briefly on behalf of the state. She described the details of her assault, wherein defendant snuck into her home, knocked her unconscious, dragged her between rooms, and tied her hands behind her back with her bra before he raped her. S.E. eventually escaped when she convinced defendant to take her to the grocery store under the guise of giving him money to leave her alone. During S.E.'s testimony, the state also elicited an answer to rebut defendant's theory, advocated through earlier cross-examination, that his large penis would have necessarily caused damage to D.M.'s vagina if he had raped her.

[8] As defendant notes in his brief, this notice does not appear in the record, but defendant's trial counsel were apparently aware of it, as they filed a written opposition to it and argued regarding the motion on March 6, 2012.

Article 412.2 was a legislative response to earlier decisions from the Louisiana Supreme Court refusing to recognize a "lustful disposition" exception to the prohibition of other crimes evidence under La. C.E. art. 404. See ***State v. Buckenberger***, 07-1422 (La. App. 1st Cir. 2/8/08), 984 So.2d 751, 757, writ denied, 08-0877 (La. 11/21/08), 996 So.2d 1104. Ultimately, questions of relevancy and admissibility of evidence are discretion calls for the trial court. See ***State v. Mosby***, 595 So.2d 1135, 1139 (La. 1992). Such determinations regarding relevancy and admissibility should not be overturned absent a clear abuse of discretion. ***Mosby***, 595 So.2d at 1139.

In the instant case, the trial court, despite not giving any oral or written reasons, apparently concluded that the evidence of defendant's earlier forcible rape was admissible under La. C.E. art. 412.2(A). Given the similarity of the actions taken by defendant in performing each of the attacks and the attempt by the state to use that earlier offense to rebut an exculpatory theory advocated by the defense, we conclude that the trial court did not abuse its discretion in ruling this evidence admissible. Further, while defense counsel argued that the state's notice was unreasonably close to trial, the trial court expressed skepticism that defense counsel did not know the details of defendant's earlier offense, or that they could not discover them in the time prior to trial. Given the fact that the state recited the details of this earlier offense at the hearing, we find that the trial court did not abuse its discretion in finding the notice reasonable.

Even if we were to find that the trial court erred in admitting evidence of defendant's earlier conviction or in concluding that the notice was reasonable, we would find this error to be harmless beyond a reasonable doubt. See La. C.Cr.P. art. 921. The test for determining whether an error is harmless is whether the verdicts actually rendered in this case were "surely unattributable to the error." ***Sullivan v. Louisiana***, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182

(1993). In the instant case, there was overwhelming evidence of defendant's guilt, including D.M.'s direct testimony establishing defendant's identity as the perpetrator of the offenses and DNA evidence presented by the state. Therefore, we are convinced that even if the evidence of defendant's prior offense was erroneously introduced into evidence, the guilty verdict actually rendered was surely unattributable to this evidence.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.