NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 0137

STATE OF LOUISIANA

VERSUS

BRETT WARD

Judgment rendered JUL 10 2014

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 505742-3
Honorable Allison H. Penzato, Judge

* * * * * *

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McClendon, J. dissents in part and assigns reasons.

PETTIGREW, J.

The defendant, Brett Ward, was charged by grand jury indictment with aggravated rape (count one) and attempted aggravated rape (count two), in violation of La. R.S. 14:42 and La. R.S. 14:27. The defendant entered a plea of not guilty. The trial court granted the State's motion in limine to exclude from evidence the sexual history of the victim. Following a trial by jury, the defendant was found guilty as charged on both counts.[1] The trial court denied the defendant's motion for postverdict judgment of acquittal and motion for new trial. The defendant was sentenced on count one to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence, and on count two to thirty years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The trial court ordered that the sentences be served concurrently. The trial court denied the defendant's motion to reconsider sentence.

The defendant now appeals[2], assigning error as follows:

1. The trial court erred in denying the defendant's motion for new trial and post verdict judgment of acquittal as there was insufficient evidence to convict the defendant of aggravated rape and attempted aggravated rape.

2. The trial court erred when it denied the defendant's ability to present evidence that the victim had made false allegations of pregnancy to different individuals in order to maintain a relationship with those individuals.

3. The trial court erred in not allowing the defendant to question the victim concerning other allegations of being raped before and limited questions concerning how she knew she was vaginally raped.

4. The trial court erred in finding nonunanimous jury verdicts constitutional.

5. The trial court erred in not granting the defendant's motion to reconsider his sentence as life imprisonment without the benefit of probation or parole is cruel and unusual punishment.

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[1]Three codefendants, indicted and tried along with the defendant, were also convicted as charged and have separate appeals pending in this court: Clayton King (2013-0135), Michael Ayo (2013-0134), and Derrick Maise (2013-0136). Having been fully developed in **State v. King**, 2013-0135 (La. App. 1 Cir. __/__/__), ___ So.3d ___, the facts and full discussion of the issues set forth therein will not be repeated in this case. Only initials are used to identify the victim (R.P.), a second female youth (A.L.) who was also victimized, and their immediate family members. See La. R.S. 46:1844(W).

[2]Based upon newly discovered evidence, the defendant filed another motion for new trial after lodging an appeal with this court. The trial court denied that motion, and this court reset the briefing deadline.

6. The trial court erred when it allowed other crimes evidence.

The defendant raised the following additional assignments of error in a supplemental brief filed after the denial of the second motion for new trial.

1. The trial court applied the wrong evidentiary burden of proof when deciding the motion for new trial.

2. The trial court erred in failing to find the testimony of Ms. Laurent, Ms. Lombard, Mr. Magee and Ms. Strausbaugh would probably have changed the verdicts against the defendant.

3. The trial court erred in failing to grant the defendant a new trial.

4. The trial court erred in failing to grant a new trial by exercising the option of La. Code Crim. P. art. 851(5) by finding that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

5. The defendant reasserts all of the issues, assignments and arguments raised in his original brief to this Court.

For the following reasons, we affirm the convictions and sentences.

ASSIGNMENT OF ERROR NUMBER ONE

The defendant notes that the primary evidence against him came from R.P. and A.L. whom he contends are unworthy of belief, considering their inconsistent and contradicting statements, and the testimony of Dr. Suarez, Devon Radecker, Shelby Markey, and Megan Perkins. The defendant also contends that R.P.'s version of the story was inconsistent with A.L.'s version. The defendant argues that the actions and behavior of R.P. and A.L. on the night in question, and thereafter, were not consistent with a rape having taken place. While R.P. stated in part that she lied to medical and police personnel and to JoBeth Rickels at the Children's Advocacy Center because she did not believe that any of them cared about her, the defendant argues that this excuse was nonsensical given R.P.'s ultimate full disclosure to the Attorney General's Office. As an explanation of R.P.'s rape allegations, the defendant notes that R.P. had been grounded by her parents just before they allowed her to spend the night away from home, that R.P. had concerns about getting in trouble with her parents again, and that R.P. testified that her boyfriend gave her a deadline to report the rape to her mother. Finally, the defendant argues that

the jury was irrational and was prejudiced by the nature of the allegations and the peripheral facts surrounding the case.

R.P.'s pretrial statements and trial testimony consistently indicated that the defendant fondled her breasts, held her down, and repeatedly punched her with a closed fist in the rib and stomach area as she struggled, while being attacked by the codefendants. Based on R.P.'s statements, the jury could have reasonably concluded that the defendant aided and abetted in the non-consensual vaginal sexual intercourse by Maise and Ayo and the attempted non-consensual oral sexual intercourse by King. Further, during the trial, R.P. disclosed that the defendant stopped beating her at some point to masturbate in a failed attempt to get an erection. Thus, the jury could have also reasonably concluded that the defendant had the specific intent to have non-consensual sexual intercourse with R.P. and he acted toward accomplishing that goal. For the reasons expressed herein and fully developed in **State v. King**, 2013-0135 (La. App. 1 Cir. __/__/__), ___ So.3d ___, under assignments of error numbers one and two, we find that the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of aggravated rape and attempted aggravated rape. Thus, we find no merit in assignment of error number one herein.

ASSIGNMENTS OF ERROR NUMBERS TWO AND THREE

In assignment of error number two, the defendant contends that evidence of R.P.'s past false allegations of pregnancy was sought to be introduced to demonstrate R.P.'s lack of credibility and willingness to lie and manipulate regarding matters of extreme importance.[3] The defendant further contends that the evidence was not intended to be used to comment on R.P.'s past sexual behavior. The defendant argues that the defense was extremely prejudiced by the trial court's preclusion of the evidence. Citing La. Code

[3] While the defendant seems to suggest that there was evidence that the victim made pregnancy claims to more than one individual pertaining to more than one relationship, the testimony proffered by the defense in this case regarded one pregnancy claim pertaining to one relationship. Specifically, outside of the presence of the jury, Reid Calderone testified that he dated R.P. from about the end of 2005 until about halfway through 2007, and that during their relationship R.P. told him that she was pregnant though she was not.

Evid. art. 607(C) and **State v. Smith**, 98-2045 (La. 9/8/99), 743 So.2d 199, the defendant notes that the defense may present evidence for impeachment purposes that a victim made false allegations regarding sexual activity. The defendant argues that if the jury had heard the evidence at issue that showed that R.P. lied about serious matters concerning other people for her own benefit, the jury would have been more likely to accept the defense's position that R.P. was lying about the accusations of rape in this case.

In assignment of error number three, the defendant argues that the trial court erred in precluding the defense from questioning R.P. about the prior alleged rape by someone whom she referred to as Adam and her past sexual history, even though the State put the issue before the jury in part to buttress R.P.'s testimony on penetration. The defendant argues that the line of questioning could have been used to refute R.P.'s claim that she did not know what to do in reporting the instant allegations. Applying the reasoning of **State v. Edwards**, 420 So.2d 663 (La. 1982), and **State v. Jackson**, 98-277 (La. App. 3 Cir. 2/3/99), 734 So.2d 658, to the instant case, the defendant notes that courts have recognized that certain questions and responses to them can "open the door" to evidence not normally admissible.

As the court noted in **Edwards**, it is well settled that where one side has gone partially into a matter on examination-in-chief, the other side may go fully into it on cross-examination. Further, mere doubt as to the propriety or the extent of cross-examination is always resolved in favor of the cross-examination. **Edwards**, 420 So.2d at 675. Nonetheless, the right of an accused sex offender to present a defense must be balanced against the victim's interests under La. Code Evid. art. 412, which is intended to protect a victim of a sexual assault from having his or her sexual history made public. **State v. Everidge**, 96-2665 (La. 12/2/97), 702 So.2d 680, 684.

Herein, following testimony by Radecker regarding R.P. claiming that she had been raped in a separate incident by someone other than the defendants (four times by another individual), and R.P.'s subsequent testimony that she had been sexually active prior to the instant incident and had prior knowledge of penetration, the defense asked

the trial court to revisit the issue. The evidence was again found inadmissible. The trial court noted that the State did not ask R.P. about her sexual activities. Moreover, the trial court did not believe that R.P.'s brief reference opened the door to further questioning about her past sexual history. We find that the evidence at issue simply was not of a nature tending to negate the commission of the instant offenses. We agree with the trial court's conclusion that the references at issue did not open the door to inquiry into the past sexual history as that would be a violation of Article 412. Based on the foregoing, and as further set forth in **State v. King**, 2013-0135 (La. App. 1 Cir. __/__/__), ___ So.3d ___ and **State v. Maise**, 2013-0136 (La. App. 1 Cir. __/__/__), ___ So.3d ___, we find no merit in assignments of error numbers two and three herein.

ASSIGNMENT OF ERROR NUMBER FOUR

In assignment of error number four, the defendant concedes that the United States Supreme Court in **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) held that the Sixth Amendment right to a jury trial does not require a unanimous jury verdict in state criminal trials. Despite this concession, the defendant argues that nonunanimous verdicts "are right for abuse" and should be deemed unconstitutional. In support of this argument the defendant simply quotes Justice Brennen's dissent in **Johnson v. Louisiana**, 406 U.S. 356, 358-60, 92 S.Ct. 1620, 1623-24, 32 L.Ed.2d 152 (1972).

The issue raised in this assignment of error has been fully addressed in **State v. King**, 2013-0135 (La. App. 1 Cir. __/__/__), ___ So.3d ___, and found meritless. The defendant has not raised any additional arguments regarding the issue. Accordingly, assignment of error number four herein lacks merit.

ASSIGNMENT OF ERROR NUMBER FIVE

In the fifth assignment of error, the defendant contends that the sentencing in his case is excessive and constitutes cruel and unusual punishment. The defendant specifically argues that due to the unusual circumstances of his life and the circumstances of the case, a mandatory life sentence without the benefit of probation,

parole, or suspension of sentence was not envisioned by the Legislature.[4] Due to a brain injury caused by an automobile accident that occurred when the defendant was twelve years old, it is alleged that he has the intellectual capacity of a child and the life sentence would violate his Eighth Amendment rights. The defendant concedes that the U.S. Supreme Court has not extended to individuals suffering from mental retardation the holding of **Graham v. Florida**, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), that the Eighth Amendment prohibits a life sentence without parole on a nonhomicide offender under eighteen years old. The defendant argues that the jurisprudence is evolving in that direction, noting that **Atkins v. Virginia**, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), held that mentally retarded individuals were not subject to capital punishment.

Herein, as the trial court noted, Ward was twenty-eight years old at the time of sentencing and was twenty-four at the time of the offenses. The defendant's prior criminal history consists of a 2006 guilty plea to possession of marijuana. The defendant's brain injury was noted in his motion to reconsider sentence in support of his argument that he is exceptional and that due to unusual circumstances, a mandatory life sentence without benefit of probation, parole, or suspension of sentence was not envisioned by the Legislature.

At the hearing on the motion to reconsider sentence, the defendant's father (Mr. Ward) testified that the defendant lost his motor skills and was unable to continue playing sports after suffering a head injury in a car accident when he was twelve years old. Mr. Ward further testified that the defendant's mental capacity diminished to that of a younger child. Mr. Ward noted that the defendant lived with him at the time of the offenses and was unable to handle living on his own or maintain employment due to his deficient attention span, though he was able to acquire jobs. Mr. Ward described his son as "a child in a man's body," but confirmed that with special attention the defendant did

[4] The defendant is not specifically challenging the thirty-year sentence imposed on count two.

graduate from high school. During cross-examination, Mr. Ward confirmed that the defendant occasionally spent up to two days unattended in the home, though his siblings would come and check on him. He further confirmed that none of the defendant's siblings were present on the night of the offenses. Additionally, the defendant acquired his driver's license at the age of sixteen and attended classes at a junior college after high school, although he did not complete those studies. The defendant was arrested for DWI in 2007, but pled guilty to improper lane usage. Mr. Ward noted that the defendant had a child who was three years old at the time of the hearing and that the defendant cared for the child at times.

In denying the motion to reconsider sentence and finding that this case did not warrant a downward departure from the sentence mandated by the Legislature, the trial court reviewed the defendant's medical records and noted that the defendant's mental capacity was not raised as an issue with respect to his ability to understand the proceedings, the charges against him, or the nature of the offenses. The trial court noted that the records submitted consisted of 1996 evaluations (when the defendant was twelve years of age), while the offenses took place in 2008, and the sentencing took place in 2012. The trial court further considered the fact that the defendant has a driver's license, was allowed to drive alone and go places, had jobs in the past, and has a high school diploma.

While the U.S. Supreme Court in **Coker v. Georgia**, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), held that a death sentence for rape is excessive punishment under the Eighth Amendment, it did not discount the seriousness of the crime of rape. "It is highly reprehensible, both in a moral sense and in its almost total contempt ... of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the 'ultimate violation of self.'" **Coker v. Georgia**, 433 U.S. at 597, 97 S.Ct. at 2869. Aggravated rape inflicts mental and psychological damage to its victim and undermines the community sense of security. **Coker v. Georgia**, 433 U.S. at 597-598, 97 S.Ct. at 2869.

In **Graham v. Florida**, the United States Supreme Court rendered a historic decision, holding that the Eighth Amendment forbids the sentence of life without the possibility of parole for juvenile offenders who did not commit homicide. The United States Supreme Court subsequently decided **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The **Miller** court ruled that the Eighth Amendment prohibits mandatory life sentences for offenders under the age of 18 who committed homicides. It explained that, "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and wealth of characteristics and circumstances attendant to it." **Miller,** ___ U.S. at ___, 132 S.Ct. at 2467. However, the **Miller** court noted "[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime." **Miller,** ___ U.S. at ___, 132 S.Ct. at 2471. Therefore, it did not preclude a sentencing court from sentencing a juvenile offender to life imprisonment without parole. Rather, it required that it "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." **Miller,** ___ U.S. at ___, 132 S.Ct. at 2469.

After **Atkins v. Virginia**, in cases where the defendant was originally sentenced to the death penalty, the Louisiana Supreme Court has remanded for a hearing to determine if the defendant was mentally retarded. See **State v. Williams**, 2001-1650 (La. 11/01/02), 831 So.2d 835 (superseded by statute); **State v. Dunn**, 2001-1635 (La. 11/1/02), 831 So.2d 862, 887-888 (superseded by statute). Where the defendant was subsequently deemed mentally retarded and resentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, the case was upheld. See **State v. Williams**, 2005-1556 (La. 2/17/06), 921 So.2d 105 (per curiam).

As noted, the defendant concedes that the U.S. Supreme Court has not extended to individuals suffering from mental retardation the holding of **Graham v. Florida**; and based on the foregoing, we reject the defendant's argument that the jurisprudence is evolving in that direction. We note that R.P. consistently indicated that the defendant violently attacked her, beating her in the abdominal area. The defendant struck R.P. countless times and held her down as she was vaginally raped and subjected to an

attempt to force oral sexual intercourse. After a careful review of the jurisprudence and the record herein (including the nature of the offenses and the irreparable damage suffered by R.P.), and the trial court's stated reasons for denying the defendant's motion to reconsider sentence, we find that the defendant has failed to show that he is exceptional such that the mandatory life sentence is not meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Thus, we agree that a downward departure from the mandatory life sentence was not required in this case. The mandated life sentence imposed is not excessive, and assignment of error number five lacks merit.[5]

ASSIGNMENT OF ERROR NUMBER SIX

In assignment of error number six, the defendant contends that the defense did not have notice of the accusation that he forced A.L. to have oral sex. The defendant contends that the discovery described the encounter as consensual. The defendant contends that the trial court erred in denying the motion for mistrial in this regard and in finding the evidence admissible.

Arguably, the State provided notice of the encounter at issue. At any rate, the State is not required to give notice of its intent to offer evidence of acts integral to the current offense. La. Code Crim. P. art. 720; **State v. Haarala**, 398 So.2d 1093, 1097 (La. 1981). This court disagrees with the assertion raised by the defendant that the evidence at issue was not necessary to provide narrative completeness. For the reasons fully expressed in **State v. King**, 2013-0135 (La. App. 1 Cir. __/__/__), ___ So.3d ___, under assignment of error number five, assignment of error number six herein lacks merit.

SUPPLEMENTAL BRIEF ASSIGNMENTS OF ERROR NUMBERS ONE, TWO, THREE, FOUR, AND FIVE

In addition to the arguments raised by the codefendants in their supplemental briefs, the defendant in his supplemental brief herein argues that the ends of justice

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[5] For a full discussion of the applicable law, see **State v. King**, 2013-0135 (La. App. 1 Cir. __/__/__), ___ So.3d ___.

would be served by the granting of a new trial pursuant to La. Code Crim. P. art 851(5) and that the trial court erred in failing to do so. The defendant reiterates testimony by several witnesses that R.P. lied under oath, and reasserts Ms. Strausbaugh's status as a person who voluntarily came forth and doesn't know the defendants or R.P. The defendant also relies on the evidence presented and the testimony by R.P.'s mother to show that R.P.'s injuries were the result of a four-wheeler accident and that R.P. would have been further grounded if her parents were to discover that she was riding the four-wheeler during the time at issue, as she was already grounded during that time and was not allowed to ride the four-wheeler. The defendant also argues that the 10-2 verdicts should be considered in evaluating the new evidence. The defendant contends that despite due diligence in this case, the evidence at issue could not have been discovered before the trial. The defendant asks this court to find that the ends of justice would be served by granting him a new trial based on "the numerous facts in evidence pointing to his innocence and supporting his position that nothing was done to R.P."

Article 851(5) allows the trial court to grant a new trial if "the ends of justice would be served ... although the defendant may not be entitled to a new trial as a matter of strict legal right." At the outset we note that the defendant did not assert this ground as a basis for his second motion for new trial and is therefore precluded on appeal from challenging the trial court's ruling on remand on this basis. La. Code Crim. P. art. 841(A). However, this basis was listed in the defendant's original motion for new trial below that was also denied by the trial court. Nonetheless, appellate courts may review the grant or denial of a motion for new trial only for errors of law. See La. Code Crim. P. art. 858; see also **State v. Guillory**, 2010-1231 (La. 10/8/10), 45 So.3d 612, 614-616 (per curiam). A determination of the weight of the evidence is a question of fact; and in a criminal case, such a determination is not subject to appellate review. La. Const. art. V, § 10(B); **State v. Azema**, 633 So.2d 723, 727 (La. App. 1 Cir. 1993), writ denied, 637 So.2d 460 (La. 1994). Accordingly, the grant or denial of a new trial pursuant to Article 851(5) does not involve questions of fact. See **Guillory**, 45 So.3d at 615. In deciding whether the trial

court abused its great discretion in granting or denying a new trial on Article 851(5), we keep in mind two precepts. One, in this provision the trial court is vested with almost unlimited discretion and its decision should not be interfered with unless there has been a palpable abuse of that discretion. Two, this ground 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. **Guillory**, 45 So.3d at 615-616.

In the instant case, the defendant has made no showing that an error of law was committed. For reasons more fully expressed in **State v. King**, 2013-0135 (La. App. 1 Cir. __/__/__), ___ So.3d ___, and **State v. Maise**, 2013-0136 (La. App. 1 Cir. __/__/__), ___ So.3d ___, we find no abuse of discretion in the trial court's ruling on the second motion for new trial. Further, we find no abuse of discretion in the trial court's ruling on the defendant's original motion for new trial. The supplemental assignments of error numbers one through five herein lack merit.[6]

CONVICTIONS AND SENTENCES AFFIRMED.

[6] The fifth assignment of error in the defendant's supplemental brief strictly adopts the assignments of error raised in the defendant's original brief without additional argument. As noted, all of the assignments raised in the original brief have been addressed and found to lack merit. Therefore, we find no merit in assignment of error number five of the supplemental brief.

STATE OF LOUISIANA

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McCLENDON, J., dissenting in part.

Although the evidence is sufficient to warrant a conviction for aggravated rape under the **Jackson** standard, a different standard applies for the granting of a new trial. The motion for a new trial is based on an injustice having been done to the defendant. See LSA-C.Cr.P. art. 851. Based on the reasoning set forth more fully in my dissent in the companion case of **State v. King**, 2013 KA 0135, I find that the law and the interest of justice require the defendant be granted a new trial.