NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 1726

STATE OF LOUISIANA

VERSUS

DONALD RAY MAGEE, JR.

DATE OF JUDGMENT: JUN 06 2014

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 11-CR5-114111, DIV. B, PARISH OF WASHINGTON
STATE OF LOUISIANA

HONORABLE AUGUST J. HAND, JUDGE

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* * * * * *

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: CONVICTION AND SENTENCE AFFIRMED.

KUHN, J.

Defendant, Donald Ray Magee, Jr., was charged by bill of information with sexual battery, a violation of La. R.S. 14:43.1, for which he pled not guilty. Following a jury trial, defendant was found guilty as charged. The trial court denied defendant's motion for new trial and motion for post-verdict judgment of acquittal. The trial court sentenced defendant to thirty-five years imprisonment at hard labor and ordered that twenty-five years of the sentence be served without the benefit of probation, parole, or suspension of sentence. Defendant now appeals, assigning as error the sufficiency of the evidence; the trial court's denial of his motion for mistrial; and the constitutionality of the sentence. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

In January of 2011, the victim, C.W. and her twin sister (whose initials are also C.W.), were left in their home alone with defendant.[1] The victim and the rest of the family knew defendant because he fathered a child with a member of the family. According to the victim, before her mother left, she instructed defendant (who the victim knew by name and as "Pumpkin") to discipline the victim for earlier bad behavior. Defendant instructed the victim to wait in the bedroom while he entered the restroom. When he came back into the bedroom he removed the victim's clothing and placed his "private," also described by the victim as his penis, between the cheeks of her buttocks, but not "in the hole." The victim also indicated that defendant kissed her on the lips and touched her all over her body, including her vagina, with his hands. Defendant threatened to shoot her if she told anyone and further told her that he knew where her grandmother lived. According

[1]Herein, we use the initials of the victim's and her family members' names in order to keep her identity confidential in accordance with La. R.S. 46:1844(W).

to the victim, defendant discontinued when he heard her mother pulling back into the driveway.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, defendant contends that the evidence in this case is insufficient to convict him of sexual battery. Defendant notes that the victim told her therapist, Joan Scanlan, about an incident of sexual misconduct four months after it allegedly occurred. Defendant further notes that the victim did not tell anyone else, such as her grandmother or sister, about the allegations prior to the disclosure to Scanlan. Defendant also notes that the initial disclosure was prompted by Scanlan during routine questioning for patients diagnosed with post traumatic stress disorder (PTSD). Defendant contends that there were inconsistencies in Scanlan's report and argues that her trial testimony was unreliable and untruthful in some respects. Defendant contends that Detective David Miller of the Bogalusa Police Department did not independently corroborate statements made by the victim during the forensic interview. Defendant notes that Detective Miller failed to take a statement from the victim's mother and twin sister. Defendant also notes that Dakota Chavers, an adult friend of the family, denied leaving the residence with the victim's mother on the day in question though the victim claimed otherwise. Defendant further notes that the victim failed to give a time period for the incident, failed to state how long she was in the bedroom before defendant entered the room, did not indicate how long the conduct lasted, and gave no indication as to how she or defendant knew about her mother's return just before the conduct as alleged was discontinued. Defendant argues that there were conflicts among the victim's various statements and that it is unclear as to whether she was truthful before and during the trial.

The standard of review for the sufficiency of evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to

the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the crime and the defendant's identity beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. C.Cr.P. art. 821; ***State v. Lofton***, 96-14295 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. The ***Jackson*** standard of review incorporated in Article 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. ***State v. Davis***, 2000-2685 (La. App. 1st Cir. 11/9/01), 818 So.2d 76, 79. This standard of review, in particular the requirement that the evidence be viewed in the light most favorable to the prosecution, obliges the reviewing court to defer to the actual trier of fact's rational credibility calls, evidence weighing, and inference drawing. See ***State v. Mussall***, 523 So.2d 1305, 1308-11 (La. 1988). Thus, the reviewing court is not permitted to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. See ***State v. Burge***, 515 So.2d 494, 505 (La. App. 1st Cir. 1987), writ denied, 532 So.2d 112 (La. 1988).

Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. ***State v. Thomas***, 589 So.2d 555, 570 (La. App. 1st Cir. 1991). Because a determination of the weight of the evidence is a question of fact, this court has no appellate jurisdiction to review it in appeals of criminal cases. ***State v. Gordon***, 2001-0236 (La. App. 1st Cir. 2/15/02), 809 So.2d 549, 552 writ denied, 2004-2438 (La. 6/24/05), 904 So.2d 733. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a jury's determination of guilt. ***State v. Hendon***, 1994-0516 (La. App. 1st Cir. 4/7/95), 654 So.2d 447, 450.

It is well settled that if found to be credible, the testimony of the victim of a sex offense alone is sufficient to establish the elements of the offense, even where the State does not introduce medical, scientific, or physical evidence or prove the commission of the offense by the defendant. ***State v. Lilly***, 2012-0008 (La. App. 1st Cir. 9/21/12), 111 So.3d 45, 62, writ denied, 2012-2277 (La. 5/31/13), 118 So.3d 386; see also ***State v. Hampton***, 1997-2096 (La. App. 1st Cir. 6/29/98), 716 So.2d 417, 418. As it pertains to this case, La. R.S. 14:43.1(A)(1) defines sexual battery as an intentional touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender, where the offender acts without the victim's consent. We note that in this case the victim was under the age of thirteen and the defendant was thirty-three years old. See La. R.S. 14:43.1(C)(2).

The victim's grandmother, E.D., was raising the twins at the time of the trial. They had been living with her since February 2011, when she reported to the Office of Child Services (OCS) inappropriate behavior by her daughter including the use of drugs and allowing other intoxicated adults in the home, although on cross-examination she admitted that she never actually saw her daughter use drugs. E.D. testified that she was notified about the instant allegations when the children's therapist, Joan Scanlan, contacted her after one of her routine sessions with the victim. E.D. stated that she was in shock because the victim did not tell her about the incident. She confronted the victim and the victim disclosed details consistent with the information provided by Scanlan. The police were contacted and they conducted a photograph line-up with the victim at E.D.'s home.

Detective Miller testified that he first became involved in the case after being alerted by OCS that the victim made a disclosure of sexual abuse during therapy. Detective Miller spoke with Scanlan to determine the nature of the disclosure before contacting the Children's Advocacy Center (CAC) to schedule a

forensic interview of the victim. The CAC interview was conducted on May 27, 2011, and the detective observed it on closed-circuit television. Detective Miller testified that the disclosure made by the victim during the interview was consistent with the information relayed by Scanlan. Detective Miller confirmed that the victim identified the defendant in a photographic lineup.

During cross-examination, Detective Miller specified that prior to the CAC interview, Scanlan told him that the victim disclosed that defendant rubbed his penis between her butt cheeks, which was consistent with what she relayed to JoBeth Rickels during the CAC interview. He indicated that Scanlan did not state that penetration had been alleged. The detective noted, however, that the investigation was ongoing and that rape had not been ruled out. The police ultimately determined that the victim gave consistent disclosures that specifically denied penetration.

The victim testified that she was thirteen years old and confirmed her date of birth, December 2, 1998. She confirmed that she and her twin sister started living with her grandmother in February of 2011, when she was twelve years old. When asked why she moved in with her grandmother she indicated that her mother "got on drugs" and was violent. The victim identified defendant in open court, confirmed she also knew him by the nickname "Pumpkin," and stated that he would sometimes come to her mother's house when she lived there. After identifying the male and female parts of the body, including the use of "private" for genitalia, the victim testified that Pumpkin touched her on one occasion. She stated that the incident occurred in her mother's bedroom in January of 2011 during nighttime hours. She further indicated that defendant had come to the home on that occasion with a woman who she only identified as "Dakota." According to the victim, as her mother and Dakota were leaving to get some drugs, her mother

asked defendant, "Can you discipline [C.W.] because she was being disrespectful?" Defendant agreed to do so and they left.

The victim thought she was going to "get a whooping" as defendant followed her into her mother's bedroom. However, defendant shut and locked the door, pulled down the victim's pants and underwear, and started touching her. She added, "Then he had put his stuff between my butt." The victim stated that she was scared and that she did not want defendant to touch her. The victim confirmed that defendant was moving around when he put his "private" between her butt cheeks. When asked if his private went inside or outside her butt, she stated, "[o]utside." She further stated that defendant touched the outside of her private and other parts of her body with his hand. When the victim told defendant that she was going to tell her grandmother about his actions, defendant told her he knew where her grandmother lived and that he had a gun.

Defendant stopped when the victim's mother pulled up. He told the victim that he loved her, and warned her not to tell her mother. Defendant put his clothes back on, and the victim pulled up her pants. The victim's twin sister was watching television in another part of the home at the time. The victim was crying when she returned to the room with her sister but she was afraid to tell her sister, her mother, or her grandmother what had happened. The victim confirmed that "Ms. Joan -- my psychiatrist" was the first person to whom she ultimately disclosed the incident. When asked why she told Scanlan, she responded, "Because she asked ... had someone ever touched me in a place that I didn't want them touching me." She indicated that it was the first conversation that she had ever had about the inappropriate touching. The victim identified the drawing that she made at the CAC interview and confirmed her pretrial photographic lineup identification of defendant.

During cross-examination, the victim was asked about Dakota, and she stated that she did not know her well. She said that her mother asked Dakota if she knew where to get drugs before they left. When asked who she first told of the incident, she initially said her sister but then corrected herself to indicate that she told Scanlan first and then told her sister and grandmother. The victim said that she did not tell her sister and grandmother the whole story, but did tell them that Pumpkin had touched her. She noted that Scanlan had already told her grandmother what happened. The victim indicated that her statements to Scanlan were consistent with her trial testimony. The victim denied having told Scanlan that defendant put his private part in her private part. The victim was unsure of the number of times that she discussed the incident with Scanlan.

The victim's sister testified that she was twelve years old when the incident happened. She also testified that defendant's friend Dakota came to their house with defendant on the night in question. She stated that she was in the living room watching television when her mother was telling Pumpkin that the victim was being disrespectful. She added, "And then my momma was talking to Dakota because she wanted to go buy some drugs with Dakota. And then [C.W.] had went to her room -- to my momma's room -- and Pumpkin had followed right behind her." The victim's sister continued watching television in the living room. She stated that she thought defendant was going to whip the victim or talk to her. The victim subsequently came out of the room crying but would not tell her sister what had happened. Pumpkin came out of the bedroom about the same time and left. The victim's sister confirmed that her mother and Dakota left before defendant followed the victim into the bedroom. She further confirmed that her sister had not been crying before defendant and Dakota came to the house.

JoBeth Rickels conducted the forensic interview of the victim and also testified at trial. During the interview, consistent with the victim's trial testimony,

the victim stated that Pumpkin "put his private part between my butt" and specified "not in the hole." She further consistently indicated that defendant kissed her on the mouth, touched her all over with his hands, including the exterior of her vagina, and told her he loved her. The victim used anatomical drawings to identify the referenced body parts. The victim also detailed the same facts leading up to her mother leaving. Further, the victim stated that defendant threatened to shoot her if she told anyone what he had done, that defendant told her he knew where her grandmother lived after she told him she would tell her grandmother about the incident, and that defendant stopped when he heard her mother pulling up.

Scanlan, a licensed clinical social worker, who testified as the final State witness, stated that when she initially began having counseling sessions with the twins, around March of 2011, there was no indication that there had been any sexual abuse but the girls were suffering from PTSD. On May 9, 2011, Scanlan administered a PTSD assessment test to the victim that included the following question about inappropriate touching: "Has anyone ever touched you in your, on your sexual body parts without your permission?" The victim responded, "Yes," and Scanlan continued questioning her from there. Scanlan specifically asked, "So can you tell me what happened?" Scanlan was not sure of all of the details of the incident that the victim attempted to relay, but she concluded that someone the victim called Pumpkin had sexually abused the victim. She stated that in taking clinical notes some of the statements reflect her own words or interpretation of what the victim was saying as opposed to being limited to what the victim specifically stated. Scanlan further testified that she "felt" that the victim was trying to say that defendant put his penis into her vagina. She testified that the victim later clarified that such penetration did not occur. Scanlan also confirmed

that while she used the word "rape" in her notes, the victim never actually used that word.

The sole defense witness, Dakota Chavers, testified that she knew defendant for about two years. She indicated that she remembered the day that the instant offense was alleged to have occurred. She stated that she and defendant had only been to the victim's mother's home a few times and denied ever having left the home with the victim's mother. Chavers did not recall ever being in a car with her at any point in time. She further denied having seen defendant doing anything inappropriate to the victim. On cross-examination, Chavers confirmed that defendant had been to the victim's mother's home without her on some occasions.

According to the victim, defendant touched her genitals with his hands and penis without her consent when she was under the age of thirteen. The jury found the victim's testimony credible. We observe that before and during the trial the victim consistently described defendant's actions in committing the offense. Further, the fact that the record may contain evidence which conflicts with testimony accepted by the trier of fact does not render the evidence accepted by the trier of fact insufficient. ***State v. Busch***, 515 So.2d 605, 609 (La. App. 1st Cir. 1987). It is the factfinder who weighs the respective credibilities of the witnesses, and this court generally will not second-guess those determinations. ***State v. Hughes***, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051. Therefore, after carefully reviewing the record in this case, we find that any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have concluded that the State proved beyond a reasonable doubt that defendant committed the crime of sexual battery upon C.W. Accordingly, the evidence was sufficient to support the jury's verdict. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, defendant argues that the trial court erred in denying his motion for mistrial and subsequent motion for new trial. Defendant notes that when the prosecutor asked Detective Miller how he was able to connect defendant to the nickname provided by the victim, the detective stated that defendant's actual name and photograph were obtained when he put the nickname in the police department's database. Defendant argues that the remark was prejudicial and was solicited by the prosecutor. Defendant contends that the prosecutor knew the answer to the question regarding the nickname before it was asked. Defendant further contends that the prosecutor and Detective Miller were aware of the fact that he had a prior arrest and booking record on file which explains why his nickname, actual name, and photograph would be contained in the database. Defendant argues that the testimony was elicited to suggest or disclose that he had a criminal record and it was not relevant to explain his identification. Defendant notes that the jury had already been informed, without objection, of his full name as the suspect before the testimony in question was elicited. Defendant concludes that people of ordinary and reasonable intelligence understood that police database inclusion indicates a previous arrest or criminal history.

Louisiana Code of Criminal Procedure article 775 provides that a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Articles 770 or 771. Defendant contends that a mistrial was warranted pursuant to either La. C.Cr.P. arts. 770 or 771. Article 770 states, in pertinent part:

> Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to ...

> Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible....
>
> An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial.

Article 771 states, in pertinent part:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury...
>
> When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.
>
> In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

A mistrial under the provisions of La. C.Cr. P. art. 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness or of the prosecutor make it impossible for the defendant to obtain a fair trial. Nevertheless, in situations where the witness's impermissible reference to another crime was deliberately elicited by the prosecutor, the impermissible reference is imputable to the State and mandates a mistrial. ***State v. Pooler***, 96-1794 (La. App. 1st Cir. 5/9/97), 696 So.2d 22, 45, writ denied, 97-1470 (La. 11/14/97), 703 So.2d 1288.

Herein, defendant references the following colloquy during the State's direct examination of Detective Miller:

> Q. Okay. Based upon your knowledge, was the disclosure consistent with what she previously disclosed?
>
> A. Yes.
>
> Q. So based upon that, what action did you take at that point?

A. Based upon consistent disclosures from the child, we still had a tiny question as to putting the name with a face because the child was using a nickname.

Q. Which nickname was that?

A. Pumpkin.

Q. Okay.

A. She was using Pumpkin. Originally, the child knew that the person -- that Pumpkin's name was Donald, but she was unsure of his last name. So we checked our database against that nickname and we did have the nickname entered into our database under Donald Magee, Junior.

Q. Okay.

A. So--

At this point the defense attorney interrupted the witness by stating, "Objection, Your Honor" and a sidebar conference was held at which point defendant moved for a mistrial. The trial court concluded that the testimony did not warrant a mistrial. The trial court noted that the witness did not use the word arrest.

In this case, we find that the prosecutor did not intentionally elicit evidence of another crime. Detective Miller's response about the database was not directly solicited. Unsolicited and nonresponsive testimony is not chargeable against the State to provide a ground for the reversal of a conviction. See ***State v. Perry***, 420 So.2d 139, 147 (La. 1982), cert. denied sub nom., ***McCray v. New York***, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983). Further, innocuous or obscure references to other crimes made without explanation or elaboration do not prejudice the defendant. ***State v. Tribbet***, 415 So.2d 182, 184-85 (La. 1982)

We note, as well, that the defense counsel did not request an admonition by the trial court. Louisiana Code of Criminal Procedure article 771 mandates a request for an admonishment. Absent a request by the defendant, the trial court's failure to instruct the jury to disregard Detective Miller's testimony was not, in

itself, reversible error. See ***Pooler***, 696 So.2d at 48; see and compare ***State v. Celestine***, 98-1166 (La. App. 5th Cir. 3/30/99), 735 So.2d 109, 114, writ denied, 99-1217 (La. 10/8/99), 750 So.2d 178 (no admonition to jury was required where the police officer testifying for the State did not refer to any specific crime committed by the defendant but merely stated that he ran the defendant's name through the national crime computer, got a past criminal history, and obtained a photograph).

Despite the vague reference by Detective Miller to defendant having been included in the police department's database, defendant did not suffer such substantial prejudice that he was deprived of any reasonable expectation of a fair trial. Accordingly, the trial court did not abuse its discretion in denying the defendant's motion for mistrial.

The second assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In the third assignment of error, defendant contends that the sentence is excessive. Defendant notes that he was sentenced as a first offender and argues that the sentence constitutes nothing more than the needless imposition of pain and suffering and shocks the sense of justice. Citing ***Apprendi v. New Jersey***, 530 U.S. 466, 476, 120 S.Ct. 2348, 2355, 147 L.Ed.2d 435 (2000) and ***Blakely v. Washington***, 542 U.S. 296, 303, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004), defendant also claims that the verdict form in this case did not provide for conviction of sexual battery of a victim under the age of thirteen years under La. R.S. 14:43.1(C)(2). Defendant therefore argues that the maximum sentence applicable in this case should be ten years under La. R.S. 14:43.1(C)(1) and that the imposed sentence is therefore excessive on its face. Finally, defendant contends that the trial court did not comply with the sentencing provisions of La. C.Cr.P. art. 894.1.

At the outset we note that while defendant claims on appeal that the verdict form was inconsistent with the conviction and sentencing, according to the record defendant did not object to the relevant portion of the jury instructions, the verdict form, or the verdict. Absent an objection during the trial, defendant waived any such claim on appeal of an allegedly erroneous jury instruction, verdict form, or verdict. See La. C.Cr.P. arts. 801(C), 841(A); ***State v. Parker***, 98-0256 (La. 5/8/98), 711 So.2d 694, 695 (per curiam); ***State v. Jackson***, 2006-1904 (La. App. 1st Cir. 3/23/07), 960 So.2d 170, 173, writ denied, 2007-1026 (La. 11/16/07), 967 So.2d 523; ***State v. Dilosa***, 2001-0024 (La. App. 1st Cir. 5/9/03), 849 So.2d 657, 671, writ denied, 2003-1601 (La. 12/12/03), 860 So.2d 1153. Moreover, defendant objected to the sentence without raising any grounds for the objection and did not file a written motion to reconsider sentence. Louisiana Code of Criminal Procedure article 881.1(E) precludes the State or defendant from raising an objection to the sentence or from urging any grounds not raised in a motion to reconsider sentence on appeal or review. See ***State v. Bickham***, 98-1839 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 891 (a general objection to a sentence preserves nothing for appellate review); ***State v. Jones***, 97-2521 (La. App. 1st Cir. 9/25/98), 720 So.2d 52, 53 (the defendant's failure to urge a claim of excessiveness or any other specific ground for reconsideration of sentence by his oral or written motion precludes our review of his assignment of error). Thus, review of the excessive sentence argument raised in assignment of error number three is procedurally barred.

DECREE

For these reasons, we affirm the conviction and sentence of defendant, Donald Ray Magee, Jr.

CONVICTION AND SENTENCE AFFIRMED.