NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 1822

STATE OF LOUISIANA

VERSUS

CAMERON P. WILLIAMS

DATE OF JUDGMENT: JUN 06 2014

ON APPEAL FROM TWENTY-SECOND JUDICIAL DISTRICT
NUMBER 526869, DIV. D, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE PETER J. GARCIA, JUDGE

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.

KUHN, J.

Defendant, Cameron P. Williams, was charged by felony bill of information with simple rape, a violation of La. R.S. 14:43. He pled not guilty. Following a jury trial, defendant was found guilty as charged. He filed motions for new trial and postverdict judgment of acquittal, but the trial court denied these motions. The trial court subsequently sentenced defendant to twenty years at hard labor, without benefit of parole, probation, or suspension of sentence. The trial court also denied defendant's motion to reconsider sentence. Defendant now appeals, alleging two assignments of error. For the following reasons, we affirm defendant's conviction. However, we vacate defendant's sentence and remand for resentencing.

FACTS

In the evening on July 19, 2012, L.M.[1] (the victim) met up with her neighbor, Tim Jacobs, in their apartment complex. Jacobs showed L.M. his new car and invited her over to his apartment to have a few drinks with him and his friends. L.M. went to Jacobs's apartment, had a shot of vodka, and went home to eat dinner with her sister.

After dinner, L.M. returned to Jacobs's apartment with her own bottle of flavored vodka. While at Jacobs's apartment for the second time, L.M. consumed several more shots of vodka. Jacobs's friend Joseph Duffy was also present at the apartment. Defendant, a friend of Duffy's, showed up at the apartment later in the evening. Shortly after defendant's arrival at the apartment, the group decided to go to a nearby bar to shoot pool. Jacobs and his girlfriend, Vivian Blackledge, rode together. L.M. rode with Duffy and defendant.

At the bar, L.M. played pool and socialized mainly with Duffy and defendant. Eventually, L.M. and defendant began to flirt with one another, despite the fact that L.M. was openly homosexual. L.M. consumed only a small amount of

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

alcohol at the bar. When the group left the bar a couple of hours after their arrival, L.M. rode back to Jacobs's apartment with Duffy and defendant.

Back at the apartment, Jacobs and Blackledge went to bed, but L.M. stayed up and talked with Duffy and defendant. She sat on a sofa, next to defendant, where the topic of conversation eventually turned to the size of L.M.'s breasts. L.M. removed her t-shirt, but remained wearing a tank top and bra, to show the men her breast size. Soon thereafter, L.M. allowed defendant to touch her breasts under her clothing. At some point, Duffy left the room.

After defendant began to touch her breasts, L.M. experienced a gap in her memory. Her next memory was lying on her back on the floor of Jacobs's kitchen. Both she and defendant were naked. Defendant penetrated her vagina a few times with his penis, and L.M. began to attempt to push defendant off of her. In the process, she hit her head on the wall, and alcohol bottles began to fall off the counter and break on the kitchen floor. L.M. physically resisted every time that defendant began to penetrate her. When she was finally able to use the counter as leverage to help her stand, defendant attempted to penetrate her from behind. Throughout the incident, L.M. recalled telling defendant to stop twice. After the first time, defendant tried to penetrate her anus. Only after the second time did defendant cease his actions.

Following the incident, L.M. got dressed, walked back to her apartment, and showered. The following day, Jacobs spoke to L.M. to ask her what happened to his apartment, noting that several alcohol bottles and his microwave were broken. L.M. simply apologized to him and offered to replace the alcohol. Over the course of the next week, L.M. began to feel very anxious as a result of the incident. She also photographically documented the multiple bruises and cuts that she had sustained during the struggle, including injuries to her lips, face, chest, arms, legs, and feet. Approximately a week after the incident, L.M. confided in a coworker

about what happened to her. The coworker brought L.M. to St. Tammany Parish Hospital, where she reported the incident. In connection with the subsequent investigation, defendant was arrested and charged with simple rape.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, defendant argues that the evidence presented by the state at trial was insufficient to support his conviction of simple rape. Specifically, he contends that the state failed to show that L.M. suffered from an alcohol-induced incapacity and that, even if such capacity existed, the state failed to show that defendant knew or should have known of it.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the 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 have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006–0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308–09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that in order to convict, the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001–2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statutes 14:41 states, in pertinent part:

> A. Rape is the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent.

> B. Emission is not necessary, and any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime.

Louisiana Revised Statutes 14:43(A) defines simple rape, in pertinent part, as:

> A. Simple rape is a rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of a victim because it is committed under any one or more of the following circumstances:
>
> (1) When the victim is incapable of resisting or of understanding the nature of the act by reason of a stupor or abnormal condition of mind produced by an intoxicating agent or any cause and the offender knew or should have known of the victim's incapacity.

At trial, defendant admitted via his own testimony that he had used his penis to penetrate L.M.'s vagina. Therefore, the only questions on appeal are whether the evidence presented at trial was sufficient to prove that L.M. was incapable of resisting or understanding the nature of the act by reason of a stupor or abnormal condition of mind produced by an intoxicating agent, and whether defendant knew or should have known of L.M.'s incapacity.

At trial, L.M. testified that she was openly homosexual and that she had no interest in having sex with defendant. She admitted to flirting with him at the bar, but she explained that she only did so because defendant was paying special attention to her. By her own estimation, L.M. had one shot of vodka before dinner and at least five more shots of vodka at Jacobs's apartment prior to going to the bar. L.M. recalled drinking only about half a cup of beer while she was at the bar, but she remembered consuming at least one more shot of vodka while back at Jacobs's apartment. This alcohol consumption took place between approximately 8:00 p.m. and 1:00 a.m. L.M. stated that the alcohol consumption began to really affect her after she took the last shot. She testified that when she was on the floor in the kitchen, she felt like she was in a game or a dream and that she was not in control.

In contrast to L.M.'s testimony, defendant testified that he saw L.M. take only one or two shots before they left for the bar. He stated that he did not see her drink anything else at the bar or at Jacobs's apartment thereafter. He also testified that L.M. did not seem overly intoxicated. Defendant detailed that he and L.M. went into the kitchen for a reason he could not recall. He said that L.M. escalated their encounter by biting his lip and beginning to kiss him roughly. He testified that when he reciprocated, L.M. appeared to enjoy it. Defendant stated that L.M. never told him to stop what he was doing and that she never resisted him. He said that when the incident was finished, L.M. seemed a bit discombobulated, but he figured that it was attributable to her first sexual encounter with a male.

Duffy testified that he had been at Jacobs's apartment starting around 1:00 p.m that day. He estimated between that time and the end of the night, he had consumed ten to twelve beers and a few shots. He classified himself as being "relatively inebriated, not to the point of belligerent." He described L.M.'s state similarly and noted that she could have a conversation and that she was not stumbling. Duffy considered himself to be more intoxicated than L.M. was. With regard to the events that took place at Jacobs's apartment, Duffy stated that he saw defendant fondling and kissing L.M.'s breasts on the sofa. He then saw them get up to go into the kitchen. As he passed by the kitchen on his way upstairs, he observed defendant and L.M., both fully clothed, kissing roughly against the kitchen wall. A short time later, he began to hear glass breaking downstairs. When he eventually returned downstairs, Duffy said he saw L.M. fully clothed by the dining room table, with defendant standing nearby buttoning his pants. Duffy testified that defendant later told him he tried to penetrate L.M., but she said, "No," and he stopped.

The "stupor or abnormal condition of mind produced by an intoxicating agent" element of simple rape does not require unconsciousness or such

incognizance as to render the victim unaware that she was raped; nor do a victim's verbal protestations during the act of rape indicate that she was necessarily capable of effectively resisting being raped. See **State v. Clouatre**, 2012-0407 (La. App. 1st Cir. 11/14/12), 110 So.3d 1094, 1099. The jurisprudence simply requires that an agent-influenced incapacity render the victim incapable of *effectively* resisting the advances of the perpetrator. The degree of alcohol influence is for the jury to decide. See **Clouatre**, 110 So.3d at 1100 (citing **State v. Porter**, 93-1106 (La. 7/5/94), 639 So.2d 1137, 1143).

In the instant case, the state presented evidence that L.M. drank at least seven shots of vodka, and possibly more, on the night in question. L.M. specifically stated that she began to feel particularly intoxicated after the final shot, and she began to feel as though she was no longer in control. The jury in this case heard the conflicting testimonies about L.M.'s alcohol consumption from defendant and Duffy, but it still found defendant guilty. Thus, the jury apparently believed L.M.'s testimony that she had become intoxicated to the point of losing control and briefly blacking out on the night of the incident. Therefore, the state clearly presented evidence sufficient to prove that L.M. was incapable of effectively resisting or of understanding the nature of the act by reason of a stupor or abnormal condition of mind produced by her alcohol consumption.

The only question that remains is whether defendant knew or should have known of L.M.'s incapacity. At trial, defendant clearly denied perceiving that L.M. was overly intoxicated on the night of the incident. However, the state presented evidence that defendant knew L.M. had been drinking in some capacity prior to when he arrived at the apartment, and that he saw her consume more alcohol after his arrival. Further, Duffy, who described himself as more intoxicated than defendant or L.M., also recognized that L.M. was inebriated.

Although defendant denied at trial that L.M. physically resisted his advances, the state presented evidence of L.M.'s extensive injuries that she suffered in attempting to fight off defendant's advances. The doctor who examined L.M. approximately one week after the incident considered L.M.'s to be one of the more severe cases of sexual assault that he had ever handled. From this evidence, the jury might have inferred that defendant became aware of L.M.'s desire to resist his advances and nonetheless decided to continue them with the use of force, rendering L.M. incapable of effectively resisting. Moreover, the jury might have found L.M.'s flirtatious actions toward defendant, despite the open knowledge of her sexual preference, as evidence that defendant should have known of L.M.'s abnormal condition of mind as a result of her alcohol consumption. Simply put, the state introduced sufficient evidence at trial to support a finding that defendant knew or should have known of L.M.'s incapacity as a result of her alcohol consumption.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97–2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99–3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). In the absence of internal

contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003–1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). Further, the testimony of the victim alone is sufficient to prove the elements of the offense. **State v. Orgeron**, 512 So.2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So.2d 113 (La. 1988). After a thorough review of the record, we find that the evidence supports the jury's verdict.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In his second assignment of error, defendant contends that the trial court imposed an excessive sentence. Because we find a reversible patent sentencing error, which requires us to vacate the sentence and remand for resentencing, we do not reach the merits of this assignment of error.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. Code Crim. P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence. See La. Code Crim. P. art. 920(2).

The trial court did not wait twenty-four hours, or secure a waiver of this required period, after denying defendant's motions for new trial and for postverdict judgment of acquittal before imposing sentence. See La. Code Crim. P. art 873.[2] In cases where the defendant either contests his sentence or complains of the absence of a twenty-four-hour delay, the failure of the trial court to observe the

[2] Louisiana Code of Criminal Procedure article 873 does not explicitly require a twenty-four hour delay in sentencing after the denial of a motion for a post-verdict judgment of acquittal, as it does after the denial of a motion for new trial. However, this court previously has applied the twenty-four hour delay required by Article 873 to motions for a post-verdict judgment of acquittal. See **State v. Coates**, 2000–1013 (La. App. 1st Cir. 12/22/00), 774 So.2d 1223, 1226; **State v. Jones**, 97–2521 (La. App. 1st Cir. 9/25/98), 720 So.2d 52, 53.

delay or to obtain a waiver thereof generally requires the sentence to be vacated and the case to be remanded for resentencing. See **State v. Augustine**, 555 So.2d 1331, 1333-35 (La. 1990). Here, defendant challenges his sentence as excessive, and his sentence is not one which is mandatory in nature. Compare **State v. Seals**, 95-0305 (La. 11/25/96), 684 So.2d 368, 380, cert. denied, 520 U.S. 1199, 117 S.Ct. 1558, 137 L.Ed.2d 705 (1997) (remand for resentencing not required for mandatory sentences of life imprisonment without benefits). Because **Augustine** requires us to vacate the sentence, we find it inappropriate to review the merits of the excessive sentence challenge at this time.

Therefore, for the foregoing reasons, defendant's conviction is affirmed, the sentence is vacated, and the case is remanded for resentencing.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.