NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 KA 0019

STATE OF LOUISIANA

VERSUS

LEONARD DOUGLAS

Judgment Rendered: JUN 09 2014

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 11-09-0634

Honorable Mike Erwin, Judge

* * * * * * *

Hillar C. Moore, III, D.A.
Baton Rouge, LA

Attorney for Appellee
State of Louisiana

Alfred F. Boustany, II
Lafayette, LA

Attorney for Appellant
Defendant – Leonard Douglas

* * * * * *

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WELCH, J.

The defendant, Leonard Ray Douglas, was charged by grand jury indictment with simple rape, a violation of La. R.S. 14:43. The defendant entered a plea of not guilty. The defendant waived his right to a trial by jury, and after a bench trial, he was found guilty as charged. The trial court denied the defendant's motion for new trial. The defendant was sentenced to twenty-five years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, assigning error as follows:

1. The trial court erred in trying the defendant without a jury because the record does not show the defendant made an on-the-record waiver of his right to a jury trial.

2. The trial court erred in denying the defendant his right to counsel and his right to counsel of his choice.

3. The original trial judge erred when she recused herself without notice and a hearing.

4. The trial judge erred in refusing, on hearsay grounds, to allow the defense witnesses to impeach the alleged victim when the witnesses proposed to testify about what they heard directly from the alleged victim.

5. The trial judge erred when he refused to allow the defendant's attorney to make a proffer of evidence he intended to introduce that was excluded when the judge granted a prosecution objection.

6. The trial judge erred when he refused to allow a defense expert to give testimony about proper police procedure.

7. The trial judge erred when he refused to allow a defense expert to testify about the effects of alcohol and about a typical reaction to an alleged rape, and assumed that information was within his own knowledge.

8. The trial judge erred when he convicted the defendant, even though the evidence failed to prove each element of the crime beyond a reasonable doubt.

9. The trial judge erred when he neglected to conduct a proper sentencing hearing.

10. The trial judge erred when he imposed an excessive sentence.

For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On July 29, 2009, A.L. (the victim) went to a bar in Baton Rouge called the House of Blues with a high school friend, Quintin Thomas.[1] Thomas's relative, the defendant, was the owner of the bar.[2] Although she was only eighteen years of age at the time, according to the victim, she was served several alcoholic beverages by the defendant and Thomas on the night in question. At some point during the night, Thomas told the victim that the defendant wanted to talk to her in an area of the club referred to as the V.I.P. room. The victim went into the room to see what the defendant wanted to talk about. After briefly conversing with the defendant, the victim began to feel lethargic. According to the victim, as the defendant got on top of her and began having intercourse with her, she wanted to resist and scream for help, but did not have control of her arms and was unable to project her voice.

ASSIGNMENT OF ERROR NUMBER EIGHT

In the eighth assignment of error, the defendant argues that the evidence was insufficient to prove the elements of simple rape. The defendant contends that the trial judge was concerned with the fact that he allowed his cousin, the victim, and their friends to drink alcohol though they were under twenty-one years of age. The defendant further contends that the trial court expressed disdain for the defendant's conduct in serving the underage patrons alcohol and in having sexual relations with the victim. The defendant notes that the victim admitted that she knew the defendant was trying to have sex with her, and he argues that the victim was clearly capable of understanding the nature of the act and resisting. The defendant further notes that the victim voluntarily consumed alcohol that night and claims

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[1] The identity of the victim is protected in accordance with La. R.S. 46:1844(W).

[2] The defendant testified that Thomas was his cousin. Thomas, who was significantly younger than the defendant, regularly referred to the defendant as his uncle though he acknowledged that the defendant was actually his cousin.

that she engaged in sexual intercourse with him without resisting or telling him to stop.

When issues are raised on appeal, both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. The reason for reviewing sufficiency first is that the accused may be entitled to an acquittal under **Hudson v. Louisiana**, 450 U.S. 40, 43, 101 S.Ct. 970, 972, 67 L.Ed.2d 30 (1981), if a rational trier of fact, viewing the evidence in accordance with **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), in the light most favorable to the prosecution, could not reasonably conclude that all of the elements of the offense have been proven beyond a reasonable doubt. See La. C.Cr.P. art. 821(B); **State v. Ordodi**, 2006–0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Hearold**, 603 So.2d 731, 734 (La. 1992); **State v. Mussall**, 523 So.2d 1305, 1308–09 (La. 1988).

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 **Jackson** standard of review 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 the factfinder must be satisfied that 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.

The victim testified that her friend, Quintin Thomas, first took her to the defendant's bar on July 25, 2009. Thomas told her that his uncle, the defendant, would allow them to have both admission and drinks for free. On the night in question, the victim and Thomas arrived at the bar around 10:00 p.m., and the victim began consuming alcoholic beverages (described by the victim as "Long Island"). At some point, she and Thomas left to go to Thomas's apartment because Thomas wanted to look for his pills. Thomas was unable to find the pills and ultimately took the victim back to the bar where they resumed consuming alcoholic beverages. According to the victim, both Thomas and the defendant were bringing her drinks. After briefly leaving their table to converse with the defendant, Thomas told the victim that the defendant wanted to talk to her, so she walked to the V.I.P. room to see what the defendant wanted. The victim further testified that the defendant asked her about one of her female friends who had previously been to the bar with her, and she told him that her friend was too young for him. As she and the defendant sat on a sofa in the V.I.P. room and continued to talk about her friend, the victim started feeling sleepy, her head was heavy, and she could not hold herself up. The defendant got on top of her as she tried to sit up but was unable to do so. The victim testified that she was aware of the fact that the defendant was having sexual intercourse with her, but she did not want to have sex with him. She tried to yell out to Thomas for help and wanted to push the defendant off but her arms would just fall when she attempted to do so. The victim further indicated that she wanted to scream and fight but her body felt

heavy, and she was unable to have the desired volume in her voice.

As she tried to keep her eyes open, the victim began to nod off or pass out. When she regained consciousness, the defendant was no longer in the room. The victim was unable to stand, but when Thomas entered the room, he assisted her out of the bar and took her to her sister's house. The victim testified that her next recollection was waking up at Our Lady of the Lake Hospital with pain throughout her body. The victim also recalled the doctor removing a tampon during the rape examination. The victim testified that the offense occurred during her menstrual cycle and that she would not have willingly had sex during her menstrual cycle. The victim denied stating that she wanted to have sex with the defendant, denied performing oral sex on the defendant, and stated that she referred to the defendant as "Uncle Lennie" before the offense. The victim specifically confirmed that she did not want to have sex with the defendant and denied kissing the defendant on the mouth or ever being positioned on top of the defendant.

The victim's sister, Shimara Thomas, testified that on the night in question, the victim went to the House of Blues with Quintin Thomas just as she had done a few nights before. The victim told her sister to expect her to return around 2:00 a.m. Shamira gave the victim her house key and was asleep by 2:00 a.m. Shamira was awakened when she heard banging on her door. When she went to the door to see who was knocking, Thomas instructed her to open the door and come get her sister. According to Shamira, when she opened the door, Thomas told her to come get the victim out of his vehicle. She testified that he specifically stated, "Come get your sister; my fucking uncle raped her." When Shamira went to help the victim, she was sitting in the middle of the seat in the pickup truck rocking back and forth saying, "I told him to stop and he wouldn't." Shamira was pregnant at the time and asked Thomas to help her get the victim out of the vehicle. Shamira testified that she and Thomas struggled to move the victim and described her body

as "limp" and "dead weight." Shamira smelled a strong scent of alcohol on the victim and noted that the victim was vomiting. As the victim was in and out of consciousness, she made statements such as, "I told him to stop, I told him to get off of me, he wouldn't stop." Shamira called 911 and reported the rape.[3] When emergency assistance arrived, the victim had to be restrained before being transported to the hospital, as she was combative. Thomas rode to the hospital with the victim. Shamira met them there after making arrangements for her children. On cross-examination, Shamira confirmed that the victim was crying and upset as she stated that she was telling the defendant to stop and that the victim's menstrual cycle was at the time of the offense.

Jarrod Love, a paramedic for East Baton Rouge Parish E.M.S., testified that he was dispatched for a rape incident at approximately 2:25 a.m. and arrived at the apartment a few minutes later. Love testified that the victim was crying and smelled like alcohol when he made contact with her. He further described her as hysterical, very combative, unresponsive, incoherent, and afraid. The paramedics had to use force and restrain the victim on a stretcher to get her into the ambulance to be transported to the hospital. On cross-examination, Love confirmed that the victim appeared to be highly intoxicated. Love also confirmed that according to the report, the male with the victim (presumably Quintin Thomas) had indicated that the victim was given "a lot of alcohol by an unknown male" while she was at the bar. Love also confirmed that his report did not indicate that the victim was hysterical or emotional though he testified as such.

R.N. Benjamin Schuler, the E.R. nurse who examined the victim at the hospital, testified that the victim's blood alcohol level at 3:46 a.m. was .217. Schuler further testified that, given the victim's intoxication (the victim had also

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[3] Thomas assisted Shamira with the 911 call by providing the full name and physical description of the defendant and some of the events leading up to the incident that night.

been sedated when she arrived at the E.R.) and emotional status, she was initially unable to consent to a rape examination. At approximately 3:37 a.m., the victim was coherent enough to communicate with Detective Greg Fairbanks of the Baton Rouge City Police Department and consented to the rape examination.[4] Dr. Shannon Alwood, the E.R. physician who performed the rape examination at about 10:30 a.m., testified that during the speculum examination a foreign object, specifically an impacted, crushed, disfigured tampon, was discovered and removed with forceps. Dr. Alwood confirmed that force was required to push the tampon into the location where it was discovered and that additional force would have been used to disfigure the tampon. This was the only case where Dr. Alwood had to remove an impacted tampon. On cross-examination, Dr. Alwood was questioned as to the indication of suspected oral intercourse on the report and indicated that this finding was based on the victim's indication that she had a sensation as if something had penetrated her mouth. Dr. Alwood confirmed that the victim did not have any obvious bodily injuries.

Later that same day, the police obtained a search warrant for the defendant's establishment. The police contacted the defendant, and he agreed to meet them at the bar to avoid a forced entry. After the defendant did not arrive as agreed, they called him again and he still did not show up. Thus, the police forced entry to execute the search warrant. The police also had a warrant for the defendant's arrest and placed him under arrest when he eventually arrived at the bar.

Defense witness, Anthony Burns, was the head security officer at the defendant's bar at the time of the offense. Burns was familiar with Quintin Thomas as a regular patron. Burns testified that when Thomas and the victim arrived, Thomas talked to the defendant, and the victim began flirting with the

[4] Tammy Rash, an expert in DNA analysis, testified that the analysis of the victim's vaginal washings were consistent with being mixtures of DNA from the victim and the defendant.

defendant and grabbing him. He testified that they were flirting throughout the night, specifically noting that the victim would "dance on him [the defendant]." Burns did not see the defendant bring the victim any drinks, but did see them when they went into the V.I.P. room between 11:00 and 11:30 p.m. Burns testified that the victim voluntarily entered the V.I.P. room and about forty minutes later they walked out of the room together. Burns did not notice anything unusual. Burns testified that there were about twenty-five to thirty patrons that night.

Mark Darensbourg was also present on the night in question. Darensbourg provided technical support, electrical wiring, and video sound for the bar. Darensbourg arrived at the bar about midnight and observed a female (who he later determined was the victim) signal for the defendant. When the defendant approached the victim, she stood up and started "dancing on him in a seductive manner." Darensbourg stated that he saw the defendant when he exited the V.I.P. room at approximately 1:00 a.m. and that he appeared to be in a good mood. Darensbourg also saw the victim again and noted that she was back on the dance floor dancing with her female friends.

The defendant's son, Desamas Moore, was at the bar and testified that at about 10:00 p.m., he saw the victim kiss his father. He further testified that in response, his father tried to dodge the victim and was not intimate with her. Moore specifically added, "He was like, like he wasn't like, trying to hug her or kiss her back, like. He just, like, she kissed him, and you know, like, hey, you; you know." When further questioned, Moore indicated that they were in the middle of the bar in the open when the victim kissed the defendant on the ear, and that the defendant was shocked but kept "doing what he was doing." Moore further testified that he saw the victim enter the V.I.P. room initially with Thomas and then later with his father. He stated that they were in there for about five

minutes and that they exited the room together. The victim resumed drinking and having fun.

Andre Irell Hamilton was a self-employed "fix-it man" at the time of the offense and was at the bar working on the night in question. Hamilton had previously met Thomas and was sitting in the V.I.P. room when a young lady (who he determined to be the victim) and the defendant walked in. Hamilton testified that before they got all the way into the room, the victim had already began pushing the defendant against the wall and started sticking her tongue in his mouth and grabbing his genitals. According to Hamilton, the defendant told the victim that he had "some stuff to do," and he and the victim walked out after only being in the room for a few minutes. Hamilton indicated that the victim appeared to be having a good time.

Thomas testified that he introduced the victim to the defendant on the first occasion that they went to the House of Blues. Thomas testified that he had a sexual relationship with the victim at the time. From the beginning, he believed that the victim had romantic inclinations towards the defendant and had witnessed her flirting with him. When asked if he gave the victim alcohol that first night, he stated, "We all got drinks." Thomas testified that they had the same routine when they went back to the bar on the night in question. When the defendant saw the victim, he spoke to her and shook her hand and asked about her friend, and the victim indicated that her friend could not come that night. He confirmed that they briefly left the bar at some point so he could look for ecstasy pills at his house and returned after he was unable to find them. Thomas also saw the victim kiss the defendant while they were in the bar by the stage. He described it as a kiss on the lips for about three seconds. In response, the defendant looked at Thomas as if it caught him off guard. According to Thomas, the defendant initially felt uncomfortable, and after he gave him the "go-ahead," the defendant was still

hesitant.

Thomas and the victim continued to consume alcohol, and at some point Thomas became concerned and told the victim that she needed to slow down her alcohol consumption. Thomas noted that the victim's shirt was up while she was dancing with another female. Thomas initially stated that he went into the V.I.P. room with the victim, but stated that after they went into the room, he left the bar room, and the victim remained in the room. When confronted with his affidavit, Thomas specified that he tried to get the victim to leave with him because she had consumed so much alcohol, but she did not want to leave, and the defendant indicated that he had a V.I.P. room where she could relax. Thomas stayed in the room with the victim until the defendant came in. He stated that when the defendant came in, the victim began unzipping the defendant's pants and Thomas left the room. When Thomas returned to check on the victim he opened the door and the victim was "on top of him, riding him." He testified that the victim did not see him at that point and he left again. About five minutes later, he came back and the defendant was on top of the victim at that time. The defendant asked if they were "straight" and the victim told him to close the door. When he came back another ten minutes later, the victim was on the floor and the defendant exited the room. Her top was up, her pants were pulled up, and her face was lying in her own vomit. Thomas pulled the victim up and when she realized he was there, she attempted to kiss him but he refused. He helped her to the sofa and left to look for the defendant to tell him to have someone clean up the room. Thomas then helped the victim into his vehicle and told her he would take her to her sister's house. The victim kept saying that the defendant raped her and stated that she wanted to go to Thomas's apartment instead of her sister's house. Thomas refused to take her to his apartment, and she grabbed the steering wheel at one point. When they arrived at the victim's sister's house, Thomas told her what

happened and what the victim was saying about the defendant. Thomas testified that they got in the victim's sister's vehicle and took the victim to the hospital. He denied riding in an ambulance to the hospital.

Dr. Lynn Simon, a psychiatrist, also testified for the defense. Though it was not his primary area of expertise, Dr. Simon treated many rape victims in the past and reviewed the victim's medical records. Dr. Simon noted that nothing in the record indicated that the victim had been unconscious. He further noted that the only incidents of altered level of consciousness would have been later in the morning when she was able to sleep and then consent to medical treatment. According to Dr. Simon, regarding any time prior to 3:30 a.m., there was no such indication. Dr. Simon testified that although someone the victim's height and weight could have become unconscious based on her blood-alcohol level that night, it was not necessarily a result. He further testified that the person would still have the ability to make choices.

The defendant testified that he, the victim, and Thomas were consuming alcohol on the night in question. The defendant confirmed that the victim referred to him as "Uncle Lennie." The defendant indicated that the victim called him over after he hugged two other ladies, but she kissed him instead of just hugging him. When he saw the victim about thirty minutes later, she indicated that she wanted to talk to him. They walked to the V.I.P. room, and when they got in the doorway, the victim started pushing him up against the wall. The defendant testified that Thomas was not in the room at the time. The victim began kissing and rubbing on him. They left because Irell Hamilton and a friend were in the room at that time. The victim stopped him again later and indicated that she wanted to talk again. The defendant indicated that he wanted to talk about the victim's friend when they went back into the V.I.P. room, but the victim got on her knees, unzipped the defendants pants, and started performing oral sex on him. He indicated that the

victim had been drinking, but denied that she was "tipsy." The defendant indicated that he was uncomfortable and thought of the fact that the victim was Thomas's friend, but did not try to stop her. Someone opened the door and peeked in, and at that point the defendant told the victim to stop, pulled up his pants, and they left the room. According to the defendant, the victim started dancing again.

The defendant further testified that later that night, while he was standing by the pool table, the victim told him that she wanted him. In response, he told the victim he did not want any problems with Thomas because Thomas introduced her as his girlfriend. According to the defendant, the victim spoke to Thomas, and then all three of them had a discussion in the V.I.P. room wherein Thomas told the defendant, "it's okay, me and her not together, [we're] just friends." The defendant further testified that the victim started performing oral sex on him again. The defendant indicated that the victim still was not tipsy as far as he knew. The defendant asked Thomas to leave because he did not want him to watch him engage in sexual acts. He noted that someone opened the door when the victim began "riding me." The defendant indicated that when the victim pulled up her shirt, he saw her spare tampon in her bra and realized her menstrual cycle was on and told her to get off of him. He then exited the room.

The State recalled the victim, and she again denied kissing the defendant or indicating that she wanted to have sex with him. The State further recalled Dr. Alwood, and she confirmed that "usually" she would consider someone with the victim's alcohol level greatly impaired. Dr. Alwood also confirmed that the victim's vomiting would have lowered her blood-alcohol level. On recall, Detective Fairbanks confirmed that the victim told him that she screamed for help, but did not say that she was unable to do so or that she only screamed in her mind, as she testified.

In **State v. Porter**, 93–1106 (La. 7/5/94), 639 So.2d 1137, 1143, the

Supreme Court recognized that even where there was evidence of alcohol consumption by the victim and of an alcohol-influenced state of mind, and even though the victim denied excessive drinking and recalled the events of the ordeal, a reasonable juror could have concluded that the essential elements of simple rape had been proven. Similarly, in the instant matter, the judge heard the testimony and viewed the evidence presented at trial and found the defendant guilty. There was proof sufficient to establish, beyond a reasonable doubt, that the defendant did not have consensual sex with the victim, and that because of the victim's intoxicated condition, she could not effectively resist the defendant's advances.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. 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. Moreover, the fact that the record contains some 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). 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 verdict. We are convinced, viewing the evidence in the light most favorable to the

State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of simple rape. See **State v. Calloway**, 2007–2306 (La. 1/21/09), 1 So.3d 417, 418 (*per curiam*). Thus, assignment of error number eight lacks merit.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends that the record does not show that he knowingly and intelligently waived his right to a trial by jury. The defendant notes that while the minute entry indicates a waiver, it is inconclusive as to whether the waiver was made knowingly. Thus, the defendant contends that a reversal is warranted.

At the outset, we note that as indicated by the defendant the minute entry is not conclusive as to the voluntariness of the waiver of his right to a trial by jury. However, this court ordered that the record be supplemented with the transcript of the pretrial hearing. The record now includes a transcript of the colloquy between the trial judge and the defendant concerning his jury trial waiver. We note that the defendant never requested that his waiver of a jury be set aside until this appeal.

Both the United States Constitution and the Louisiana Constitution expressly guarantee a criminal defendant the right to a jury trial. U.S. Const. amend VI; La. Const. art. I, §§ 16, 17. However, La. Code Crim. P. art. 780(A) provides, in pertinent part, that a defendant charged with an offense other than one punishable by death may knowingly and intelligently waive a trial by jury and elect to be tried by the judge. A valid waiver of the right to a jury trial must be established by a contemporaneous record setting forth an apprisal of that right followed by a knowing and intelligent waiver by the accused. While the trial judge must determine if a defendant's jury trial waiver is knowing and intelligent, that determination does not require a **Boykin**-like colloquy. **State v. Brooks**, 2001-1138 (La. App. 1st Cir. 3/28/02), 814 So.2d 72, 78, writ denied, 2002-1215 (La.

11/22/02), 829 So.2d 1037. Prior to accepting a jury trial waiver, the trial court is not obligated to conduct a personal colloquy inquiring into a defendant's educational background, literacy, and work history. **State v. Allen**, 2005-1622 (La. App. 1st Cir. 3/29/06), 934 So.2d 146, 154.

In the instant case, the defendant, with counsel, personally appeared before the trial court, and, on the defendant's motion, defense counsel informed the judge of the defendant's desire to waive his rights to a jury trial. We note that his case had previously been set for a jury trial. Because simple rape is not an offense punishable by death, an individual charged with simple rape may waive his right to trial by jury and elect to be tried by the judge. La. C.Cr.P. art. 780(A); La. R.S. 14:43(B). The trial court personally addressed the defendant, informed him of his right to a trial by jury, and confirmed that it was the defendant's desire to be tried by the judge rather than a jury. The defendant personally and expressly agreed that it was his intention to waive a jury trial. The trial court then accepted the waiver. The trial court was required only to determine whether the defendant's waiver was made knowingly and intelligently. The trial court did not err in accepting the defendant's waiver and permitting him to proceed to trial before the judge alone. Assignment of error number one lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant contends that the trial court violated his right to counsel of choice at the arraignment. The defendant notes that he was arraigned without his attorney and that he objected to the arraignment because he wanted his counsel present. The defendant further notes that the trial court forced him to accept a court-appointed attorney even though he was not indigent. After the arraignment, the defendant moved for continuances in proper person on two status hearing dates.

A defendant's right to the assistance of counsel is guaranteed by both the

federal and state constitutions. U.S. Const. amend. VI; La. Const. art. I, § 13. Further, the right of a defendant to counsel of choice has been implemented by La. Code Crim. P. art. 515 which provides:

> Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned by the court. The court may assign other counsel in substitution of counsel previously assigned or specially assigned to assist the defendant at the arraignment.

The Louisiana Supreme Court has consistently held that the right to counsel cannot be manipulated to obstruct the orderly procedure of the courts and cannot be used to interfere with the fair administration of justice. **State v. Champion**, 412 So.2d 1048, 1050 (La. 1982). A defendant must exercise his right to counsel of his choice at a reasonable time, in a reasonable manner and at an appropriate stage of the proceedings. **State v. Seiss**, 428 So.2d 444, 447 (La. 1983). A defendant's refusal to proceed with appointed counsel and to retain counsel on his own may constitute a waiver of the right to counsel. See **State v. Harper**, 381 So.2d 468, 471 (La. 1980); **State ex rel. Johnson v. Maggio**, 449 So.2d 547, 549-50 (La. App. 1st Cir.), writ denied sub nom., **State v. Johnson**, 450 So.2d 354 (La. 1984).

In **State ex rel. Johnson v. Maggio**, the defendant was advised at arraignment of his right to counsel and instructed to contact the court if he desired appointed counsel. The defendant appeared for trial without counsel. The court refused to continue the trial, but offered to appoint an attorney for the defendant. The defendant refused. The trial proceeded. This court held that the defendant's actions in continually refusing appointed counsel and failing to retain private counsel amounted to a waiver of his right to counsel. **Johnson**, 449 So.2d at 549–50.

According to the record herein, the defendant appeared for arraignment on December 14, 2009 in proper person, and was advised of his right to counsel and

appointed counsel if indigent. The defendant advised the court that he would retain counsel to represent him. He declined the right to counsel for arraignment purposes only. The defendant was formally arraigned and pled not guilty. The case was assigned and the defendant was given notice of the date and was to contact his attorney. After the initial arraignment, on January 6, 2010, the defendant appeared in proper person for a status conference and named J. C. Alexander as his counsel, and a joint motion to continue was granted. The record further reflects that the defendant was rearraigned on January 28, 2010 in the presence of his counsel, Mr. Alexander, and again pled not guilty. The minutes reflect several additional status conferences, wherein the defendant either appeared with Mr. Alexander or in proper person, that were continued by the defendant or by joint motion.

Not only did the defendant waive the right to counsel at the initial arraignment, he was subsequently rearraigned in the presence of counsel. Moreover, assuming arguendo that the defendant's Sixth Amendment right to counsel was somehow violated by Mr. Alexander's occasional absence at the time the trial court granted continuances, the defendant has not pointed to what adverse effects or prejudice he suffered, which showing must be made for him to be entitled to relief. **State v. Givens**, 99-3518 (La. 1/17/01), 776 So.2d 443, 452. The third assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In the third assignment of error, the defendant challenges the trial court judge's recusal of herself without notice to the parties. The defendant argues that Judge Trudy M. White should not have recused herself without a hearing on the matter. The defendant argues that this matter warrants a new trial.

Louisiana Code Crim. P. art. 671(A) provides as follows:

In a criminal case a judge of any court, trial or appellate, shall be

recused when he:

(1) Is biased, prejudiced, or personally interested in the cause to such an extent that he would be unable to conduct a fair and impartial trial;

(2) Is the spouse of the accused, of the party injured, of an attorney employed in the cause, or of the district attorney; or is related to the accused or the party injured, or to the spouse of the accused or party injured, within the fourth degree; or is related to an attorney employed in the cause or to the district attorney, or to the spouse of either, within the second degree;

(3) Has been employed or consulted as an attorney in the cause, or has been associated with an attorney during the latter's employment in the cause;

(4) Is a witness in the cause;

(5) Has performed a judicial act in the case in another court; or

(6) Would be unable, for any other reason, to conduct a fair and impartial trial.

A judge may recuse himself, whether a motion for his recusation has been filed by a party or not, in any case in which a ground for recusation exists. La. C.Cr.P. art. 672. Further, a judge may recuse himself sua sponte. **State v. Franks**, 45,818 (La. App. 2nd Cir. 11/3/10), 55 So.3d 34, 36, writ denied, 2011-0107 (La. 11/18/11), 75 So.3d 451.

In this case, Judge White indicated that her recusal was based on the grounds that her impartiality might be reasonably questioned based on the fact that the defendant was an unpaid volunteer with her previous campaign, citing Code of Judicial Conduct, Canon 3(C). In accordance with Canon 3(C), a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned and shall disqualify himself or herself in a proceeding in which disqualification is required by law or applicable Supreme Court rule. In accordance with the above, we find no error in the recusal in this case. The third assignment of error lacks merit.

ASSIGNMENTS OF ERROR NUMBERS FOUR AND FIVE

In the fourth assignment of error, the defendant notes that the victim denied making sexual comments to the defendant although several witnesses testified otherwise. The defendant further notes that he was not allowed to question the victim as to what she told the defendant or to proffer the statements when the State's hearsay objection was sustained. Similarly, in assignment of error number five, the defendant contends that the trial court judge erred in not allowing him to proffer the testimony of other witnesses after he attempted to elicit testimony to impeach the victim.

Louisiana Code of Evidence article 103(A) provides, in pertinent part:

> **A. Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
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> * * *
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> **(2) Ruling excluding evidence.** When the ruling is one excluding evidence, the substance of the evidence was made known to the court by counsel.

The courts have interpreted this to mean that when evidence has been excluded by the trial court, a defendant has a legal right to make an offer of proof outside the presence of the jury of what the attorney expected to prove. See **State v. Massey**, 2011–358 (La. App. 5th Cir. 3/27/12), 97 So.3d 13, 28, writ denied, 2012–0993 (La. 9/21/12), 98 So.3d 332. The purpose of a proffer is to preserve evidence excluded by the trial court so that the evidence is available for appellate review. **McLean v. Hunter**, 495 So.2d 1298, 1305 (La. 1986).

Herein, the defendant argues that the court erred in not allowing him to proffer impeachment testimony regarding the victim's denial that she made sexual comments to the defendant. Nonetheless, several witnesses, including Anthony Burns, Mark Darensbourg, the defendant's son Desamas Moore, Andre Hamilton, and Quintin Thomas, testified that the victim made sexual advances toward the

defendant. Thus, the defendant has failed to show that his substantial rights were affected, and any error as to the trial court's failure to grant the defendant's motion to proffer additional testimony was harmless beyond a reasonable doubt. See La. C.Cr.P. art. 921 & **State v. Adams**, 550 So.2d 595, 599 (La. 1989) (Dennis, J., concurring). The fourth and fifth assignments of error lack merit.

ASSIGNMENTS OF ERROR NUMBERS SIX AND SEVEN

In the sixth assignment of error, the defendant contends that the trial judge denied him the right to present a part of his defense to show that the police did not follow proper police procedure. The defendant notes that Detective Fairbanks only wanted to view the surveillance footage for the approximate time of the rape and wanted Darensbourg to speed up the tape, although, according to Darensbourg doing so could compromise the integrity of the recording. The trial court refused to allow expert testimony on proper police procedure. In assignment of error number seven, the defendant contends that the trial judge erred in refusing to allow Dr. Simon to testify about the effects of alcohol and about a typical reaction to an alleged rape.

Louisiana Code of Evidence article 702 sets forth the general rule governing the admissibility of expert testimony, and states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Louisiana Code of Evidence article 403 provides:

> 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.

Testimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the

trier of fact. However, in a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused. La. Code Evid. art. 704.

The trial judge is vested with broad discretion in ruling on the scope of expert testimony. **State v. Casey**, 1999-0023 (La. 1/26/00) 775 So.2d 1022, 1038, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000). Herein, the defendant attempted to have William Picard qualified as an expert in "subjective and objective investigations." Picard acknowledged that he had never been qualified in that area before. The trial court determined that Picard was not any more qualified than the average person to make such an assessment. We find no abuse of discretion in the trial court's ruling. The defendant has failed to show how Picard could assist the trial court in understanding any matter that it would otherwise be unable to understand or how the value of Picard's testimony would not have been outweighed by prejudice. As to Dr. Simon, **again** we find no abuse of discretion. The trial court properly granted the State's objection when defense counsel attempted to question him regarding the ultimate issue as to whether the victim had the ability to make a decision as to whether she wanted to have sexual intercourse despite her intoxication. Further, the trial court allowed defense counsel to ask Dr. Simon general questions regarding the victim's level of impairment and how it could affect someone, including an individual's ability to make decisions like whether or not to have sexual intercourse. Assignments of error numbers six and seven lack merit.

ASSIGNMENTS OF ERROR NUMBERS NINE AND TEN

In the ninth assignment of error, the defendant contends that the trial judge failed to properly consider the mitigating factors in this case. In the tenth assignment of error, the defendant contends that the trial court erred in imposing the maximum sentence. In that regard, the defendant contends that the record does not support the belief that he is the worst of offenders.

Although the defendant notes that the record does not include the transcript of the sentencing, this court had the record supplemented with the transcript. In imposing sentence, the trial court considered the defendant's lengthy criminal record dating back to 1988. The trial court noted that while the instant case is the defendant's first felony conviction, he had several arrests for sexual charges. The trial court also considered the facts of the case. Nonetheless, our review of the record revealed that it does not contain a motion to reconsider sentence. Moreover, while the defendant orally objected to the sentence, there were no grounds for the objection.

Louisiana Code of Criminal Procedure article 881.1 states, in pertinent part:

> A. (1) In felony cases, within thirty days following the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence.
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> B. The motion shall be oral at the time of sentence or shall be in writing thereafter and shall set forth the specific grounds on which the motion is based.
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> * * *
>
> E. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.

Under La. C.Cr.P. art. 881.1(E), the failure to file or make a motion to reconsider sentence precludes a defendant from raising any objection to the sentence on appeal, including a claim of excessiveness. A general objection to a sentence preserves nothing for appellate review. See La. C.Cr.P. art. 881.1(E); **State v. Caldwell**, 620 So.2d 859 (La. 1993); **State v. Mims**, 619 So.2d 1059 (La. 1993) (*per curiam*); **State v. Bickham**, 98-1839 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 891. Thus, the defendant is barred procedurally from now having

assignments of error numbers nine and ten reviewed on appeal. See **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141 (*en banc per curiam*). See also **State v. Myles**, 616 So.2d 754, 758-759 (La. App. 1st Cir.), writ denied, 629 So.2d 369 (La. 1993).

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.