NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 KA 0456

STATE OF LOUISIANA

VERSUS

ANTHONY SMITH

Judgment Rendered: DEC 23 2014

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On appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 08-12-0782, Section IV

Honorable Bonnie Jackson, Judge Presiding

* * * * * *

Hillar C. Moore, III
District Attorney
Stacy Wright
Assistant District Attorney
Baton Rouge, LA

Counsel for
Appellee
State of Louisiana

Frederick Kroenke
Louisiana Appellate Project
Baton Rouge, LA

Counsel for
Defendant/Appellant
Anthony Smith

* * * * * *

BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ

GUIDRY, J.

The defendant, Anthony Carl Smith, was charged by bill of information with forcible rape, a violation of La. R.S. 14:42.1 (count 1), and second degree kidnapping, a violation of La. R.S. 14:44.1 (count 2). He pled not guilty and, following a jury trial, he was found guilty as charged on both counts. On count 1, he was sentenced to thirty years at hard labor without the benefit of probation, parole, or suspension of sentence. On count 2, he was sentenced to five years at hard labor. The district court ordered both sentences to run concurrently. He now appeals, alleging two assignments of error. For the following reasons, we affirm his convictions and sentences.

FACTS

On July 11, 2008, around 2:00 a.m., Baton Rouge Police Officer Terrell Brown was dispatched to North 23rd Street in connection with a sexual assault complaint from the victim, T.H.[1] Once informed that the assault occurred on Convention Street, Officer Brown went to that location, secured the scene, and contacted Detective Trina Dorsey. Detective Dorsey spoke to the victim. After speaking with the victim, Detective Dorsey directed her to go to Woman's Hospital for a rape examination. The victim was assessed by Dr. Jeffery Breaux. Although the victim had no apparent injuries or markings, Dr. Breaux observed that she was visibly upset and crying. The doctor also noted that the victim had consensual intercourse on July 9, 2008, and that at the time of the assault, she was menstruating.

The victim testified that she was walking home from her friend's house, from Laurel to North 23rd Street, after dark, when someone that she "knew from the streets" took her phone. She crossed Florida Boulevard and approached

[1] The victim herein is referenced only by her initials. See La. R.S. 46:1844W.

Convention Street in an attempt to find this person. She recognized a group of people standing on Convention Street who helped her locate her phone. She was standing alone for a moment when a man she knew as Tony, and later identified as the defendant, approached her. He put his arm around her neck and told her not to worry about her phone. She told the defendant that she needed to go home, but he insisted that she go with him and continued to pull her down the street. He told her that he would get her a new phone and lured her behind a fence. The defendant then forced her inside of a house and raped her while holding her down by her neck and pushing down on her chest. The victim testified that she was menstruating at the time, and the defendant made her remove her tampon. On cross examination, she indicated that the defendant removed her tampon. According to the victim, when the defendant turned his back, she got up, ran home, and called the police.

The investigation was suspended in 2008, because the victim was unable to identify any witnesses or the suspect. In 2012, Detective Christopher McDowell was assigned the victim's case, while working on cold cases. He reviewed the case and determined that the rape kit had a hold on it, but was still in evidence. According to the crime lab, the evidence may have not been processed because there was no reference sample from the consensual partner that the victim had intercourse with within seventy-two hours of the rape. Detective McDowell brought the evidence to the crime lab, and the lab provided a name of a possible suspect. The detective located the victim and presented her with a photographic lineup. Within about five seconds, the victim identified the defendant as the person who raped her. The detective then obtained a search warrant for the defendant's DNA samples.

Tammy Rash, a DNA analyst at the Louisiana State Police Crime Lab, testified at trial. She performed DNA analysis on various items including the victim's underwear, a swab from the victim's breast, fingernail scrapings from the victim, and the non-stained portion of the string of the used tampon located on the scene. The victim's underwear yielded a DNA mixture of at least two individuals. The victim could not be excluded as the major contributor, and the defendant could not be excluded as the minor contributor. Rash testified that in the black population, the deduced DNA profile was one-hundred and thirty-nine thousand times more likely to be observed if originated from a mixture of DNA of the victim and the defendant than the victim and an unrelated random individual.

The results from the breast swab taken from the victim indicated a mixture of DNA from two individuals. The victim could not be excluded as the minor contributor, and the defendant could not be excluded as the major contributor. Rash testified that assuming there was one contributor, the probability of finding the same deduced DNA profile if the DNA came from an unrelated random person other than the defendant in the black population would be one in thirty-three-point-nine sextillion.

Analysis of the scraping taken from underneath the victim's fingernail revealed a mixture of DNA from two individuals. The victim could not be excluded as the major contributor, and the defendant could not be excluded as the minor contributor. Rash testified that in the black population, the deduced DNA profile was thirty-seven-point-seven times more likely to be observed if it originated from a mixture of DNA from the victim and the defendant than an unrelated random individual.

There was a mixture of DNA from two individuals on the non-stained portion of the used tampon string. The victim could not be excluded as a major

contributor. The DNA of the minor contributor was present at such a low concentration that a valid profile could not be obtained. However, Rash testified that a third party's DNA was present on the tampon string that was not that of the victim or the defendant. She indicated that it was possible that genetic material could still be in the victim's vagina from the consensual intercourse that she had days prior to the rape, which could account for the alleles from the third party on the tampon string.

SUFFICIENCY

In cases where a defendant has raises issues on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should preliminarily determine the sufficiency of the evidence before discussing the other issues raised on appeal. When the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must review the assignments of error to determine whether the accused is entitled to a new trial. State v. Hearold, 603 So. 2d 731, 734 (La. 1992). Accordingly, we will first address the defendant's second assignment of error, which challenges the sufficiency of the State's evidence. Specifically, the defendant argues that the DNA evidence proved that he could not be the person who committed the crimes and was insufficient to prove the elements of forcible rape and second degree kidnapping.

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, after 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. C. Cr. P. art. 821. 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. When analyzing circumstantial evidence, La. R.S. 15:438 provides that, in order to convict, the fact-finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 01-2585, p. 5 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144. Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the fact-finder who weighs the respective credibility of the witnesses, and this court will generally not second-guess those determinations. See State v. Hughes, 05-0992, p. 6 (La. 11/29/06), 943 So. 2d 1047, 1051. The testimony of the victim alone is sufficient to prove the elements of the offense. State v. Hampton, 97-2096, p. 3 (La. App. 1st Cir. 6/29/98), 716 So. 2d 417, 418.

As pertinent here, rape "is the act of . . . vaginal sexual intercourse with a . . . female person committed without the person's lawful consent." La. R.S. 14:41A. "Emission is not necessary, and any sexual penetration, when the rape involves vaginal . . . intercourse, however slight, is sufficient to complete the crime." La. R.S. 14:41B. "Forcible rape is rape committed when the . . . vaginal sexual intercourse is deemed to be without the lawful consent of the victim" because it is committed ... [w]hen the victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape." La. R.S. 14:42.1A(1). Second degree kidnapping is the forcible seizing and carrying of any person from

one place to another wherein the victim is physically injured or sexually abused. La. R.S. 14:44.1A(3) & B(1).

After a thorough review of the record, we are convinced that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of those reasonable hypotheses of innocence raised by the defendant at trial, all of the elements of forcible rape and second degree kidnapping and the defendant's identity as the perpetrator of those offenses against the victim. The verdicts rendered against the defendant indicate the jury rejected the defendant's claims that his DNA could have gotten on the victim's breast and underneath her fingernails by means other than sexual assault and that someone else raped the victim because another male's DNA was found on the tampon string.

Moreover, Detective McDowell testified that the victim positively identified the defendant in about five seconds from a six-person photographic line up presented to her. At trial, the victim acknowledged having positively identified the defendant in the photographic line up as the person who had raped her. Following the victim's identification of the defendant, Detective McDowell secured a warrant for the defendant's arrest and a search warrant to obtain the defendant's DNA to submit as a reference sample to verify the defendant's DNA as the same as that found on evidence in the rape kit submitted to the crime lab.

When a case involves circumstantial evidence, and the jury reasonably rejects the hypotheses of innocence presented by the defense, those hypotheses fall, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126 (La. 1987); see also State v. Mack, 13-1311, p. 6 (La. 5/7/14), 144 So. 3d 983, 989 (per curiam). No such hypothesis exists in the instant

case. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. State v. Lofton, 96-1429, p. 5 (La. App. 1st Cir. 3/27/97), 691 So. 2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So. 2d 1331. Additionally, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See State v. Ordodi, 06-0207, p. 14 (La. 11/29/06), 946 So. 2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. State v. Calloway, 07-2306, p. 1-2 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam). Accordingly, this assignment of error is without merit.

MOTION TO DISMISS JURY PANEL

The defendant argues that the district court erred in denying his motion to dismiss the jury panel for cause after it witnessed an "outburst" by the defendant during voir dire.

During voir dire, the district court asked a panel of potential jurors whether any of them had a hearing impairment or any other physical condition they needed to bring to the court's attention. The following exchange then transpired:

The defendant: I do, ma'am.

The court: Sir, have a seat. Please have a seat.

The defendant: I mean, I've - -

The court: Sir. Sir. I think you need - -

The defendant: I've been in here twenty-one days.

The court: - - to discuss this with your attorney first.

The defendant: That's what I'm about to tell you. The attorney and I have only been - -

[**Prosecutor**]: Judge - - Judge, can we maybe excuse the jurors?

The court: Wait just a minute. Ladies and - - sir, have a seat. Sir, have a seat.

[**Prosecutor**]: Judge - -

The defendant: I've only been with the attorney for twenty-one days. How you - - how you - -

The court: Sir. Sir, have a seat. Now, let me explain something to you. The courthouse is set up so that we can have you in on [sic] another floor listening to this trial from another floor. If you disrupt court I'm going to order you removed from court, taken to another floor.

The defendant: I mean, well, remove me then because y'all picking this jury anyway.

The court: All right. Let's take him out.

The defendant: You're picking the jurors. My attorney and me only had twenty-one days - -

The court: Let's take him out. Let's take him out. Let's - - let's take him out.

The defendant: - - representing me on this case.

The court: Let's take him out.

The defendant: I mean, you're doing what you want to do.

[**Defense counsel**]: Your honor, could we have a recess, please?

The court: All right. Let's take a brief recess. Have the jurors all go out in the hallway, please.

Outside of the jury's presence, the district court explained to the defendant that it would give him one more opportunity to sit in the courtroom, but that if he had another outburst, he would be removed and would listen to the proceedings from another floor in the courthouse. Once the panel of prospective jurors returned to the courtroom, the district court instructed them that if selected, they were not to

be influenced by the defendant's actions. It instructed the panel not to consider his actions as evidence against him and to decide on the basis of the evidence presented throughout the trial. The court told the panel to disregard the defendant's speaking out and to not allow that to influence how they decide the case. Voir dire examination of the prospective jurors then continued with the court and the State asking questions. The defense moved to have the jurors on the panel and the pool dismissed for cause because he felt they would be tainted by the defendant's outburst.[2]

The court denied the defendant's motion, pointing out that it had already admonished the jury to disregard the defendant's behavior. The court also stated that although the defendant did speak out, he did not display any violence, fight, physically harm, or threaten anyone in the jury's presence. After the denial of his motion, defense counsel asked the court to voir dire each individual juror. The court responded that it would not tie up hours of the trial to remedy something that the defendant brought on himself or further bring the matter to the jury's attention.

"A general venire, grand jury venire, or petit jury venire shall not be set aside for any reason unless fraud has been practiced, some great wrong committed that would work irreparable injury to the defendant, or unless persons were systematically excluded from the venires solely upon the basis of race." La. C. Cr.. P. art. 419A. The defendant bears the burden of proving the grounds for setting aside the venire. State v. Wessinger, 98-1234, p. 5 (La. 5/28/99), 736 So. 2d 162, 171, cert. denied, 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999) (statutorily superceded in part by La. C. Cr. P. art. 905.2A regarding who may give

[2] Additionally, defense counsel argued that because one of the charges against the defendant was forcible rape and the judge was female, the jury may have preconceived notions regarding how the defendant feels toward women.

victim impact testimony); State v. Lee, 559 So. 2d 1310, 1312-13 (La. 1990), cert. denied, 499 U.S. 954, 111 S.Ct. 1431, 113 L.Ed.2d 482 (1991).

A district court is vested with broad discretion in ruling on challenges for cause, and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. State v. Lucky, 96-1687, p. 6 (La. 4/13/99), 755 So. 2d 845, 850, cert. denied, 529 U.S. 1023, 120 S.Ct. 1429, 146 L.Ed.2d 319 (2000). Thus, only where it appears that the judge's exercise of that discretion has been arbitrary or unreasonable, resulting in prejudice to the accused, will the ruling of the district court be reversed. See State v. Lee, 93-2810, p. 9 (La. 5/23/94), 637 So. 2d 102, 108.

In our law, there is no provision that either prohibits or requires the selection of prospective jurors for an individual voir dire. State v. Comeaux, 514 So. 2d 84, 88 (La. 1987). Consequently the manner in which the veniremen are called and the scope of the examination are left to the court's discretion. La. C. Cr. P. art. 784; Comeaux, 514 So. 2d at 88. In its discretion, a district court permits individual voir dire when a defendant demonstrates the existence of special circumstances. Absent special circumstances, however, it is not error for the district court to refuse requests for individual voir dire, and the defendant bears the burden of showing that the district court abused its discretion in refusing to sequester the venire at voir dire. Comeaux, 514 So. 2d at 88.

The defendant's outburst occurred before the start of questioning of the second panel of prospective jurors, and therefore the entire venire remained for counsel to explore any source of prejudice the fourteen prospective jurors may have had. The defendant made no showing that the entire panel was tainted by his conduct. The district court's admonition cured any potential prejudice, and of the prospective jurors exposed to the defendant's alleged outburst, only three were

selected for the jury. Moreover, the defendant was ultimately responsible for his actions, and he should not be allowed to benefit from his intentional disruption. See State v. Calhoun, 00-614, p. 8 (La. App. 3d Cir. 11/2/00), 776 So. 2d 1188, 1194, writ denied, 00-3309 (La. 10/26/01), 799 So. 2d 1151. Accordingly, we find no error in the district court's refusal to dismiss the entire panel or the district court's denial of individual voir dire.

This assignment of error is without merit.

SENTENCING ERROR

Under La. C. Cr. P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. See State v. Price, 05-2514, p. 18 (La. App. 1st Cir. 12/28/06), 952 So. 2d 112, 123 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So. 2d 1277. After a careful review of the record, we have found a sentencing error.

The defendant was sentenced to five years at hard labor on count 2. Louisiana Revised Statutes section 14:44.1 provides that at least two years of the sentence imposed shall be served without benefit of parole, probation, or suspension of sentence. The district court failed to specify how many years of the defendant's five-year sentence were to be served without the benefit of probation.[3] Thus, the defendant's sentence is illegally lenient. However, because the sentence is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See Price, 05-2514 at p. 22, 952 So. 2d at 124-25.

CONVICTIONS AND SENTENCES AFFIRMED.

[3] The minutes also reflect that the district court failed to specify how many years of the defendant's five-year sentence were to be served without parole.