

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 0845

STATE OF LOUISIANA

VERSUS

COSEA BELL

Judgment Rendered: DEC 23 2014

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension, State of Louisiana
Trial Court Number 23,307

Honorable Alvin Turner, Jr. Judge Presiding

Ricky L. Babin
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Counsel for Appellee,
State of Louisiana

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Cosea Bell

BEFORE: WHIPPLE, C.J., McCLENDON AND HIGGINBOTHAM, JJ.

WJW
TMT
JMC

WHIPPLE, C.J.

The defendant, Cosea Bell, was charged by bill of information with indecent behavior with a juvenile (victim under the age of thirteen), a violation of LSA-R.S. 14:81 (count 1), and sexual battery (victim under the age of thirteen), a violation of LSA-R.S. 14:43.1 (count 2). He pled not guilty. Following a jury trial, the defendant was found guilty as charged on count 1 and guilty of the responsive offense of attempted sexual battery on count 2, both by a unanimous jury. He filed a motion for new trial arguing that the prosecution should have been instituted by grand jury indictment because at the time of the offense, sexual battery was punishable by life imprisonment. See LSA-C.Cr.P. art. 382; LSA-R.S. 14:43.1 (prior to amendment by 2008 La. Acts No. 33, § 1). The district court granted the motion. Subsequently, the State entered a nolle prosequi on count 2. The defendant was then sentenced on count 1 to twenty-five years at hard labor without the benefit of probation, parole, or suspension of sentence. He now appeals, arguing that his counsel was ineffective for failing to object to the district court's comment during jury instructions. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

On November 30, 2007, at approximately 6:17 p.m., Ascension Parish Sheriff's Office Deputy Jeremy Watson was dispatched to Twin Lakes Trailer Park in reference to a suspicious vehicle. The vehicle's engine was off and its windows were steamed from the inside. Deputy Watson approached the vehicle and knocked on its window. A black male, later identified as the defendant, exited the front driver's side. The defendant's face was sweating; he spoke rapidly and appeared extremely nervous. He was thirty-four years old.¹ The victim, P.B., who

¹The defendant's date of birth is August 6, 1973.

was twelve years old, exited the rear passenger side of the vehicle. Both ends of the belt she was wearing were dangling open.² When Deputy Watson asked the defendant what he was doing with a twelve-year-old female in his car, the defendant replied that he was trying to get his car fixed. The defendant never directly answered why the victim was inside his car.

Deputy Watson spoke with P.B., who told him that the defendant knocked on her trailer and indicated that he had car trouble. She gave him a phone book or a phone to use and then sat down in his car. The defendant asked her to kiss his cheek, and she complied. She told Deputy Watson that the defendant touched her leg and felt her breasts. The victim's mother brought her to the hospital, but no marks, scratches, bruises, or signs of any sexual activity were observed.

The victim filled out a written statement on November 30, 2007, wherein she indicated that the defendant rubbed inside of her bra. She tried to remove his hand but was unable to do so. She filled out a second statement on December 1, 2007. In the second statement, the victim indicated that she and the defendant were chatting online, and he told her that he was nineteen years old. He asked where she lived and whether she was home alone. She filled out a third statement on December 2, 2007. In her third statement, she wrote that the defendant felt her breasts, made her lie down, and started kissing her neck. He unzipped his pants and took out his "private part." He tried to put his private part "in [her]." The victim indicated that when the police came, the defendant told her that he would kill her family and her if she told anyone.

Ascension Parish Sheriff's Office Detective Mike Songy recorded the victim's statement on December 3, 2007. In her recorded statement, the victim

²Pursuant to Louisiana Revised Statutes section 46:1844(W), initials will be used to protect the identity of the minor victim, whose date of birth is June 20, 1995.

indicated that she was sitting in the front passenger side of the defendant's vehicle, and he asked her to get in the backseat. Once they were in the backseat, the defendant rubbed her breasts, pulled her pants down, pushed her underwear to the side, and attempted to put his penis in her vagina. She pushed him away, and they saw headlights approaching. The defendant told her not to say anything or he would kill her and her family.

Detective Songy also spoke with the defendant on December 3, 2007. The defendant advised Detective Songy that he was in the trailer park to see his friend, "Michael." However, the defendant was unable to provide Detective Songy with Michael's address or any information on how to contact him. The defendant acknowledged that he was in the car with the victim, but denied having sex with her. He did not provide Detective Songy with an explanation as to why the victim was inside the car with him.

The victim was fifteen years old at the time of trial. She testified that she met the defendant through a party line, which she described as a phone line used to meet or talk to people. Once a caller creates a greeting, he can browse other greetings. If he likes another caller's greeting, he can send that caller a message or connect and talk one-on-one. According to the victim, she called the party line, created a greeting, and used a fake name. She talked to the defendant, who identified himself as "Corey" through the party line and eventually spoke with him on a regular phone line. She and the defendant spoke on the phone for about a week prior to November 30, 2007, and they discussed having sex. On November 30, 2007, the defendant drove from New Orleans and parked his vehicle in the driveway of the lot next to the victim's lot. The victim stood outside of the defendant's vehicle and talked to him for about five minutes before she got inside. He asked her to get in the backseat, and she agreed. He then crawled over the front

seat into the backseat with her. The defendant began to rub the victim's back, thighs, and breasts. He forced his body on top of hers and made her lie down. The defendant then unzipped his pants, unbuckled the victim's pants, pulled the victim's underwear to the side, and attempted to insert his penis in her vagina. He succeeded on his third attempt, but stopped because she pushed him and the police officer approached. The victim testified that when the police officer knocked on the window, the defendant told her not to say anything and to "be cool" or he would kill her and her family. The defendant then jumped in the front seat of the vehicle. She testified that she left her belt unbuckled "to leave a clue."

DISCUSSION **Ineffective Assistance of Counsel**

In his sole assignment of error, the defendant claims that his counsel was ineffective for failing to object to the district court's comments during his charge to the jury.³

A claim of ineffective assistance of counsel is more properly raised by an application for postconviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. State v. Carter, 96-0337 (La. App. 1st Cir. 11/8/96), 684 So. 2d 432, 438.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution. In assessing a claim of ineffectiveness, a two-pronged test is employed. The defendant must show that (1) his attorney's performance was

³The defendant does not argue that his counsel was ineffective for failing to move for a mistrial based on the district court's comments.

deficient, and (2) the deficiency prejudiced him. The error is prejudicial if it was so serious as to deprive the defendant of a fair trial, or “a trial whose result is reliable.” Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). In order to show prejudice, the defendant must demonstrate that, but for counsel’s unprofessional conduct, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; State v. Felder, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So. 2d 360, 369-70, writ denied, 2001-3027 (La. 10/25/02), 827 So. 2d 1173. Further, it is unnecessary to address the issues of both counsel’s performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. State v. Serigny, 610 So. 2d 857, 860 (La. App. 1st Cir. 1992), writ denied, 614 So. 2d 1263 (La. 1993).

Certain comments by the district court judge are prohibited by LSA-C.Cr.P. arts. 772 and 806. Article 806 provides:

The court shall not charge the jury concerning the facts of the case and shall not comment upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the testimony of any witness, or giving an opinion as to what has been proved, not proved, or refuted.

Similarly, Article 772 provides, “[t]he judge in the presence of the jury shall not comment upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the testimony of any witness, or giving an opinion as to what has been proved, not proved, or refuted.” It is well settled that a verdict will not be set aside because of improper remarks by the judge unless the reviewing court is thoroughly convinced that the jury was influenced by the remarks and that they contributed to the verdict. State v. Gallow, 338 So. 2d 920, 922 (La. 1976).

During jury instructions, after defining "lewd" and "lascivious," the district court stated:

Thus, in order to convict the defendant of indecent behavior with a juvenile, you must find, one, that the defendant committed a lewd or lascivious act upon the person of [the victim];

Two, that the touching of [the victim's] back, breasts, thighs with his hand and the touching of her vagina with his penis was a lewd or lascivious act;

And three, that [the victim] was under the age of 17 and more than two years younger than the defendant at the time of the alleged offense;

And four, that the defendant was at least 17 years of age at the time of the alleged offense;

And five, that the defendant acted with a specific intent to arouse or gratify the defendant's own sexual desires or the sexual desires of [the victim].

The defendant argues that the district court's reference to "the touching of [the victim's] back, breasts, thighs with his hand and the touching of her vagina with his penis" was a direct comment on the facts of the case and gave the jury the impression that the State had proven those facts.

We have reviewed the record and are not "thoroughly convinced" that the district court's comment influenced the jury and contributed to the verdict. The defendant was convicted based on testimonial evidence including that of the victim and the responding officer. Although the victim's story changed slightly, she explained that the version she gave at trial was the truth and that she originally did not tell the truth because of the threats made by the defendant. In addition, the district court judge instructed the jury that it "must decide the facts from the testimony and other evidence." The district court also specifically stated to the jury that "[i]f I have given you the impression that I have an opinion regarding any facts in this case, you are to disregard that impression."

Therefore, considering the entirety of the district's court's instructions and statements, even assuming that the remarks were prejudicial and, thus, defense counsel should have objected, the defendant was not prejudiced by the alleged deficient performance. He has failed to demonstrate that, but for his counsel's failure to object, the result of the proceeding would have been different. Accordingly, the defendant has failed to make the required showing of sufficient prejudice and, as such, his claim of ineffective assistance of counsel is without merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.