NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 1510

PMc
WSH
TMH

STATE OF LOUISIANA

VERSUS

GARY MONTEZ SHEPPARD

Judgment Rendered: APR 2 4 2015

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 08-12-0781

Honorable Donald R. Johnson, Judge Presiding

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

McCLENDON, J.

The defendant, Gary Montez Sheppard, was charged by grand jury indictment with aggravated rape, a violation of LSA-R.S. 14:42. The defendant pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed a motion for new trial. Following a hearing on the matter, the motion was denied. The defendant was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

In early 2012, eight-year-old I.R.[1] and her father lived with Ashley Sheppard, (the girlfriend of I.R.'s father), I.R.'s brother and sister, and Ashley's children. The defendant, Ashley's brother, occasionally slept at the house. On or about February 17, 2012, I.R. was home with all of the other children. I.R.'s father was watching all the children when Linda Sheppard, Ashley's mother, arrived. Linda said she would watch the children, so I.R.'s father left and went to a friend's house. Later the defendant arrived, and Linda left to go out, leaving the children with the defendant. According to I.R.'s testimony, she was lying in bed when the defendant lay down next to her. He got on top of I.R., pulled down his pants, and began doing "nasty stuff." I.R. stated that the defendant was "sticking his thing inside of me," and that she was screaming. She said it felt like a stick inside of her, and that it hurt. The defendant stopped when one of the boys began kicking on the door. The defendant went to the bathroom. I.R. took off her panties and tried to hide them because she was bleeding. However, it appears I.R.'s blood got on her bed and the rug. When I.R.'s father got home, he asked I.R. what the red substance was on the floor in her room. I.R. lied that it was ketchup because the defendant had threatened to kill I.R. and her parents if she told anyone. I.R.'s father testified that he saw something

[1] The victim is referred to by her initials. See LSA-R.S. 46:1844W.

red on "the little blanket thing" and that I.R. and one of the other children tried to hide it. That same night, after I.R.'s father had gone to sleep, the defendant, who was still at the house, again approached I.R. and raped her. He whipped her with a belt and put tape over her mouth. I.R. stated that the defendant did "grown up stuff" to her like getting on top of her "and sticking his thing inside of me." When asked if anything came out of "his privacy," I.R. responded, "[w]hite stuff." At this point, I.R. did not tell anyone what the defendant had done to her.

A few months later, I.R.'s father and Ashley ended their relationship, and I.R. went to live with her mother. I.R. told her mother what the defendant did. I.R.'s mother testified I.R. told her the defendant stuck "his pee-pee inside of her." I.R.'s mother called the police. Detective Christopher McDowell, with the Baton Rouge Police Department, spoke with I.R., then arranged for a forensic interview of I.R. at the Child Advocacy Center (CAC).

I.R.'s mother took I.R. to the hospital for a medical examination on May 2, 2012, shortly following I.R.'s disclosure to her. The doctor, who examined I.R. only externally because of her age, did not note any tears or trauma. The doctor did determine, however, that I.R.'s hymen was perforated, but could not say conclusively that the tear was caused from the alleged sexual offense. I.R. told the doctor that the incident had occurred some time in February at her father's house.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in denying his motion for a new trial. Specifically, the defendant contends that pursuant to LSA-C.Cr.P. art. 851B(1), the guilty verdict was contrary to the law and evidence.

The defendant asserts in brief that I.R. was inconsistent in her testimony regarding the blood stain on her bed. She referred to the blood as ketchup and, as noted by the defendant, the location of the blood was not entirely clear from

I.R.'s testimony at trial and her CAC interview with Detective McDowell. I.R.'s father testified at trial about there being a red substance on the blanket, while I.R. testified about the red substance being on the floor.[2] At the CAC interview, I.R. stated her father had asked her what was on the sheets. Thus, according to the defendant, pursuant to the standard set forth in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), since there was internal contradiction or irreconcilable conflict with the physical evidence, the testimony of a single witness is insufficient to support a factual conclusion. The defendant continues that the State's failure to produce "a single shred of empirically verifiable evidence in support of the victim's bald allegations" lead to the conclusion that the verdict was contrary to the law. The defendant also suggests that the State did not establish the precise date of the alleged rape and that such a "movable date is far too convenient a device for the State to have at its unbridled disposal."

This assignment of error by the defendant addresses the sufficiency of the evidence. Sufficiency is properly raised by a motion for postverdict judgment of acquittal, not by a motion for new trial. Under La. Code Crim. P. art. 851, the trial court can consider only the weight of the evidence, not the sufficiency. See **State v. Williams**, 458 So.2d 1315, 1324 (La.App. 1 Cir. 1984), writ denied, 463 So.2d 1317 (La. 1985). Louisiana Code of Criminal Procedure article 851B(1) provides that the court, on motion of the defendant, shall grant a new trial whenever the verdict is contrary to the law and the evidence. Louisiana Code of Criminal Procedure article 858 provides that neither the appellate nor supervisory jurisdiction of the supreme court may be invoked to review the granting or the refusal to grant a new trial, except for error of law. The trial judge can grant a new trial only if dissatisfied with the weight of the evidence, and in so determining, the trial judge makes a factual review as a thirteenth juror rather than under the **Jackson** standard. **State v. Walder**, 504 So.2d

[2] At the time I.R.'s father first discovered the substance, he believed it to be ketchup because that is what I.R. had told him.

991, 995 (La.App. 1 Cir.), writ denied, 506 So.2d 1223 (La. 1987). See **State v. Morris**, 99-3075 (La.App. 1 Cir. 11/3/00), 770 So.2d 908, 927, writ denied, 00-3293 (La. 10/12/01), 799 So.2d 496, cert. denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002).

In denying the motion for new trial, the trial court stated:

> An allegation of aggravated rape, very serious, especially when the victim is a child. Child makes an allegation of being raped bothers everybody. It's almost an allegation, if made, can on the surface of an allegation alone be sufficient to trouble the conscience of all of us. And when made, in and of itself, to be on the receiving end of such an allegation is troublesome. Just the [very] nature of it. Just the very statement that is asserted against someone is hard to live down. Imagine if someone, a child, was to make an allegation and say that about me. How would you be able to defend it if you had no alibi or you can't prove where you [were]? So most of us look for corroboration of this event; scientific or medical or both. It's a high intensity fact case. Especially when there's lack of incident time issues involved. In this case, did have a time issue from the date of the alleged event to the day of the discovery of the day of report. Now, the law says, one witness['s] testimony, if believed beyond a reasonable doubt, is sufficient evidence to warrant a conviction. And that's the standard. Doesn't take two witnesses. Doesn't take three. Our scriptures tell us to be very leary of any case involving one witness -- those of us who read the good book. Read in there what it says. Troublesome issues involving one witness cases.
>
> Nevertheless, the promise of the jury will not be upset by the Court. So with that decision, I deny the motion -- statement, I deny the motion for new trial.

The denial of a motion for new trial based upon LSA-C.Cr.P. art. 851B(1) is not subject to review on appeal. See **State v. Snyder**, 98-1078 (La. 4/14/99), 750 So.2d 832, 859 n.21; **State v. Skelton**, 340 So.2d 256, 259 (La. 1976) ("[W]e have uniformly held that a bill of exceptions reserved to the refusal of the trial judge to grant a motion for a new trial based on Article 851(1) [now Article 851B(1)], relative to sufficiency of the evidence presents nothing for our review."); **State v. Bartley**, 329 So.2d 431, 433 (La. 1976) ("It is well established in Louisiana that an assignment of error reserved to the denial of a motion for a new trial alleging that the verdict is contrary to the law and the evidence presents nothing for appellate review.") See also **State v. Giles**, 04-359 (La.App. 3 Cir. 10/6/04), 884 So.2d 1233, 1248, writ denied, 04-2756 (La. 3/11/05), 896 So.2d 62.

Moreover, even under the proper sufficiency of evidence standard pursuant to LSA-C.Cr.P. art. 821, the defendant's claim is baseless. I.R. testified that the defendant penetrated her with his penis, and that she bled. She further stated she lied to her father about the blood because such a disclosure would lead to the truth and, according to I.R., the defendant told her that if she told anyone what he had done to her, he would kill her, her mother, and her father. The jury heard the testimony about the blood and despite any alleged inconsistent statements regarding the location of the blood, the jury chose to believe I.R. We note that it is not at all clear that the statements regarding the location of the blood were inconsistent because the jury could have reasonably concluded that if I.R. had been bleeding after being raped, and then got off the bed and stood up, there could have been blood on both her bed and the floor. Further, whether the blood was on a "sheet" or a "blanket" seems not to suggest an internal contradiction, as argued by the defendant, but rather the speaker's vernacular regarding certain items.

In any event, the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. 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. 1 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. 1 Cir. 1985).

When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1

Cir.), writ denied, 514 So.2d 126 (La. 1987). The jury's verdict reflected the reasonable conclusion that based on the testimony of I.R., the defendant raped her. 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. 1 Cir. 1987), writ denied, 519 So.2d 113 (La. 1988).

After a thorough review of the record, we are convinced that 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 the hypotheses of innocence suggested by the defense at trial, that the defendant was guilty of the aggravated rape of I.R. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

Accordingly, because the trial court did not abuse its discretion in denying the motion for new trial, this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that the trial court erred in failing to give due regard to the fact that when I.R. was asked to identify the defendant at trial, she had significant trouble doing so.

When asked to identify the defendant in court, I.R. said the defendant was wearing a white "T-shirt." According to the defendant, the State then led I.R. by asking, "A white shirt?" I.R. then responded, "A white shirt with a blue tie." As noted in the first assignment of error, this issue goes to credibility, which falls within the purview of the factfinder. The jury heard I.R.'s testimony, including her identifying the defendant as the person who raped her, and chose to believe her. Moreover, the defendant did not file a pretrial motion to suppress identification; and upon I.R.'s identifying the defendant in court, the defense counsel made no objection to the defendant being identified or the manner in which it was made. A defendant who fails to file a motion to suppress an identification, and who fails to object at trial to the admission of the identification evidence or testimony, waives the right to assert the error on appeal. LSA-

C.Cr.P. arts. 703 and 841; **State v. Brooks**, 633 So.2d 659, 663 (La.App. 1 Cir. 1993), writ denied, 94-0308 (La. 5/20/94), 637 So.2d 475.

Accordingly, this assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.