NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 KA 0150

STATE OF LOUISIANA

VERSUS

THAIRIE XAVIER ROBINSON

Judgment Rendered: SEP 21 2018

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On Appeal from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 06-16-1072

Honorable Richard D. Anderson, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

PENZATO, J.

The defendant, Thairie Xavier Robinson, was charged by grand jury indictment with first degree rape, a violation of La. R.S. 14:42. He pled not guilty and, following a jury trial, was found guilty as charged by a unanimous jury. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. He now appeals, designating one assignment of error. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

On May 5, 2016, the victim, J.O.[1], and her fiancé, R.T, attended a neighborhood Cinco de Mayo party. J.O. had a headache, and she was ready to leave the party at approximately 9:30 p.m., but R.T. wanted to stay a little while longer. J.O. and a neighbor who was also ready to leave the party walked home together.

After telling her neighbor goodbye, J.O. unlocked her front door and entered her home. She decided to leave the door unlocked, because R.T. was still at the party, and she wanted to go to bed. She walked to her bedroom, turned on the light, and then heard "the [front] doorknob rattle like someone was trying to figure out if it was locked or unlocked." J.O. heard the front door open and proceeded back down the hall to find the defendant standing in her house. J.O. instructed the defendant to leave, but instead he "turned off the light . . . put his finger to his mouth and told [J.O.] to be quiet, to shut up." J.O. did not observe the defendant in possession of any weapons, but he said either, "I'm going to love you," or "I'm going to f--- you" (it was not clear to her), and grabbed her from behind and wrestled her to the ground. As the defendant wrestled J.O. to the ground, she hit her head on a wall. J.O. screamed for help, but the defendant put his hand over her

[1] We reference the victim only by her initials. See La. R.S. 46:1844(W).

mouth, his arm around her neck, and began to squeeze her neck. J.O. pulled at the defendant's arms and tried to kick her feet, but the defendant's grasp became tighter. J.O. testified that the defendant "squeezed so hard that I couldn't breathe at all. I couldn't make a noise. I couldn't breathe. I just remember kicking – trying to kick my feet as he was choking me. And he – I – it was at that time where I was, like, I'm going [to] die. My husband-to-be is going to come home and see me on the floor dead."

The defendant momentarily let up and told J.O., "[p]romise to shut the f--- up." J.O. agreed and said "[s]wear to God that you won't kill me." After the defendant told her he would not kill her, he took off his pants and ordered J.O. to do the same. His arms still wrapped around J.O., the defendant bent her over, pushing her on her hands and knees. Because of the position, the defendant could not penetrate J.O., so he flipped her over, made her take off her jacket and shirt, and forced her on her back. J.O. lay on the floor while the defendant "put his mouth on [her] genitals" and then penetrated her vagina with his penis. The defendant continued his vaginal rape of J.O., ultimately ejaculating inside her. Apart from the rape, J.O. sustained many bruises and scratches on her neck and back due to the defendant's actions.

After raping J.O., the defendant had her get bleach from the kitchen. The defendant poured the bleach onto his hands and rubbed it on his mouth. He told J.O. that "he was going to pour the bleach on [J.O.] and then he was going to watch [her] shower." J.O. told the defendant her fiancé would be back soon, so he poured bleach on J.O.'s hands, instructing her to "wipe it all over." Still naked, J.O. superficially wiped bleach on herself. The defendant then dumped bleach all over J.O.'s clothes that were on the floor. He took J.O.'s iPad, money from her wallet, and her Florida driver's license. He told J.O. "he was going to come back and hit [her] up and he wanted [her] name, he wanted [her] phone number." The

defendant then left J.O.'s residence. J.O. locked herself in the bathroom, called R.T., told him about the rape, and then called 911. The police arrived, collected evidence, and took J.O. to Woman's Hospital for an examination.

At Woman's Hospital, J.O. was examined by Dr. Jeffery Breaux. Dr. Breaux testified that the scratches and bruises J.O. sustained on her neck and back were consistent with the reported rape and being grabbed in a "chokehold." As part of the examination, Dr. Breaux collected samples for a rape kit, which was then turned over to Detective Karole Muller of the Baton Rouge Police Department ("BRPD").

Two days after the rape, Richard Frederick, an EMS paramedic with the City of Baton Rouge, was dispatched to the Salvation Army in response to a drug overdose. No one at the Salvation Army was able to identify the subject of the overdose, so the subject's jeans and shirt were searched for identification. J.O.'s Florida driver's license was recovered from the subject's pocket. At trial, Mr. Frederick positively identified the subject of the overdose that day as the defendant. Corporal Chad Montgomery of the BRPD was also dispatched to the reported drug overdose and, upon his arrival, Mr. Frederick gave Corporal Montgomery J.O.'s Florida driver's license. Corporal Montgomery searched the department's computer system and discovered that the individual identified on the driver's license was the victim of a crime two days earlier. Eventually, Corporal Montgomery turned the defendant over to BRPD detectives at police headquarters. At police headquarters, Officer Matthew Kelly photographed the defendant and collected DNA samples.

With the defendant in custody, BRPD Detective Daniel Ervin prepared and presented a photographic lineup to J.O., who immediately recognized and identified the defendant as the person who raped her.

DNA analyst Manda Orgeron examined the rape kit collected from J.O. and the DNA samples collected from the defendant, and ultimately concluded that the defendant's DNA was found on both J.O.'s genitalia and the clothing she wore to the hospital.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, the defendant argues that the State failed to present sufficient evidence that the defendant committed first degree rape, rather than second degree rape. The defendant does not contest his identity as the perpetrator of the offense, but avers that his conviction should be set aside, and a conviction for second degree rape entered in its place, and that he should be resentenced. We initially note that the proper procedural vehicle for raising the sufficiency of the evidence is by first filing a motion for post-verdict judgment of acquittal before the trial court. La. C.Cr.P. art. 821. Nevertheless, despite the defendant's failure to file such a motion, we will consider his claim of insufficiency of the evidence which has been briefed pursuant to a formal assignment of error. *State v. Williams*, 613 So.2d 252, 255 (La. App. 1 Cir. 1992).

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See La. C.Cr.P. art. 821(B); *State v. Ordodi*, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; *State v. Mussall*, 523 So.2d 1305, 1308-09 (La. 1988). The *Jackson* standard of review, incorporated in La. C.Cr.P. art. 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 the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. *State v. Patorno*, 2001-2585 (La. App. 1 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.

Further, La. R.S. 14:42 provides, in pertinent part:

> A. First degree rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> (1) When the victim resists the act to the utmost, but whose resistance is overcome by force.
>
> (2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.

Additionally, La. R.S. 14:42.1 states as follows, in pertinent part:

> A. Second degree rape is rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> (1) When 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.

In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. *State v. Higgins*, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about

factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a fact finder'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. *State v. Mitchell*, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence that 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).

In his brief, the defendant argues this case is similar to *State v. Parish*, 405 So.2d 1080 (La. 1981), where the defendant charged with attempted aggravated rape (prior to Acts 2015, No. 256, § 1, which redesignated aggravated rape as first degree rape) was convicted of attempted forcible rape (prior to Acts 2015, No. 256, § 1, which redesignated forcible rape as second degree rape). *Parish* involved a man entering a woman's apartment on the pretense of getting change for the laundry and then seizing her, threatening her, and dragging her toward the bedroom. However, in *Parish*, the defendant changed his mind before reaching the bedroom and simply left the apartment. The Supreme Court considered the fact that the woman had not been fondled or subjected to any sexual indignity and concluded that attempted forcible rape rather than attempted aggravated rape was the proper conviction. It was noted that the only distinction between the two crimes is the "degree of force employed and the extent to which the victim resists." *Id.* at 1087; see also *State v. Ford*, 2003-1321 (La. App. 4 Cir. 2/18/04), 867 So.2d 835, 842, writ denied, 2004-1087 (La. 10/8/04), 883 So.2d 1026.

Parish is inapplicable and factually distinguishable. Herein, the defendant entered J.O.'s home, grabbed her, covered her mouth so she could not cry for help, and squeezed her neck to the point where she could not breathe and believed she would die. Though she tried to escape by kicking the defendant, she was unable to do so. During the attack, J.O. hit her head on a wall, and the defendant inflicted bruises and scratches to her body. The defendant forced J.O. onto her back, removed his and her pants, placed his mouth on her genitals, and repeatedly penetrated her vagina with his penis.

A greater degree of force is necessary to justify the more serious punishment imposed for first degree rape. The degree of force employed and the determination of the grade of rape is for the jury to decide. *State v. Dixon*, 2004-1019 (La. App. 5 Cir. 3/15/05), 900 So.2d 929, 934. Here, the jury found the defendant's threats and continuous use of force sufficient to constitute first degree rape under La. R.S. 14:42(A)(1) and/or (A)(2).[2]

After reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See *Ordodi*, 946 So.2d at 662. Defendant's sole assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.

[2] In *State v. Headley*, 541 So.2d 396, 397 (La. App. 4 Cir. 1989), the appellate court noted: "The distinction between the statutes is obvious. In the case of aggravated rape the defendant's power to carry out his threats must be proved as an objective fact as perceived by a third party like the juror. In order to convict the defendant the trier of fact must be convinced that the defendant had the power to carry out his threats. In the case of forcible rape the test is subjective; did the victim reasonably believe that resistance on her part would not prevent the rape even though from the objective viewpoint of the juror the defendant might lack the power of carrying out his threats."