NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 KA 0209

STATE OF LOUISIANA

VERSUS

JERRY JON KAN

DATE OF JUDGMENT: SEP 2 1 2018

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 582253, DIVISION E, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. BURRIS, JUDGE

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Jerry Jon Kan

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Disposition: CONVICTION AND SENTENCE AFFIRMED.

Welch J. concurs without reasons

CHUTZ, J.

The defendant, Jerry Jon Kan, was charged by bill of information with third degree rape, a violation of Louisiana Revised Statutes 14:43. He entered a plea of not guilty and, following a jury trial, was found guilty as charged by unanimous verdict. He filed motions for new trial and postverdict judgment of acquittal, both of which were denied. The defendant was then sentenced to twelve years at hard labor without the benefit of parole, probation, or suspension of sentence. He filed a motion to reconsider sentence, which was denied. The defendant now appeals, alleging three assignments of error. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

On August 21, 2016, Alexis Jefferson was working as a care partner at Beau Provence Memory Care Assisted Living in Mandeville, Louisiana, where the defendant worked as a cook, and the seventy-eight-year-old victim, S.J.,[1] was a resident. That morning, Ms. Jefferson noticed the defendant walking with the victim to her room. Around lunchtime, Ms. Jefferson saw the defendant standing in front of the door to the victim's room. After serving lunch, the defendant sat across from the victim at the dining room table and ate lunch. Around two o'clock that afternoon, a birthday party was being held for another resident. While bringing cake to two residents who did not attend the party, Ms. Jefferson observed the defendant exiting the victim's room. When Ms. Jefferson walked into the victim's room to check on her, she noticed that the victim was fastening her bra. The victim's skirt was unzipped and pulled up, and she was not wearing her adult diaper, which Ms. Jefferson found inside the victim's closet. When asked if she was okay, the victim responded affirmatively and stated that she was changing her shirt. Shortly thereafter, Ms. Jefferson returned to the victim's room with her

[1] Pursuant to La. R.S. 46:1844W, the victim herein is referenced to by initials only.

manager. When they again asked the victim whether she was okay, the victim responded, "[W]hy do you keep asking me that; is he supposed to be a rapist or something?" After noticing stains on the victim's bedsheets, the manager collected the sheets as well as the adult diaper.

The Mandeville Police Department was contacted, and Detective Kevin Covert interviewed the defendant about the incident. During the defendant's recorded interview, he admitted having sexual intercourse with the victim and was subsequently placed under arrest.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant argues that the evidence presented by the State was insufficient to support his conviction of third degree rape. Specifically, the defendant argues that the State failed to prove beyond a reasonable doubt that on August 21, 2016, the victim was unable to consent due to her dementia and that he knew or should have known of the victim's incapacity.

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, 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 also La. Code Crim. P. art. 821B; **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660. 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 the fact finder must be satisfied 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 14:43A(2) defines third degree rape, in pertinent part, as "rape committed when the . . . vaginal sexual intercourse is deemed to be without the lawful consent of a victim because it is committed . . . [w]hen the victim, through unsoundness of mind, is temporarily or permanently incapable of understanding the nature of the act and the offender knew or should have known of the victim's incapacity." The defendant does not deny that he engaged in sexual intercourse with the victim. Rather, he contends that the victim consented to the intercourse and that he did not know, nor should he have known, of her incapacity.

Dr. Susan Andrews, a neuropsychologist, testified at trial. She evaluated the victim on September 15, 2016, and noted that although the victim had an IQ of 102, she had a very low memory score and a "completely low" orientation score. Specifically, according to Dr. Andrews, most individuals with the same level of education as the victim would have scored ten points on the orientation scale, while the victim scored zero. Based on her memory test results, Dr. Andrews determined that the victim was "severely impaired" for her age and education level. The doctor concluded that the victim was suffering from dementia and a mild level of depression.

Dr. Michael Becker, a neurologist, also testified at the defendant's trial. When Dr. Becker examined the victim on September 29, 2016, it was "readily apparent to [him] that she had progressed significantly down the road of dementia." In explaining why the victim gave different details of her encounter with the defendant, the doctor explained that because the victim's short-term memory is poor, she probably substituted remote past memories in place of that event.

Riva Williams, a charge care nurse at Beau Provence, testified that the victim was forgetful and would speak as though she were in the past, sometimes like she was a young girl in high school. After the incident, a hospice aide,

Brittany Muse, drove the victim to her doctor's appointment. According to Ms. Muse, during the appointment, the victim told the doctor that she had sex with a boy in the schoolyard. The victim also stated that the incident had occurred three weeks prior, when it actually had occurred only ten or eleven days prior.

The victim participated in a recorded interview at the Children's Advocacy Center. During her interview, the victim stated that she had sex with a man named Jerry while she was at Beau Provence because "he asked." She could not remember what he looked like, but explained that Jerry was also a resident at the facility. According to the victim, the incident happened outside of the facility, near some bushes. Although she was unsure how she exited the building, because the main doors could only be opened with a code, she explained that the encounter was "great" and that she consented. She was unsure how others found out, but stated that a couple of men were outside and within sight. The victim knew that the defendant was placed under arrest and in jail. She stated that the incident was "bad news for him all the way around because he was married."

The victim also testified at trial, during which she stated that she did not remember participating in an interview at the Children's Advocacy Center. After the recording of her interview was played, the victim testified that she did remember the interview. She further indicated that she was uncertain if the defendant was the person that she had sex with. The victim reiterated that she consented to the sexual encounter and that it was "great."

According to the executive director of Beau Provence, at the time the victim was a resident, there was no requirement that a resident suffer from dementia or Alzheimer's disease to live there. However, the logo of the facility specifically stated that it was "memory care assisted living." Moreover, training on the types of dementia, levels, and stages was provided to all of the employees at the facility, including the defendant. Ms. Jefferson, defendant's co-worker, was under the

impression that all of the patients at the facility were suffering from dementia or Alzheimer's disease and testified that she went to all of the training sessions with the defendant.

The defendant participated in a recorded interview at the Mandeville Police Department. He initially admitted only that he knew the victim and the two had kissed and hugged. After additional questioning, the defendant admitted that he and the victim had sexual intercourse and claimed that it was consensual. According to the defendant, he thought the victim "still had enough wit and sense about her" that she wanted a relationship with someone. However, he continued to explain that he "knew [he] was wrong" and that "you feel so bad sometimes for them because they want so desperately to have somebody in their lives." He went on to state, "It wasn't right of me, it really wasn't. I'm an ass." When the detective interviewing the defendant stated that the issue was the victim's level of awareness because she was in a facility for dementia or Alzheimer's disease patients, the defendant agreed.

At trial, the defendant argued that the victim consented to the sexual intercourse and that he did not know, nor should he have known, of her incapacity to consent to the act. After hearing testimony from the victim's doctors, testimony from the victim herself, and watching her recorded interview, the jury obviously determined that the victim was incapable of consenting to the sexual intercourse, despite her statements to the contrary. The jury also heard testimony that the defendant participated in training on the types of dementia, levels, and stages. The jury viewed the video recording of the defendant's statement during which he agreed that the victim was in the facility because of dementia or Alzheimer's and stated that his actions were not "right." The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). Unless there is internal contradiction or

irreconcilable conflict with the physical evidence, the testimony of a single witness, if believed by the fact finder, is sufficient to support a factual conclusion. **State v. Marshall**, 2004-3139 (La. 11/29/06), 943 So.2d 362, 369, cert. denied, 552 U.S. 905, 128 S.Ct. 239, 169 L.Ed.2d 179 (2007). Where 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. **Richardson**, 459 So.2d at 38. 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. 1st Cir. 9/25/98), 721 So.2d 929, 932. Considering the victim's apparent confusion as to the details of the encounter, the testimony related to her dementia and level of orientation, and the defendant's clear statement that he knew the encounter was not "right," we cannot say that the jury's determination was irrational under the facts and circumstances presented. See **Ordodi**, 946 So.2d at 662. We also note that, at the time of the offense, the defendant was not a new employee unfamiliar with the facility or its thirty-seven residents. He had been working at the memory care facility for over four months, and the victim had been a resident of the facility during that entire time.

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 trier of fact. **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). A court of appeal impinges on a fact finder's discretion beyond the extent necessary to guarantee the fundamental protection of due process of law in accepting a hypothesis of innocence that was

not unreasonably rejected by the fact finder. See **State v. Mire**, 2014-2295, p. 4 (La. 1/27/16), __So.3d __, 2016 WL 314814 (per curiam).

We have conducted a thorough review of the record. We are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of third degree rape. See **State v. Jeansonne**, 2006-263 (La. App. 3d Cir. 5/31/06), 931 So.2d 1258, 1261-62. Accordingly, we find no merit in this assignment of error.

RIGHT TO PRESENT TESTIMONY

In his second assignment of error, the defendant argues that the district court erred in denying his request to present the testimony of Dr. Ted Bloch, a geriatric psychiatrist. He specifically contends that because of the court's ruling, he was denied his right to present a defense. The defendant also argues that in denying his request to present Dr. Bloch's testimony, the district court misapplied the discovery rules set forth in La. Code Crim. P. art. 725.

A criminal defendant's right to present a defense is guaranteed by the Sixth Amendment of the United States Constitution and Article I, § 16 of the Louisiana Constitution. Evidentiary rules may not supersede the fundamental right to present a defense. See **State v. Van Winkle**, 94-0947 (La. 6/30/95), 658 So.2d 198, 202. However, constitutional guarantees do not assure the defendant the right to the admissibility of any type of evidence, only that which is deemed trustworthy and has probative value can be admitted. See **State v. Governor**, 331 So.2d 443, 449 (La. 1976). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or waste of time. La. Code Evid. art. 403. Ultimately, questions of relevancy and admissibility of

evidence are discretion calls for the district court. Such determinations regarding relevancy and admissibility should not be overturned absent a clear abuse of discretion. See **State v. Mosby**, 595 So.2d 1135, 1139 (La. 1992).

Louisiana Code of Criminal Procedure article 725 provides:

> When the court grants the relief sought by the defendant pursuant to Article 719 of this Code, it shall, upon the written motion of the state, condition its order by requiring the defendant to disclose to the state, and to permit or authorize the state, or an expert working with the state, to inspect and copy, photograph, or otherwise reproduce, and disclose to the district attorney any results of reports, or copies thereof, of physical and mental examinations and of scientific tests or experiments, made in connection with the particular case, that are in the possession, custody, control, or knowledge of the defendant, and intended for use at trial. If the witness preparing the report will be called as an expert, the report shall contain the witness's area of expertise, his qualifications, a list of materials upon which his conclusion is based, and his opinion and the reason therefor. If the expert witness has not reduced his results or reports to writing, or if the expert witness's written report does not contain the information required of an expert as provided in this Article, the defendant must produce for the state a written summary containing any information required to be produced pursuant to this Article but absent from a written report, if any, including the name of the expert witness, his qualifications, a list of materials upon which his conclusion is based, and his opinion and the reason therefor.

At a pretrial hearing held August 7, 2017, the State noted that it had not received notice from the defense that it intended to call an expert to testify as to the defendant's ability to recognize that the victim could not consent. Defense counsel stated that the doctor's name was listed on the witness list. The State responded that was the first it heard of Dr. Bloch and that defense counsel was required to provide the doctor's curriculum vitae and a copy of any results that had been reduced to writing or a summation of his testimony. The court instructed defense counsel to provide the information before the following morning. The parties then began jury selection.

On August 8, 2017, the defendant filed notice of intent to call Dr. Bloch as an expert witness "to testify at trial that the Defendant ... would not know or have reason to know of [the victim's] incapacity." According to the notice, the doctor's

opinion would be based on his review, assessment, and evaluation of the open-file discovery provided by the State.

After the jury was selected, the parties revisited the matter of the expert witness. The State argued that defense counsel's notice did not conform with La. Code Crim. P. art. 725, and despite the court's instructions to defense counsel to comply with Article 725 by the following morning, the documentation provided by the defense was inadequate. According to the State, defense counsel provided Dr. Bloch's curriculum vitae and resume as well as a letter via email stating that the doctor reviewed the discovery and would testify that the defendant would not have known or have reason to know of the victim's incapacity. The State complained that the doctor's proposed testimony related to "the ultimate issue of fact for the jury to determine" and "the only contested element in this case." The State further complained that if the doctor planned to provide additional testimony and reviewed other materials, then the notice was deficient. The defense argued the defendant was "just not knowledgeable when [the victim] was having a lucid day to be able to tell that she didn't have the capacity to consent," and in [Dr. Bloch's] opinion, "it would be unlikely that [the defendant] could determine at that time that [the victim] was suffering from an incapacity that rendered her unable to consent." The district court noted that in lieu of a report, a list of materials upon which the doctor based his opinion should have been provided. Defense counsel argued that the "list of materials" was all the discovery provided by the State. The court responded, "In other words, trial by ambush. Is that what you're saying?" It further noted that it had given defense counsel additional time to file the appropriate documentation.

The State argued that allowing the defendant to present Dr. Bloch's testimony is "more than a technicality" and that it prejudiced the State because it was not allowed to "line up [its] own expert to say these are the materials the

expert looked at, and now we want our expert to look at them and render an opinion." After hearing arguments from both parties, the court excluded the testimony that the defendant was seeking to introduce. Defense counsel objected and requested the opportunity to proffer Dr. Bloch's testimony. The court instructed defense counsel to make arrangements with the court reporter to make a proffer of the testimony.

To preserve the right to appeal a district court ruling that excludes evidence, the defendant must make the substance of the evidence known to the district court. La. Code Evid. art. 103A(2). This can be effected by a proffer, either in the form of a complete record of the testimony or a statement describing what the party expects to establish by the excluded evidence. **State v. Magee**, 2011-0574 (La. 9/28/12), 103 So.3d 285, 326, cert. denied, **Magee v. Louisiana**, 571 U.S. 830, 134 S.Ct. 56, 187 L.Ed.2d 49 (2013); **State v. Stampley**, 2012-1883, p. 5 (La. App. 1st Cir. 7/31/13), 2013 WL 3964797 (unpublished). Defense counsel failed to follow the district court's instructions concerning proffering the challenged testimony, but he did describe what he expected to establish through Dr. Bloch's testimony.

Louisiana Code of Evidence article 702 governs the admissibility of expert testimony. Under Article 702, 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. The Louisiana Supreme Court has, however, placed limitations on this codal provision in that, "[e]xpert testimony, while not limited to matters of science, art or skill, cannot invade the field of common knowledge, experience and education of men." See **State v. Young**, 2009-1177 (La. 4/5/10), 35 So.3d 1042, 1046-47 (quoting **State v. Stucke**, 419 So.2d 939, 945 (La. 1982)), cert. denied, 562 U.S.

1044, 131 S.Ct. 597, 178 L.Ed.2d 434 (2010); **State v. Cumberland**, 2013-1847, p. 11 (La. App. 1st Cir. 6/25/14), 2014 WL 3843854 (unpublished), writ denied, 2014-1583 (La. 3/6/15), 161 So.3d 13.

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. Credibility determinations are made by the trier of fact. **State v. Carter**, 2010-0614 (La. 1/24/12), 84 So.3d 499, 522-23, cert. denied, 568 U.S. 823, 133 S.Ct. 209, 184 L.Ed.2d 40 (2012).

There was no abuse of discretion in the exclusion of Dr. Bloch's testimony. Whether or not the victim, through unsoundness of mind, was temporarily or permanently incapable of understanding the nature of the vaginal sexual intercourse between herself and the defendant and whether or not the defendant knew or should have known of the victim's incapacity were ultimate issues for the jury's determination. The defendant failed to show how Dr. Bloch's testimony would have assisted the jury in understanding any matter that it would otherwise have been unable to understand or how the value of the testimony would not have been outweighed by prejudice. See **State v. Wheeler**, 416 So.2d 78, 81 (La. 1982) ("[t]he evidence is not truly expert testimony because it relates to matters well within the jury's understanding and is wholly without value to the trier of fact in reaching a decision."); **State v. Douglas**, 2014-0019, p. 13 (La. App. 1st Cir. 6/9/14), 2014 WL 3843933 (unpublished), writ denied, 2014-1358 (La. 2/13/15), 159 So.3d 461 ("[t]he trial court properly granted the State's objection when defense counsel attempted to question [the defense expert] 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."). Moreover, the

defense did, in fact, present evidence to the jury concerning the defendant's claim that he neither knew nor had reason to know of the victim's incapacity. On cross-examination of Dr. Andrews, the defense established that people are considered mentally infirm when they have an IQ under 70, but when she was evaluated on September 15, 2016, the victim had an IQ of 102. Further, on cross-examination of Dr. Becker, the defense established that as part of behavioral changes with dementia, "certain filters can break down," and the victim may have been more sexually promiscuous than she would have been when she was younger. The defense also questioned Dr. Becker concerning how "a high school educated man working at a Level 2 facility, [would] be able to know whether or not [the victim] is really bad or just a promiscuous person that wanted to live there."

This assignment of error is without merit.

EXCESSIVE SENTENCE

In his last assignment of error, the defendant argues that the sentence imposed by the district court is excessive. Specifically, he contends that in sentencing, the district court did not take into account the victim's "seeming consensual participation" as a mitigating circumstance; that the victim was not injured in any way; that the "age gap" between the defendant and the victim was "not so great as to make their relationship unrealistic;" or the defendant's military service, education, work history, and family situation. The defendant further contends that the district court "mistakenly characterized [the victim's] granddaughter's embarrassment at [the victim's] sexuality as a 'serious permanent injury to the family.'"

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered

constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The district court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the district court to consider when imposing sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the district court adequately considered the criteria. **State v. Brown**, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of Article 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with Article 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The district court judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981). On appellate review of a sentence, the relevant question is whether the district court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (per curiam).

The defendant was found guilty of third degree rape. For this conviction, the defendant was exposed to a term of imprisonment at hard labor without the benefit

of parole, probation, or suspension of sentence, for not more than twenty-five years. See La. R.S. 14:43B. The district court sentenced the defendant to twelve years at hard labor without the benefit of parole, probation, or suspension of sentence.

Prior to imposing the sentence, the district court ordered a presentence investigation. The presentence investigation report indicates that the defendant was charged with driving under the influence in 1995 and that he had no other criminal record prior to the instant offense. The probation officer who prepared the report did not provide a recommended term of imprisonment, but requested that the court consider the defendant's lack of remorse for the victim.

At the defendant's sentencing hearing, while reviewing the sentencing guidelines set forth in Article 894.1, the district court found that the defendant was in need of correctional treatment and that a lesser sentence would deprecate the seriousness of the offense. See La. Code Crim. P. art. 894.1A(2) and (3). The court also found that the defendant used his status as an employee of Beau Provence to take advantage of a person with dementia despite being trained on that condition as an employee of the facility. See La. Code Crim. P. art. 894.1B(2) and (4). The court opined that the defendant's actions caused serious permanent injury to the family of the victim and that there were no substantial grounds to excuse or justify his behavior. The court considered the fact that the defendant had no prior criminal history and stated that it weighed that fact against the very serious nature of the instant offense. In doing so, the court decided that a midrange sentence of twelve years was required. See La. Code Crim. P. art. 894.1B(9), (25) and (28).

The defendant's sentence is within the statutory parameters. Based on our review of the record, we cannot say that the sentence is grossly disproportionate to the severity of the offense or shocking to one's sense of justice. Therefore, the

sentence is not excessive and does not constitute manifest abuse of the district court's wide discretion. Accordingly, this assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.