STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 KA 1082

STATE OF LOUISIANA

VERSUS

DARYL WILLIAMS

Judgment Rendered: MAY 09 2019

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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 No. 06-14-1012

Honorable Richard Anderson, Judge Presiding

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Hillar C. Moore, III District Attorney Dylan C. Alge Assistant District Attorney Baton Rouge, Louisiana	Counsel for Appellee State of Louisiana
Lieu T. Vo Clark Mandeville, Louisiana	Counsel for Defendant/Appellant Daryl Williams
Daryl Williams Angola, Louisiana	In Proper Person

* * * * * *

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

McCLENDON, J.

Defendant, Daryl Williams, was charged by grand jury indictment with aggravated rape (victim under the age of thirteen years), a violation of LSA-R.S. 14:42 (redesignated as first degree rape) (count 1); molestation of a juvenile (victim under the age of thirteen years), a violation of LSA-R.S. 14:81.2D(1)[1] (count 2); and molestation of a juvenile (victim thirteen years of age or older), a violation of LSA-R.S. 14:81.2B(1) (count 3). Defendant entered a plea of not guilty to the charges and, following a jury trial, was found guilty as charged on all counts. For the aggravated rape conviction, defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; for the molestation of a juvenile (victim under the age of thirteen years) conviction, he was sentenced to twenty-five years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; and for the molestation of a juvenile (victim thirteen years of age or older) conviction, he was sentenced to five years imprisonment at hard labor. Defendant now appeals, designating one counseled assignment of error and two pro se assignments of error. We affirm the convictions and sentences.

FACTS

Defendant and his wife lived alone in a subdivision in Baton Rouge. Defendant had several grandchildren, including a granddaughter, P.W.[2] P.W. was close to her grandparents and spent a lot of time at the home of defendant (her paternal grandfather). She also often slept over at defendant's home. According to P.W., she saw her grandparents at least three times a week. P.W. testified that defendant began molesting her at his home when she was eleven years old, which was in 2011. According to P.W., defendant, at first, just touched her breasts, buttocks, and vagina. Over time, the touching progressed to defendant inserting his fingers in P.W.'s vagina and performing oral sex on her. The sexual abuse continued until P.W. was fourteen years old (in 2014), at which time she told her mother what defendant had been doing

[1] The indictment charged that defendant committed molestation of a juvenile (victim under thirteen years) from August 1, 2010 through March 12, 2013. In 2010, the applicable provision was LSA-R.S. 14:81.2E(1).

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

to her. P.W. indicated that some form of sexual abuse occurred every time she went to defendant's home. P.W. testified that defendant told her that if she told anyone, it could really hurt their family and he (defendant) could get in a lot of trouble.

Defendant did not testify at trial.

COUNSELED AND PRO SE ASSIGNMENT OF ERROR

In his sole counseled assignment of error and in his first pro se assignment of error, defendant argues the trial court erred in denying his motion to allow the jury to visit the alleged crime scene.

Prior to trial, defendant filed a written motion to allow the jury to visit the alleged crime scene. In this motion, defendant sought an order by the trial court to allow the empaneled jury to leave the courtroom to physically view the scene of the alleged offenses, that is, defendant's house. At the hearing on this motion (over two years before trial), defense counsel argued that these alleged offenses occurred in "close proximity within a relatively small home." According to defense counsel, the jury should be allowed to visit the scene to determine who could hear what and whether or not defendant's wife "would have heard any screaming that may have occurred and that sort of thing during the course of these events." The trial court ruled that "at this time I'm going to grant this motion."

At trial, after the State rested its case-in-chef, the trial court reversed its ruling and denied defendant's motion to allow the jury to visit the crime scene. According to the trial court, there had been no evidence of any screaming by P.W. One of defendant's attorneys insisted that "the question becomes" that *if* P.W. had screamed, whether or not it would have been heard. The trial court disagreed, explaining that the layout of the house could be described through testimony. Further, the State had a diagram of the house that the parties discussed and looked over at the hearing. In any event, the trial court reiterated that "last time," defense counsel had referred to screaming and whether or not it could be heard, yet there was no evidence of any screaming. Defense counsel replied: "I understand, Your Honor. But had there been, then there would have been a response. And that's the peculiar nature of the structure and why it's relevant." The trial court confirmed its denial of the motion.

In his counseled brief, defendant notes that P.W. had lied before, and that she admitted herself at trial that she had a habit of lying. Despite issues with P.W.'s credibility, defendant suggests, the jury overlooked this and found him guilty as charged. The trial court's reversal of its pretrial ruling, according to defendant, was unexpected and left him at "a disadvantage of not even having a sub-par option available to present to the jury in terms of a logical layout of the alleged crime scene in the form of photographs or a scaled diagram." Defendant asserts that the trial court's denial of his motion was an abuse of discretion and a denial of the right to a fair trial, since a jury visit to the alleged crime scene was relevant to the jury's consideration of the credibility of P.W.'s allegations.

Under LSA-C.Cr.P. art. 762(2), sessions of court may be held at places within the parish other than the courthouse at the discretion of the court to "allow the jury or judge to view the place where the crime or any material part thereof is alleged to have occurred, or to view an object which is admissible in evidence but which is difficult to produce in court." It is well settled that the decision regarding whether to grant or deny a motion to have a jury view the scene of a crime is within the sound discretion of the trial court, and such a ruling will not be disturbed on appeal absent an abuse of that discretion. **State v. Duvall**, 97-2173 (La.App. 1 Cir. 12/28/99), 747 So.2d 793, 801, writ denied, 00-1362 (La. 2/16/01), 785 So.2d 838. See **State v. Lavy**, 13-1025 (La.App. 1 Cir. 3/11/14), 142 So.3d 1000, 1008-09, writ denied, 14-0644 (La. 10/31/14), 152 So.3d 150.

We see no reason to disturb the trial court's denial of defendant's motion to allow the jury to visit the crime scene. On the one incident described with any particularity, P.W. testified that her first memory of sexual abuse was when she was eleven years old in middle school and staying the night at defendant's house. She was in the back bedroom, where she slept. Defendant went into the bedroom, and P.W. asked him to rub her back because she was sore from gymnastics practice. Defendant began rubbing P.W.'s back, but then slowly moved his hands lower down her back. He put his hands inside her pants and began touching her buttocks. He then moved his hands around to the front and began touching her vagina. P.W. testified that she got

scared and ran out of the bedroom to the other side of the house toward her grandmother's bedroom, where she got "close" to the bedroom door.[3] Defendant followed her and stopped her before she went into her grandmother's bedroom. Defendant apologized and said that it was a mistake and would not happen again. P.W. believed defendant and, as such, did not tell her grandmother or anyone else about what defendant had done to her. P.W. was asked on cross-examination if she was screaming or upset when she ran toward the bedroom. She testified she was not screaming, but was probably out of breath. P.W.'s grandmother did not come out of her bedroom. She was asked on cross-examination if she had any reason to believe that her grandmother had heard what was going on. P.W. replied, "I feel like if she heard something, that something was wrong, that something was happening, her immediate response would have been to check on me."

The foregoing was the only incident described by P.W. as her having gone toward her grandmother's bedroom after being sexually abused by defendant. P.W. testified there were many other incidents of sexual abuse in that same back bedroom where she slept. Defendant's touching had progressed to inserting his fingers into her vagina and performing oral sex on her. On these other occasions, however, P.W. did not leave the room. Defendant also at times perpetrated these acts on P.W. in his own bedroom.

Defendant adds in his pro se brief that P.W.'s testimony suggested that his home was very large. Defendant points out that P.W. used phrases like "the very back of the house," "the very end of the hallway," "to the other side of the house," and that she was "out of breath." These descriptions, according to defendant, suggested a large home, when in fact the home was very small, or less than thirty-five feet from the bedroom of the alleged incident to P.W.'s grandmother's bedroom. Thus, according to defendant, there would have been no opportunity for him "to catch up to her and confront her" before she entered her grandmother's bedroom.

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[3] P.W. explained on redirect examination that from the bedroom she was in, she had to go down a hallway to the living room, then pass through the living room to the other side of the house to get to her grandmother's bedroom.

This is speculation by defendant. We do not find the phrases used by P.W. in her testimony suggested a large home; and even if they did, perhaps to the mind of a young child, the house was large. Further, we do not find that had the jury been allowed to view the scene, they would have concluded P.W. was lying based on her testimony.

Accordingly, to the extent that the layout of defendant's house was even relevant, there was no need to disrupt the orderly progress of the trial to have the jury view the scene. Testimony established that P.W. did not scream, or make any noise, when she was being molested and raped by defendant. Further, diagrams and testimony could sufficiently convey the layout of the house and, as such, it does not appear that a visit to the scene some six years after the specific offense at issue would have been any more informative than reviewing the evidence introduced at trial. See **State v. Johnson**, 294 So.2d 229, 230 (La. 1974); **State v. Davis**, 13-495 (La.App. 5 Cir. 12/19/13), 131 So.3d 1002, 1010-11, writ denied, 14-0226 (La. 9/12/14), 147 So.3d 703. Finally, P.W.'s grandmother could have testified, but neither the State nor defendant called her as a witness. Based on the foregoing, we find no abuse of discretion in the trial court's denial of defendant's motion.

The counseled assignment of error and pro se assignment of error are without merit.

PRO SE ASSIGNMENT OF ERROR NO. 2

In his second pro se assignment of error, defendant argues the trial court erred in sustaining the State's objection to the hearsay testimony of Benjamin Cooper regarding a conversation Cooper had with the victim's father.

Cooper testified for the defense. According to Cooper, he was defendant's next-door neighbor and was very close to defendant and his family. Cooper testified that he had learned that defendant had been arrested when P.W.'s father (the defendant's son) went to where Cooper was working to tell Cooper what had occurred. When defense counsel asked Cooper about the demeanor of P.W.'s father, Cooper stated: "He was distraught completely. He told me, he said that --". The prosecutor objected on grounds of relevance and hearsay. The trial court sustained the objection.

The following exchange among defense counsel, Cooper, the prosecutor, and the trial court then took place, which is the complained of testimony by defendant:

> Q. [Defense counsel]: Again, let's go back to the incident. Describe D's [defendant's son] demeanor when you got in the vehicle with him.
>
> A. He was down.
>
> Q. I'm sorry.
>
> A. He was down.
>
> Q. Was he emotional?
>
> A. Yes.
>
> Q. Describe the emotion.
>
> A. He told me that his dad had been arrested and that they picked him up from the airport when they got back from their trip, and I said for what. And he said, well, he said that he got picked up for molestation.
>
> Q. [Prosecutor]: Your Honor, may we approach again please.
>
> The Court: Yes.
>
> Reporter's Note: At this time, a bench conference was held.
>
> The Court: He's testifying to the hearsay.
>
> [Defense counsel]: Again –
>
> The Court: I assume that's your objection.
>
> [Prosecutor]: Yes, sir.
>
> [Defense counsel]: Again, Your Honor, the condition the witness was in when the statement was made is germane, and he's testified he was distraught, he was down, and he's relaying to this man, who knows his father next door, that he's been arrested on sex charges, and that emotion lead [sic] to the next statement, Judge.
>
> The Court: The next hearsay statement?
>
> [Defense counsel]: Yes, sir, and it's admissible as an excited utterance and suffering under the effects of the emotion at the time. It tends to give it the reliability required under the exceptions.
>
> The Court: This is, you're saying this is an excited utterance?
>
> [Defense counsel]: Yes, sir.
>
> The Court: It's after he's arrested. He's had time to drive over, call, make arrangements.
>
> [Defense counsel]: And he's talking to a friend who knows how close he is to his next door neighbor, his father, yes, sir.

The Court: That's not an excited utterance. Sustained.

According to defendant in his pro se brief, the trial court erred in sustaining the State's objection "without listening to the entirety of the testimony, including context and content, outside the presence of the jury." Defendant contends that defense counsel was attempting to establish a foundation, whereby Cooper's testimony of what defendant's son had told him would have been admissible under the excited utterance hearsay exception. According to defendant, had the trial court allowed the "development of the testimony," Cooper would have testified that defendant's son "became more distraught as the conversation continued and that he eventually stated that he did not believe his daughter but that if he did not support her his wife, the victim's mother, had threatened to leave him."

Louisiana Code of Evidence Article 801C defines hearsay as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible unless it falls within an exception. See LSA-C.E. art. 802. Under LSA-C.E. art. 803(2), the excited utterance hearsay exception, a statement relating to a startling event or condition is not excluded by the hearsay rule if it was made while the declarant was under the stress of excitement caused by the event or condition. There are two basic requirements for the excited utterance exception. There must be an occurrence or event sufficiently startling to render normal reflective thought processes of an observer inoperative. Additionally, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. **State v. Hilton**, 99-1239 (La.App. 1 Cir. 3/31/00), 764 So.2d 1027, 1034, writ denied, 00-0958 (La. 3/9/01), 786 So.2d 113.

The trial court found that, as to whatever Cooper was about to state regarding what defendant's son had told him, defendant's son was talking to Cooper after defendant had already been arrested and after defendant's son had had "time to drive over, call, make arrangements." As such, what defendant's son would have told Cooper would not have constituted an excited utterance. We agree. Nothing under these circumstances was suggestive of a spontaneous reaction to an occurrence or event, or

an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of defendant's son. The trial court implicitly, and correctly, found that the time interval between the event (defendant's arrest) and defendant's son's alleged statement that he was going to make had been long enough to permit a subsidence of emotional upset and a restoration of a reflective thought process. See **Hilton**, 764 So.2d at 1034-35. Accordingly, the trial court properly sustained the prosecutor's objection in finding that the statement was not an excited utterance and would have constituted impermissible hearsay. Moreover, defense counsel could have proffered the testimony in question, but failed to do so. As such, despite defendant's assertion in his pro se brief, we have no way of knowing what Cooper's testimony would have been regarding statements made by defendant's son.

This pro se assignment of error is without merit.

SENTENCING ERROR

The trial court failed to designate whether defendant's sentences were to be served concurrently or consecutively. Louisiana Code of Criminal Procedure Article 883 provides in pertinent part:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be served consecutively unless the court expressly directs that some or all of them be served concurrently.

In this case, although it was the same victim, defendant committed separate crimes in different locations in the house, and on different dates, over a three-year period.[4] Given that the trial court did not state that any of defendant's sentences were to be served concurrently and finding that the offenses were not based on the same act or transaction, or constituting parts of a common scheme or plan, the sentences shall be served consecutively under Article 883. The record herein provides an adequate factual basis to support consecutive sentences. See **State v. Restrepo**, 544 So.2d

[4] See **State v. Pruitt**, 474 So.2d 491 (La.App. 4 Cir. 1985) (the requirement for concurrent sentences under Article 883 did not apply where the defendant was convicted of two armed robberies of the same victim which occurred two months apart and, as such, the two armed robberies were not based on the same act or transaction and did not constitute a common scheme or plan).

512, 515 (La.App. 5 Cir. 1989). See also **State v. Granger**, 08-1480 (La.App. 3 Cir. 6/3/09), 11 So.3d 658, 663.

CONCLUSION

For the foregoing reasons, defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.