NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0691**
VERSUS	*	**COURT OF APPEAL**
MICHELE M. CAVALIER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 405-383, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer and Judge Max N. Tobias Jr.)

Harry F. Connick, District Attorney
Leslie P. Tullier, Assistant District Attorney
619 South White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

Katherine M. Franks
LOUISIANA APPELLATE PROJECT
P. O. Box 65093
Baton Rouge, LA 708965093
COUNSEL FOR DEFENDANT/APPELLANT

CONVICTION AND SENTENCE AFFIRMED

Defendant, Michele Cavalier, appeals her conviction and sentence for solicitation of crime against nature. She argues that the criminal statute upon which she was prosecuted was unconstitutionally vague and the evidence upon which the state relied to convict her was insufficient.

STATEMENT OF CASE

By bill of information on 8 March 1999, the state charged that the defendant, Michele M. Cavalier, violated LSA-R.S. 14:89 by soliciting Police Officer Frank Young to engage in unnatural carnal copulation for money. She was arraigned and pled not guilty on 11 March 1999. On 15 April 1999, she withdrew her not guilty plea and entered a plea of guilty as charged. The court sentenced her on that day to two years in the Department of Corrections but suspended the sentence and imposed two years active probation, with conditions. Thereafter, on 19 May 1999, the defendant withdrew her guilty plea. On 27 May 1999, a six-member jury found her guilty as charged. The court sentenced her on 24 August 1999, to six months in Orleans Parish jail, with credit for time served. Furthermore, the court ordered her to enter the Grace House Facility and to refrain from frequenting the French Quarter.

STATEMENT OF FACTS

On 7 February 1999, Detective Frank Young was working an undercover Vice Crimes Unit investigation of prostitution in the French Quarter. As he drove his unmarked vehicle river bound on Esplanade Avenue near the intersection of North Rampart Street, he noticed the defendant at a payphone making eye contact with passing motorists and peering into their vehicles. One vehicle stopped, and the defendant engaged in conversation with the driver. She made a disapproving gesture with her head, and the motorist drove on. As Detective Young drove past the defendant, she squatted down, peered into his vehicle, and shook her head in an approving motion. Detective Young pulled into an abandoned service station. The defendant opened the car door, and asked Young what he wanted, to which he replied: "You." The defendant got into the vehicle. As they drove, the defendant asked him if he was looking for a "date", and whether he was a police officer. He assured her he was not an officer and that he indeed was looking for a date. She told Young that she "g[ave] head for $20.00." Young understood the expression to mean oral sex. Upon giving a predetermined sign to his cover team, they stopped his vehicle and arrested the defendant.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

ASSIGNMENT OF ERROR NUMBER 1

By her first assignment of error, the defendant complains that the trial court erred in denying her motion to quash the bill of information.

LSA-R.S. 14:89 A(1) provides that a crime against nature is:

> The unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal, except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in R.S. 14:41, 14:42, 14:42.1 or 14:43. Emission is not necessary; and when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.

The defendant attacks LSA-R.S. 14:89 as unconstitutionally vague in that it fails to provide notice of the prohibited conduct.

The constitutional guarantee that an accused shall be informed of the nature and cause of the accusation against him requires that penal statutes describe unlawful conduct with sufficient particularity and clarity that ordinary persons of reasonable intelligence are capable of discerning the meaning and conforming their conduct thereto. U.S. Const. Amend. XIV, § 1; Art. I, §§ 2, 13 of the 1974 Louisiana Constitution; *Kolender v. Lawson,* 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *State v. Azar,* 539 So.2d 1222 (La. 1989), *cert. denied*, *Azar v. Louisiana,* 493 U.S.

823, 110 S.Ct. 82, 107 L.Ed.2d 48 (1989); *State v. Powell*, 515 So.2d 1085 (La. 1987); *State v. Pierre*, 500 So.2d 382 (La. 1987). A criminal statute is unconstitutionally vague if it does not give individuals adequate notice that certain conduct is proscribed and punishable by law, and if it does not provide adequate standards for those charged with determining the accused's guilt or innocence. *State v. Union Tank Car Co*., 439 So.2d 377, 384 (La. 1983); *State v. Dousay*, 378 So.2d 414 (La. 1979).

LSA-R.S.14:89 has withstood challenges for vagueness. See *State v. Neal*, 500 So.2d 374, 376 (La. 1987), relying on the summary of jurisprudence found in *State v. Phillips*, 365 So.2d 1304 (La. 1978), *cert. denied, Phillips v. Louisiana*, 942 U.S. 919, 99 S,Ct. 2843 (1979):

> The statutory terms defining the crime as "unnatural carnal copulation" involving the "use of the genital organ of one of the offenders" have acquired historically and jurisprudentially a definite meaning. As between human beings, it refers only to two specified sexual practices: sodomy (anal-genital intercourse of a specified nature, ...) and oral-genital activity (whereby the mouth of one of the participants is joined with the sexual organ of the other participant.)

Neal, supra at 376.

Recently, in *State v. Smith*, 99-0606 (La. 7/28/00), ___So.2d ___, 2000 WL 1036302, the Louisiana Supreme Court reaffirmed the constitutionality of LSA-R.S. 14:89. This assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER 2

In a second assignment, the defendant argues that the evidence is insufficient to support her conviction. More particularly, she claims the State failed to establish that the sexual act allegedly solicited constituted "unnatural carnal copulation" and that her actions rather than Detective Young's constituted the solicitation.

When considering a claim of insufficient evidence, a reviewing court must determine whether, after 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, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). It is not the function of an appellate court to assess credibility or reweigh the evidence. *State v. Stowe,* 93-2020 (La. 4/11/94), 635 So.2d 168, 171.

When circumstantial evidence is used, the elements must be proven such that every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438; *State v. Wright,* 445 So.2d 1198, 1201 (La. 1984). LSA-R.S. 15:438 does not establish a separate test from *Jackson v. Virginia*, but rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found the defendant guilty beyond a reasonable doubt. All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. *Id.*

LSA-R.S. 14:89 A(2) defines crime against nature as: "The solicitation by a human being of another with the intent to engage in any unnatural carnal copulation for compensation." To support a conviction for crime against nature the State must prove that defendant solicited another person with the intent to engage in unnatural carnal copulation for compensation. *State v. Wallace*, 466 So.2d 714, 716 (La.App. 4 Cir. 1985). The trier of fact is entitled to rely upon common knowledge and experience in determining whether the prosecution proved essential elements of the crime beyond a reasonable doubt. *State v. Pruitt*, 482 So.2d 820, 823 (La.App. 4 Cir. 1986), *writ denied*, 488 So.2d 1018 (La. 1986). The question of credibility of witnesses lies within the sound discretion of the trier of fact. *State v. Klar*, 400 So.2d 610 (La. 1981).

The defendant argues that the State did not establish that the sexual act solicited was "unnatural carnal copulation." However, the cases discussed in the first assignment of error do not support Cavalier's argument. *State v. Neal*, *supra* at 376, *citing State v. Phillips*, 365 So.2d 1304 (La. 1978). Moreover, she also asserts that her actions did not constitute "solicitation"; rather, she maintains Detective Young "solicited" her.

Detective Young testified that he witnessed the defendant attracting

the attention of passing motorists, and in one instance, engage one driver in conversation. When she refused that driver, she caught Young's eye and signaled her interest by shaking her head in a positive gesture. She got into his car and agreed to "give head for $20.00." He testified that in his four years of experience with the police department, the last year and a half specifically in prostitution cases, he understood a "head job" to refer to oral sex. Oral sex is considered unnatural carnal copulation for the purposes of the statute. *State v. Grubbs*, 93-2559 (La.App. 4 Cir. 10/25/94), 644 So.2d 1105, *writ denied* 94-2880 (La. 5/5/95), 654 So.2d 323. Under re-direct examination, Detective Young stated that he did not entice the defendant to approach or enter his vehicle. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 3

In a third assignment of error, the defendant argues she was denied the right to cross-examine Detective Young in order to establish that the sexual act charged is not "unnatural."

The record does not support the defendant's assertion.

BY THE DEFENSE:

Q. You said that term "head" you understand to refer to oral sex?
A. Yes, sir.

Q. That would be oral sex performed by a woman on a man?
A. Either way.

Q. Man on a woman, that would be head. Woman on a man, that

would also be head?
A. Pretty much I understand it to be used by prostitutes, meaning that a prostitute is going to perform oral sex on her customer.

Q. Have you heard it used in any other – any other circumstance other than a conversation with someone you believe to be a prostitute?
A. Yes.

Q. And as you state it could be either way. It could be man on a woman or a woman on a man?
A. I'd have to say that typically it's a woman on a man. I suppose it could mean –

* * *

BY THE DEFENSE:

Q. Your basis of the meaning of the term head is because you have engaged in vice squad activities before?
A. Yes. My experience as a –

Q. But you said –
A. – as a detective.

Q. You said you have encountered it elsewhere. Have you ever engaged in this sort of sexual activity, oral sex?

BY THE STATE:

Objection . . .

BY THE COURT:

.. . sustain[ed]

* * *

BY THE DEFENSE:

No further questions.

The trial judge did not deny the defendant the right to cross-examine Detective Young, only the right to delve into his personal sexual experiences. This assignment has no merit.

ASSIGNMENT OF ERROR NUMBER 4

In this assignment of error, the defendant maintains that the "denial" of her right to cross-examine Detective Young " on the issue of the 'unnatural' nature of the sexual activity charged inferred that issue had been proven and was not subject to question, and therefore constituted an impermissible comment on the evidence by the trial judge."

LSA-C.Cr.P. art. 772 provides:

> The 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.

One element of a fair trial is the requirement of complete neutrality on the part of the judge. *State v. Jones*, 593 So.2d 802, 803 (La.App. 4 Cir.1992). It is the duty of the trial judge to abstain from any expression of opinion or comment on facts or evidence in a criminal jury trial. *State v. Williams*, 375 So.2d 1379, 1381 (La. 1979). Reasons given by the trial judge in the jury's presence for his rulings on objections for admitting or excluding evidence or explaining the purpose for which evidence is offered

or admitted are not objectionable as comments or expressions of opinion provided they are not unfair or prejudicial to the accused. *State v. Edwards*, 420 So.2d 663, 679 (La. 1982).

As the quoted trial excerpt in Assignment of Error Number 3 shows, the trial judge did not comment on, or recapitulate evidence, nor repeat testimony of a witness. He did not give an opinion of what had been proven, not proven, or refuted. Neither can the court's refusal to allow cross-examination of Detective Young's personal sexual experiences be construed as a "comment" by inference. This assignment has no merit.

ASSIGNMENT OF ERROR NUMBER 5

In her final assignment, the defendant points out that the trial court failed to advise her of the two-year limitation for post conviction relief under LSA-C.Cr.P. art. 930.8(C) which states: "At the time of sentencing, the trial court shall inform the defendant of the prescriptive period for post conviction relief." The defendant urges this Court to order the district court to send the defendant written notice of the prescriptive period.

Relying upon *State ex rel. Glover v. State*, 93-2330, 94-2101, 94-2197 (La. 9/5/95), 660 So.2d 1189, 1201, this court routinely holds that the language in LSA-C.Cr.P. art. 930.8(C) is supplementary language and does not bestow an enforceable right upon an individual defendant. Accordingly,

failure to comply with LSA-C.Cr.P. art. 930.8(C) is not an error patent and requires no action on the part of the appellate court. See *State v. Brooks*, 98-1124 (La.App. 4 Cir. 10/20/99), 745 So.2d 129; *State v. Guillard*, 98-0504 (La.App. 4 Cir. 4/7/99), 736 So.2d 273; *State v. Jones*, 97-2217, (La.App. 4 Cir. 2/24/99), 731 So.2d 389, *writ denied*, 99-1702 (La. 11/5/99), 751 So.2d 234; *State v. Guy*, 95-0899 (La.App. 4 Cir. 1/31/96), 669 So.2d 517, *writ denied*, 96-0388 (La. 9/13/96), 679 So.2d 102.

CONCLUSION

Cavalier's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED