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| **STATE OF LOUISIANA** | * | **NO. 2001-KA-2251** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **KENNETH POLLARD** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 392-265, SECTION "I"
Honorable Raymond C. Bigelow, Judge

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**JUDGE**

**JOAN BERNARD ARMSTRONG**

* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray and Judge Max N. Tobias, Jr.)

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**AFFIRMED.**

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**STATEMENT OF CASE**

On October 10, 1997, the State re-instituted prosecution of the defendant, Kenneth Pollard, charging him with forcible rape, a violation of La. R.S. 14:42.1(A). Following trial on November 6, 1997, the jury found Pollard guilty as charged. The trial court sentenced him on December 5, 1997, to twenty years at hard labor without benefit of probation, parole or suspension of sentence. This Court overturned that conviction and sentence on appeal in State v. Pollard, 98-1376 (La. App. 4 Cir. 2/9/00), 760 So.2d 362. Following a second trial, on July 17, 2000 the jury found Pollard guilty as charged. On August 4, 2000, the trial court once again sentenced him to twenty years without benefit of probation, parole or suspension of sentence. This out of time appeal was granted on March 15, 2001.

**STATEMENT OF FACT**

The victim, M. N., met the defendant at the New Orleans International Airport, where the defendant worked as a skycap. At the time the two met, M. N. was a student at Xavier University and was returning from Thanksgiving vacation with her parents in Illinois. The defendant

approached M. N. and engaged her in conversation while she waited for her luggage. He invited her to a party he was giving and gave her his telephone number.

The next contact the victim had with the defendant was when she was leaving New Orleans to spend Christmas with her parents. She and the defendant exchanged telephone numbers and spoke on two occasions during the holidays. They agreed to meet when she returned to New Orleans.

On January 10, 1996, the defendant met the victim at Xavier University for a date. The pair drove to a Metairie restaurant for lunch. After they ate, the defendant gave the victim a driving tour of New Orleans. As they drove, the defendant claimed he heard his car making a noise, and said he needed to have his mechanic check it out. The defendant drove to a house where he claimed his mechanic lived and went inside, while the victim waited in the car. The defendant returned to the car, and told the victim that the mechanic would be back in fifteen minutes. He suggested that they wait at his house, which was just down the street. The victim and the defendant entered the defendant's house, sat in the den and played a video game. No one else was in the house. The defendant asked the victim if she wanted to watch a movie. He explained they would have to go to his bedroom because that is where the VCR player was. The victim entered the

bedroom and sat on the bed to watch the movie. The defendant kissed the victim and massaged her back, without objection from the victim. However, when he unfastened her bra, she felt she was losing control of the situation and told the defendant to stop. As she attempted re-hook her bra, the defendant pushed her down on the bed, pinning her arms underneath her body. She told him to stop. He unfastened her pants, pulled her panties to the side, and raped her. The victim continued to resist him, pushing him and crying. When the defendant stopped, the victim gathered her clothes and went into the bathroom. She demanded that he call a cab for her but he refused, telling her he would drive her back to her dormitory. As he drove her to the Xavier campus, he apologized. She was extremely upset and crying when she returned to her dorm room. She called her friend Aja Montgomery in Chicago and related the incident. After calming the victim, Ms. Montgomery urged the victim to call her mother. When the victim refused to do so, Ms. Montgomery called the victim's mother and told her something had happened to the victim. After speaking with her daughter, the victim's mother notified the dorm mother, who in turn called the police.

Rape Squad Detective Dennis DeJean interviewed the victim after investigating officers transported her to headquarters. The victim was emotional and visibly upset but was able to give a full statement of the

incident, including the location of the rape and the identity of her assailant. After completing the interview, DeJean and his sergeant drove the victim to Charity Hospital where she underwent a medical examination. DeJean collected the sexual assault kit completed by the attending physician, plus the victim's blouse and underwear, which he deposited in the police department's evidence room. On January 26, 1996, DeJean compiled a photographic lineup from which the victim positively identified the defendant as the rapist. Pursuant to the victim's identification of her assailant and the location of the rape, DeJean obtained a warrant for the defendant's arrest and a search warrant for his residence. When the police executed the search warrant, they seized the defendant's bedspread.

Dr. Christine Bugas testified by stipulation as an expert in the field of emergency room medicine specifically dealing with rape victims, and explained the protocol of a rape examination. Dr. Bugas examined the victim on January 11, 1996 and noted that she was extremely upset but coherent as she detailed the assault. Test results were positive for the presence of seminal fluid in the victim's vagina.

The parties stipulated that if called to testify, crime lab technician, Karen Lewis Holmes, would qualify as an expert in the testing, classification and identification of bodily fluids and other substances related to sexual

assaults. Further, Ms. Holmes would verify that her testing of the victim's underwear produced positive results for the presence of seminal fluid.

The defendant testified on his own behalf at trial. His version of the events generally matched that of the victim's up until the time they went to his house. He denied there was any problem with his car and said he took the victim to his house because she wanted to watch a movie. He said that the victim removed his shirt and that she was receptive to his advances. She became upset, and told him to get up after his beeper and phone began to ring. She accused him of having a girlfriend, and attempted to grab the phone from him after it rang a second time. At that point, he took the victim back to her dormitory.

**ERRORS PATENT**

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

**ASSIGNMENT OF ERROR NUMBER 1**

In his first assignment of error, defendant complains that there is insufficient evidence to support his conviction.

The standard for reviewing a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact after could have found the essential elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S.

307, 99 S.Ct. 2781, 61 L.Ed.2d 560; State v. Hawkins, 96-0766 (La.1/14/97), 688 So.2d 473. The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So.2d 1305 (La. 1988). Additionally, the court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Id. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. State v. Brauner, 782 So.2d at 63.

La. R.S. 14:41 defines rape as an act of anal or vaginal intercourse with a male or female person committed without the person's consent; and, emission is not necessary and any sexual penetration, vaginal or anal, however slight, is sufficient to complete the crime. The essential elements of forcible rape are: (1) an act of vaginal or anal intercourse; (2) without the lawful consent of the victim; (3) where 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. La. R.S. 14:42.1(A)(1); State v. Brauner, 99-1954 (La. App. 4 Cir. 2/21/01), 782 So.2d 52, 63.

The testimony of the victim alone can be sufficient to establish the elements of a sexual offense, even where the State does not introduce medical, scientific or physical evidence to prove the commission of the offense. State v. Campbell, 97-0358 (La. App. 4 Cir. 5/20/98), 715 So.2d 488, 494. Furthermore, credibility determinations, as well as the weight to be attributed to the evidence, are soundly within the province of the jury's trial function. State v. Brumfield, 93-2404 (La. App. 4 Cir. 6/15/94), 639 So.2d 312, 316. A determination of the weight of evidence is a question of fact, which rests solely with the trier of fact who may accept or reject, in whole or in part, the testimony of any witness. State v. Crowell, 99-2238 (La. App. 4 Cir. 11/21/00), 773 So.2d 871, writ denied by, State v. Augustine, 2001-0045 (La. 11/16/01), 802 So.2d 622.

In this case, the victim's testimony, supported by the State's witness, Dr. Bugas, established the elements of forcible rape. The victim testified that she consented to the defendant's kissing her and massaging her back. However, she testified that once the defendant unhooked her bra, she very clearly expressed her lack of consent to any further advances. She immediately sat up and told him to stop. As she attempted to re-fasten her bra with her hands behind her back, the defendant forcefully pushed her back onto the bed, kept her hands locked behind her by exerting pressure

and holding one of his arms over her chest. Even though she continued to resist the attack and began to cry, the defendant did not stop.

The victim's vaginal exam took place within hours of the rape. Dr. Bugas testified that the exam did not show physical trauma, but there was physical evidence that the victim's underpants were forcefully pulled to the side, causing tenderness around the victim's upper thighs, in the crease of her buttocks, and in the perineal area.

Although the defendant testified that he and the victim had consensual sexual relations, the jury apparently chose to credit the victim's testimony rather than the defendant's. The evidence presented by the State's witnesses was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant committed forcible rape upon the victim. This assignment is without merit.

**ASSIGNMENT OF ERROR NUMBER 2**

In this assignment, the defendant argues the record does not contain any indication as to the jury's actual verdict because there is no verdict sheet in the record. Further he complains that the trial transcript reflects that the jury returned a "guilty" verdict, but does not indicate to what charge, in violation of La. C.Cr.P. art. 810.

This assignment is without merit.

Filed along with the State's brief is a Motion to Supplement the Record with the verdict sheet and polling slips from the defendant's July 13, 2000 trial. These documents clearly convey the jury's unanimous verdict of guilty of forcible rape. The verdict sheet is two sided. On one side, the four verdicts responsive to the offense of forcible rape with which the defendant was charged are listed: 1) Guilty; 2) Guilty of Attempted Forcible Rape; 3) Guilty of Sexual Battery; and 4) Not Guilty. The flip side of the verdict sheet contains the verdict of the jury, which was signed by the foreman on July 17, 2000. The verdict reads, "We, the jury, find the defendant: Kenneth Pollard, guilty."

An examination of the twelve polling slips reflects that each slip is signed. Moreover, each polling slip reflects the answer, "yes", on the blank line after the question, "Is this your verdict?"

Prior to rendition of the verdict, the trial judge instructed the jury:

> As I've stated, the defendant is charged with forcible rape. To convict the defendant of the offense charged, you must find beyond a reasonable doubt that the State proved every element of forcible rape. If you are not convinced that the defendant is guilty of the offense charged, you must find the defendant guilty of one of the lesser offenses, if you are convinced beyond a reasonable doubt that the defendant is guilty of a lesser offense.
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> * * *
>
> When you retire to deliberate, you must select one of your members to serve as foreman of the jury. I will send a verdict sheet back into the jury room with you. It lists the four possible verdicts that you can return in this case. At least ten members of the jury must concur on one of the four verdicts for it to be a legal verdict. If and

> when ten of twelve of you agree on one of the four verdicts, then the foreman will fill out the back of the verdict sheet.
>
> It says, "We, the jury, find the defendant, Kenneth Pollard," and then a blank. Write in, in full whichever one of the four verdicts that at least ten of you agree on. The foreman will sign his or her name and write the date. This verdict sheet has to be filled out in ink.
>
> I'll also send in twelve polling slips, which says, "Is this your verdict?" If you agree with the verdict, write "yes." If you disagree with the verdict, write "no." Sign your name at the bottom. I will view the polling slips, make sure that at least ten of you have written yes and agree with the verdict and it is indeed a legal verdict.

The trial judge's instructions were clear and the jury's verdict clearly conveys that it unanimously found the defendant guilty of forcible rape.

**ASSIGNMENT OF ERROR NUMBER 3**

In a final assignment, the defendant argues ineffective assistance of counsel at the sentencing hearing.

Generally, the issue of ineffective assistance of counsel is more properly addressed in an application for post-conviction relief filed in the trial court, where a full evidentiary hearing can be conducted. State v. Smith, 97-2221 (La. App. 4 Cir. 4/7/99), 734 So.2d 826, 834. Only if the record discloses sufficient evidence to rule on the merits of the claim does the interest of judicial economy justify consideration of the issues on appeal. Id. at 834-35.

A defendant's claim of ineffective assistance of counsel is to be assessed by the two part test of Strickland v. Washington, 466 U.S. 668, 104

S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Fuller, 454 So.2d 119 (La. 1984). The defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. Counsel's performance is ineffective when it can be shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Strickland, at 686, 104 S.Ct. at 2064. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 693, 104 S.Ct. at 2068. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. State v. Sparrow, 612 So.2d 191, 199 (La. App. 4 Cir.1992).

In this case, prior to sentencing, the trial judge asked the defendant if he wished to make a statement; defense counsel declined. The defendant suggests that his counsel should have called to the court’s attention that he had completed an intensive incarceration program, his lack of criminal convictions, good work record, educational level and reputation for good

character. The defendant further argues that had counsel highlighted these issues for the court, "[the judge] would have been compelled to consider a lesser sentence."

The record indicates that the trial judge was aware of the foregoing issues prior to sentencing the defendant.

While the defendant was housed in parish prison, he wrote a letter to the trial judge in which he informed the judge that he had completed the intensive probation program. He declared that he followed "each and every direction" with regard to the probation program. He also explained that he had no prior convictions, that he was not a threat to society, and that his fiancée and son needed him for support and guidance.

Several letters written to the judge by the defendant's friends expounded upon his reputation for good character.

In a letter dated November 28, 1997, Evelyn Rounds described the defendant as a "well-mannered, and friendly person not one who would take advantage of another person."

Nikia Newman, the defendant's fiancée, wrote the judge on November 28, 1997 to "enlighten [the judge] on the true character of [the defendant]." She described the defendant as "an intelligent, hardworking and highly respectable young man." She said that he was not a forceful person, and

mentioned his six-year employment as a skycap for Southwest Airlines.

Damian Ross, one of the defendant's co-workers, wrote that he found the defendant to be a "kind and considerate person," with whom he often double-dated. Ross went on to say that the defendant "always treated women in a respectful and courteous manner."

Damian Ross' fiancée, Trudy F. Johnson, wrote on December 2, 1997 that during the three years she had known the defendant, he was a "very caring and giving person."

Finally, Keith Jasmin, an inmate at Orleans Parish Prison and the defendant's long-time friend, wrote the trial judge that the defendant was "respectable" and "kind." Jasmin also mentioned that the defendant "hasn't been in trouble with the law" and that the defendant is a high school graduate.

Based upon the correspondence attesting to the defendant's completion of the intensive incarceration period, work record, education, and his reputation for good character, defense counsel's declination to make a statement prior to sentencing did not prejudice the defendant. The sentencing proceeding would not have been different if counsel had re-iterated information already brought to the trial judge's attention. This assignment is without merit.

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

**AFFIRMED.**