NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2003-KA-0370**
VERSUS	*	**COURT OF APPEAL**
KEVIN HENNAGIR	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 426-106, SECTION "L"
Honorable Terry Alarcon, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., and Judge Leon A. Cannizzaro, Jr.)

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AFFIRMED

Defendant Kevin Hennagir was charged by bill of information on November 9, 2001 with one count of forcible rape, a violation of La. R.S. 14:42.1, one count of sexual battery, a violation of La. R.S. 14:43.1, and one count of aggravated burglary, a violation of La. R.S. 14:60. Defendant pleaded not guilty at his November 15, 2001 arraignment. The trial court denied defendant's motion to suppress the identification on March 12, 2002. Defendant was tried by a twelve-person jury on August 13, 2002, and found guilty of simple rape as to count one, and guilty as charged as to counts two and three. Defendant was sentenced on November 21, 2002 to eight years at hard labor on count one, and two years at hard labor each on counts two and three, all counts to run concurrently. Defendant now appeals this final judgment.

FACTS

New Orleans Police Department Detective Christy Harper testified that on September 6, 2001, while a patrol officer, she and her partner responded to a call of a possible rape at 1428 N. Roman Street. She met the

victim at that address, the residence of her neighbor. The victim lived next door, at 1426 N. Roman. The victim was crying and distraught, and had a split lip, with bruising to her face, wrists and legs. The victim refused medical attention. She expressed fear of her former boyfriend, the defendant, with whom she had broken up earlier in the day because of domestic violence. Det. Harper said the victim's home was surrounded by a chain link fence, and that the victim had to unlock the gate so they could enter her residence. The defendant had been living with her on and off prior to the breakup that day. The victim stated that the defendant had entered her residence through the back door and immediately began a verbal tirade. She was in her living room, and attempted to leave. He grabbed her, threw her down on the sofa, and disrobed down to his underwear. He attempted to tie her up with a pair of pantyhose. Det. Harper observed a pair of pantyhose in the residence. She asked the defendant if he was going to rape her, and he replied that he was going to do to her what he wanted to do. The defendant grabbed the victim's genitals.

Det. James O'Hern investigated the alleged crimes. The victim's lower lip was swollen and split, and she had bruising on her wrist, upper arms and thigh. He admitted that no photographs were taken of these injuries. The victim steadfastly refused to be examined by medical

personnel at the scene or to be transported to a hospital for examination. The victim reported to Det. O'Hern that she had a tumultuous relationship with the defendant and they had broken up. The victim related that she and the defendant had been in the French Quarter, and the victim purposely went to stand inside of the entrance to the Eighth District police station to tell the defendant she did not want to see him anymore. On the day of the attack at her residence, the victim said she was inside of her residence, and had locked the gate to protect herself from the defendant. That night he entered her residence through a back door she had left open because it was hot and she had no air conditioning. During the attack the victim fled out the front door with the defendant in pursuit. She grabbed the fence, screaming as he attempted to pull her off. A neighbor, Ms. Cox, heard the victim's screams, and came outside and told the defendant to leave her alone. At that point the defendant fled back into the victim's residence, and Ms. Cox telephoned police.

Det. O'Hern testified that the victim related to him that the defendant had resided with her until that day, but that he had moved out and was residing at 1016 Burgundy Street. Det. O'Hern's supplemental police report reflected that the victim reported that she had known the defendant for five months, and that he had resided with her for two months. The victim told

the officer the defendant did not have keys to her residence. Det. O'Hern testified that the victim's residence appeared to be in disarray on the day of the incident. The victim pointed out objects that had been disturbed in the altercation. Det. O'Hern later displayed a photo lineup to Ms. Cox, who identified the defendant as the person she saw attacking the victim. Det. O'Hern obtained an arrest warrant for the defendant, and arrested him at the Burgundy Street address. At the time of his arrest, the defendant's left eye was red and swollen. The defendant related that on the previous night he and his girlfriend had a physical altercation, during which she struck him in the eye.

Det. O'Hern testified on cross examination that the defendant told her he wanted to have sex with her, that he held her arms down on the sofa and at one point attempted to tie her hands with an article of clothing to prevent her from resisting. The victim asked the defendant if he was going to rape her, and he replied that he was going to do what he wanted to do. The victim reported that the defendant grabbed her genitals. During Det. O'Hern's interview of the victim she also reported that the attack did not surprise her, because the defendant had raped her earlier in the week. With regard to the earlier attack, the victim related that the defendant penetrated her vagina with his penis. She reported to him that at 1:00 a.m., when the

defendant was visiting her home, she refused to have sex with him, and he began to attack her. She resisted him until she was exhausted and no longer able to resist, at which point she submitted. The victim said she did not report the incident because the defendant told her he would kill her daughter if she did. The victim had shared custody of her daughter. With regard to this earlier rape, Det. O'Hern replied in the negative when asked whether the victim had reported being raped three times on the occasion.

Michelle Cox testified that she lived next door to the victim on September 6, 2001. She was sitting on her sofa when she heard someone screaming in a shrill voice, "Help me! He's going to kill me!" Ms. Cox looked outside to see the defendant holding the victim in a headlock. The victim was struggling to get away. Ms. Cox came outside and told the defendant, who was wearing white boxer shorts, to let the victim go. The victim jerked her gate open and ran to Ms. Cox's residence. Ms. Cox described the victim as hysterical, distraught, shaking and expressing fear for her life. She had bruises on her arms. Ms. Cox called 911. The tape of the call was played for the jury. Ms. Cox was asked by the operator during the 911 call whether an ambulance was needed, but the victim told her no. Ms. Cox identified the defendant in a photo lineup the next day.

Ms. Cox said on cross examination that the victim was wearing blue

jeans and a T-shirt. Ms. Cox first testified that she had seen the defendant at the victim's home frequently during the two months prior to the incident. She subsequently answered "no" when asked whether it was her statement that for the two months prior to September 6 she had not seen the defendant. She did not know whether the defendant had a key to the victim's residence. She had seen the defendant apparently unlocking the gate before, but also said that the victim sometimes left her gate so that it appeared to be locked but was not. Ms. Cox said she was certain the defendant did not live at the victim's residence at the time of the September 6, 2001 incident. Ms. Cox said police had been called out before because the defendant had threatened the victim's life, but that he had not been arrested. Ms. Cox said that the defendant threatened to kill her and her roommate at that time, because they had helped the victim. Ms. Cox testified that the victim was small, approximately four feet nine inches tall, and that the defendant was tall.

The victim, K.E., testified that her four to five month relationship with the defendant ended around August. She said the defendant had problems she could not deal with, and he was getting violent with her. On the Sunday prior to the September 6, 2001 incident, K.E. said she worked a ten-hour shift as a waiter at a party. She came home and noticed a light on inside. She discovered that the defendant had broken a hole through her back door

and entered her residence. She had not been seeing the defendant, and told him he had to leave. She said she was tired and had to get some rest. He refused to leave, and ripped her telephone out of the wall when she attempted to call for help. The defendant wanted to have sex, but she refused. The defendant began touching her on her breasts and vaginal area. He told her he was going to kill her. He forced his body on top of her, using pressure to hold her hands, and eventually got her clothes off. While doing this, the defendant told her that she was going to do what he wanted or he was going to kill her and hurt her daughter. The defendant forced his knee between her legs and eventually penetrated her. She believed he ejaculated. The defendant rolled off of her, but later raped her again, and later still raped her a third time. She said she tried to resist each time. K.E stated that the defendant left the next morning when she left. He showed up again on Wednesday night, and again would not leave. The next day she walked to pay her water bill at the S & W B office on St. Joseph Street, and the defendant would not let her leave his sight. She eventually walked into the French Quarter to the Eighth District police station. The defendant followed, and she informed him in front of the police station that if he did not leave her alone she was going inside to tell the police everything.

K.E. testified that later that night, she locked her gate and her front

door, but left the back open because it was hot. She was dozing in her bed when she heard something. She looked up to see the defendant. K.E. said she was in shock. She was wearing a T-shirt and a pair of underwear, but went into the bathroom to put some shorts on. She came out of the bathroom and ran down the back steps. However, the defendant grabbed her and started crushing her. He pinned her against the stove, and told her that she was going to do what he wanted or he was going to kill her. She grabbed a stick, but the defendant ripped it out of her hand. She saw a knife, but decided that if she got that he might take it from her and stab her. She slipped away from the defendant at one point, and ran to the front door. He was shirtless, sweating and slippery. The defendant grabbed her before she could get outside, and threw her on the bed in the front room.

K.E. said the defendant started sticking his knee into her vagina again, trying to get her to spread her legs, and trying to stick his hands down her pants. He touched her on her breasts and between her legs. She was screaming, and he tried to put his hands over her mouth. K.E. ran into the next room, and the defendant caught her and threw her down on the sofa. He attempted to silence her screams by taping her mouth shut with masking tape. However, she was sweating and the tape would not stick. He tied her up with panty hose, but she was able to break a part of the stocking. The

defendant forced her down and onto the floor. He again told her he was going to do what he wanted, and threatened to kill her and her daughter. K.E. got him to let her up by promising not to try anything and saying that she was tired. They went into the front room, where he sat down and took off his pants. She talked him into getting something to drink, and was able to run out the front door when he started to walk to the kitchen. The gate was locked, and she started climbing it and screaming for help. The defendant came out and was trying to pull her from the gate. She said she held on, and finally the locked gate latch twisted and the gate opened. K.E. said that when people came outside the defendant let her go, and she crawled out of the gate. She said that was the last time she saw the defendant until the day of trial.

K.E. testified that she did not seek medical attention, but that she had telephoned a rape crisis center more than once. K.E. identified a letter the defendant wrote her from parish prison. The trial court read it. In the letter the defendant professed his love for K.E., and talked about God bringing her to him. He wrote of marrying K.E., and of having children together. He wrote that he knew she was very mad and upset with him. He wrote that he was sorry, asked for her forgiveness, and said he prayed to God to forgive him for his sins.

K.E. said on cross examination that she was sure she told the first responding officer, Det. Harper, that the defendant had raped her on September 3. She did not think she had told Det. O'Hern that the defendant had been living with her for two months prior until September 6. She said that if she did, that she had been upset. She reiterated that she had not been seeing the defendant for a while before then. She denied telling Det. Harper that she had broken up with the defendant that day. She explained that she did tell the defendant that day not to come back to her home. K.E. said the defendant never had a key to her residence. She denied using drugs, and said she had gone to NA and AA meetings with the defendant to help him. K.E. admitted that she had two dogs, but denied that the hole in her back door was for the dogs to use.

The defendant testified that at the time of the alleged incidents in the case, September 3 and 6, he was living at K.E.'s residence. He had been living there since April. He had known her for two years prior to that, having met her in a French Quarter bar. He worked in a restaurant on Iberville Street, at the edge of the French Quarter. He said they spent Sunday, the day before September 3, together. He said K.E. was simply mistaken about working that day, that she had worked the previous Sunday. They went to Harrah's Casino and had a few drinks, went to a couple of bars

in the French Quarter and shot pool, and smoked a little marijuana. They returned to her home where they got into an argument about what kind of wedding they would have. They got into a physical altercation, but made up and had consensual sex. The defendant testified that K.E. smoked marijuana and cocaine during their relationship. He said they were both trying to quit, and had gone to NA and AA meetings. He answered in the affirmative when asked on direct examination whether K.E.'s desire for him to stop using drugs was part of what fueled arguments between them. The defendant said he had a key to the front door of K.E.'s residence, but not to her gate, which he said he used to jump over. The defendant said the hole in K.E.'s back door was for her dogs to use. He said that on September 6 he went with K.E. to pay some bills. She was agitated with him the whole day for some reason unknown to him. She told him in front of the police station that she did not want him around anymore.

The defendant said that later that day he telephoned her, and she agreed that he could come and pick up his clothes at her residence. He came into her residence, and told her he was going to change his clothes. He said he was in boxer shorts, a T-shirt and socks when K.E. grabbed a knife. He said she was going to try to stab him. He grabbed the knife out of her hand and threw her down to the floor. He said that was how she got bruises on

her legs. They then started arguing and fighting. K.E. ran outside, and he followed, attempting to stop her from making a scene. He admitted he was trying to pull her, but said he was not trying to pull her back inside of the residence. He let her go after Ms. Cox came outside and started screaming at him. The defendant said he never had sex with K.E. against her will, and did not use his hands, his penis or any other part of his body to touch her in her genital area. The defendant testified that in the letter he wrote to K.E. from prison, when he asked for forgiveness he was referring to them fighting all the time, and to him getting physical with her during the struggle in the front yard. He said they fought on numerous occasions when they drank. He said that it was either K.E.'s way or no way. He claimed that she testified that he raped and beat her because he did get physical and a domestic fight did happen, but also because he stopped paying her bills.

The defendant was asked on cross examination if it was true that on the Sunday before September 3 K.E. had worked at the "Decadence Festival." The defendant answered to the effect that K.E. had worked there, but that she got her dates wrong and had worked the weekend before. The court read a second letter written by the defendant to K.E. while he was in parish prison. In the letter the defendant again proclaimed that he found God, and that he loved K.E. and wanted to marry her. In this letter he

begged her to drop the charges and to tell authorities she was mad at the time. The defendant denied that he raped the victim, stating that she was his girlfriend, and that they had sex every night. He denied that she told him that she was tired and did not want to have sex. He said she was lying.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR ONE

In his first assignment of error, the defendant argues that the principle of double jeopardy was violated by the State's charging him with sexual battery and aggravated burglary, because the offense of battery was a necessary aggravating factor to prove the offense of aggravated burglary. Although it appears that the defendant did not raise the plea of double jeopardy in the trial court by a motion to quash, this court has previously considered the plea when raised for the first time on appeal. See State v. Picchini, 463 So. 2d 714 (La. App. 4 Cir. 1985).

Both the United States and Louisiana Constitutions protect individuals from being put in jeopardy twice for the same offense. U.S. Const. Amend. V; La. Const. art. I, § 15 (1974). The Louisiana Supreme Court discussed the tests for double jeopardy in State v. Smith, 95-0061, pp. 3-4 (La. 7/2/96), 676 So.2d 1068, 1069-1070), as follows:

> Louisiana courts have applied two distinct tests to

determine whether offenses are the same for double jeopardy purposes. In Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the U.S. Supreme Court set out a precise rule of law to determine if a double jeopardy violation has transpired. The Blockburger test is as follows:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions the test to be applied to determine whether there are two different offenses or only one, is whether each provision requires proof of an additional fact which the other does not." (Citations omitted).

The other standard employed by our courts is the "same evidence" test. This test tell [sic] us:

> "If the evidence required to support a finding of guilt of one crime would also have supported a conviction for the other, the two are the same under a plea of double jeopardy, and a defendant can be placed in jeopardy for only one. The test depends on the evidence necessary for a conviction, not all of the evidence introduced at trial." (Citations omitted.)

95-0061, pp. 3-4, 676 So.2d at 1069-1070).

The crime of sexual battery is defined in La. R.S. 14:43.1 as follows:

> A. Sexual battery is the intentional engaging in any of the following acts with another person, who is not the spouse of the offender, where the offender acts without the consent of the victim, or where the other person has not yet attained fifteen years of age and is at least three years younger than the offender:
>
> (1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender; or
>
> (2) The touching of the anus or genitals of the offender

> by the victim using any instrumentality or any part of the body of the victim.
>
> B. Lack of knowledge of the victim's age shall not be a defense. However, where the victim is under seventeen, normal medical treatment or normal sanitary care of an infant shall not be construed as an offense under the provisions of this Section.

The crime of aggravated burglary is defined in La. R.S. 14:60 as follows:

> Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure, water craft, or movable where a person is present, with the intent to commit a felony or any theft therein, if the offender,
>
> (1) Is armed with a dangerous weapon; or
>
> (2) After entering arms himself with a dangerous weapon; or
>
> (3) Commits a battery upon any person while in such place, or in entering or leaving such place.

In the instant case, there was evidence presented that on September 6 the defendant entered the victim's residence without authorization, tried to pry her legs apart, and committed at least one non-sexual simple battery upon her. There was also evidence presented that the defendant had similarly entered the victim's residence without authorization on September 3 and raped her, using his knee to pry apart her legs. Therefore, there was evidence from which the jury could conclude that the defendant entered the victim's residence on September 6 without authorization, intending to rape

her, and committed a simple battery on her while inside, thus constituting the crime of aggravated burglary without any element of the offense of sexual battery being proven. Each provision requires proof of an additional fact that the other does not, and the evidence required to support a finding of guilt of one crime would not have necessarily supported a conviction for the other. Accordingly, there was no double jeopardy violation.

Subsumed within this assignment of error is what appears to be a claim by the defendant that the bill of information charging him with aggravated burglary was defective in that it failed to inform him of the nature and cause of the accusation against him in sufficient particularity. The defendant concedes that the bill of information met the specific indictment form provided by La. C.Cr.P. art. 465(13), but nevertheless submits that the bill of information was fatally defective. There is no merit to this claim. The so-called short form indictments provided by La. C.Cr.P. art. 465 are constitutionally valid. State v. Coldman, 99-2216, p. 10 (La. App. 4 Cir. 8/30/00), 769 So. 2d 131, 137. In State v. Moore, 302 So. 2d 284 (La. 1974), the defendant, charged with and convicted of aggravated burglary, argued on appeal that he was deprived of his right under the Louisiana Constitution to be informed of the nature and the cause of the accusation against him because he had been charged using the short form

indictment provided by La. C.Cr.P. art. 465(13). The Louisiana Supreme Court rejected that argument.

There is no merit to any part of this assignment of error.

ASSIGNMENT OF ERROR TWO

In his second assignment of error, the defendant argues that the evidence was insufficient to convict him of the three crimes.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.
>
> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of

> collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-228.

The defendant was charged in count one with forcible rape, but was convicted of the lesser crime of simple rape, a responsive verdict. La. R.S. 14:41 defines rape, in pertinent part, as the act of vaginal sexual intercourse with a female person committed without the person's lawful consent. Emission is not necessary, and any sexual penetration, however slight, is sufficient to complete the crime. Id. The evidence adduced in the instant case is not consistent with the crime of simple rape, defined by La. R.S. 14:43. However, if the evidence adduced at trial was sufficient to support a conviction of the charged offense, the jury's responsive verdict is authorized. State v. Harris, 97-2903, p. 8 (La. App. 4 Cir. 9/1/99), 742 So. 2d 997, 1001. The rape offense charged, forcible rape, is defined by La. R.S. 14:42.1, in pertinent part, as a rape committed when the vaginal

intercourse is deemed to be without the lawful consent of the victim because it is committed 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.

The facts testified to by the victim support a finding by the jury that on Monday, September 3, 2001, the defendant had vaginal sexual intercourse with the victim without her lawful consent because she was prevented from resisting the act or acts by force or threats of physical violence under circumstances where the victim reasonably believed that such resistance would not prevent the rape. Defendant claimed the sex was consensual.

The defendant correctly notes that there was no physical evidence of the September 3 rape or rapes. He attacks the victim's credibility, noting that the victim did not report the September 3 incident until police responded to the September 6 incident. The victim testified that she did not report the rapes earlier because the defendant had threatened to kill her and her daughter. The defendant also claims that the victim only reported a single rape to police, while at trial she stated that he raped her three times on that night. However, the victim testified that she thought she told both Det. Harper and Det. O'Hern that he had raped her three times. While the

testimony of Det. O'Hern, and his police report, reflect that the victim reported being raped, and did not report being raped more than once, there is no evidence that she affirmatively reported being raped only once. The defendant cites the testimony by first-responding Det. Harper and investigating Det. O'Hern that the victim related that she had ended her relationship with the defendant on September 6. The victim testified that she ended it during the month of August. When questioned about this inconsistency on cross examination, the victim denied telling police that she only broke up with the defendant on September 6, but that she had told the defendant while in front of the police station on September 6 not to come to her house. Her testimony was to the effect that on that occasion she was reiterating to the defendant that she did not want to see him again, after having already told him this.

The defendant also notes that the victim testified that during the September 3 incident he ripped her telephone out of the wall when she attempted to call for help, but that her telephone was working on September 6. The victim testified on direct examination that her telephone was still broken on Wednesday night, which would have been September 5. However, she also testified that she walked into her home on the evening of September 6 to find the telephone ringing. She said she thought she

"repaired it a little bit" so that it would ring. But, within several sentences of that statement she said that maybe she had borrowed a telephone from Ms. Cox. She was adamant that she had a working telephone on September 6. The victim was questioned further on cross examination about whether she had a telephone on Wednesday. She said she did not remember, that maybe she did have it on Wednesday, but that she did not try to use it to call for help because the defendant had threatened to kill her and her daughter.

There were other internal inconsistencies in the victim's testimony, as well as between her testimony and police testimony. However, this all goes to the victim's credibility. A court reviewing a conviction for sufficiency is not permitted to decide whether it believes the witnesses; it is not the function of an appellate court to assess credibility. State v. Marcantel, 2000-1629, p. 9 (La. 4/3/02), 815 So. 2d 50, 56. In a case where there is no physical evidence to link a defendant to the crime charged, the testimony of one witness, if believed by the trier of fact, is sufficient support for a factual conclusion required for a verdict of guilty. Id.

Despite any internal inconsistencies in the victim's testimony, and any inconsistencies between her testimony and the recollections of police officers, viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found all of the essential

elements of the offense of forcible rape present beyond a reasonable doubt. Thus, the verdict of simple rape was proper.

The defendant next questions the sufficiency of the evidence as to his conviction for sexual battery that occurred on September 6. The crime of sexual battery is defined by La. R.S. 14:43.1, in pertinent part, as the nonconsensual touching of the anus or genitals of the victim, who is not the spouse of the offender, using any instrumentality or part of the offender's body. Police officers testified that the victim was bruised and had a split lip when they viewed her on September 6. The victim testified that the defendant stuck his knee into her vagina, trying to pry open her legs. Sexual battery can be committed by touching through clothing; skin on skin contact is not necessary. State in the Interest of D.M., 97 0628, p. 6 (La. App. 1 Cir. 11/7/97), 704 So. 2d 786, 790; State v. Bouton, 615 So. 2d 23, 25-26 (La. App. 3 Cir. 1993). Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the crime of sexual battery present beyond a reasonable doubt.

The third offense for which the defendant was convicted, aggravated burglary, requires for conviction proof beyond a reasonable doubt that the offender entered the victim's residence without authorization, with the intent to commit a felony or any theft therein, and that he was armed, armed

himself after entering, or after entering committed a battery upon anyone inside. La. R.S. 14:60. Viewing the evidence in a light most favorable to the prosecution, any rational trier of fact easily could have found beyond a reasonable doubt that the defendant did not have authorization to enter the victim's residence, and that he committed a battery on her after entering.

As to the requirement that the offender have entered with the intent to commit a felony or any theft therein, that intent must have been present at the moment of entry. See State v. Ortiz, 96-1609, p. 16 (La. 10/21/97), 701 So. 2d 922, 932. The defendant correctly notes that he had entered the residence and spent the previous night with the victim, and there was no evidence he had committed a felony or theft therein on that occasion. The defendant testified that he entered the residence that night to retrieve his clothes, planning to go to a friend's home on Burgundy Street. The defendant testified further that after the altercation with the victim that night, he walked to that Burgundy Street residence. The defendant was arrested the following day at 1016 Burgundy Street. However, shortly after entering the victim's home that night, the defendant grabbed the victim, bent her backwards over the stove, and told her that she was going to do what he wanted. The victim testified that when the defendant took off his pants she knew "that was it," and fled out the front door. While there was no evidence

that the defendant raped the victim on the previous night, Wednesday, when he spent the night, there was evidence that he raped the victim three days earlier, on September 3. Any rational trier of fact, viewing all of the evidence most favorable to the prosecution, could have inferred that the defendant intended to rape the victim when he entered her residence on September 6, and, together with the other evidence, found all of the essential elements of the offense of aggravated burglary present beyond a reasonable doubt.

There is no merit to this assignment of error.

For the foregoing reasons, we affirm the defendant's convictions and sentences.

AFFIRMED