

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007/KA/0167

STATE OF LOUISIANA

VS.

JOEL SMITH

JUDGMENT RENDERED: SEP 26 2008

ON APPEAL FROM THE
NINETEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 11-04-0557, SECTION II,
IN AND FOR THE PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

THE HONORABLE RICHARD ANDERSON, JUDGE

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BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

McDONALD J.

Defendant, Joel Smith, was charged by bill of information with one count of forcible rape, a violation of La. R.S. 14:42.1. After entering a plea of not guilty, defendant was tried before a jury. The jury determined defendant was guilty as charged. The trial court subsequently sentenced defendant to a term of twelve years at hard labor, with the first two years to be served without benefit of parole, probation, or suspension of sentence.

Defendant appeals, citing the following as error:

1. Whether or not the trial court committed a manifest and reversible error when the court accepted a guilty verdict without the prosecution proving its case beyond a reasonable doubt.
2. Whether or not the sentence imposed by the trial court is excessive and a reversible error under the circumstances of this case.

We affirm defendant's conviction and sentence.

FACTS

On September 9, 2004, L.T., the victim, went to her friend, Tericka Dodd's home to get her hair done. L.T. stayed with Dodd until approximately 10:00 p.m., when L.T. needed a ride to her mother's house.¹ Dodd phoned her boyfriend, Brandon Gibson, to bring L.T. home. When Gibson arrived, defendant was in the car with him. L.T. and Dodd got into Gibson's vehicle. On the way to L.T.'s mother's house, Gibson purchased some alcohol at a drive-thru liquor store and everyone in the vehicle made drinks for themselves.

L.T.'s mother was not at home, so the group proceeded to defendant's residence, where they sat in the kitchen and socialized for awhile. L.T. stated that someone was sleeping on the sofa in the living room when they came in, but she did not know that person. L.T. testified that she did not consume more than "two

¹ At this time, L.T. was living with her boyfriend, but they had a disagreement earlier that day and L.T. planned to spend the night at her mother's house.

sips” of alcohol because she did not drink; however, the rest of the group had more to drink.

After awhile, Dodd and Gibson went into defendant’s bedroom. Because of the late hour, L.T. began to feel tired. Defendant suggested she watch television in his mother’s room.² L.T. agreed and went into the bedroom to lie down and watch television. After a period of time, L.T. fell asleep. L.T. woke up when defendant entered the room, turned the volume of the television up, and shut the door. L.T. attempted to get up from the bed, and defendant shoved her back down. L.T. testified that she told defendant she wanted to leave, and defendant responded, “I want you.”

L.T. tried again to get up and was pushed back down by defendant. According to L.T., she struggled with defendant, who pulled her underwear to the side (ripping them in the process). L.T. testified she kept telling defendant to stop, while he kissed her on her neck, but defendant pushed her down again, and forced her legs apart with his own. Defendant then unzipped his pants, put his penis inside her vagina and proceeded to have sexual intercourse with L.T. until he ejaculated. After defendant ejaculated, L.T. told him to “get off” and he rolled over and laid down on the bed. L.T. explained that she did not punch or kick defendant because she was afraid that defendant would hurt her.

L.T. got up and went to the next bedroom where Dodd and Gibson were. According to L.T.’s testimony, she loudly banged on the door. When Dodd opened the door, Gibson was still dressing. Gibson left and went into the room with defendant. L.T. testified that she told Dodd what had occurred. According to L.T., Dodd became “hysterical” and said they would leave. L.T. testified that she

² At the time, defendant’s mother, Rhona Washington, was on active military duty in Pennsylvania.

did not know defendant before this night and denied they were on any date or that there had been any physical contact between them prior to the rape.

L.T. further testified that Dodd told Gibson to take L.T. home, but Gibson did not want to. L.T. heard defendant state that “she better walk.” Eventually Dodd got Gibson to take L.T. to the house she shared with her boyfriend. L.T. told her boyfriend, as well as her family, about the rape and contacted the police.

Deputy Ronnie Washington of the East Baton Rouge Parish Sheriff’s Office was the initial officer dispatched to speak with L.T. Washington, along with Detectives Wallis and Kenny Kwan, proceeded to defendant’s residence. After making contact with defendant, they advised him of his **Miranda** rights, which he waived. Kwan took photos of the crime scene, including a pair of panties at the foot of defendant’s bed.

Lieutenant Dale Hodges of the East Baton Rouge Parish Sheriff’s Office was dispatched to L.T.’s home. He took an initial statement from L.T. and transported her to Earl K. Long Hospital in order to complete a rape exam. Lieutenant Hodges then proceeded to his office to speak with defendant.

After being advised of and waiving his **Miranda** rights, defendant provided a taped statement wherein he admitted that he ripped L.T.’s panties off and had sex with her until he ejaculated, despite the fact L.T. had told him no. At the end of the statement, defendant apologized for his actions with L.T. Following this statement, Lieutenant Hodges completed an affidavit of probable cause for defendant’s arrest and transported him to the parish prison for booking.

According to defendant’s trial testimony, L.T. had made several sexual advances toward him, including attempting to lift his shirt while they were in Gibson’s car, and touching his chest when they were in his kitchen. Defendant testified that once they were at his house, L.T. asked where his bedroom was. Defendant explained that he led her there and she got into bed. Defendant stated

that he and L.T. then engaged in foreplay, followed by consensual sexual intercourse. Following intercourse, defendant went to sleep. Defendant testified the next thing that happened was the police arrived at his home and informed him of the rape allegations against him.

At trial, defendant explained the admissions contained in his taped statement were not true because he was only stating what Lieutenant Hodges told him to say and he was in a hurry to get to work that morning. Defendant denied he raped L.T.

Spencer Parker testified on defendant's behalf. Parker was the person who was asleep on the sofa when L.T., defendant, Gibson, and Dodd arrived at defendant's residence. According to Parker, no television was on after the group arrived, and he did not hear any type of disturbance in the house. Parker also claimed to have gotten off the sofa and spoken to L.T., whom he recognized from meeting a month earlier.

Brandon Gibson and Tericka Dodd also testified on defendant's behalf. Gibson testified that no television was on in the residence at the time of the incident between defendant and L.T. Gibson also testified that he saw L.T. and Dodd speaking in a normal fashion after L.T. entered the bedroom where he and Dodd were, and denied L.T. had been banging on any door. Gibson admitted he did not know whether defendant raped L.T.

Dodd testified that L.T. and defendant entered a bedroom at the same time she and Gibson went into another bedroom. After some time, L.T. knocked on the bedroom door and said she was ready to leave. Dodd stated at no time did L.T. indicate she had been raped, and it was not until after they dropped L.T. off at the home she shared with her boyfriend, that L.T.'s boyfriend called her and asked about the rape allegation.

The prosecution called Lieutenant Hodges as a rebuttal witness. On rebuttal, Lieutenant Hodges testified that defendant never indicated L.T. had made any

sexual advances toward him, that any foreplay occurred between them, or that L.T. engaged in any type of consensual sexual behavior. According to Lieutenant Hodges, in Gibson's original statement to the police, he never indicated Spencer Parker woke up and left the living room sofa when the group arrived at defendant's residence. Gibson also originally told the police that the television was on in the bedroom where he and Dodd were the entire time. Lieutenant Hodges further denied he directed defendant what to say in his tape-recorded statement.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, defendant contends that the evidence is insufficient to support his conviction for forcible rape. Specifically, defendant argues that there is evidence that the victim voluntarily met with defendant, consumed alcohol with him and failed to scream for assistance from her friend who was in the adjacent bedroom. Alternatively, defendant argues this situation is akin to the situation presented in **State v. Clark**, 2004-901 (La. App. 3d Cir. 12/8/04), 889 So.2d 471, 475, wherein the third circuit rejected the jury's credibility determination and reduced defendant's conviction from forcible rape to simple rape.

The standard of review for 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 conclude the State proved the essential elements of the crime beyond a reasonable doubt. La. Code Crim. P. art. 821(B); **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

Rape is defined as "the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent". La. R.S. 14:41(A). Forcible rape is defined, by La. R.S. 14:42.1, in pertinent part:

A. Forcible rape is rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) 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.

In a forcible rape, the victim is not required to actually resist. It is necessary only that the victim be prevented from resisting either from (1) force or (2) threats of physical violence justifying the victim in believing that resistance will not prevent the rape. All that is required is a reasonable belief. See State v. Brown, 546 So.2d 1265, 1273-74 (La. App. 1st Cir. 1989). A victim's testimony alone can establish the elements of forcible rape. See State v. Savario, 97-2614, p. 8 (La. App. 1st Cir. 11/6/98), 721 So.2d 1084, 1089, writ denied, 98-3032 (La. 4/1/99), 741 So.2d 1280.

As the trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. Furthermore, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of credibility of the witness, the matter is one of the weight of the evidence, not its sufficiency. State v. Probst, 623 So.2d 79, 83 (La. App. 1st Cir.), writ denied, 629 So.2d 1167 (La. 1993).

In the present case, the sole issue was whether L.T. consented to the sexual intercourse, as defendant claimed. Accordingly, the issue of consent was based on the jury's credibility determinations of the witnesses.

The jury's determination that defendant was guilty of forcible rape indicates it found L.T.'s testimony that she did not consent to sexual intercourse to be more credible than defendant's trial testimony claiming that L.T. consented. Moreover, we note the jury obviously placed great weight on defendant's initial statement to the police wherein he admitted to ripping L.T.'s panties; engaging in intercourse

with her despite her objection; and apologizing for his actions. The jury clearly rejected defendant's trial testimony that Lieutenant Hodges told him to state those things on the tape, and that he admitted to doing something he later claimed to be false, in an effort to leave the police station and report to work.

After reviewing the record and applying the standard of review incorporated in Article 821, we find there is sufficient evidence to support a conviction for forcible rape. This assignment of error is without merit.

EXCESSIVE SENTENCE

In his second assignment of error, defendant argues the trial court failed to consider the mitigating record in the sentencing phase. However, defense counsel's brief is silent as to what specific mitigating factors were not considered by the trial court.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868, pp. 10-11 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. La. Code Crim. P.

art . 894.1. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982).

Louisiana Revised Statutes 14:42.1(B) provides that whoever commits the crime of forcible rape shall be imprisoned at hard labor for not less than five nor more than forty years. At least two years of the sentence imposed shall be without benefit of probation, parole, or suspension of sentence.

In the present case, after considering the Presentence Investigation Report, the trial court sentenced defendant to a term of twelve years at hard labor. This sentence was less than one third of the maximum sentence. Although defense counsel argued at the hearing on the motion to reconsider sentence that defendant had shown remorse, the trial court stated that defendant had not, in fact, shown any remorse.

After reviewing the record, we find the defendant's sentence is not excessive. Defendant used physical force to push L.T. down onto the bed, tear away her panties, and engage in sexual intercourse with her. Defendant's initial statement to the police reflects that he was well aware that the victim had indicated she did not wish to engage in sexual intercourse. Moreover, despite defendant's indication of remorse in his statement to the police, at trial, defendant testified that this was not a sincere apology.

Considering the circumstances of this crime, we cannot say the trial court abused its discretion in sentencing defendant to twelve years at hard labor for his conviction of forcible rape.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.