NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1539

STATE OF LOUISIANA

VERSUS

JOSHUA FORD REED

Judgment Rendered: March 23, 2012

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 460214-2

Honorable Richard A. Swartz, Judge Presiding

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BEFORE: WHIPPLE, KUHN AND GUIDRY, JJ.

WHIPPLE, J.

The defendant, Joshua Ford Reed, was charged by grand jury indictment with aggravated rape, a violation of LSA-R.S. 14:42. The defendant entered a plea of not guilty. After a trial by jury the defendant was found guilty of the responsive offense of forcible rape, a violation of LSA-R.S. 14:42.1. The defendant was sentenced to thirty years imprisonment at hard labor, the first ten years to be served without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, assigning error to the sufficiency of the evidence to support the conviction and the constitutionality of the sentence. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

During the early morning hours of October 26, 2008, Chance Ross, Jerrell Payton, Ralph Robertson, Elroy Cooper, and another individual identified only as "Troy" greeted A.E.[1] (the victim) and a group of her friends near Canal Street in New Orleans. The victim accepted Payton's offer to smoke marijuana and got into Ross's vehicle with the group of males. However, after she entered the vehicle, they left downtown New Orleans and drove her to the Slidell area. They then pulled into a driveway near the defendant's trailer located in Alton, where the victim was forced to engage in vaginal and oral sexual encounters with the men.[2] They then drove her to the defendant's trailer home where the men, including the defendant, forced the victim to engage in further sexual encounters. They eventually dropped the victim off at a gas station in Slidell, where she called for emergency assistance.

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[1]The victim's date of birth is April 1, 1989. Herein, we reference the victim by use of initials. See LSA-R.S. 46:1844W.

[2]There is indication in the record that Troy was a minor and though he was present during at least a portion of the time in question, he was not arrested or charged in connection with this incident. According to the defendant and Cooper, Troy left shortly after the group arrived at the defendant's residence.

ASSIGNMENT OF ERROR NUMBER ONE

In assignment of error number one, the defendant argues that the evidence was insufficient to support the conviction of forcible rape. The defendant argues that although the victim alleged that the sexual encounters in question were without her consent, she chose not to physically resist and was not prevented from resisting by threats of force. The defendant contends that the fact that the victim walked around his trailer, wearing only her underwear is inconsistent with her claim that she was repeatedly raped or kept there against her will. The defendant further argues that while Chance Ross testified that the defendant pulled a gun on the victim because she did not want to have sex with him, the record evidence was not clarified as to whether Ross actually saw the gun. The defendant further notes that the victim does not claim that he brought the gun with him into the bedroom. The defendant also relies on Ross's testimony in which he claimed that after smoking marijuana, the victim went back into the bedroom with the defendant and some of the other male individuals. Finally, the defendant notes that he denied having a gun that night and that he, Ross, and Cooper all testified that any sex that occurred with the victim was consensual.

In reviewing a claim challenging the sufficiency of the evidence, this court must consider 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, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 660. The trier of fact makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony; thus, a reviewing court may impinge on the fact finder's discretion only to the extent necessary to guarantee the fundamental protection of due process of law. State v. Johnson, 2003-1228 (La. 4/14/04), 870 So. 2d 995,

998; State v. Sylvia, 2001-1406 (La. 4/9/03), 845 So. 2d 358, 361. In the absence of internal contradiction or irreconcilable conflict with physical evidence, the testimony of one witness, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. State v. Higgins, 2003-1980 (La. 4/1/05), 898 So. 2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S. Ct. 182, 163 L. Ed. 2d 187 (2005).

The Jackson standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that, in order to convict, the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. State v. Captville, 448 So. 2d 676, 680 (La. 1984).

As noted above, the defendant was found guilty of the responsive offensive of forcible rape. The elements of the offense of forcible rape are: 1) the act of anal, oral, or vaginal sexual intercourse; 2) with a male or female person; 3) without lawful consent of the victim; 4) committed when the victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes such resistance would not prevent the rape; 5) emission is not necessary and any sexual penetration, vaginal or anal, however slight is sufficient to complete the rape. LSA-R.S. 14:42.1 and 14:41.

Chance Ross pled guilty to forcible rape based on the instant incident and testified as a State witness in this case. Ross, who sat in the front seat along with Payton, the driver, testified that after the victim entered the vehicle, she asked the individuals if they had condoms. Ross did not see the victim attempt to exit the

vehicle. According to Ross, the victim was consuming alcohol at the time and was intoxicated while the males were sober. Payton gave condoms to the men. Before they arrived at the defendant's trailer, they pulled into a driveway and Payton got in the backseat with the victim while the others waited outside. When Payton exited the vehicle, he asked, "Who's next?" Robertson and Troy then got into the vehicle with the victim. After they exited the vehicle, Ross and Cooper entered the vehicle. Ross testified that Cooper had vaginal intercourse with the victim while he had oral sex with her. The other men got back in the car and they went to the defendant's trailer. Ross stated that the victim never attempted to run and no one physically abused her.

When they arrived at the defendant's trailer, the victim asked to be allowed to use the telephone. However, the men smoked marijuana and the defendant gave Ross money and instructed him to go to a gas station and buy cigars and cigarettes, and Payton and Ross left. According to Ross, when they got back the victim was wearing underwear only and seemed disorientated and mad. She was upset and told the men that she was not a "slut." The group smoked more marijuana. After the others went into the bedroom with the victim, Robertson informed Ross that the victim did not want to have sex with the defendant and further indicated that the defendant got angry and pulled a gun on the victim. Ross did not see the gun and initially was afraid to tell the police about the statement. Payton called the victim's friends and when Robertson got on the phone, Ross heard him refer to the police. The defendant then made everyone leave and they dropped the victim off at a nearby gas station. According to Ross, the victim was not beaten or threatened in his presence and he was under the impression that the sex was consensual.

Ross did not know the victim before the night in question. He testified that he thought she was drunk when they met on Canal Street because she had a drink in her hand, was stumbling, and was acting flirty. Ross admitted that in his

statement to the police he denied having sex with the victim and did not mention that condoms were passed out between the men. Ross initially stated that he was unsure if the victim was ever allowed to use a telephone. However, he ultimately admitted that she was not allowed to do so until he and Payton got back from the gas station.

The victim, who was twenty-one years old when the trial began on February 22, 2011, was a resident of Lexington, Kentucky, and at the time of the offense was on her first trip to New Orleans with friends to attend the Voodoo Festival. She and her friends decided to go for a walk on Bourbon Street during the late night hours of October 25th, up into the early morning hours of October 26th. As they were walking, a group of males called out to her and asked if she wanted to smoke marijuana with them. According to the victim, although she had already smoked marijuana that day and was drinking alcohol, she was not intoxicated. She was told that they would sit in the car and smoke and she agreed. Initially, her friends were walking right behind her, but as she approached the vehicle, she noticed they were further behind and she began to feel unsafe. She testified that the men were "kind of rushing me in" and she entered the vehicle and sat in the middle of the back seat, in the laps of two of the men. The victim became terrified when Payton started the vehicle. The victim opened the right back door to get out of the vehicle, but one of the men closed it and locked the doors as the driver (Payton) drove away. The victim began asking why they were leaving and wanted to know where they were going. She also told the men that her friends would be worried about her and asked to use a telephone.

The victim testified that when they pulled into the driveway in the Slidell area, the male who remained in the car with her told her to slide her panties aside. The victim was wearing a skirt at the time. She added, "I don't know exactly how I said it -- something in terms of, 'I don't know you. I'm uncomfortable. I don't

want to do this.' And he proceeded to put a condom on, and raped me in the back seat." When asked for clarification, she stated that he put his penis in her vagina. She stated that another male entered the vehicle and forced her to perform oral sex on him, adding that he pulled his penis out and forced her head down to his crotch. The rest of the men got back in the vehicle and they drove to the trailer. The victim testified that once they got her in the trailer, the men took turns having vaginal intercourse with her without her consent as she repeatedly told them "no." When she went to use the restroom, one of the men bent her over the sink and vaginally penetrated her without her consent. She did not attempt to physically fight the males and feared that she would be killed, noting that there were several males who acted against one female. The victim further stated that at one point, she tried to push one of the men away, but quickly realized that the other men were surrounding her and she did not stand a chance. She admitted to asking the men to wear condoms. After repeated requests, she was finally allowed to use the telephone, but was made to dial star sixty-seven before dialing out. She was afraid to call for emergency assistance because she was being watched, so she called her friends instead. The victim was unfamiliar with the area so she could not tell her friends where she was.

The victim repeatedly asked to be taken back to New Orleans and one of the individuals stated, "Have you ever gotten something for nothing?" She replied, "No, I don't want to do this. I'll figure out another way to get home." The same individual took out a silver gun from under a pillow and displayed the bullets to show the victim it was loaded and said, "I kill people. Do you want to die tonight?" The victim responded negatively. She said the men tried to act like it was only a joke, but she was terrified. The victim identified the defendant as the one who threatened her with the gun. He took her into the bedroom and forced her to have oral sex with him. The victim testified she stared out of the window and

was "tuning out" as the men took turns having sex with her. They eventually allowed her to call her friends again and they decided to drop her off at a gas station. Once she walked into the gas station, the clerk, Alysia Johnson, asked her if she was okay and allowed her to use a telephone. According to Johnson's handwritten, signed statement to the police, when the victim entered the gas station she asked her what was wrong and the victim informed her that she had been raped at an unknown location in a trailer just before being dropped off. The victim called her friends again and then called for emergency assistance. An ambulance arrived shortly thereafter and took the victim to Slidell Memorial Hospital, where a sexual assault kit was completed. The victim testified that she never actually smoked marijuana with the perpetrators. The victim also stated that she would sometimes laugh as a coping mechanism when she was in a tense or uncomfortable situation. During cross-examination, the victim admitted to tendering a guilty plea in an unrelated case in Tennessee.

Deputy Danny Gallavan of the St. Tammany Parish Sheriff's Office responded to the victim's call for assistance and noted that the victim was in the ambulance and crying when he arrived. He followed the ambulance to the hospital. The victim was still crying and upset and gave an unrecorded statement and a recorded statement that were consistent with her trial testimony. The victim adamantly stated that she did not consent to any of the sexual encounters and that she used the word 'no' when confronted and raped by the men.

Elroy Cooper gave a recorded statement to the police and testified as a defense witness. Cooper admitted to having sexual encounters with the victim. Cooper confirmed that the victim opened the car door before they drove off, but added that he thought she closed it herself after one of the males told her that her friends knew she was leaving with them. Cooper described the victim as the sexual aggressor. However, during his previous recorded statement, Cooper

admitted that at one point, the victim did not want to "do it" anymore and further indicated that the defendant got angry and showed his pistol to the victim. Cooper did not recall any statements by the defendant at that point. The men took turns having sex with the victim again.

During his trial testimony, Cooper stated that he only had sex with the victim in the driveway where they entered and parked before arriving at the defendant's trailer and stated that it was consensual. Cooper testified that the victim smoked marijuana and took pills while they were at the defendant's trailer. Further, during his trial testimony, Cooper stated that the police coached him before he gave his recorded statement and told him they would allow him to go home, so he made false statements. He then testified that the victim was not shown a weapon, although he still admitted that the defendant did have one.

The defendant also gave a recorded statement to the police. According to the defendant, the victim started removing her clothes and having sex with the men shortly after they arrived at his trailer. During his recorded statement, the defendant further stated that the victim appeared to be enjoying the encounters. At some point, she acted as if she needed a break or to catch her breath. The defendant further stated that the victim kept saying she wanted to leave because her friends would be worried, and added, "but she wasn't really enforcing it." The defendant also stated that it was the other males who did not want to allow the victim to leave the bedroom, although she was able to periodically take a break to catch her breath. The defendant confirmed that the sexual encounters were constant for about a two-hour period. The defendant also confirmed that the victim asked to use the telephone several times, but the men stalled and continued to have sex with her. The men left because they started to get worried about the victim still being with them. The defendant admitted to taking his bullets out and making a statement about shooting while the victim was in the hallway. The

defendant was not speaking to the victim at the time, but assumed she heard him. He denied stating that he killed people. The defendant also stated that he "only" had oral sex with the victim, although the others had vaginal intercourse with the victim. The defendant reiterated that he did not threaten the victim with a gun, but he admitted to displaying ammunition and making statements about shooting. The defendant stated that Payton, whom he referred to by the nickname "Wee," was the leader of the group and may have made threats to the victim regarding the gun. The defendant stated that the victim did not use any drugs while at his residence. The police executed a search warrant for the defendant's trailer and located unspent ammunition and a magazine to a semiautomatic handgun.

During his trial testimony, the defendant stated that he lied to the police about the marijuana and indicated that he and the victim smoked marijuana while at his trailer. He consistently stated that he had consensual oral sex with the victim. The defendant stated that he did not have to ask the victim to perform oral sex, but that she did so as soon as he entered the bedroom. The defendant described the victim's conduct as dancing around, flirting, and "flaunting her stuff." The defendant admitted that the victim asked to use a telephone, but added that he did not have one. The defendant confirmed that he picked up his clip, stating, "And I picked it up, and played like I had a gun, but I didn't have no gun." The defendant testified that the victim was not present at the time. The defendant further testified that no one threatened the victim and during the entire time, he believed that she wanted to have sex.

As indicated, the defendant does not deny having sexual intercourse with the victim. Initially, we note that the testimony of the victim alone is sufficient to prove the elements of an offense. State v. Orgeron, 512 So. 2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So. 2d 113 (La. 1988). The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover,

where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. State v. Gordon, 582 So. 2d 285, 292-93 (La. App. 1st Cir. 1991). In finding the defendant guilty of the responsive offense of forcible rape, it is obvious that the jury believed the testimony of the victim and rejected the defense claim of consensual sexual intercourse. The credibility of the witnesses' testimony is a matter of the weight of the evidence. A determination of the weight to be given evidence is a question of fact for the trier of fact not subject to appellate review. State v. Tate, 506 So. 2d 546, 551 (La. App. 1st Cir.), writ denied, 511 So. 2d 1152 (La. 1987). An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the trier of fact. State v. Calloway, 2007-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

Under the circumstances, the jury could have reasonably concluded that the victim in this case was prevented from resisting the act of rape because she was outnumbered by the group of men and was aware of the fact that the defendant was armed with a gun. The jury could reasonably have concluded that the victim did believe, and believed reasonably, that resistance would be futile and would not prevent the rape. Viewing all the evidence in the light most favorable to the State, any rational trier of fact could have concluded that the State proved the defendant's guilt beyond a reasonable doubt and to the exclusion of the hypothesis of innocence. Accordingly, assignment of error number one lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant argues that the trial court erred in imposing an unconstitutionally excessive sentence. The defendant notes that he is a twenty-one-year-old man without previous arrests. The defendant also

notes that he is not the individual who picked up the victim in the French Quarter. While conceding that the imposed sentence was ten years less than the statutory maximum, the defendant argues that he is not the worst offender and this is not the worse type of forcible rape.[3]

The record does not contain an oral or written motion to reconsider sentence. Although the defense counsel orally objected to the sentence imposed, there was no stated ground for the objection. One purpose of the motion to reconsider sentence is to allow the defendant to raise any errors that may have occurred in sentencing while the trial judge still has the jurisdiction to change or correct the sentence. The defendant may point out such errors or deficiencies, or may present argument or evidence not considered in the original sentencing, thereby preventing the necessity of a remand for resentencing. See State v. Mims, 619 So. 2d 1059 (La. 1993) (per curiam). Under the clear language of LSA-C.Cr.P. art. 881.1(E), the failure to make or file a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. The defendant's failure herein to urge a claim of excessiveness or any other specific ground for reconsideration of sentence precludes our review of assignment of error number two. See State v. Felder, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So. 2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So. 2d 1173; State v. Jones, 97-2521 (La. App. 1st Cir. 9/25/98), 720 So. 2d 52, 53.

CONVICTION AND SENTENCE AFFIRMED.

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[3]As noted, the trial court imposed a thirty-year term of imprisonment with the first ten years to be served without the benefit of probation, parole, or suspension of sentence. In accordance with LSA- R.S. 14:42.1(B), the maximum sentence that could have been imposed by the trial court is forty years imprisonment at hard labor with *at least* two years of the sentence imposed without the benefit of probation, parole, or suspension of sentence. Thus, the trial court could have imposed forty years and ordered that the entire sentence be served without the benefit of probation, parole, or suspension of sentence.