NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0030

STATE OF LOUISIANA

VERSUS

SADAT EL-AMIN

Judgment Rendered: June 10, 2011

Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of Washington, State of Louisiana
Trial Court Number 09 CR1 101854

Honorable William J. Burris, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

The defendant, Sadat El-Amin[1], was charged by bill of information with two counts of forcible rape, in violation of LSA-R.S. 14:42.1. He pled not guilty to both charges. Following a jury trial, the defendant was found guilty as charged. The state filed a bill of information seeking to have the defendant adjudicated and sentenced as a habitual offender under LSA-R.S. 15:529.1. The defendant was adjudicated a second-felony habitual offender and sentenced to sixty-five years imprisonment at hard labor without the benefit of probation or suspension of sentence on count one.[2] He was sentenced to a concurrent term of forty years at hard labor on count two.[3] The defendant moved for reconsideration of sentence. The trial court denied the motion. The defendant now appeals, raising the following assignments of error:

1. Did the district court commit reversible error in not granting the defendant's motion for a mistrial when the record reflects that a captain of the police department blurted to the jury that El-Amin was on parole during the time he was processing an arrest warrant for his arrest?

2. Was it manifest error for the district court to deny the defendant's motion for post verdict judgment of acquittal considering that the record dictates that the circumstances surrounding the incident as well as M.C.'s apathetic behavior during the alleged incident presented sufficient reasonable doubt to either return a not guilty verdict or a verdict for a lesser included offense?

For the following reasons, we affirm the defendant's convictions, habitual offender adjudication, and sentences.

FACTS

[1]The spelling of the defendant's last name appears variously in the record as "El-Amin" and "Elamin". For consistency, we adopt the spelling used in the defendant's brief "El-Amin".

[2]The multiple offender bill of information reflects that, "[o]n February 18, 2005, the defendant pled guilty to operation of a clandestine lab, in violation of LSA-R.S. 40:983.1."

[3]Under LSA-R.S. 14:42.1(B), the trial judge was required to impose at least two years of the forcible rape sentences without benefit of probation, parole, or suspension of sentence. However, because the trial court's failure to restrict parole eligibility was not raised by the state in either the trial court or on appeal, we are not required to take any action. See State v. Price, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So. 2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So. 2d 1277. As such, we decline to correct the illegally lenient sentences.

During the summer of 2008, K.E. and her best friend, M.C.,[4] regularly visited K.E.'s grandmother, Martha El-Amin, in Franklinton, Louisiana. K.E. and M.C. lived in Covington, Louisiana, with K.E.'s mother, but they frequently visited Franklinton to visit their friends who lived there.[5] On June 31, 2008, K.E. and M.C., as they often did, spent the night at Ms. El-Amin's home. The defendant, Martha El-Amin's son, also lived in the home with Ms. El-Amin. M.C. was very comfortable with K.E.'s family. She considered Ms. El-Amin to be her grandmother, and looked upon the defendant as her uncle.

On the morning of July 1, 2008, K.E. observed that something appeared to be bothering M.C. When K.E. asked M.C. what was wrong, M.C. initially denied that anything was bothering her. However, later, when K.E. insisted that M.C. disclose what was troubling her, M.C. told K.E. that the defendant, K.E.'s uncle, had raped her. According to M.C., the abuse had occurred earlier that same morning, at approximately 1:00 a.m. M.C. claimed that the defendant had approached her after everyone else was asleep, pushed her and started taking off her clothing. The defendant then engaged in oral and vaginal sexual intercourse with M.C. against her will. M.C. told K.E. she did not scream during the encounter because she was afraid. M.C. asked K.E. to promise that she would not tell anyone of the abuse. M.C. explained that she did not want to tell anyone about the rape because she feared that K.E.'s family would hate her. K.E. promised to keep her friend's secret. Later that night, M.C. asked K.E. to stay awake with her all night because she now was afraid of the defendant. K.E. complied. The teenage girls eventually returned to their home in Covington.

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[4]At the time of the offenses, the victim was sixteen years old. In accordance with LSA-R.S. 46:1844(W), the victim herein is referenced only by her initials. To further protect the identity of the victim, her friend is also referenced by initials.

[5]The evidence established that M.C.'s mother had previously allowed M.C. to live with K.E.'s family after she was forced to relocate after losing her job.

Approximately one and one-half months later, K.E. contacted M.C. (who was no longer living with K.E.'s family) and told her that she planned to tell her mother (the defendant's sister) about the rape. M.C. cried and told K.E. she did not want to disclose the abuse. However, on August 17, 2008, K.E. told her mother, L.E., about the rape. L.E. spoke to M.C. and advised her to tell her mother about the abuse. M.C. then contacted her mother and explained what had happened to her at Ms. El-Amin's home on July 1, 2008. M.C. was taken to the Franklinton Police Department to report the abuse.

In August 2008, Captain Justin Brown, of the Franklinton Police Department, received information regarding the reported rape. Captain Brown arranged for M.C. to be interviewed by forensic interviewer, Bethany Case. During a videotaped interview, M.C. described the incident to Ms. Case just as she had to K.E. The defendant was eventually arrested and charged with two counts of forcible rape.

DENIAL OF MOTION FOR A MISTRIAL

In his first assignment of error, the defendant contends the trial court erred in denying his motion for a mistrial after a state witness, Captain Justin Brown, improperly referred to the defendant's criminal history. Specifically, the defendant points to Captain Brown's testimony indicating that he learned during the investigation of this matter that the defendant was on parole. The relevant testimony was as follows:

> Q: Captain Brown, I am going to show you what has been marked as State's Exhibit 1 and ask if you can identify that document, please.
>
> A. Yes, sir. It's a State of Louisiana arrest warrant. Item number 20081132 for the arrest of Sadat Elamin.
>
> Q: Is your signature affixed to that affidavit?
>
> A: Yes, it is.
>
> Q: Did you have the opportunity to present that to a judge?

A: Yes, I did.

Q: After your presentation to a judge, what action did you take next?

A: The judge instructed me to affect an arrest on Sadat Elamin. We determined that Sadat was currently on parole at the time.

Immediately following this statement, counsel for the defendant lodged an objection, which the trial court sustained. The prosecutor acknowledged that the reference to the defendant's parole status was improper and advised that he did not realize the witness's response would contain this information. The prosecutor then requested that the court admonish the jury to disregard the information. Counsel for the defendant moved for a mistrial, arguing that an admonition would not be sufficient to cure the prejudice resulting from the reference to the defendant's criminal history. The court then recessed the matter to allow the parties to research the issue of whether a mistrial was mandated based upon the improper comment. Later, outside the presence of the jury, the court heard argument on the mistrial motion. Counsel for the defendant conceded that the instant matter was not governed by the mandatory mistrial provisions of LSA-C.Cr.P. art. 770. Nevertheless, counsel urged the court to exercise its discretion under LSA-C.Cr.P. art. 771 and grant a mistrial. Counsel argued that an admonition alone would not cure the prejudice to the defendant's case. The trial court noted that a police officer is not a court official within the meaning of LSA-C.Cr.P. art. 770. Thus, the court noted that the instant matter is governed by the discretionary mistrial provision of LSA-C.Cr.P. art. 771.[6] Applying the discretionary mistrial provisions, the trial court denied the defendant's motion for a mistrial. After the jury was returned to the courtroom, the trial court admonished the jury, as follows:

[6]On appeal, the defendant does not challenge the trial court's ruling regarding the inapplicability of article 770. Instead, he only argues that the trial court abused its discretion in failing to grant a mistrial under article 771.

> You may be seated. Ladies and gentlemen, please listen closely. The Court at this time is going to strongly admonish you to disregard the remark by the witness as to parole. Whether or not such is correct, that has absolutely and totally nothing to do with the trial of this case. You are strongly instructed to disregard any such reference whatsoever.

Generally, evidence of other crimes or bad acts is inadmissible at a criminal trial unless the probative value of the evidence outweighs its prejudicial effect, and unless it falls under one of the statutory or jurisprudential exceptions to the exclusionary rule. See State v. Johnson, 94-1379 (La. 11/27/95), 664 So. 2d 94, 99.

Remarks by witnesses fall under the discretionary mistrial provisions of LSA-C.Cr.P. art. 771, which provides, in pertinent part:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:
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> * * *
>
> (2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.

A mistrial is warranted when certain remarks are considered so prejudicial and potentially damaging to the defendant's rights that even a jury admonition could not provide a cure. State v. Edwards, 97-1797 (La. 7/2/99), 750 So. 2d 893, 906, cert. denied, 528 U.S. 1026, 120 S. Ct. 542, 145 L. Ed. 2d 421 (1999). Mistrial is a drastic remedy that is authorized only where substantial prejudice will otherwise result to the accused. State v. Anderson, 2000-1737 (La. App. 1st Cir. 3/28/01), 784 So. 2d 666, 682, writ denied, 2001-1558 (La. 4/19/02), 813 So. 2d 421. A trial court's ruling denying a mistrial will not be disturbed absent an abuse of discretion. State v. Givens, 99-3518 (La. 1/17/01), 776 So. 2d 443, 454.

The jurisprudence interpreting LSA-C.Cr.P. art. 771 has held that an impermissible reference to another crime deliberately elicited of a witness by the prosecutor would be imputable to the state and would mandate a mistrial. State v. Madison, 345 So. 2d 485, 494 (La. 1977). However, unsolicited and unresponsive testimony is not chargeable against the state and does not provide a ground for mandatory reversal of a conviction. State v. Lucas, 99-1524 (La. App. 1st Cir. 5/12/00), 762 So. 2d 717, 727. Furthermore, a statement is not chargeable to the state solely because it was in direct response to questioning by the prosecutor. While a prosecutor might have more precisely formulated the question that provoked a witness's response, where the remark is not deliberately obtained by the prosecutor to prejudice the rights of the defendant, it is not the basis for a mistrial. State v. Pooler, 96-1794 (La. App. 1st Cir. 5/9/97), 696 So. 2d 22, 45, writ denied, 97-1470 (La. 11/14/97), 703 So. 2d 1288.

A prejudicial remark by an experienced police officer should be viewed with considerable concern as to the fairness of the trial and may require the granting of a mistrial, especially if the remark was precipitated by or should have been anticipated by the district attorney. The decision as to the necessity of granting a mistrial under these circumstances is left to the sound discretion of the trial court. State v. Leblanc, 618 So. 2d 949, 960 (La. App. 1st Cir. 1993), writ denied, 95-2216 (La. 10/4/96), 679 So. 2d 1372.

Initially, we note that while Captain Brown's comment that the defendant was on parole at the time of his arrest indirectly referred to another crime by the defendant, we do not find that the reference to another crime was deliberately obtained by design of the prosecutor to prejudice the rights of the defendant. We find, as did the trial court, that Captain Brown's response to the prosecutor's question was unsolicited and unresponsive. Thus, the trial court correctly found LSA-C.Cr.P. art. 770 to be inapplicable.

The defendant contends the introduction of the comment regarding his parole status was so prejudicial that it prevented him from receiving a fair trial. We find that the trial court's actions in sustaining the defendant's objection and admonishing the jury to disregard the statement adequately protected the defendant's right to a fair trial. We do not find that the unsolicited response was so prejudicial that the court's corrective measures were insufficient to insure the defendant a fair trial. As previously noted, mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. When the trial court is satisfied that an admonition to the jury is sufficient to protect the defendant, such an admonition is the preferred remedy. State v. Ortiz, 96-1609 (La. 10/21/97), 701 So. 2d 922, 929, cert. denied, 524 U.S. 943, 118 S. Ct. 2352, 141 L. Ed. 2d 722 (1998).

Considering the above, we find no error or abuse of discretion in the trial court's denial of the defendant's motion for a mistrial. This assignment of error lacks merit.

SUFFICIENCY OF THE EVIDENCE OF FORCIBLE RAPE

In his second assignment of error, the defendant argues that the evidence presented at the trial of this matter was insufficient to support the convictions. The defendant contends M.C.'s account of the alleged rape is "suspicious and saturated with reasonable doubt." He argues that the jury's verdicts were motivated by sympathy and are not supported by the evidence. The defendant urges that the "unusual circumstances" under which M.C. claimed the offenses occurred, and the lack of any eyewitnesses and/or physical evidence of rape, should be considered by this court. The defendant claims that this evidence, or the lack thereof, raises doubt as to whether a sexual encounter ever occurred. Alternatively, the defendant argues that if the offenses occurred as M.C. described, he should have only been

convicted of the lesser offense of sexual battery because there was no evidence of any force, violence, or threats.

The constitutional standard for testing the sufficiency of the evidence, as adopted by the Legislature in enacting LSA-C.Cr.P. art. 821, requires that a conviction be based upon proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find 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). The Jackson standard of review is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt.

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. Richardson, 459 So. 2d 31, 38 (La. App. 1st Cir. 1984). On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. State v. Creel, 540 So. 2d 511, 514 (La. App. 1st Cir.), writ denied, 546 So. 2d 169 (La. 1989).

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. LSA-R.S. 14:41A. Any sexual penetration, however slight, is sufficient to complete the crime. LSA-R.S. 14:41B. Forcible rape is defined in LSA-R.S. 14:42.1, in pertinent part, as follows:

> 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 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). This is equally applicable to the testimony of victims of sexual assault. State v. Ponsell, 33,543 (La. App. 2d Cir. 8/23/00), 766 So. 2d 678, 682, writ denied, 2000-2726 (La. 10/12/01), 799 So. 2d 490; See also State v. Probst, 623 So. 2d 79, 83 (La. App. 1st Cir.), writ denied, 629 So. 2d 1167 (La. 1993).

Upon review of the record in this case, we find the evidence presented at the defendant's trial sufficiently supports the forcible rape convictions. M.C.'s trial testimony and her videotaped interview at the Child Advocacy Center established that the defendant used force during the sexual encounter with the victim. According to M.C., at approximately 1:00 a.m., she was laying in a chair in the living room when the defendant approached and asked if she ever had "fellatio" performed on her before. M.C. told him she had not. The defendant then asked if he could perform fellatio on M.C. M.C. told him no. The defendant moved closer to M.C. and repeatedly requested that she allow him to perform oral sex. Uncomfortable, M.C. attempted to ignore the defendant. The defendant grabbed M.C.'s legs and pulled her up onto the arm of the chair. M.C. attempted to back away, but the defendant "locked" her legs in his arms. The defendant then pulled down M.C.'s shorts and underwear. M.C. stated she held on to the top of her shorts in an attempt to prevent the defendant from removing them, but her efforts were unsuccessful. The defendant "yanked" off M.C.'s shorts and underwear.

M.C. was able to momentarily free herself from the defendant's grasp. Afraid, she sat up in the chair, crossed her legs up near her chest and covered herself with a blanket. The defendant grabbed M.C. by the ankles and slid her

down into the chair. According to M.C., she told the defendant that she did not wish to engage in sexual intercourse with him and pleaded with him to stop. However, against M.C.'s will, the defendant began performing oral sex on her M.C. covered her head with a blanket. She stated she was scared and did not want to see anything.

The defendant then pulled down his pants and inserted his penis into M.C.'s vagina. As he did so, and thereafter, M.C. continued to tell the defendant that she did not want to engage in the sexual activities. Still holding M.C. by her legs, the defendant told M.C. to "be quiet" and assured her that "everything was going to be okay." The defendant eventually stopped and went into the bathroom for approximately five to ten minutes. M.C. did not move from the chair. The defendant later returned to M.C., grabbed her by her legs again and slid her toward him. M.C. tried to resist by pulling her legs back and pushing her body back in the chair. The defendant held M.C.'s legs and penetrated her vaginally again. M.C. testified she closed her eyes and wished she was at home with her mother.

M.C. explained that throughout the sexual encounters she did not scream or otherwise attempt to awaken K.E., who was in the same room asleep on the couch, or K.E.'s grandmother, who was asleep in a nearby bedroom. She stated that she was afraid and could not think about anything else.

After careful review of the evidence presented during the trial, viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could reasonably conclude that all of the essential elements of forcible rape were proven beyond a reasonable doubt. We first note that the victim's account of these incidents has remained consistent. From the morning the abuse occurred (when she told K.E.) to the day she testified at the defendant's trial, M.C. repeatedly described acts of sexual intercourse that consisted of persistent physical and verbal resistance by the victim that was eventually overcome by the

defendant's use of physical force. Although the defendant did not use more extreme physical violence and/or threats of physical injury, these facts do not negate the evidence showing that forcible rape occurred. The victim's account of the incidents established that the defendant forced himself upon her against her will, locked her legs with his arms and orally and vaginally raped her. This court has previously held that a victim need not suffer physical harm to constitute the degree of physical force or threat of physical violence necessary to support a conviction of forcible rape. State v. Montana, 533 So. 2d 983, 988 (La. App. 1st Cir. 1988), writ denied, 541 So. 2d 852 (La. 1989).

At trial, the jury was made aware of the fact that M.C. did not scream or otherwise attempt to awaken anyone in the house during the incidents. The jury also heard M.C.'s explanation indicating that she was essentially frozen by fear throughout the ordeal. The jury also heard evidence of M.C.'s delayed disclosure of the abuse. In deciding the case, the jury was required to make a credibility determination. The jury obviously found M.C. to be credible and accepted her account of the incidents. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a jury's determination of guilt. State v. Williams, 2002-0065 (La. App. 1st Cir. 6/21/02), 822 So. 2d 764, 768, writ denied, 2003-0926 (La. 4/8/04), 870 So. 2d 263.

It is well settled that if found to be credible, the testimony of the victim of a sex offense alone is sufficient to establish the elements of the offense, even where the state does not introduce medical, scientific, or physical evidence to prove commission of the offense by the defendant. See State v. Hampton, 97-2096 (La. App. 1st Cir. 6/29/98), 716 So. 2d 417, 418-21. Even in the absence of any eyewitnesses or physical evidence, any rational trier of fact, viewing the evidence in this case in the light most favorable to the state, could have found that the state proved, beyond a reasonable doubt and to the exclusion of every reasonable

hypothesis of innocence, all of the essential elements of forcible rape. This assignment of error also has no merit.

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

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.