

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1673

STATE OF LOUISIANA

VERSUS

WARDELL STEVENS

Judgment Rendered: May 3, 2012

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On Appeal from the
18th Judicial District Court,
In and for the Parish of Pointe Coupee,
State of Louisiana
Trial Court No. 76,495

Honorable J. Robin Free, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, Wardell J. Stevens, was charged by grand jury indictment with aggravated rape, a violation of La. R.S. 14:42. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motion for post-verdict judgment of acquittal or for new trial. The trial court sentenced the defendant to life imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, assigning error as to the jury instructions, the trial court's removal of a juror, and the trial court's failure to sequester the jury during deliberations.¹ For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On the night of December 2, 2009, the defendant brutally raped his sister, C.F. (the victim), in their home in New Roads.² Specifically, as the victim resisted by kicking, pushing, and struggling with her arms, the defendant punched the victim in the head and face several times, attempted to choke her and smother her with a pillow, threatened to kill her at knifepoint, pulled off the victim's shorts and pushed her underwear aside, and forcefully penetrated her vaginally. The victim sustained a knee injury when she fell while running in an attempt to get away, her back was hurt when the defendant threw her onto a bed railing, and she further sustained bruises on her neck and face from the attack. According to the victim,

¹ The defendant filed a *pro se* motion for extension of time and for use of the record shortly after his defense brief was filed, allegedly so that he could file a supplemental *pro se* brief. However, because the defendant was convicted of a sex offense, the record is confidential. It would be a violation of the Victim's Rights Act, La. R.S. 46:1844(W)(1)(a), for the court or the prison to allow public disclosure of the identity of the victim. For this reason, we deny the defendant's motion for an extension of time and use of the record.

² In accordance with the law, herein the victim will be referenced by initials only. See La. R.S. 46:1844(W). The record is unclear as to whether or not the victim and the defendant are blood relatives, as the words half-brother, stepbrother, and brother are used interchangeably. The victim's mother testified that the defendant is her husband's son, the victim simply referred to the defendant as her brother, and the defendant referred to the victim as his sister during his interview.

she briefly lost consciousness at some point during the attack. After penetrating the victim, the defendant used a white T-shirt in an attempt to clean her vaginal area.

The victim was eighteen years old at the time, while the defendant was forty years old. The victim's two younger siblings were in the home at the time and heard the victim screaming, crying, and telling the defendant to stop. The children looked for a telephone to call for help but were unable to find one. They also tried to check on the victim, but the defendant instructed them to go back to their mother's bedroom. The defendant left after the incident. The victim found a telephone and contacted her mother, who was at work at the time, and her mother called the police. The victim was taken to the Pointe Coupee General Hospital emergency room, and a rape examination was conducted.³

ASSIGNMENTS OF ERROR NUMBERS ONE AND THREE

In the first assignment of error, the defendant notes that the trial court failed to instruct the jury not to discuss, read about, or watch television accounts on the case. The defendant further notes that the trial court had the duty to control the proceedings in the interest of justice. The defendant contends that it is the trial court's responsibility to insulate the jurors from outside influence so that the verdict will be based on the evidence. The defendant argues that while he did not object to this error at trial, it is discoverable by mere inspection of the pleadings and proceedings and without inspection of the evidence, and is reviewable pursuant to La. C.Cr.P. art. 920(2).

Closely related to the argument raised in the first assignment of error, the defendant argues in the third assignment of error that the trial court failed to

³ Along with the victim's statement, the defendant made corroborating, incriminating statements in an audio and video recorded interview given after his arrest, and DNA evidence was derived from the samples collected in the rape examination kit, including vaginal swabs and the victim's clothing, and a white T-shirt seized from the home.

sequester the jury during deliberations. The defendant notes that the trial court told the jurors that they could begin deliberations during lunch at a restaurant if they could talk privately. The defendant contends that the trial court erred in permitting the jurors to deliberate outside the confines of the courthouse. The defendant notes that he did not object to the form of deliberation but argues that it can be reviewed pursuant to La. C.Cr.P. art. 920(2), as it is discoverable by mere inspection of the pleadings and proceedings and without inspection of the evidence. Noting that the trial court failed to instruct the jurors not to discuss the case with others, the defendant contends that, in this case, there is no way to determine that no prejudice could have occurred to him. Finally, the defendant notes that the trial court did not insure that the jurors did not purchase alcoholic beverages at lunch to be consumed during deliberations.

As noted, the defendant did not object to the jury charge, nor did he object to the lunch arrangements with the option to deliberate. In that regard, the trial court offered to have the jurors eat lunch in the courthouse as they deliberated and the defense attorney stated, "I don't have a preference, Judge, I just would like to close before lunch." After charging the jury, the trial court stated that the jurors would be escorted to a restaurant for lunch and noted in the presence of the jurors that they could begin deliberations only if they were able to get "in a room by themselves ... talking amongst themselves about how they feel about things." The trial court added the following:

If they can't put you guys by yourself, we'll just start deliberating when you come back. What I'm thinking is I don't want other people listening to you all deliberate. That's just for you guys to deal with. So, if we can get you guys by yourselves where you can kind of start talking about it. I don't care, I mean, but I don't want other people listening. That's the main thing. I want your deliberations to be private amongst yourselves.

Erroneous instructions or failure to give jury instructions are not errors discoverable by a mere inspection of the pleadings and proceedings without

inspection of the evidence, and absent an objection during the trial, a defendant may not complain on appeal of an allegedly erroneous jury charge or the failure to give a jury instruction. Herein, as the defendant did not make a contemporaneous objection to the jury charges on the basis of the alleged failure now asserted on appeal, the issue raised in assignment of error number one is not properly preserved for appellate review. See La. C.Cr.P. arts. 801(C), 841, & 920(2); **State v. Dilosa**, 2001-0024 (La. App. 1st Cir. 5/9/03), 849 So.2d 657, 671, writ denied, 2003-1601 (La. 12/12/03), 860 So.2d 1153. We further note that in 1995, the legislature made the requirement in La. C.Cr.P. art. 791(B) for sequestration after each juror is sworn in capital cases waivable. This legislative change implies that sequestration is also waivable in noncapital cases, either through action or inaction, as the requirements in noncapital cases generally are less stringent than capital cases. (See also **State v. Schrader**, 518 So.2d 1024, 1037 (La. 1988), cert. denied, 498 U.S. 903, 111 S.Ct. 265, 112 L.Ed.2d 221 (1990), wherein the Louisiana Supreme Court held, “despite its long lineage, the jurisprudential presumption of prejudice for ‘capital cases’ does not apply to a ‘capital case’ where the defendant never faced the prospect of the death penalty and where counsel failed to press the point in the trial court, or object to the lack of sequestration. *In the absence of actual prejudice, this right to sequestration is waived.*”) (Emphasis added.) At any rate, as discussed below, we find insufficient grounds to set aside the verdict in the instant case.

A jury is sequestered by being kept together in the charge of an officer of the court so as to be secluded from outside communication. La. C.Cr.P. art. 791(A). In noncapital cases, the jury shall be sequestered after the court’s charge. La. C.Cr.P. art. 791(C). The purpose of Article 791 is to protect jurors from outside communications, which might influence them to base their verdict on something other than the evidence introduced at the trial. Reversal is required when an

outside communication occurs that is prejudicial to the accused. Where circumstances indicate, however, that no prejudice could have occurred to the accused, the brief separation of a juror may be insufficient grounds to set aside the verdict. **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449-50, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603; see also **State v. Carriere**, 141 La. 136, 142-43, 74 So. 792, 794 (1917) (the Louisiana Supreme Court found that the taking of the jury in the custody of deputy sheriffs to a restaurant was not an improper separation where they were placed at tables apart from other customers and did not communicate with third persons).

In this case, the defendant does not argue specific prejudice or allege that any separation or outside communication occurred. He merely poses, for the first time on appeal, the unsubstantiated possibility that the jury might have been exposed to outside influences or discussed the case with others. The record reflects that after the jury charge, the trial court emphatically informed the jurors to deliberate only in "private amongst yourselves." The defendant did not object and has not alleged any impropriety. After lunch the jurors returned, completed deliberations, and returned a verdict the same day. Based on our examination, the record does not reveal any prejudice or any violation of the fundamental requirements of due process. Assignments of error numbers one and three lack merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant argues that the trial court erred in disqualifying a juror, Ethel Bazile Derozan, upon motion by the State to have her replaced with the alternate juror. The defendant notes that the trial court did not instruct the jurors not to discuss the case with anyone and argues that Derozan should not have been disqualified for having a conversation about the case with a prospective juror. The defendant contends that once the trial court

realized it erred in failing to instruct the jurors not to discuss the case with anyone, it should have granted the defense motion for mistrial as opposed to merely disqualifying a single juror.

In this case, before closing arguments, the trial judge noted that after the State and defense had rested, James Jarreau, a potential juror who had been excused during voir dire, made statements to the trial judge raising possible grounds for disqualifying Derozan. The trial court held a hearing wherein Jarreau testified that after he had been excused from serving in this case, he had inadvertently run into Derozan (prior to the commencement of the State's case-in-chief) on the morning of the second day of trial, at a civic center. During a conversation, Jarreau informed Derozan that he questioned the defendant's mental state and whether he should be sentenced to life if he did not understand what he did. Derozan agreed and stated she did not want to be on the jury. According to Jarreau, Derozan further stated, "they're going to pay and they're not going to use me again." Jarreau admitted that he could not recall Derozan's exact wording but that he came as close as he could. Based on their brief conversation, Jarreau concluded that Derozan had already made a decision "[t]o let him [the defendant] go no matter what." Derozan admitted to the conversation with Jarreau, but indicated that she had merely agreed with Jarreau as to why he was not picked as a juror and denied stating that she was displeased with being picked or anything to indicate that she had preconceived notions. The trial court denied the defendant's motion for mistrial and noted its concern with the fact that Derozan had a conversation about the case outside of the court prior to the presentation of evidence. Thus, the trial court replaced the juror with the alternate.

Pursuant to La. C.Cr.P. art. 789, an alternate juror shall replace a juror who becomes unable to perform or disqualified from performing his or her duties prior to the time the jury retires to consider its verdict. A trial judge may disqualify a

juror upon a finding of blatant prejudices and partiality. See State v. Fuller, 454 So.2d 119, 123 (La. 1984).

Herein, the trial judge held a hearing to decide whether the juror had become disqualified to perform her duties and, if so, what action to take. See La. C.Cr.P. art. 789. The judge acted properly in holding an evidentiary hearing, with all parties present. The trial court has discretion to utilize the service of an alternate juror, rather than to grant a mistrial, upon a proper finding that this is the best course of action. **Fuller**, 454 So.2d at 123. As indicated above, when it is shown that a juror should be disqualified from further service because of the blatant display of prejudices and partiality, the replacement of the juror with the alternate is proper. While disputing the content, juror Derozan admitted to having an outside communication with Jarreau about the instant case. We find that the trial court did not abuse its discretion in disqualifying and replacing juror Derozan with a qualified alternate juror. Accordingly, assignment of error number two is without merit.

MOTION FOR EXTENSION OF TIME AND USE OF RECORD DENIED; CONVICTION AND SENTENCE AFFIRMED.