

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 2076

STATE OF LOUISIANA

VERSUS

WARREN BURNETT

Judgment rendered December 21, 2011.



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Appealed from the
22nd Judicial District Court
in and for the Parish of Washington, Louisiana
Trial Court No. 07 CR3 97152
Honorable Raymond Childress, Judge

* * * * *

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

PETTIGREW, J.

The defendant, Warren Burnett, was charged by "amended bill of information"¹ with one count of second degree sexual battery (count I), a violation of La. R.S. 14:43.2, and one count of attempted aggravated rape (count II), a violation of La. R.S. 14:27 and La. R.S. 14:42, and pled not guilty. Following a jury trial, he was found guilty as charged on both counts. He moved for a new trial, for a post-verdict judgment of acquittal, and to arrest the judgment, but the motions were denied. On count I, he was sentenced to fifteen years at hard labor without the benefit of probation, parole, or suspension of sentence. On count II, he was sentenced to forty-five years at hard labor without the benefit of probation, parole, or suspension of sentence. The trial court ordered that the sentences would run concurrently with each other. The defendant now appeals, contending: (1) the evidence was insufficient to support the verdict on count II; and (2) the trial court erred in denying the motions for a new trial and for a post-verdict judgment of acquittal because the evidence was insufficient to support the verdict on count II. He also files a pro se brief contending the State used "suggestive questioning" of the victim at trial, and the police coerced her into wrongfully identifying him. For the following reasons, we affirm the convictions and sentences.

FACTS

On May 16, 2007, the victim, C.M.,² was living on Recreation Center Road in Varnado/Angie. She indicated, on that date, the defendant entered her home through the unlocked door, while she was in the kitchen. She had not invited him into the home. Against her will, he pulled her into the bathroom by her hair. He "put" her on the floor, spread her legs wide open, and pulled down his pants, exposing his "private parts." The victim indicated "[the defendant then] put it up me." She described the item pushed into her as a piece of inhaler equipment from her asthma machine. She did not want to have

¹ The defendant was initially charged by grand jury indictment with aggravated rape, a violation of La. R.S. 14:42.

² The victim is referenced herein only by her initials. See La. R.S. 46:1844(W).

sex with the defendant or any contact with him. She indicated she had seen the defendant before in "a lady's house down the road." Further, she indicated, the defendant had come to her house a couple of times before the incident, but had not come inside. She also identified the defendant as her attacker in a photographic line-up and in a live line-up on the day after the incident. She indicated, prior to the incident, he had asked her to have sex with him, but she had refused. The victim was twenty-nine years old at the time of the incident, but was mentally retarded, had a full scale IQ of 65, and functioned at about the level of a seven or eight-year-old child.

Dr. John Whithurst Gallaspy of LSU Bogalusa Hospital was accepted by the court as an expert in the field of OB/GYN. He was consulted by the emergency room to remove the foreign object from the victim's vagina. When Dr. Gallaspy saw the victim, she was bleeding from her vagina and had a laceration on the back side of her vagina and in the region of her urethra. She was in "very significant" pain. Dr. Gallaspy indicated the victim had suffered serious injury to her vagina, and could have possibly died by exsanguination. After the victim was placed under anesthesia, Dr. Gallaspy used vaginal retractors to remove from the victim's vagina a hard plastic object used on a breathing machine.

The defendant's mother, Johnnie Mae Burnett, indicated the defendant and his brother, Perry, were living with her at the time of the incident. She claimed the defendant was at home with her from the evening before the incident until the police came to her house after the incident. She conceded, however, she had previously stated she had fallen into a deep sleep after she heard the defendant turn off the TV at approximately 3:00 a.m.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, the defendant argues the evidence was insufficient to support the verdict of guilty of attempted aggravated rape because the victim did not testify that he tried to put his penis inside her. In assignment of error number 2, he argues the trial court erred in denying the motions for a new trial and for a post-verdict judgment of acquittal because there was no evidence he intended to engage

in sexual intercourse with the victim. He does not challenge the sufficiency of the evidence to support the conviction on count I.

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 and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states, in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601, p. 2 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 98-0601 at 3, 730 So.2d at 487.

Louisiana Revised Statutes 14:41, in pertinent part, provides:

A. Rape is the act of ... vaginal sexual intercourse with a ... female person committed without the person's lawful consent.

B. Emission is not necessary, and any sexual penetration, when the rape involves vaginal ... intercourse, however slight, is sufficient to complete the crime.

Louisiana Revised Statutes 14:42, in pertinent part, provides:

A. Aggravated rape is a rape committed ... where the ... vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

....

(6) When the victim is prevented from resisting the act because the victim suffers from a ... mental infirmity preventing such resistance.

....

C. For purposes of this Section, the following words have the following meanings:

....

(2) "Mental infirmity" means a person with an intelligence quotient of seventy or lower.

Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. La. R.S. 14:27(A). "Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1); **State v. Henderson**, 99-1945, p. 3 (La. App. 1 Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235. Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. *Id.*

The defendant relies on part of the following testimony from the victim:

[State]: Now, when was it, going back into the bathroom now -- when was it that you saw his private part?

[Victim]: When we were in the bathroom.

[State]: Were you on the floor?

[Victim]: Yes.

[State]: Were you laying on your side or your back?

[Victim]: My back.

[State]: Okay. And did you see his private part while he was on his knees in front of you in between your legs?

[Victim]: Yes.

[State]: Did he try to do something with his private part?

[Victim]: No. He just tried to do the other.

[State]: He tried to put his private part inside of you?

[Victim]: No.

[State]: Did he get down close to you?

[Victim]: Yes.

[State]: Was he, like, on top of you? Was his weight on you?

[Victim]: No. It was just between my legs.

[State]: So his -- was his body close to your body where his private part is, when he was between your legs?

[Victim]: He was just between my -- he was turned, you know, I was laying like this and my -- my legs was down this a way and he was just up like this.

[State]: All right. All right. You could feel his weight next to your private part.

[Victim]: No.

[State]: Now, did you feel some pressure down there?

[Victim]: I did when he was doing the other.

[State]: Tell me about that. What happened then?

[Victim]: Well, he just stuck it up me.

[State]: Did you know what it was at that time?

[Victim]: Not right at the time.

[State]: Did he -- will you tell the Jury how that felt and what that felt like?

[Victim]: It hurt.

[State]: What did he [sic] do when something hurts you like that?

[Victim]: I went to the bathroom.

[State]: Did you holler first?

[Victim]: No. I was bleeding.

[State]: When he put that in you, was he still on top of you?

[Victim]: No. He was just by the floor.

[State]: All right. Did he get --

[Victim]: And then, when he -- when I went to the bathroom, he ran out.

[State]: Did he get up from over you after he put that in you?

[Victim]: Yes.

....

[State]: [C.M.], did you get a good look at that man that came in your house that morning?

[Victim]: Yes; because he was in the bathroom.

[State]: Was he, like, right over you?

[Victim]: He was between my legs.

A thorough review of the record convinces us that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of attempted aggravated rape and the defendant's identity as the perpetrator of that offense against the victim. The verdict returned on count II indicates, after weighing the victim's testimony, including her limited abilities, the jury found her credible. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The testimony of the victim alone is sufficient to prove the elements of the offense. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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. Lofton**, 96-1429, p. 5 (La. App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Further, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See State v. Ordodi, 2006-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662; **State v. Waymire**, 504 So.2d 953, 959 (La. App. 1 Cir. 1987) ("Defendant's argument that the [S]tate did not prove he actually intended to

penetrate the victim's anus or vagina has no merit. Any rational trier of fact could have inferred that, when defendant ordered the victim to pull down her pants and pulled down his own before climbing on top of her, he intended to penetrate the victim."). 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 jury. **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

These assignments of error are without merit.

PRO SE BRIEF

In his pro se brief, the defendant argues the State used "suggestive questioning" of the victim at trial. He also argues the police coerced her into wrongfully identifying him as the assailant.

A thorough review of the record indicates the defendant failed to object to the alleged suggestive questioning. Further, a thorough review of the allegations of the motion to suppress, as well as the arguments at the hearing on the motion, indicate the defendant failed to argue that the victim was coerced into identifying him. Accordingly, he failed to preserve his challenges to the evidence at issue. See La. Code Evid. art. 103(A)(1) ("Error may not be predicated upon a ruling which admits ... evidence unless a substantial right of the party is affected, and ... a timely objection ... appears of record, stating the specific ground of objection."); La. Code Crim. P. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence."); La. Code Crim. P. art. 703(F) ("Failure to file a motion to suppress evidence in accordance with this Article prevents the defendant from objecting to its admissibility at the trial on the merits on a ground assertable by a motion to suppress.").

These pro se assignments of error are without merit.

CONVICTIONS AND SENTENCES AFFIRMED.