NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0508

STATE OF LOUISIANA

VERSUS

KIRK MOSBY

Judgment Rendered: SEP 10 2010

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On Appeal from the Eighteenth Judicial District Court
In and for the Parish of Iberville
State of Louisiana
Docket No. 236-03

Honorable William C. Dupont, Judge Presiding

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Richard J. Ward
District Attorney
Tony Clayton
Becky Chutz
Don Cazayoux
Elizabeth A. Engolio
Assistant District Attorneys
Plaquemine, Louisiana

Plaintiff/Appellee
State of Louisiana

Holli Herrle-Castillo
Marrero, Louisiana

Counsel for Defendant/Appellant
Kirk Mosby

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

Defendant, Kirk Mosby, was charged by grand jury indictment with two counts of aggravated rape (counts I and II), violations of LSA-R.S. 14:42A(4). He entered a plea of not guilty on both counts. Following a jury trial, defendant was found guilty as charged. On each count he was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence, with the sentences to run consecutively. Defendant now appeals, designating the following assignments of error:

1. The trial court erred in denying the defense's cause challenges.

2. The trial court erred in granting the state's cause challenges.

3. The state failed to provide sufficient evidence to support the convictions.

4. The trial court erred in imposing consecutive sentences.

For the following reasons, we affirm the convictions and sentences.

FACTS

The victim of count I, B.Z.,[1] testified at trial. Her date of birth was January 8, 1993. In approximately December of 2002, when she was nine years old, B.Z. was living in White Castle with her mother, her sister, her brothers, and defendant. Defendant was the father of one of her brothers. According to B.Z., she went to sleep with her friend, R.B., in the children's room on the night in question, but defendant awakened her and R.B. and took them to her mother's room. B.Z. testified that defendant "did R.B. first," and then put his penis in B.Z.'s vagina. B.Z. stated that when she told the police that defendant did not "do it", she was lying to protect her little brother and because her mother told her to say that.

The victim of count II, R.B., also testified at trial. Her date of birth was October 14, 1991. In November or December of 2002, when she was eleven years old, R.B. spent the night at B.Z.'s house in White Castle. According to R.B., she went to sleep in the children's room on the night in question, but woke up in defendant's bed along with B.Z. R.B. testified that defendant put his penis in B.Z.,

[1] The victims are referenced herein only by their initials. See LSA-R.S. 46:1844W.

then put his penis in R.B.'s vagina, and then "went and got" B.Z. again. She indicated that before raping her, defendant took her clothes off, "jacked" her legs open, and put on a condom. She also stated that defendant threatened to kill her if she disclosed the rape. A February 2, 2003 medical exam revealed that R.B.'s hymen was ruptured, but that she had "no inference of fresh trauma."

A.V. also testified at trial.[2] Her date of birth was December 21, 1996. She testified that defendant was once married to her mother, E.V., and was her sister's father. According to A.V., when she was six years old, defendant took her into a room in a trailer, told her it was going to be her room, and then laid her down on her stomach and put his penis inside her. A.V. testified that when defendant pulled his penis out, "white stuff" came out of it, which he put on her stomach. A.V. stated that defendant told her that she would "catch a whooping" if she told anyone about what he had done to her. She also indicated that defendant "did it to [her] again" at his sister's house. A March 29, 2004 medical exam revealed that A.V.'s hymen was "not intact."

Defendant testified at trial. He conceded he was once married to E.V., and that A.V. was his stepdaughter. He denied, however, having a "sexual relationship" with A.V., either at a trailer or at his sister's house. He also conceded that B.Z. was his stepdaughter, and that he was present in the house with B.Z. and R.B. on the night in question. He denied, however, raping either B.Z. or R.B. He claimed that prior to the alleged rapes of B.Z. and R.B., he overheard R.B. telling B.Z. that R.B. was having sex with her neighbor. Defendant claimed that he told B.Z. that he was going to tell her mother that B.Z. was talking about sex, but gave her another chance after she begged him not to tell her mother.

CHALLENGES FOR CAUSE

In his first assignment of error, defendant argues that the trial court erred in denying the defense challenges for cause against prospective jurors Diane Sasser

[2] The instant appeal does not involve any crimes committed by defendant against A.V.

and Paula Nelson.[3] In his second assignment of error, defendant argues that the trial court abused its discretion in striking prospective jurors Maurice Sims, Quincy McNair, and Thomas Williams for cause because their initial responses, indicating that they were not impartial, were rehabilitated by the defense.

The state or the defendant may challenge a juror for cause on the ground that the juror is not impartial, whatever the cause of his partiality; on the ground that "[t]he relationship, whether by ... friendship, ... between the juror and the defendant ... [or] the district attorney, ... is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict;" or on the ground that the juror will not accept the law as given to him by the court. LSA-C.Cr.P. art. 797(2), (3), & (4).

In order for a defendant to prove reversible error warranting reversal of both his conviction and sentence, he need only show the following: (1) erroneous denial of a challenge for cause; and (2) use of all his peremptory challenges. Prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all his peremptory challenges.[4] An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. **State v. Taylor**, 03-1834, pp. 5-6 (La. 5/25/04), 875 So.2d 58, 62. The defense exhausted its peremptory challenges in this case.

A trial judge's refusal to excuse a prospective juror for cause is not an abuse of his discretion, notwithstanding that the juror has voiced an opinion seemingly prejudicial to the defense, when subsequently, on further inquiry or instruction, he has demonstrated a willingness and ability to decide the case

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[3] Defendant offers no specific argument in support of his claim of error. We note, however, that defense counsel's argument at trial concerning these particular challenges was not contained in the record originally filed with this court. Nevertheless, following the filing of the defense brief, the record was supplemented to add the argument of trial counsel concerning the defense challenges for cause against prospective jurors Sasser and Nelson.

[4] The rule is now different at the federal level. See **United States v. Martinez-Salazar**, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) (exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from trial court's erroneous denial of a cause challenge).

impartially according to the law and the evidence. **Taylor**, 03-1834 at p. 6, 875 So.2d at 62-63.

A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the prospective juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to the law reasonably may be inferred. However, the trial court is vested with broad discretion in ruling on a challenge for cause; its ruling will not be disturbed on appeal absent a showing of an abuse of discretion. **State v. Henderson**, 99-1945, p. 9 (La.App. 1 Cir. 6/23/00), 762 So.2d 747, 754, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235.

The erroneous allowance to the state of a challenge for cause does not afford the defendant a ground for complaint, unless the effect of such ruling is the exercise of more peremptory challenges than it is entitled to by law. LSA-C.Cr.P. art. 800B. The state also exhausted its peremptory challenges in this case.

DIANE SASSER

Diane Sasser was on the first panel of prospective jurors. She was a professor of family and child development at LSU. The state asked Sasser if she agreed that children could be afraid to come forward, and she stated that she was afraid as a child of what her parents "would think" and that they would not believe her. The defense asked her if she understood the presumption of innocence, and Sasser answered affirmatively. She also answered affirmatively when asked if she understood who had the burden of proof in the case. She stated that if it was not required, she would not require the defense to put on any evidence. When asked if she had a problem with the concept that defendant did not have to prove his innocence, she replied, "Possibly." She explained she would like as much information as possible to be able to come to a conclusion. Sasser stated that she was the kind of person who liked to hear both sides. The defense asked her if there was not another side, would she lean toward one side, and she replied, "Not necessarily."

The defense asked Sasser what her vote would be if the state failed to carry its burden of proof, and the defense did not put on any evidence. Sasser replied she would "have to do what the law says." The defense asked her that if she was selected to serve on the jury, could the defense rely on her to determine whether or not the state had carried its burden of proof. Sasser replied, "I do have to say that I will probably be an advocate for children. I can't take that bias out." Sasser agreed with the suggestion by the defense that the fact that the alleged victims were children would cause her a "problem." The defense then asked her if her profession and her expertise in family and child development would have a tendency to keep her from being fair and impartial to defendant because children were involved, and she answered, "potentially."

The defense challenged Sasser for cause. The court noted that Sasser had stated she would be an advocate for children, but had also stated that she would follow the law, and her statement, taken in context, merely indicated that she was concerned about children. The defense argued that Sasser had also indicated she had a problem with defendant not taking the stand. The state argued that Sasser's comments concerning defendant taking the stand had been "cleared ... up." The court agreed, and noted Sasser had "cleared that up," and her comments were made in connection with her "trying to get to that understanding of what the process is." Lastly, the defense claimed Sasser had stated that because she was a children's advocate, she could not be fair. The court disagreed, and denied the challenge for cause. The defense objected to the court's ruling and used its first peremptory challenge against Sasser.

The trial court did not abuse its broad discretion in denying the challenge for cause against Sasser. She demonstrated a willingness and ability to decide the case impartially according to the law and the evidence, and her responses as a whole did not reveal facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred.

PAULA NELSON

Paula Nelson was also on the first panel of prospective jurors. She was an accountant with the Louisiana Department of the Treasury. She stated that she had seen Clarice Zachary, a possible witness, a couple of times, but, even if Zachary testified, she (Nelson) could be fair and impartial to both sides. She agreed that some children might delay reporting abuse, and added that some children might never "bring it up," or might not know how to explain abuse to their parent, or might be afraid of hurting "the other person." The state told Nelson that defendant might have relatives in the courtroom and they might ask that he be found not guilty, but that was not evidence. The state also advised Nelson that the judge would instruct her that she could not be guided by sympathy, passion, or anything and had to "call this case from that stand." Nelson agreed. When the entire panel was asked by the defense if there was anything about the charges of aggravated rape or the alleged victims that concerned them, Nelson stated, "To be honest, I don't know if I could be fair." She explained, "Just being female, and I'm know [sic] I'm supposed to presume that he's innocent. But I don't think I can." The defense asked Nelson if she were the defendant, would she be uncomfortable with a person with her frame of mind being a juror, and she replied, "Right." The defense then asked Nelson, "And you can't be fair and impartial because of what the allegation is?" Nelson replied, "I don't know."

The defense challenged Nelson for cause, arguing that she had stated that she could not be fair. The court denied the challenge for cause, finding it "did not see anything on her that really," and that she was a little confused by the questions. The defense objected to the court's ruling and used its seventh peremptory challenge against Nelson.

The trial court did not abuse its broad discretion in denying the challenge for cause against Nelson. She demonstrated a willingness and ability to decide the case impartially according to the law and the evidence, and her responses as a whole did not reveal facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred. Nelson initially

indicated she could be fair and impartial to both sides. Upon questioning by the defense, however, she indicated she did not know whether she could be fair and impartial. The trial court specifically found that Nelson's equivocal answer was the result of confusion by the defense questioning rather than her changing her mind. The trial court was in the best position to make this determination. A trial court's ruling on a motion to strike jurors is afforded broad discretion because of the court's ability to get a first-person impression of prospective jurors during voir dire. **State v. Brown**, 05-1676, p. 5 (La.App. 1 Cir. 5/5/06), 935 So.2d 211, 214, writ denied, 06-1586 (La. 1/8/07), 948 So.2d 121.

MAURICE SIMS

Maurice Sims was on the third panel of prospective jurors. He worked as a janitor for the Iberville Parish School Board. He stated that he had gone to school with some of defendant's nieces and nephews since elementary school, and that his family knew defendant's family. He also stated that he had already heard something about the charges against defendant. When asked if he had formed any opinions about the case that would prohibit him from giving either side a fair trial, he replied, "I don't think so." The state asked Sims if he had "an issue" and could not "do it," and he replied, "[w]ell, somewhat like that, you know." Sims again stated that he and his family knew defendant's family. The state asked Sims, "And you cannot sit to vote to send their loved one to Angola for the rest of his life knowing he's gonna die over there, you can't do it, right?" Sims replied, "That's kinda hard, you know." The state asked Sims if he was uncomfortable sitting on a case where he knew the loved ones of defendant, and Sims answered affirmatively. The state asked Sims, "And you can't do it, correct?" Sims replied, "No, sir, I can't."

The defense asked Sims if he was a law-abiding citizen, and he answered affirmatively. Sims also answered affirmatively when asked if he could follow the law. The defense then asked, "So if the judge tells you that the law is that if [the prosecutor] proves his case beyond a reasonable doubt you must find the

defendant guilty, you're gonna follow that, wouldn't you?" Sims again answered affirmatively.

The state challenged Sims for cause, arguing that while the defense had asked Sims if he could follow the law, it had not rehabilitated him on whether or not he could be fair and impartial in spite of his connection to defendant's family. The court granted the challenge for cause, noting Sims knew the facts, knew the family, and had stated he could not convict.

The trial court did not abuse its broad discretion in granting the challenge for cause against Sims. Sims's responses as a whole revealed facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred.

QUINCY MCNAIR

Quincy McNair was also on the third panel of prospective jurors. He worked for Brinks Incorporated. He stated that he had grown up with defendant, he was best friends with defendant's brother, and defendant's family and he were "basically like family." When asked if he knew anything about the charges in the case, he replied, "Kinda sort of." He indicated, however, that he had not formed any opinions that would prohibit him from giving both sides a fair trial. The court then asked McNair, "You think you can sit there and listen to the evidence and call it like it is one way or the other?" McNair replied, "I think it'll be a problem for me." The state asked McNair, "You can't do it on this case?" McNair replied, "No, sir."

The defense asked McNair, "Now, my question to you is, can you or would you follow the law as given to you by this judge?" McNair answered affirmatively. The defense also asked McNair, "Okay. Whatever that law is you would follow it?" He again answered affirmatively. The defense then asked McNair, "The judge tells you about reasonable doubt and the [sic] tells you that's the burden of proof and if the State does that you're gonna abide by that law, right?" McNair answered, "Correct."

The state challenged McNair for cause, arguing that he had grown up with defendant's brother, was "basically like family" with defendant's family, and had

indicated he could not sit on the case. The court granted the challenge for cause, noting that McNair knew some of the facts before he came to court, could taint the jury, and was close to defendant's family. The defense objected to the court's ruling.

The trial court did not abuse its broad discretion in granting the challenge for cause against McNair. McNair's responses as a whole revealed facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred.

THOMAS WILLIAMS

Thomas Williams was also on the third panel of prospective jurors. He was a painter. He stated that he had grown up with defendant, had gone to school with two of defendant's brothers, his first cousin had married defendant's sister, and he knew defendant's father. He answered affirmatively when asked if he had heard anything about the charges before coming to court. The court asked Williams, "The fact that you know the family and have heard about the case, have you formed any opinions that would prohibit you from coming in here and giving a fair trial to both sides?" Williams replied, "I don't think so." The court then asked Williams, "Your having grown up with the Mosbys[,] any problem with you sitting here and listening to both sides and deciding one way or the other in this case?" He replied, "Yes, it'd be a problem." The prosecutor also indicated that he and Williams grew up together. Williams agreed, stating that he played high school football with counsel for the state. The prosecutor then asked Williams, "But you know the folks? You know the family? ... And you can't do it?" Williams answered, "Can't do it."

The defense asked Williams, "And are you gonna follow the law that's given to you if you're selected?" Williams answered affirmatively. The defense asked Williams, "Whatever that law is, if the judge tells you what reasonable doubt is and the [s]tate loses the case beyond a reasonable doubt, that's the law that he's given to you and you gonna follow it, right?" Again, Williams answered affirmatively.

The state challenged Williams for cause. The court interrupted the state's argument, and granted the challenge for cause, noting that Williams had grown up with defendant and knew some of the facts before he came to court. The defense objected to the court's ruling.

The trial court did not abuse its broad discretion in granting the challenge for cause against Williams. Williams's responses as a whole revealed facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred.

These assignments of error are without merit.

SUFFICIENCY OF THE EVIDENCE

In his third assignment of error, defendant contends the evidence was insufficient because no physical evidence was presented and because the testimony of the two victims was "fraught with discrepancies and unlikely scenarios."

In reviewing claims 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. 821B; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

Louisiana Revised Statute 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 Statute 14:42, prior to amendment by 2003 La. Acts No. 795, § 1, in pertinent part, provided:

> A. Aggravated rape is a rape ... 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:
>
> . . .

(4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

After a thorough review of the record, we are convinced that any rational trier of fact viewing the evidence in the light most favorable to the state could have found beyond a reasonable doubt that defendant was guilty of counts I and II. The verdicts rendered against defendant indicate that the jury accepted the testimony offered against him and rejected the testimony offered in his favor. 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. 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**, 07-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

CONSECUTIVE SENTENCES

In his last assignment of error, defendant argues the sentences must be set aside because the trial court failed to provide specific reasons for imposing consecutive sentences. He argues that when the trial court fails to state the factors considered and the reasons for consecutive terms, the Louisiana Supreme Court normally vacates sentences and remands for resentencing, citing **State v. Sherer**, 437 So.2d 276 (La. 1983) (per curiam).

Louisiana Code of Criminal Procedure Article 883, in pertinent part, provides:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be served consecutively unless the court expressly directs that some or all of them be served concurrently.

Although LSA-C.Cr.P. art. 883 favors imposition of concurrent sentences for crimes committed as part of the same transaction or series of transactions, a trial court retains the discretion to impose consecutive penalties in cases in which the offender's past criminality or other circumstances in his background or in the commission of the crimes justify treating him as a grave risk to the safety of the community. **State v. Walker**, 00-3200, p. 1 (La. 10/12/01), 799 So.2d 461, 461-62 (per curiam); see **State v. Berry**, 95-1610, p. 25 (La.App. 1 Cir. 11/8/96), 684 So.2d 439, 460, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603 ("It is within the sentencing court's discretion to order that sentences run consecutively, rather than concurrently. ... Given the nature of the crimes involved (second degree murder and aggravated rape), we find no abuse of the trial court's discretion in imposing consecutive sentences.").

Sherer involved a conviction of one count of negligent homicide and a five-year sentence and an adjudication as a habitual offender on another count of negligent homicide and an enhanced sentence of seven years under the habitual offender law to run consecutively to the five-year sentence. **Sherer**, 437 So.2d at 276. The court in **Sherer** vacated the sentences and remanded for resentencing with a full statement of reasons for the particular sentences imposed. **Sherer**, 437 So.2d at 277. The court noted:

> Because the function of the consecutive sentence should be similar to the sentence imposed on habitual or dangerous offenders, sentences for crimes arising from a single course of conduct should be concurrent rather than consecutive, absent a showing that the offender poses an unusual risk to the safety of the public. See **State v. Franks**, 373 So.2d 1307 (La.1979); **State v. Cox**, 369 So.2d 118 (La.1979). Cf. La.C.Cr.P. art. 883. We cannot presume that the sentencing judge viewed the defendant as an unusual risk to the safety of the public because he did not so state. Instead, the judge expressed his belief that the defendant had become virtually rehabilitated and should be released on parole at the earliest possible time. For these reasons, the imposition of consecutive rather than concurrent sentences

> totaling 12 years at hard labor upon a defendant deemed parole-eligible by the sentencing judge for crimes of criminal negligence, rather than intentional offenses, arising from a single course of conduct, are unexplained by the judge's statements and unillumined by this problematic record.

Id.

In the instant case, there was no abuse of discretion in the imposition of consecutive sentences. **Sherer** is distinguishable. The record supports consecutive sentences for defendant. At sentencing, the court noted that the instant offenses were some of the most heinous crimes that the court had seen and that, "Murder is one thing but this with children is another thing." Defendant presents a grave risk to the safety of the community.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.