

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

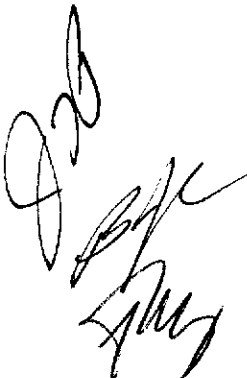
NO. 2009 KA 2263

STATE OF LOUISIANA

VERSUS

ROBERT HENRY ELZY, JR.

Judgment rendered May 7, 2010.



* * * * *

Appealed from the
21st Judicial District Court
in and for the Parish of Tangipahoa, Louisiana
Trial Court No. 106864
Honorable Jerome Winsberg, Judge, Ad Hoc

* * * * *

HON. SCOTT M. PERRILLOUX
DISTRICT ATTORNEY
PATRICIA PARKER
ASST. DISTRICT ATTORNEY
AMITE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

J. GARRISON JORDAN
RON S. MACALUSO
HAMMOND, LA

ATTORNEYS FOR
DEFENDANT-APPELLANT
ROBERT HENRY ELZY, JR.

* * * * *

BEFORE: CARTER, C.J., GUIDRY, AND PETTIGREW, JJ.

PETTIGREW, J.

Defendant, Robert Elzy, Jr., was charged by bill of information with one count of forcible rape, a violation of La. R.S. 14:42.1.¹ Defendant entered a plea of not guilty, waived his right to trial by jury, and was tried before the trial court. The trial court determined defendant was guilty as charged. The trial court subsequently sentenced defendant to a term of thirteen years at hard labor, with the first five years to be served without the benefit of probation, parole, or suspension of sentence.

Defendant appeals, citing the following as error:

1. The [T]rial [C]ourt erred when it denied defendant's Motion to Quash pertaining to the defendant's constitutional right to a speedy trial.
2. The Trial Court erred when it granted the State's motion to introduce evidence of [an] alleged prior sexual assault that occurred in 1996, under [La. Code Evid. art.] 412.2.
3. The Trial Court erred when it ... denied the defendant's Motion for Judgment of Acquittal at the conclusion of the State's case.
4. The Trial Court erred when it found the defendant guilty based on the evidence presented by the State of Louisiana, as it did not prove the defendant's guilt beyond a reasonable doubt using the burden of proof standards set forth in **Jackson v. Virginia**, 443 U.S. 307 (1979).
5. The sentence of thirteen years with the Louisiana Department of Corrections for the crime of principal to forcible rape is excessive in light of the mitigating factors raised by the defendant in his Motion to Reconsider Sentence.

We affirm defendant's conviction and sentence.

FACTS

Mark Anthony Spears was originally charged as a co-defendant in the present case. Prior to trial, Spears entered a guilty plea to the charge of forcible rape, in exchange for a sentencing recommendation for a sentence of seven to ten years. Pursuant to this plea agreement, Spears would testify against defendant. Spears admitted he had three prior felony convictions, including a 1991 conviction for forcible rape involving his girlfriend's sister.

¹ Mark Anthony Spears was charged as a co-defendant in the same bill of information. Prior to trial, Spears entered into a plea bargain in exchange for testifying against defendant.

Spears, who was forty-three years old at the time of trial, first met defendant when he was a student at Independence Junior High and defendant was a teacher and coach. Since then, Spears and defendant had maintained a friendship. In 2001, J.M. met defendant and shortly thereafter they began a romantic relationship, and eventually discussed getting married.

According to Spears, on May 30, 2003, defendant contacted him with an invitation to "party" and brought up the prospect of Spears engaging in sexual relations with J.M. Spears had met J.M. previously and knew she was in a relationship with defendant. Spears agreed to go out with defendant and J.M., and they picked him up in the earlier part of the evening. J.M. initially objected to having Spears around on this particular evening, but defendant insisted, so she agreed.²

The group initially went to a club in Tangipahoa, but because it was a small crowd, they proceeded to a different club in Hammond known as Pajo's. Spears was the only one who entered the club, apparently just long enough to drink one beer. When he returned to defendant's vehicle, Spears claims defendant and J.M. were having sex in the vehicle.³ Spears briefly returned to the club, then went outside again.

After the group left Pajo's, they all returned to defendant's residence in Ponchatoula. J.M. was not aware defendant intended for Spears to spend the night at his residence until he told J.M. not to drive Spears home. Inside the residence, there was an air mattress on the floor in the living room. According to Spears, they had a few drinks in the living room, and then J.M. went to the bathroom to get sheets for the air mattress.

² At trial, J.M. explained that she was fearful of Spears and described how the first time she met him, she was with defendant and they had picked up Spears. According to J.M., defendant told Spears to drive the vehicle while he and J.M. rode in the backseat. J.M. stated this gave her a "fishy" feeling, so she phoned her sister and talked to her while they drove around. J.M. said the next two times she was around Spears, it was at defendant's residence. While Spears was there, J.M. noticed that, once, the phone in the master bedroom had been taken off the receiver; and another time, the phone line had been unplugged from the receiver and run through the computer.

³ During her testimony, J.M. denied she and defendant engaged in sexual activity while in the vehicle in the parking lot. Rather, J.M. stated they argued and then she fell asleep.

At trial, Spears explained that defendant told him he wanted Spears to have sex with J.M. "by all means necessary." Spears stated that defendant told him even if J.M. refused, he was to go on because it was "all about control." According to Spears, defendant would be present during the incident, but would be pretending to be asleep. Thus, when J.M. was in the bathroom, defendant directed Spears to follow her and bring her out and have sex with her, in front of where he was sitting on the sofa.

Spears walked over to the spare bathroom near the kitchen, grabbed J.M., and an altercation ensued. J.M. and Spears struggled, and Spears forced J.M. out into the living room, where Spears raped J.M. According to Spears, defendant was in the living room pretending to be asleep; however, J.M. testified she thought defendant had gone into their bedroom. J.M. stated the door to their bedroom was open, but she was unsure if defendant watched the rape. Spears testified that he told J.M. that defendant would not help her and that defendant wanted this to happen.

After the rape, J.M. got up to go to the bathroom. As J.M. entered the master bedroom, she began striking defendant and accusing him of setting her up. Defendant responded to J.M.'s attempts to awaken him, and he woke up and stated he had done nothing to her. J.M. went into the master bathroom where she pretended to douche. According to J.M., defendant watched her in the bathroom and failed to exhibit any concern for her given what she had told him had occurred.

Spears testified that following the rape, J.M. appeared "strange" and that he told defendant they were "going to have a problem." J.M. began arguing with defendant, and defendant stated, "I'll kill that bitch." While defendant and J.M. continued to argue, Spears left the residence on foot.

J.M. testified the argument between her and defendant turned physical and she pulled a knife on him and stabbed him in the leg. J.M. stated she realized she could not overpower defendant so she "quit" and told him to beat her. At that point, defendant began to hug and console her and told J.M., "Remember we both work for the school system." However, J.M. resumed arguing with defendant over his role in her rape, and defendant told her, "You know you wanted to be turned out."

As the morning wore on, J.M. realized she would not be able to get away from defendant as long as she argued and fought, so she decided she would act like nothing happened. Since they had planned to do some painting at her residence, J.M. told defendant she wanted to go home and paint. Because she could not find her cell phone, she asked defendant if she could use his phone to call her house. J.M. called her house and told her son to stay there until she arrived with the paint.

Defendant and J.M. went to Sears and bought paint. Defendant then drove J.M. back to his house to get her cell phone. When they arrived, J.M. refused to get out of defendant's vehicle and said he could bring her the phone. Defendant then told J.M. she needed to change her clothing. J.M. refused, so defendant stayed in his vehicle and began driving to New Orleans. J.M. then agreed she would get out at his residence and go inside and change clothes, so defendant turned around and drove back to his house. When they arrived at his residence, J.M. jumped from the vehicle and began walking toward a neighbor's house.

As J.M. exited defendant's vehicle, defendant commented, "It's going to be like that." J.M. simply replied, "Yeah," as she proceeded to the neighbor's house and asked to use the phone. J.M. called her sister to pick her up, but did not tell any of the neighbors what had occurred. When her sister arrived and drove away, J.M. asked her to take her to North Oaks Hospital where she reported the rape.

At North Oaks Hospital, J.M. was examined by Bernadine Milton, a registered nurse with training in sexual assaults. Milton completed the sexual assault evidence gathering. At trial, the parties stipulated that the vaginal swab contained a DNA profile that matched the DNA of Spears.

Officer John Cieutat, of the Ponchatoula Police Department, was dispatched to the hospital in response to J.M.'s complaint that she had been raped. In her statement to Officer Cieutat, J.M. identified Spears as the rapist and defendant as being in the house and allowing the rape to occur. J.M. also told Officer Cieutat that she had gone to Sears with defendant earlier that day in an attempt to stop the fighting between them and that

defendant had earlier grabbed the clothing she wore the previous night from the air mattress and threw it in the washing machine.

Detective Christy Varnado of the Ponchatoula Police Department also spoke with J.M. Based on her interview with J.M., Detective Varnado obtained a search warrant of defendant's residence at Southeast Railroad Avenue. In executing the search warrant at 6:09 p.m., Detective Varnado observed in the spare bathroom there appeared to be evidence that a towel rack had been removed, and there was a hook where a shower curtain may have been. Detective Varnado also noted fragments of blue glass on a shelf in the bathroom. Detective Varnado noticed there were pieces of the same type of blue glass in the trash can. There also was evidence that the bathroom door had been forced open. Detective Varnado also seized the clothing J.M. described she had been wearing the previous night and sheets from the dryer in defendant's residence.

J.M. went on to testify that despite her feelings that defendant had been involved in allowing Spears to rape her, she attempted reconciliation with him. Several weeks following her rape, J.M. contacted defendant regarding money he owed her. J.M. explained she was still in love with defendant and they wound up meeting at a hotel, where they seemingly worked out their problems, with defendant indicating he wanted to marry her. J.M. wound up having sexual intercourse with defendant that night; however, J.M. later realized the relationship would not last given what had occurred. J.M. testified that she had always felt sexually inadequate in their relationship because defendant wanted her to do things she was not comfortable doing.

Following his arrest, Spears did not tell the police defendant had taken any action to facilitate Spears's rape of J.M. It was only after the State entered plea negotiations with Spears that Spears revealed he and defendant had previously engaged in this type of arrangement. According to Spears, in 1996, defendant had Spears over to his residence for the purpose of raping defendant's then-wife, C.G. Spears testified that in April 1996, similar to the present incident, defendant called him and invited him to "party" and discussed Spears having sex with C.G. and how defendant wanted to watch Spears force himself on his wife. According to Spears, he went to defendant's house and after a few

drinks, defendant encouraged Spears to "pursue" C.G., who had just gone into the bedroom. Spears claimed he went into the bedroom, began struggling with C.G., and that defendant went into the room to watch as he raped C.G. According to Spears, defendant did nothing to help C.G., despite her cries, and defendant made her ride with them when he drove Spears home.

Although Spears was arrested for the 1996 incident, the matter was reviewed by a grand jury, which declined to return a true bill. Defendant was not charged or arrested in connection with the 1996 incident involving C.G.⁴

Defendant presented testimony from Jessie Mae Hill, his cousin, who lived next door to him. According to Hill, J.M. came over on May 31, 2003, so she could call her sister. Hill testified that J.M. appeared calm and not upset in any manner. Debbie Brown, defendant's sister, testified she was at Hill's residence on May 31, 2003, engaged in a normal conversation with J.M., and J.M. appeared normal.

Defendant did not testify.

DENIAL OF MOTION TO QUASH

In defendant's first assignment of error, he contends the trial court erred in denying his motion to quash pertaining to his constitutional right to a speedy trial.

⁴ The State also presented testimony from C.G., who had been married to defendant from July 1995 to April 1996. C.G. described an incident in 1996, while still married to defendant, wherein he picked up Spears and took him back to their residence. After Spears and defendant visited and drank beer, she decided to go to bed. C.G. thought defendant would drive Spears home. After she went to bed, someone came into the bed that she initially thought was her husband. However, when she touched him, she realized it was not defendant, but Spears. C.G. screamed for defendant and began fighting with Spears. Spears told C.G. that defendant was passed out drunk and dragged her into the room where defendant appeared to be passed out. C.G. tried to shake defendant awake, but he never responded. Spears dragged C.G. back into the bedroom and raped her. C.G. testified that as she struggled in the bedroom with Spears, she noticed that the gun they usually kept in the bedroom was not there, nor was the alarm switch in its usual location.

After Spears finished raping her, he left the room. About forty-five minutes to an hour later, defendant entered the bedroom and tried to initiate sexual relations. Defendant also asked C.G. why she had locked the door. Although defendant was initially concerned when C.G. told him what had happened, as time wore on, defendant appeared more and more defensive of Spears and vocalized to J.M. that if she reported this, it would ruin Spears's reputation. As defendant further withdrew his support of C.G. and their relationship crumbled, C.G. left and filed for divorce. Defendant filed a countersuit to the divorce petition claiming C.G. had an affair with Spears. According to C.G., the divorce was bitter and ugly.

At trial, C.G. testified that the day after Spears raped her, it occurred to her that defendant had been involved in her rape. She explained she waited a month before reporting the rape because defendant did not want her to report it, and she only reported it after she filed for divorce. C.G. testified she did not know if defendant watched Spears rape her.

Statutory Time Limitations

In the instant case, defendant is charged with one count of forcible rape, a violation of La. R.S. 14:42.1, a non-capital felony. Under La. Code of Crim. P. art. 578(2), defendant's trial was required to commence within two years from the date the prosecution was instituted. Prosecution of this matter was instituted by the filing of a bill of information on August 20, 2003. Therefore, the State had until August 20, 2005, to commence the defendant's trial. As of September 17, 2007, the date defendant moved to quash the bill of information, a trial had not been commenced. Clearly, the two-year prescriptive period for the commencement of trial was exceeded; thus, on its face, the defendant's motion to quash had merit.

Once an accused shows that the State failed to bring him to trial within the time periods specified by Article 578, the State bears a heavy burden of showing that an interruption or suspension of the time limit tolled the running of the two-year period. **State v. Cotton**, 2001-1781, pp. 4-5 (La. App. 1 Cir. 5/10/02), 818 So.2d 968, 971, writ denied, 2002-1476 (La. 12/13/02), 831 So.2d 982.

Article 578(2) provides that the trial of non-capital felonies must be held within two years from the date of the institution of prosecution. Institution of prosecution includes the finding of an indictment, or the filing of a bill of information, or affidavit, which is designed to serve as the basis of a trial. La. Code Crim. P. art. 934(7). Upon expiration of this time limitation, the court shall, on motion of the defendant, dismiss the indictment and there shall be no further prosecution against defendant for that criminal conduct. **Cotton**, 2001-1781 at 4, 818 So.2d at 971.

An interruption of prescription occurs when the State is unable, through no fault of its own, to try a defendant within the period specified by statute. Once the cause of the interruption disappears, the time limit begins anew. See La. Code Crim. P. art. 579(B). Time limits are suspended when a defendant files a motion to quash or other preliminary plea. La. Code Crim. P. art. 580. When the prescriptive period is suspended, the relevant period is not counted, and the running of the time limit resumes when the court rules on

the motions. **State v. Lathers**, 2005-0786, pp. 7-8 (La. App. 1 Cir. 2/10/06), 924 So.2d 1038, 1043, writ denied, 2006-1036 (La. 11/3/06), 940 So.2d 659.

The legislation fixing the time limitations for prosecution serves to establish legislative recognition of the time that the legislature has in all probability found to be a reasonable delay for prosecution. When the defendant has brought an apparently meritorious motion to quash based on prescription, the State bears a heavy burden to demonstrate either an interruption or a suspension of the time limit such that prescription will not have tolled. The trial court cannot give the State "the benefit of the doubt" but must require the State to prove suspension or interruption of the time delays if the prosecution takes place beyond the statutory delays. **Lathers**, 2005-0786 at 8, 924 So.2d at 1043.

In the present case, it appears that several events occurred to both interrupt and suspend the running of the two-year time limitation. First, we note that prior to the original two-year deadline of August 20, 2005, the parties agreed to continue trial of this matter from July 11, 2005 to September 12, 2005. The September 12, 2005 transcript reflects that as of that date, the State was still waiting for results from the Louisiana State Police Crime Lab. The trial court also made specific note that the law enforcement entities were facing major problems in the aftermath of Hurricane Katrina, thus the trial court set October 5, 2005, as a pre-trial conference date.

The first indication that the crime lab results had been provided to defense counsel was at the October 5, 2005 hearing. At this hearing, both parties indicated they wanted a trial date. We note that under Article 579(A)(2), the time limitations are interrupted for any cause beyond the control of the State. In our opinion, the delay from the State Police Crime Lab is not a cause within the control of the State; thus, we find once these results were provided to defense counsel, the time limitations began to run anew as provided by Article 579(B). Thus, the new two-year period to commence trial would run until October 5, 2007.

Within this new two-year period of limitations, the record reflects on June 28, 2006, the State provided an Article 404(B) notice of intent to use other crimes evidence

against defendant. On December 29, 2006, defendant filed a discovery request in connection with this notice by the State. On that same date, the defense also filed an objection to the State's Notice of Intent to Use Statement of a Co-Conspirator at trial.

Under La. Code Crim. P. art. 580, when a defendant files a motion to quash or other preliminary plea, the running of the periods of limitations established in Article 578 are suspended until the ruling of the court thereon; but in no case shall the State have less than one year after the ruling to commence trial. For purposes of Article 580, a preliminary plea is any plea or motion filed by the defense that has the effect of delaying trial. Such pleadings include properly filed motions to quash, motions to suppress, or motions for a continuance, as well as applications for discovery and a bill of particulars. **State v. Allen**, 2003-2815, pp. 8-9 (La. 4/23/04), 871 So.2d 1097, 1102. The record reflects defendant requested a special setting for the December 29, 2006 motions he filed. However, prior to obtaining a ruling on these pending motions, defendant filed the motion to quash at issue in this assignment of error. On October 17, 2007, the trial court denied defendant's motion to quash.⁵

We note at this point, defendant's motions regarding the State's use of his prior crimes evidence, which had been filed on December 29, 2006, were still pending before the trial court. Because this preliminary plea had not been ruled upon, the time period for bringing defendant to trial was suspended. Following the supervisory review of the trial court's denial of defendant's motion to quash, on December 4, 2008, the trial court issued a ruling denying defendant's motion regarding the State's use of prior crimes evidence. According to the minute entry of this date, defendant again obtained a thirty-day stay of the proceedings in which to file a writ application with this court. In a decision dated February 2, 2009, this court denied defendant's writ application. **State v. Elzy**, 2008 KW 2641 (La. App. 1 Cir. 2/2/2009) (unpublished). The minute entry of February 11, 2009,

⁵ Defendant sought supervisory writs to this court and obtained a thirty-day stay of the proceedings. On February 6, 2008, this court denied defendant's writ application. **State v. Elzy**, 2007 KW 2286 (La. App. 1 Cir. 2/6/2008) (unpublished). However, defendant filed a rehearing application with this court and on February 20, 2008, obtained a continuance from the trial court. On March 3, 2008, this court denied defendant's rehearing application on the trial court's denial of his motion to quash. **State v. Elzy**, 2007 KW 2286 (La. App. 1 Cir. 3/8/2008) (unpublished).

indicates defendant obtained a continuance in order to seek review of this ruling with the Louisiana Supreme Court. The record reflects the Louisiana Supreme Court denied defendant's writ application. **State v. Elzy**, 2009-0312 (La. 4/3/09), 6 So.3d 774.

Defendant's trial was commenced on August 3, 2009, less than one year from the denial of his writ application by the supreme court, which falls within the time limits for bringing the matter to trial set forth in Article 580. Accordingly, we cannot say the delay commencing defendant's trial violated the statutory time frame set forth in the Louisiana Code of Criminal Procedure.

Sixth Amendment Right to Speedy Trial

A defendant's right to a speedy trial is a fundamental right imposed on the states by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. **Klopfer v. North Carolina**, 386 U.S. 213, 222-223, 87 S.Ct. 988, 993, 18 L.Ed.2d 1 (1967). See also La. Const. art. I, § 16. The underlying purpose of this constitutional right is to protect a defendant's interests in preventing oppressive pretrial incarceration, limiting possible impairment of his defense, and minimizing his anxiety and concern. **Barker v. Wingo**, 407 U.S. 514, 532, 92 S.Ct. 2182, 2193, 33 L.Ed.2d 101 (1972).

In determining whether a defendant's right to a speedy trial has been violated, courts are required to assess the following factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant. **Barker**, 407 U.S. at 530, 92 S.Ct. at 2192. Under the rules established in **Barker**, none of the four factors listed above is "either a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial." **State v. Love**, 2000-3347, p. 15 (La. 5/23/03), 847 So.2d 1198, 1210 (citing **Barker**, 407 U.S. at 533, 92 S.Ct. at 2193). Instead, "they are related factors and must be considered together ... in a difficult and sensitive balancing process." *Id.*

Length of the delay

The first of the **Barker** factors, the length of the delay, is a threshold requirement for courts reviewing speedy trial claims. This factor serves as a triggering mechanism.

Unless the delay in a given case is presumptively prejudicial, further inquiry into the other **Barker** factors is unnecessary. However, when a court finds that the delay was presumptively prejudicial, the court must then consider the other three factors. **Love**, 2000-3347 at 16, 847 So.2d at 1210.

In the present case, defendant's trial was commenced six years following the filing of the bill of information. For purposes of this analysis, we will presume this delay, which was three times as long as the statutory delay, was presumptively prejudicial.

Reason for the delay

In the present case, there appear to be multiple reasons for the delay following the filing of the bill of information and commencement of the trial. First, we note the parties were waiting on results from the State Police Crime Lab, and such results were delayed by the effects of Hurricane Katrina on the area.⁶ Then, following the resolution of this obstacle, it appears the State negotiated a plea agreement with defendant's co-defendant, Spears. The information gleaned from Spears caused the State to file its intent to use other crimes evidence. Defendant sought to block use of such evidence and the litigation and review of the trial court's ruling, coupled with defendant's application for supervisory review from the trial court's denial of his motion to quash, were the major factors in causing the delay of this trial. Thus, although the delay was presumptively prejudicial, there were legitimate reasons for such delay.

Defendant's assertion of his right to a speedy trial

The third factor to be considered when analyzing a defendant's speedy trial claim is whether the defendant asserted this right to a speedy trial. The **Barker** balancing test allows a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection. The failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. **Love**, 2000-3347 at 19, 847 So.2d at 1211-1212.

⁶ Another circuit has recognized that the effect of Hurricane Katrina on the criminal justice system was a circumstance beyond control of the State. See **State v. Hamilton**, 2007-0582, pp. 5-6 (La. App. 4 Cir. 11/28/07), 973 So.2d 110, 113-114 (regarding trial delays in Orleans Parish).

In the present case, there were numerous objections by the defendant to the State's motions for continuance. However, the minute entries and record clearly reflect at the time defendant filed his motion to quash, there were outstanding motions regarding use of other crimes evidence that he had filed. Moreover, once the trial court ruled on defendant's motion to quash, there was considerable, yet understandable, delay following defendant's attempts to seek supervisory review of that ruling. Finally, although defendant objected to the State's motions for continuance prior to filing his motion to quash, there were several times following the trial court's ruling on the admission of other crimes evidence that defendant sought and obtained continuances so he could seek supervisory review of that ruling. Given the fact defendant had outstanding motions and his own actions in seeking continuances, we find his objections to the delays are not entitled to significant weight.

Prejudice to the defendant

The final factor to be considered when analyzing a defendant's speedy trial claim under **Barker** is the prejudice to the defendant resulting from the delay. Prejudice to the defendant should be analyzed in light of the following interests that the right to a speedy trial was designed to protect: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. **Love**, 2000-3347 at 19-20, 847 So.2d at 1212.

In the present case, defendant was out on bail for a large portion of the six-year period. Moreover, there are numerous minute entries reflecting defendant was not even present for a hearing date, although his appearance was waived by his counsel. Thus, such instances raise serious questions regarding the anxiety and concern suffered by defendant. Finally, there is no indication that the defense was impaired whatsoever by this delay, despite defendant's assertions in brief regarding how he was personally affected by the delay.

Considering the foregoing, we find there has been no showing that defendant's constitutional right to a speedy trial was unfairly prejudiced by this delay. This assignment of error is without merit.

EVIDENCE ADMITTED PURSUANT TO ARTICLE 412.2

In his second assignment of error, defendant argues the trial court erred in allowing evidence pertaining to a 1996 rape involving Spears (originally a co-defendant) and C.G., defendant's then-wife. In support of this argument, defendant points to the fact the State acknowledged defendant was not a suspect in the 1996 incident between C.G. and Spears, and even testified against Spears at the grand jury proceedings.

Defendant argues the State should have been precluded from using this evidence against him because the 1996 incident failed to meet the definition of prior "sexually assaultive behavior" as contemplated by La. Code Evid. art. 412.2. Defendant asserts he was not involved in the 1996 incident and that admission of this evidence was unfairly prejudicial.

Louisiana Code of Evidence article 412.2 (A) provides in pertinent part:

When an accused is charged with a crime **involving sexually assaultive behavior**, ... evidence of the accused's commission of another ... act involving sexually assaultive behavior ... may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test as provided in Article 403. [Emphasis added.]

Article 412.2 was a legislative response to earlier decisions from the Louisiana Supreme Court refusing to recognize a "lustful disposition" exception to the prohibition of other crimes evidence under La. Code Evid. art. 404. The language of Article 412.2 closely follows Fed. R. Evid. 413 with the proviso that the evidence addressed therein "**may be admissible** ... subject to the balancing test provided in Article 403." **State v. Williams**, 2002-1030, pp. 4-5 (La. 10/15/02), 830 So.2d 984, 986-987 (emphasis in original). Thus, the jurisprudence interpreting the federal rule is highly instructive. The federal courts have determined that Fed. R. Evid. 413 is based upon the premise that evidence of other sexual assaults is highly relevant to prove the propensity to commit like crimes and often justifies the risk of unfair prejudice. See U.S. v. Guardia, 135 F.3d 1326, 1328 (10th Cir. 1998).

Despite defendant's argument that there was never any allegation he was directly involved in the 1996 rape of C.G., we note that just like the present case, he can still be charged as a principal to a rape, even if he was not the individual who physically engaged

in the rape. The Louisiana Code of Criminal Procedure provides two classifications to parties to crimes. These classifications are principals and accessories after the fact. La. R.S. 14:23. A principal to a crime is any person concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime. La. R.S. 14:24.

Moreover, the fact that defendant was never charged or identified in any manner as a suspect in the 1996 rape does not prohibit the admission of this evidence under Article 412.2. Article 412.2 merely requires that defendant has committed another act involving sexually assaultive behavior. The evidence in support of defendant's "commission" of the 1996 rape was presented through testimony of C.G. and Spears. Article 412.2 does not require evidence of the prior act to be established by proof of conviction. The jury was free to weigh such testimony in its role as fact finder.

In the present case, the State alleges that defendant, although not the physical rapist, took actions that would allow him to be found a principal to the instant rape. In other words, the State argues defendant took actions to plan and assist Spears in actually raping J.M. Under these circumstances, we find that the probative value of the evidence supporting defendant's previous involvement in orchestrating the rape of C.G. by the same perpetrator as the present case substantially outweighs the danger of unfair prejudice, confusion of the issues, misleading of the jury, or undue delay. Rather, we find the evidence at issue directly contradicts the defense notion that defendant had no involvement in the present crime.

This assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE

In his third and fourth assignments of error, defendant contends the evidence used to support his conviction for forcible rape is insufficient. Specifically, defendant argues the State's case was based on "mere conjecture and speculation;" there was no circumstantial evidence to support the conviction; and the only evidence of defendant's involvement in planning the rape was the testimony of his former co-defendant, Spears.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That standard of appellate review, adopted by the Legislature in enacting La. Code Crim. P. art. 821, 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.

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.

A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Smith**, 600 So.2d 1319, 1324 (La. 1992). 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.

The defendant was charged with forcible rape under La. R.S. 14:42.1A(1), which provides:

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:

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.

Viewing the evidence in the light most favorable to the prosecution, the evidence introduced at trial established the following pertinent facts. Defendant contacted Spears on May 30, 2003, at his home in regard to going out with defendant and his girlfriend, J.M. According to Spears, defendant discussed the fact he wanted Spears to engage in sexual intercourse with J.M. After spending the evening with defendant and J.M., Spears returned to defendant's residence in Ponchatoula where he was going to spend the night. At defendant's home, an air mattress was placed on the living room floor. The three talked for a while, then J.M. went to the guest bathroom to get sheets to put on the air mattress. When J.M. was gone, defendant urged Spears to go after her and use any force necessary. Spears testified that defendant wanted to watch him rape J.M. and that the sex was "all about control."

Spears went into the bathroom, grabbed J.M., and a struggle ensued. Spears testified he forced J.M. to have sex with him in the same room where defendant pretended to be sleeping. Spears stated that he and defendant had engaged in similar activity with defendant's ex-wife, C.G. Spears explained that defendant "sets everything up" and described how in 1996, he had raped C.G. with defendant in the same room pretending to be asleep.

J.M. confirmed that she had been raped by Spears after he followed her into the bathroom. J.M. stated she initially struggled and called out to defendant, but that Spears dragged her to where defendant was and claimed he was passed out and would not help her. According to J.M., she tried to shake defendant awake, but he did not move. J.M. testified that while Spears was raping her, the door was open between the location of the rape and where defendant was purportedly sleeping; however, she did not know if defendant watched the rape.

J.M. testified that sometime after the rape, defendant woke up and forced his way into the bedroom where she was. An argument ensued between them because J.M. accused defendant of "sett[ing] her up." J.M. testified that despite being told she had just been raped by Spears, defendant showed no compassion. J.M. testified that after Spears left and she continued arguing with defendant, he told her "You know you wanted to be turned out."

J.M. testified that defendant retrieved the clothing she had been wearing and put them in the washing machine. Over the course of the next several hours, defendant would not let J.M. leave. Finally, she agreed to run an errand with him and upon their return to his residence, she left his vehicle and ran to a neighbor's house, which happened to be a relative of defendant's. After contacting her own sister, J.M. went to the hospital where she reported the rape to law enforcement authorities.

Detective Christy Varnado, who investigated the incident, testified she obtained a search warrant for defendant's residence based on J.M.'s statement. When she executed the search warrant, Detective Varnado observed pieces of broken blue glass in the guest bathroom, and an area where it appeared the towel rack and shower curtain had been torn down. Detective Varnado also retrieved the clothing J.M. described she had been wearing the previous night and sheets from the dryer in defendant's residence.

C.G. testified at trial regarding her 1996 rape by Spears. According to C.G.'s testimony, defendant had Spears over prior to the rape, and C.G. noticed that the phone was hooked up to the computer. C.G. testified that defendant was allegedly asleep during the rape, but came to her about an hour after the rape and tried to make love to her. Although defendant was initially compassionate when told of the rape, he did not want her to press charges against Spears. In the days following the rape, defendant appeared to be more sympathetic to Spears than to her. Eventually, some thirty days after Spears raped her, C.G. reported the incident to the police and sought a divorce from defendant. According to C.G., the divorce was very hostile, and defendant even filed a countersuit against her claiming she had engaged in an affair with Spears.

The jury was presented with testimony from Spears describing how defendant had provided a time and place so Spears could rape J.M. Spears testified this was not the first time this type of arrangement had occurred and cited the 1996 rape of C.G., defendant's ex-wife. Although C.G. never told the police she thought defendant was involved in the rape, she testified he was unsympathetic about the incident. In the present case, defendant was not concerned that J.M. had been raped within his own home by the same individual who had been accused of raping his ex-wife several years earlier. Defendant also took steps to clean up the evidence of a struggle between J.M. and Spears in the bathroom and had washed the sheets where the rape had occurred and J.M.'s clothing that she wore the evening of the rape.

The jury was aware that Spears's testimony was brought about by a plea agreement. Also, the jury heard testimony that following the report of the rape, J.M. and defendant briefly reconciled their relationship. The jury was also aware that there were some discrepancies in the testimony presented by the State's witnesses regarding whether each victim was aware defendant watched the rapes occur. However, the jury chose to credit Spears's testimony that defendant had facilitated the rape of J.M. The jury's verdict is based on a credibility determination in favor of the testimony of the State's witnesses, particularly Spears.

Given our standard of review, we cannot reassess the credibility determinations by the jury. 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).

The evidence sufficiently supports the conviction. These assignments of error are without merit.

EXCESSIVE SENTENCE

In his final assignment of error, defendant complains that his sentence is excessive in light of the mitigating factors presented in connection with his Motion to Reconsider Sentence.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979); see also **State v. Lanieu**, 98-1260, p. 12 (La. App. 1 Cir. 4/1/99), 734 So.2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So.2d 962. A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. See **State v. Dorthey**, 623 So.2d 1276, 1280 (La. 1993). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Hogan**, 480 So.2d 288, 291 (La. 1985). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

The penalty for a conviction for forcible rape is found in La. R.S. 14:42.1(B), which provides as follows:

Whoever commits the crime of forcible rape shall be imprisoned at hard labor for not less than five nor more than forty years. At least two years of the sentence imposed shall be without benefit of probation, parole, or suspension of sentence.

In the present case, the trial court sentenced defendant to a term of thirteen years at hard labor with the first five years to be served without the benefit of probation, parole, or suspension of sentence. Defendant argues the trial court failed to consider that he was a fifty-six year old first-time felony offender, who had been a teacher for twenty-eight years. Defendant also asserts his sentence was excessive in light of the fact Spears received eight and one-half years.

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. La. Code Crim. P. art. 894.1. The trial court need not cite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1 Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La. App. 1 Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982).

In reviewing the sentencing transcript, we note the trial court, which also sat as fact finder, reiterated that it was convinced of defendant's guilt. The trial court specifically noted defendant was a first-time offender and had been a productive member of the community prior to this incident. However, the trial court also noted that it had taken into account the impact of this incident on the victim.

We note the circumstances of defendant's role in J.M.'s rape display a level of cruelty that justifies the sentence issued by the trial court. Further, we note that despite defendant's claims of excessiveness, the sentence is one-third of the maximum sentence for which he was eligible. Under the circumstances of this case, we cannot say the trial court imposed an excessive sentence.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.