NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0972

STATE OF LOUISIANA

VERSUS

COURTNEY RICHARDSON

Judgment Rendered: DEC 28 2006

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On Appeal from the 16th Judicial District Court
In and For the Parish of St. Mary, State of Louisiana
Trial Court No.164,651

Honorable William D. Hunter, Judge Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

HUGHES, J.

The defendant, Courtney Richardson, was charged by bill of information with forcible rape (count 1), a violation of LSA-R.S. 14:42.1, and resisting an officer (count 2), a violation of LSA- R.S. 14:108(B)(1)(c). He pled not guilty. Thereafter, the state amended count one to charge the defendant with attempted forcible rape, a violation of LSA-R.S. 14:27 and 14:42.1.[1] The state maintained the resisting an officer charge in count 2. Following a trial by jury on the attempted forcible rape charge, the defendant was convicted of the responsive offense of attempted simple rape, a violation of LSA-R.S. 14:27 and 14:43.[2] The trial court sentenced the defendant to imprisonment at hard labor for ten years. The court suspended the execution of all but five years of the sentence and ordered that the defendant serve five years on active supervised probation upon his release from custody.[3]

The defendant has appealed, urging three assignments of error: (1) the evidence is legally insufficient to support the conviction for the responsive verdict of attempted simple rape; (2) the evidence is legally insufficient to support a conviction for attempted forcible rape, the crime for which defendant was charged; and (3) the trial court erred in denying the defense's motion for post verdict judgment of acquittal where the evidence was legally insufficient to support a conviction for the responsive verdict rendered or the crime charged.

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[1] The record does not reflect that the defendant was re-arraigned after this amendment. Nevertheless, because the defendant did not object to the failure to arraign him on the amended charge, the issue is waived. See LSA-C.Cr.P. art. 555; **State v. Cousin**, 96-2035, p. 2 n. 2 (La. App. 1 Cir. 9/23/97), 700 So.2d 1016, 1017 n. 2, writ denied, 97-2809 (La. 3/13/98), 712 So.2d 875.

[2] The record is silent as to the final disposition of the resisting an officer charge.

[3] In addition to all general conditions of probation, as special conditions of his probation the defendant was ordered to: (1) complete a sexual predator's group; (2) avoid any contact with the victim or the victim's family; and (3) avoid contact with all juveniles under the age of eighteen.

We affirm the defendant's conviction and sentence for the following reasons.

FACTS

On April 25, 2004, the Franklin Police Department received a report of a rape that allegedly occurred two days earlier at a residence on Cypress Street in Franklin, Louisiana. Detective Tina Dantin was dispatched to investigate. The fourteen-year-old victim, M.B.,[4] informed Detective Dantin that she had been raped while attending a party. M.B. identified the defendant, by name, as the perpetrator.

According to M.B., on April 23, 2004, she and several other individuals attended a party at the Cypress Street residence of another teenager named Nick Harmon. At some point during the party, M.B. and several other partygoers were gathered in the backyard of the residence. Shortly thereafter, the other partygoers left the backyard, leaving M.B. alone with the nineteen-year-old defendant. M.B. claimed the defendant then pushed her into the next-door neighbor's yard. M.B. claimed she did not want to go to the next-door neighbor's yard with the defendant and that she attempted to leave. The defendant pushed her onto the ground and pulled her pants down. The defendant then attempted to penetrate M.B.'s vagina with his penis, "but it didn't go in." M.B. claimed she told the defendant

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[4] In accordance with LSA-R.S. 46:1844(W), the victim is referenced only by her initials.

to stop but he ignored her demands. M.B. then began to yell "rape." The defendant replied, "you know you want to do this." According to M.B., shortly thereafter, Brian Savell and Cherie Domingue,[5] two individuals who had been in attendance at the party, arrived in the backyard and pulled the defendant off of her.

M.B. went into Harmon's house and attempted to locate her friend Brittany (then sixteen years old) to tell her what happened. M.B. was unable to speak with Brittany because, according to M.B., Brittany was attempting to engage in "sexual intercourse" with Nick Harmon. M.B. eventually told Wendy Landry, Nick Harmon's mother, what the defendant did to her. M.B. did not see the defendant at the party again that night. M.B. denied consuming any alcoholic beverages on the night in question.

Later that night, J.B., M.B.'s mother, arrived at Harmon's residence to pick M.B. up from the party. M.B. did not immediately report the incident to her mother. According to J.B., M.B. appeared to be upset but she did not reveal what upset her. M.B. did not appear to have been intoxicated. Two days later, on April 25, 2004, M.B. told her mother of the events that transpired behind the neighbor's house during Nick Harmon's party. J.B. immediately reported the incident to the Franklin Police Department.

M.B. was taken to the doctor for a physical examination later that week. Consistent with M.B.'s claim that the defendant only attempted penetration, the medical examination did not reveal any physical evidence of rape. According to J.B., however, M.B. tested positive for Chlamydia, a sexually transmitted disease.

ASSIGNMENTS OF ERROR

[5] In her trial testimony, M.B. referred to the female eyewitness as "Cherie Bonin;" however, the witness testified that her name is "Cherie Domingue."

In his first assignment of error, the defendant challenges the sufficiency of the evidence to support the conviction for the responsive offense of attempted simple rape. He argues that the evidence presented failed to prove that M.B. was suffering from unsoundness of mind or that she was incapable of understanding the nature of the act, an essential element of the offense. In his second assignment of error, the defendant contends the evidence is insufficient to prove the essential elements of the charged offense of attempted forcible rape. He specifically argues the state failed to prove that the victim was prevented from resisting the act by force or threats of physical violence, since M.B.'s testimony established that she successfully resisted the attack. Thus, the defendant argues, in his third assignment of error, the trial court erred in denying his motion for post verdict judgment of acquittal. Because the assignments of error are closely related, they will be addressed together.

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. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-9 (La. 1988).

As previously noted, the defendant was charged with attempted forcible rape and convicted of the responsive offense of attempted simple rape. Simple rape is defined by LSA-R.S. 14:43(A) as:

> [A] rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of a victim because it is committed under any one or more of the following circumstances:
>
> (1) When the victim is incapable of resisting or of understanding the nature of the act by reason of a stupor or abnormal condition of mind produced by an intoxicating agent or any cause and the offender knew or should have known of the victim's incapacity.
>
> (2) When the victim is incapable, through unsoundness of mind, whether temporary or permanent, [of[6]] understanding the nature of the act and the offender knew or should have known of the victim's incapacity.
>
> (3) When the female victim submits under the belief that the person committing the act is her husband and such belief is intentionally induced by any artifice, pretense, or concealment practiced by the offender.

An "attempt" is defined by LSA-R.S. 14:27(A), which provides:

> 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.

In charging the jury on the possible responsive verdicts in this case, the trial court only cited LSA-R.S. 14:43(A)(2) as a basis for a conviction of attempted simple rape. The court stated:

> If the State has not proven every part of the crime of Attempted Forcible Rape, you must decide if the defendant is guilty of Attempted Simple Rape.
>
> Simple Rape is the act of anal or vaginal sexual intercourse with a person who is not the spouse and without the

[6] When originally enacted, LSA-R.S. 14:43(A)(2) read "***of*** understanding" and this phrase has not been amended by subsequent legislation, however, 2003 La. Acts, No. 232 included the existing text of paragraph (A)(2) when amending another portion of the statute, and in that Act made a typographical error in stating "***or*** understanding;" this typographical error has been repeated in West publications since that time. (Emphasis added.)

> lawful consent because the person was incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act and the defendant knew or should have known of the person's incapacity.

On appeal, the defendant contends the trial court should have excluded LSA-R.S. 14:43 in its entirety as there was no evidence to support such a verdict. He argues there was absolutely no evidence to show that M.B. was of unsound mind or lacked the capacity to understand the nature of the act, which was the only simple rape instruction provided by the trial court. Thus, the defendant further asserts the trial court should have granted his motion for post verdict judgment of acquittal because the evidence presented, even when viewed in the light most favorable to the prosecution, does not support a finding of guilty of attempted simple rape.

It is well settled that, absent a contemporaneous objection to the giving of instructions on a responsive verdict, a defendant may not complain if the jury returns with a legislatively approved responsive verdict, even where there is insufficient evidence to support such a verdict, provided that the evidence is sufficient to support the charged offense. **State v. Schrader**, 518 So.2d 1024, 1034 (La. 1988); **State ex rel. Elaire v. Blackburn**, 424 So.2d 246, 251 (La. 1982), cert. denied, 461 U.S. 959, 103 S.Ct. 2432, 77 L.Ed.2d 1318 (1983). In such a case, a jury has the right to "compromise" between the charged offense and a verdict of not guilty. **State v. Charles**, 2000-1611, pp. 4-5 (La. App. 3 Cir. 5/9/01), 787 So.2d 516, 519, writ denied, 2001-1554 (La. 4/19/02), 813 So.2d 420. Jurors may return a "compromise" verdict for whatever reason they deem to be fair, so long as the evidence is sufficient to sustain a conviction for the charged offense. See **Blackburn**, 424 So.2d at 251.

In the instant case, the trial court charged the jury regarding attempted simple rape without a timely defense objection. Attempted simple rape is a legislatively approved responsive verdict to a charge of attempted forcible rape. LSA-C.Cr.P. art. 814(A)(11). Accordingly, if the evidence was sufficient to support a conviction for the charged offense, the defendant has no basis for complaint. Thus, the issue presented herein is whether the evidence presented at trial was sufficient to support a finding that the defendant committed the charged offense of attempted forcible rape.

Forcible rape is defined by LSA-R.S. 14:42.1(A) as follows:

> Forcible rape is a rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> (1) When the victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape.
>
> (2) When the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by a narcotic or anesthetic agent or other controlled dangerous substance administered by the offender and without the knowledge of the victim.

To prove the crime of attempted forcible rape, the state was required to establish beyond a reasonable doubt that defendant actively desired to commit rape by preventing the victim from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believed that such resistance would not have prevented the rape. Where the offender has the requisite intent to commit a forcible rape and does an act in furtherance of his goal, he has committed the offense of attempted forcible rape even if his victim successfully repels the threat or force. **State v. Stelly**, 93-1090, pp. 10-

11 (La. App. 1 Cir. 4/8/94), 635 So.2d 725, 730-731, writ denied, 94-1211 (La. 9/23/94), 642 So.2d 1309.

Herein, the testimonial evidence presented at the trial established that the defendant attempted to forcibly rape M.B. M.B. testified that the defendant forced her into the neighbor's yard against her will, pushed her down onto the ground, and pulled down her pants and underwear. M.B. unequivocally stated that she did not consent to engaging in any sexual contact with the defendant. The defendant ignored M.B.'s pleas to stop, telling her that she knew she wanted it. When asked if she was able to stop the defendant by pushing him off of her, M.B. testified that people had to "[c]ome get him off of [her]."

Eyewitness testimony was presented to corroborate, to some extent, M.B.'s account of the events. Brian Savell and Cherie Domingue both testified that they went to the backyard to investigate the source of the screams that were heard. Cherie Domingue testified she heard someone yelling, "help" and "rape." According to both witnesses, when they arrived in the backyard they found the defendant and M.B. lying on the ground. The defendant was on top of M.B. and her clothes were down. While M.B. testified that Brian Savell and Cherie Domingue actually pulled the defendant off of her, at trial Brian and Cherie stated only that the defendant left after they arrived. Both Brian and Cherie testified that M.B. appeared to be very upset. M.B. got up hollering and cursing. Cherie further testified that she also cursed the defendant out because she was upset at what he had done to M.B.

It is well settled that the testimony of the victim alone can be sufficient to establish the elements of a sexual offense, even where the State does not introduce medical, scientific, or physical evidence to prove the commission of the offense. **State v. James**, 2002-2079, p. 8 (La. App. 1 Cir. 5/9/03), 849

So.2d 574, 581. Herein, the testimonial evidence presented clearly established that the defendant used force to prevent M.B. from resisting during the encounter. Despite her repeated demands to discontinue the encounter, the defendant pushed the victim onto the ground and forced himself upon her, leaving her no other option but to scream out for help.

The defendant's claim that the essential elements of attempted forcible rape were not proven because M.B. successfully resisted the attack lacks merit because, for the crime of attempted forcible rape to occur, it is immaterial whether the offender actually accomplished his purpose of preventing the victim from resisting. Rather, the essential element of the crime is that the offender attempted to use force or threats to prevent the victim from resisting his actions. Therefore, the fact that M.B. was able to resist the defendant successfully with help from friends does not alter the fact that the defendant attempted to use force and threats of physical violence to prevent her from resisting his actions. See LSA-R.S. 14:27(A); **Stelly**, 93-1090 at pp. 10-11, 635 So.2d at 730-31.

We are satisfied that the evidence presented, viewed in the light most favorable to the prosecution, proved beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence, all of the elements of attempted forcible rape. The attempted simple rape verdict was apparently a compromise verdict. Thus, because the evidence was sufficient to convict the defendant of the charged offense of attempted forcible rape, the jury's verdict of guilty of the responsive offense of attempted simple rape in this case does not entitle the defendant to a reversal of his conviction. The trial court did not err in denying the defendant's motion for post verdict judgment of acquittal on the conviction of attempted simple rape.

These assignments of error lack merit.

REVIEW FOR ERROR

Under the general provisions of La. Code Crim. P. art 882(A), an illegally lenient sentence may be corrected at any time by an appellate court on review. However, this Court is not required to take such action. Although a remand for resentencing is authorized by the jurisprudence, it is not required. See **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam); **State v. Paoli**, 2001-1733, pp. 6-8 (La. App. 1st Cir. 4/11/02), 818 So.2d 795, 799-800 (en banc), writ denied, 2002-2137 (La. 2/21/03), 837 So.2d 628. Because the issue was not raised by the State in either the trial court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. See **State v. Paul**, 2005-612 p. 19 (La. App. 5th Cir. 2/14/06), 924 So.2d 345, 357

For the reasons assigned herein, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.