NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0592

STATE OF LOUISIANA

VERSUS

DESMON PHILLIPS

Judgment Rendered: October 29, 2010 .

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On Appeal from the
21st Judicial District Court,
in and for the Parish of Livingston
State of Louisiana
District Court No. 21756

The Honorable Robert H. Morrison, III, Judge Presiding

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

CARTER, C.J.

The defendant, Desmon Phillips, was charged by bill of information with one count of forcible rape, a violation of La. R.S. 14:42.1. The defendant entered a plea of not guilty and waived his right to a jury trial. Following a bench trial, the defendant was found guilty as charged. He moved for a new trial, for a post-verdict judgment of acquittal, and for arrest of judgment, but the motions were denied. The trial court sentenced the defendant to ten years at hard labor and stated, "at least two years of that sentence is imposed without the benefit of probation, parole, or suspension of sentence."[1] The defendant appeals, contending the evidence was insufficient to support the conviction and that the sentence imposed was excessive. For the following reasons, we affirm the conviction, vacate the sentence, and remand for resentencing.

FACTS

On March 31, 2007, at approximately 11:00 p.m., the victim, S.M.,[2] went to the Cypress Lounge in Walker. While at the lounge, she saw her friend, Mike Wilkinson, and his girlfriend, Jennie Milam. Wilkinson and Milam told the victim they had been at the lounge for a couple of hours. The victim conceded she drank two White Russian cocktails at the lounge and earlier consumed two beers at a crawfish boil she attended between 8:30 p.m. and 10:00 p.m.

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[1] The sentencing minutes are inconsistent with the sentencing transcript concerning the portion of the sentence imposed without benefit of probation, parole, or suspension of sentence. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

[2] The victim is referenced only by her initials. See La. R.S. 46:1844W.

According to the victim, between 12:00 a.m. to 12:30 a.m., she, Wilkinson, and Milam decided to leave the lounge. The victim indicated Wilkinson and Milam had been drinking and needed "a place to stay," so she invited them to spend the night at her house. Wilkinson and Milam agreed to meet the victim at her house, and she drove home by herself. The victim testified she spent time at the lounge only with Wilkinson and Milam. She denied talking to the defendant, denied kissing him, and denied inviting him to her home.

According to the victim, after she arrived at her home, the defendant drove up. The victim indicated she asked the defendant who he was and what he was doing there, and he claimed to be friends with "Mike and them," claimed he had met Wilkinson at the lounge, and claimed that Wilkinson had invited him to come over to the victim's house. The victim testified she believed the defendant and invited him into her home.

According to the victim, Wilkinson and Milam then arrived at the victim's home, and they, the defendant, and the victim listened to music in the living room. The victim denied that anyone got undressed in the living room. She indicated she danced for approximately thirty minutes, and Wilkinson and Milam danced and kissed each other. The victim indicated Wilkinson and Milam were ready to go to bed and went upstairs to a room in which a window unit air conditioner and fan were running. The victim indicated she then told the defendant he needed to leave because she "didn't really know him." The defendant walked out of the back door, and the victim went to the downstairs restroom.

According to the victim, after she used the toilet and was pulling up her pants, the defendant walked into the bathroom, locking the door behind him. The victim testified she asked the defendant what he was doing in the bathroom, and he replied, "I know you want to fuck me, don't you?" The victim stated she told the defendant, "No, I do not," but he grabbed her by the hair, pulled her belt from her pants, and threw her onto the tile floor. The victim indicated the defendant pulled her pants down as she tried to hold them up and scream for help. She claimed the defendant then pulled his pants down, held her hands above her head, and put his penis in her vagina. The victim denied consenting to the sexual intercourse. She also denied kissing or hugging the defendant at any time. The victim testified she told the defendant, "Please don't do this to me. I have three daughters I have to raise." She indicated the defendant got off her after she hit him with the toilet brush holder. She then jumped up, ran, and called to Wilkinson and Milam for help.

According to the victim, the defendant then grabbed her by the hair, drug her to the bedroom across from the bathroom, threw her onto the bed, held her arms over her head and, while she screamed for help, penetrated her again with his penis. The victim explained that after she managed to get one of her legs free and kick him the defendant got off her, pulled up his pants, and ran out of the back door. According to the victim, she grabbed a pen and some paper and ran out of the front door and wrote down his license plate number. The victim described the defendant as "doing donuts backwards," trying to run her over, as she wrote down his license plate number. He then put his vehicle into parking gear and chased her back inside her home. She indicated that before she could lock the front door, the defendant kicked it and took away her

paper. The victim testified that the defendant then ran back out the front door, and she locked the door, woke up Milam, and told her what had happened. The victim claimed the defendant ripped her shirt during the rapes. She also claimed she did not alert the police to the rapes until approximately 8:00 a.m. because she was scared and embarrassed.

Jennie Milam testified she went to the victim's house with her boyfriend, Wilkinson, after meeting the victim at the Cypress Lounge on the night in question. She denied talking to the defendant at the lounge or inviting him back to the victim's house. She indicated that when she and Wilkinson arrived at the victim's house, she saw a vehicle outside that was not the victim's vehicle. Also, a man with dark hair was present at the victim's house. Milam made out downstairs with Wilkinson and then went upstairs with him and "pass[ed] out." She could not recall "what anybody else was doing exactly" but did not remember the victim "being all over anybody." Milam testified the next thing she remembered was the victim waking her up and telling her that she "just got raped" by the man who had been downstairs. The victim was crying, her makeup was smeared, and her shirt was tangled up. She had red marks on her neck and arms, and her shoulder blades were "real red."

Michael Wilkinson testified he made "small talk" with the defendant at the bar, but did not introduce him to Milam or the victim, and did not invite him back to the victim's house. Wilkinson did not see the victim talking to the defendant at the bar nor did he see the victim kiss the defendant at the bar. When he arrived at the victim's home, he saw her vehicle and another vehicle that he did not recognize. He saw the defendant in the victim's home.

Wilkinson conceded he was "passed out" on the couch in the home for a little while. He admitted that he could not remember if Milam vomited outside.

According to the defendant, he was alone at the Cypress Lounge when Wilkinson called him over to join Wilkinson and Milam. Shortly thereafter, the victim arrived, and Wilkinson introduced the victim to him. The defendant claimed the victim immediately kissed him (the defendant) and asked him to buy her drinks. The defendant claimed he stayed with the group at the lounge until it closed at 2:00 a.m. He claimed the victim then invited him to a party at her house and told him to follow her, Wilkinson, and Milam over to the house. According to the defendant, he followed the victim, Wilkinson, and Milam over to the victim's house. The defendant further admitted that he left marks on the grass when he parked because he was "showing off."

The defendant testified that he saw someone going into the back door of the house, and so, he also went to the back door and knocked. He claimed the victim unlocked the door and invited him into the house. He claimed Wilkinson was lying down in the living room, and Milam was vomiting outside. The defendant testified that he tried to help Milam, and the victim brought him a cloth with which to wipe Milam's mouth but then went back inside. The defendant claimed he then carried Milam through the front door, pushing it open, and put her down on the floor next to Wilkinson.

The defendant claimed Wilkinson got on top of Milam and started undressing her. According to the defendant, the victim told Wilkinson, "No, not here" and escorted the couple upstairs while he sat on the couch. The defendant testified that when the victim came back downstairs, she danced around in front of him, jumped on top of him, and told him, "Not [sic], it's our

turn." He claimed he asked the victim what she was talking about, and she replied that, "Well, they going upstairs to have sex, so now it's our turn to do it." He claimed he told the victim, "I don't know if I can," but she told him, "Just come on" and put her hands in his pants. The defendant claimed the victim led him toward the bedroom but went into the bathroom to urinate. The defendant claimed that after the victim urinated, she jumped on top of him, causing them to fall onto the floor, and that they had consensual sex in the bathroom. He claimed he told the victim the floor was too cold, and she stated, "Come on, get up. We're going to the bedroom."

The defendant claimed that he and the victim then resumed sex in the bedroom. He claimed that when he started putting on his clothes, the victim asked him what he was doing. He explained that after he responded that he had to go home because he had a wife and child at home the victim "went off" on him. The defendant stated that the victim told him to get out of her house and hit and pushed him. He grabbed the victim and pushed her to ward off her attack. He claimed the victim threw a toilet brush at him. He then walked out of the front door and drove away. He denied trying to run over the victim.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant contends the evidence was insufficient to support the conviction because the State failed to reconcile the testimony of its own witnesses and failed to negate the defendant's account of the incident.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the

essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. **State v. Wright**, 98-0601 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 00-0895 (La. 11/17/00), 773 So.2d 732. In conducting this review, a reviewing court must also 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. See La. R.S. 15:438; **Wright**, 730 So.2d at 486.

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. **Id.** at 487. 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. **Id.**

As pertinent here, rape "is the act of ... vaginal sexual intercourse with a ... female person committed without the person's lawful consent." La. R.S. 14:41A. "Emission is not necessary, and any sexual penetration, when the rape involves vaginal ... intercourse, however slight, is sufficient to complete the crime." La. R.S. 14:41B. Forcible rape is a rape committed when the vaginal sexual intercourse is deemed to be without the lawful consent of the victim because "the victim is prevented from resisting the act by force ... under circumstances where the victim reasonably believes that such resistance would not prevent the rape." La. R.S. 14:42.1A(1).

After a thorough review of the record, we are convinced that any rational trier of fact viewing the evidence presented in this case in the light most favorable to the State could find that the evidence proved, beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence, all of the elements of forcible rape and the defendant's identity as the perpetrator of that offense against the victim. The verdict rendered against the defendant indicates that the fact finder accepted the victim's testimony that the defendant forced sex on her and rejected the defendant's testimony that the encounter was consensual. When a case involves circumstantial evidence and the fact finder reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. See **State v. Captville**, 448 So.2d 676, 680 (La. 1984). No such hypothesis exists in the instant case. Further, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Lofton**, 96-1429 (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 testimony of the victim alone is sufficient to prove the elements of the offense. **Lofton**, 691 So.2d at 1368. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. **Id**. 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. **Id**. Additionally, in reviewing the evidence, we cannot say that the trial court's determination was irrational under the facts and circumstances presented to it. See **State v. Ordodi**, 06-

0207 (La. 11/29/06), 946 So.2d 654, 662. 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 trial court. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

EXCESSIVE SENTENCE

In his second assignment of error, the defendant argues the sentence was excessive because he was a first-time felony offender and because he received twice the minimum sentence. The defendant also requests that this court examine the record for error under La. Code Crim. P. art. 920. This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under La. Code Crim. P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. We note error under La. Code Crim. P. art. 920(2), which causes us to pretermit consideration of assignment of error number two.

If a defendant who has been convicted of an offense is sentenced to imprisonment, the court shall impose a determinate sentence. La. Code Crim. P. art. 879; La. R.S. 14:42.1B. The trial court sentenced the defendant to ten years at hard labor and stated "at least two years of that sentence is imposed without the benefit of probation, parole, or suspension of sentence." The term "at least" renders the sentence indeterminate. See **State v. Cedars**, 02-861 (La. App. 3 Cir. 12/11/02), 832 So.2d 1191, 1193. Accordingly, we must

vacate the sentence and remand the case for resentencing. See **Cedars**, 832 So.2d at 1193.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.