NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 2358

STATE OF LOUISIANA

VERSUS

MARLON O. FISHER

DATE OF JUDGMENT: May 2, 2008

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
(NUMBER 01-06-0557), PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
HONORABLE LOUIS R. DANIEL, JUDGE

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BEFORE: PARRO, KUHN AND DOWNING, JJ.

Disposition: CONVICTION AND SENTENCE AFFIRMED.

KUHN, J.

Marlon O. Fisher, defendant, was charged by grand jury indictment with attempted aggravated rape, a violation of La. R.S. 14:27 and 42A(6). Defendant entered a plea of not guilty, waived a jury trial, and was tried in a bench trial. Following trial, the trial court determined defendant was guilty of the responsive offense of attempted simple rape, a violation of La. R.S. 14:27 and 43.

The trial court sentenced defendant to a term of four years at hard labor. Defendant appeals, citing two assignments of error:

> 1. The trial court committed manifest, reversible error by concluding the purely circumstantial evidence presented at trial excluded every reasonable hypothesis of innocence beyond a reasonable doubt.
>
> 2. The trial court committed manifest, reversible error by failing to grant [defendant's] Motion in Arrest of Judgment on the grounds that the indictment lacked the necessary averments to charge a valid criminal offense.

FACTS

In approximately 2001, M.A.B. (the victim)[1] was diagnosed with early onset dementia or Alzheimer's disease. Because of the increasing problems brought about by this disease, the victim retired from her job in 2003. Following her retirement, the victim's mental condition worsened, and she began wandering away from family members who were caring for her.

In February 2004, the victim entered Sunrise Assisted Living Facility (Sunrise) in Baton Rouge. Jennifer Moak, the victim's daughter, reported that by that time, her mother's communication skills had deteriorated to the point that she often did not make sense. Upon her entry into Sunrise, the victim executed a power of attorney in favor of Moak so Moak could to handle the victim's financial affairs. Because of her propensity to wander, the victim was outfitted with a

[1] See La. R.S. 46:1844W.

wander guard, which was a hospital bracelet with a magnet that activated the locking mechanisms of the exterior doors when approached by the wearer.

Brandon Curtis was employed at Sunrise as the Lead Care Supervisor, whose duties included overseeing the aides who cared for the residents. According to Curtis, the effects of the victim's dementia seemed to worsen following her placement in Sunrise. Curtis testified that the victim was not really capable of communication, was forgetful, and had difficulty with routine daily activities, such as eating and dressing.

On March 5, 2004, at approximately 8:30 p.m., Curtis and another Sunrise employee, T'keshia Ruth, walked into the smoking room to take a break. When Curtis and Ruth entered the smoking room, they noticed the lights were turned off. Curtis turned the lights on and observed the victim and defendant seated next to one another. Defendant had been hired as a private sitter for one of the patients at Sunrise who required constant care. Both Curtis and Ruth noticed that the victim was seated in a chair next to defendant, with her legs crossed, and she was rubbing the back of defendant's leg with her foot.

Immediately after Curtis and Ruth entered the room, defendant got out of his chair and stated he was going to check on his patient. When defendant got up, Curtis observed a bulge resembling an erection. The victim remained in the smoking room for a short period, then left.

Curtis and Ruth discussed how it appeared strange that the victim had been rubbing defendant's leg. Shortly after this incident, Curtis noticed that the victim was not watching television in her usual place in the living room. Because he was "a little uneasy" about what he had seen earlier between the victim and defendant, Curtis again walked over to the smoking room.

Curtis was again accompanied by Ruth as he walked toward the smoking room. Once again, the lights in the smoking room had been turned off. As Curtis

and Ruth approached the glass door of the smoking room, Curtis could see the victim on her hands and knees on the floor. Curtis opened the door and turned on the light. Both Curtis and Ruth saw the victim on her hands and knees in front of defendant, who was seated in a chair. The victim's head was between defendant's legs and her face was in his lap.

Curtis asked defendant what was going on, and defendant immediately brushed the victim aside, stood up and stated that he "had no idea." Curtis and Ruth both noticed that defendant had an erection and the victim's lipstick was also smeared. Defendant pulled his shirt down over his lap area and walked out of the smoking room. Ruth testified that the victim stated she was "looking for an earring," even though both of the victim's earrings were in place.

Neither Curtis nor Ruth saw defendant's penis exposed or his pants or underwear pulled down. Ruth commented that it was unusual for the victim to have her lipstick smeared because she was known as a "well kept" lady. Both Curtis and Ruth testified that their impression of what was occurring in the smoking room the second time they found the victim with the defendant, was that the victim was performing oral sex on defendant.

Immediately after defendant left the smoking room, Curtis went to contact his supervisor. According to Curtis, it took approximately ten minutes to walk to his office, contact his supervisor, and relay what had transpired. Curtis testified that his supervisor directed him to place the victim in the lockdown unit for the night, where defendant would not have access to her. Following his conversation with his supervisor, Curtis again went to find the victim. This time, he found the victim and defendant standing in a laundry room next to the nurses' station. Curtis observed that defendant had his arm around the victim. When the defendant noticed Curtis, he immediately left the laundry room and walked back toward his patient's room. Curtis was then paged to attend to another resident.

After responding to the page, Curtis located the victim in the defendant's patient's room with the door closed. When Curtis entered the room, the victim and defendant were seated next to each other on the spare bed. Curtis then escorted the victim to the lockdown unit.

The parties stipulated to the expertise of Dr. Marc Zimmerman in the fields of psychology, forensic psychology, and intelligence quotient (I.Q.) testing. Dr. Zimmerman evaluated the victim on April 7, 2004. Dr. Zimmerman noted that although the victim was well dressed and wore makeup, she would continually question him as to why she was with him. Dr. Zimmerman administered an I.Q. test and reported that the victim scored a composite I.Q. score of 46. According to Dr. Zimmerman, such a score correlated to the victim having the mental capacity of a five to eight-year-old child. In Dr. Zimmerman's opinion, considering the deterioration caused by the victim's dementia, at the time of the March 5 incident, the victim was no more capable of consenting to a sexual act than a five to eight-year-old child.

Dr. Zimmerman described dementia as a loss of brain functioning that is mostly marked by difficulty with short-term memory, then long-term memory. Dementia also affects a person's ability to process information. According to Dr. Zimmerman, another sign of dementia is disinhibited behavior, which is behavior that person would not normally involve themselves. As examples of such behavior, Dr. Zimmerman cited hypersexuality and aggressive sexuality.

The parties also stipulated to the expertise of Dr. Cary Rostow in the field of psychology. Dr. Rostow attempted to evaluate the victim in April 2006, and estimated her composite I.Q. score to be below 9. According to Dr. Rostow, the victim would be unable to provide competent testimony at trial. Moak further testified that at the time of trial, her mother was bedridden at another facility and unable to speak.

Defendant did not testify.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, defendant argues there was no evidence to support his conviction for attempted simple rape.

The standard of review for the 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 that the State proved 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 La. C.Cr.P. art. 821B; ***State v. Mussall***, 523 So.2d 1305, 1308-09 (La. 1988). When circumstantial evidence is used to prove the commission of an offense, La. R.S. 15:438 requires that, assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. See ***State v. Wright***, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, ***writs denied***, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 2000-0895 (La. 11/17/00), 773 So.2d 732. This is not a separate test to be applied when circumstantial evidence forms the basis of a conviction; all evidence, both direct and circumstantial, must be sufficient to satisfy a rational fact finder that the defendant is guilty beyond a reasonable doubt. See ***State v. Ortiz***, 96-1609, p. 12 (La. 10/21/97), 701 So.2d 922, 930, ***cert. denied***, 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998).

Defendant was convicted of attempted simple rape. Attempt is defined in La. R.S. 14:27A as:

> 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.

Louisiana Revised Statute 14:43A defines simple rape in pertinent part as:

> Simple rape is 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] understanding the nature of the act and the offender knew or should have known of the victim's incapacity.

The comments under the attempt article point out that the essential elements of an attempt are "an actual specific intent to commit the offense, and an overt act directed toward that end." See La. R.S. 14:27; Reporter's Comment--1950; see also ***State v. Ordodi***, 2006-0207, p. 11 (La. 11/29/06), 946 So.2d 654, 660.

Thus, the State's initial burden was to prove beyond a reasonable doubt that defendant had the specific intent to engage in oral sexual intercourse with the victim. Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Specific intent may be inferred from the circumstances surrounding the offense and the conduct of the defendant. The determination whether specific intent exists is a question for the fact finder. See ***State v. Ordodi***, 2006-0207 at pp. 11-12, 946 So.2d at 661.

In addition to proving defendant possessed the requisite specific intent to engage in oral sexual intercourse with the victim, we must also review whether sufficient evidence was presented to prove beyond a reasonable doubt to a rational fact finder that defendant did or omitted an act for the purpose of and tending directly toward the accomplishing of his object, sometimes referred to as an overt

act. See La. R.S. 14:27A. In determining whether a defendant's action is an overt act which is an attempt, the totality of the facts and circumstances presented by each case must be evaluated. The overt act need not be the ultimate step toward or the last possible act in the consummation of the crime attempted. The Louisiana Supreme Court has held that the determination of a defendant's actions as being mere preparation or acts sufficient to constitute an attempt will be fact specific to each case. See ***State v. Ordodi***, 2006-0207 at pp. 13-14, 946 So.2d at 661-62.

The court was presented with evidence that defendant and the victim were initially discovered in the smoking room around 8:30 p.m., a time during which the smoking room was not frequently used. The first time the pair was discovered, the lights in the room were off and the victim was touching defendant's leg. He had an erection. When Curtis turned on the lights and entered the room, defendant immediately left to check on his patient.

A short time after this initial incident, Curtis and Ruth again discovered defendant and the victim in the smoking room with the lights off. This second time, the victim was on her hands and knees, her head between defendant's legs and her face in defendant's lap. Both Curtis and Ruth testified that it appeared the victim was performing oral sex on defendant, although neither Curtis nor Ruth observed defendant's penis exposed. However, both Curtis and Ruth observed that the victim's lipstick was smeared and that defendant immediately brushed the victim away and pulled his shirt over his crotch area as he stood to leave the room. Defendant's explanation that he "had no idea" what was going on when asked by Curtis, failed to indicate the victim had been following him or making unwanted advances towards defendant. Moreover, at no point in time were defendant or the victim observed smoking while in the smoking room. Further, defendant and the victim were discovered together two more times after this incident, and each time they were alone in an area that was not considered a common area of the facility.

Considering the circumstances, we find it was completely reasonable for the trial judge to have concluded that defendant possessed the requisite specific intent to engage in oral sexual intercourse with the victim and completed an overt act, i.e., opening his legs to allow the victim to place her head between his legs, an act clearly tending directly toward the accomplishment of that object.

Finally, we note that the State also proved the victim was incapable of resisting or understanding the act, due to the effects of her dementia. Curtis and Moak both testified that upon her admission into Sunrise, it was obvious the victim had mentally deteriorated to the point where she could not communicate effectively. Moreover, Dr. Zimmerman provided expert opinion testimony that at the time of this incident, the victim would have been no more capable of consenting to a sexual act than a five to eight-year-old child.

Viewing the evidence in the light most favorable to the prosecution, we find the evidence supports defendant's conviction for attempted simple rape. Moreover, we also find that the evidence negates defendant's hypothesis of innocence that the victim was pursuing the defendant. The evidence indicates that on the evening of March 5, 2004, defendant left his patient's room on no less than four separate occasions and each time was discovered with the victim in a situation where the circumstances allowed them to be alone. Defendant was discovered on two separate occasions by Curtis and made no mention or allegation that the victim was persistently following him or making unwanted sexual advances toward him. Accordingly, assuming every fact to be proved that the evidence tends to prove, every reasonable hypothesis of innocence was excluded.

This assignment of error is without merit.

BILL OF INDICTMENT

In his second assignment of error, defendant argues the trial court erred in denying his Motion in Arrest of Judgment. Defendant contends that the grand jury

indictment charging him with attempted aggravated rape is constitutionally defective because it failed to allege he had the required element of specific criminal intent.[2]

A defendant has a constitutional right to be advised, in a criminal prosecution, of the nature and cause of the accusations against him. La. Const. art. I, § 13. The indictment shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. La. C.Cr.P. art. 464. The bill of information must contain all the elements of the crime intended to be charged in sufficient particularity to allow the defendant to prepare for trial, to enable the court to determine the propriety of the evidence that is submitted upon the trial, to impose the appropriate penalty on a guilty verdict, and to protect the defendant from double jeopardy. ***State v. Templet***, 2005-2623, p. 12 (La. App. 1st Cir. 8/16/06), 943 So.2d 412, 420, ***writ denied***, 2006-2203 (La. 4/20/07), 954 So.2d 158.

A defendant may not complain of technical insufficiency in an indictment for the first time after conviction, when the indictment fairly informed him of the charge against him and he is not prejudiced by the defect. See La. C.Cr.P. art. 487. After the judgment of conviction, a defendant ordinarily cannot complain of the insufficiency of an indictment unless it is so defective that it does not set forth an identifiable offense against the laws of this state, and inform the defendant of the statutory basis of the offense. ***State v. Templet***, 2005-2623 at pp. 12-13, 943 So.2d at 420.

The bill of indictment in the present case provides in pertinent part:

> [O]n or about March 5, 2004 ... defendant herein, knowingly and willfully committed the offense of Attempted Aggravated Rape, to wit:

[2] Louisiana Code of Criminal Procedure article 859 provides in pertinent part, "The court shall arrest the judgment only on one or more of the following grounds ... (1) [t]he indictment is substantially defective, in that an essential averment is omitted[.]"

> He attempted to engage in the act of oral sexual intercourse with a female resident of Sunrise Assisted Living, without the resident's consent because it was committed when the victim was prevented from resisting because she suffers from mental infirmity preventing such resistance.

The bill of indictment specifically cites La. R.S. 14:27 and 42A(6) in relation to the count.

Clearly, defendant was aware that he was being charged with an attempted crime. Moreover, it is basic criminal law that as part of the State's burden of proof for an attempted crime, it must show defendant possessed the specific criminal intent to accomplish this crime. See La. R.S. 14:27A. Further, we note that the language of the indictment specifically tracks the language of the statute defendant is charged with violating. See La. R.S. 14:42A(6).

Defendant maintains that the use of the phrase "knowingly and willfully" only defines a general intent crime. In support of this, defendant cites ***State v. Parker***, 536 So.2d 459 (La. App. 1st Cir. 1988), ***writ denied***, 584 So.2d 670 (La. 1991). However, we find defendant's reliance on this case misplaced. ***State v. Parker*** does hold that the use of the terms "knowingly and intentionally" equate to a general intent crime. Id. at 463. In ***State v. Parker***, this court addressed the issue of the sufficiency of the evidence supporting Parker's conviction for distribution of cocaine. The "knowingly and intentionally" language used by the ***Parker*** court was merely a partial recitation of La. R.S. 40:967(A), which is a general intent crime. Id.

In the present case, defendant was clearly charged with attempted aggravated rape. The attempt statute is also clearly referenced in the bill of indictment. Moreover, we note that at no time prior to or during trial did defendant object to the indictment or request a bill of particulars. See La. C.Cr.P. art. 484.

After considering the plain language of the indictment, we cannot say the indictment fails to set forth an identifiable offense or inform defendant of the

statutory basis for the offense. Accordingly, the trial court properly denied defendant's motion in arrest of judgment.

This assignment of error is without merit.

DECREE

Accordingly, we affirm the conviction of, and sentence imposed against, defendant, Marlon O. Fisher.

CONVICTION AND SENTENCE AFFIRMED.