

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2000-KA-0689**
VERSUS * **COURT OF APPEAL**
KELLY HOLMES * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 389-900, SECTION "H"
Honorable Greg G. Hangartner, Judge Pro Tempore
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Judge Patricia Rivet Murray
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(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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AFFIRMED

Defendant, Kelly Holmes, appeals his conviction of simple kidnapping and simple robbery and his sentence as a multiple offender. For the reasons that follow, we affirm.

On May 29, 1997, defendant was charged with two counts of armed robbery and two counts of aggravated kidnapping; he pled not guilty. On July 9, 1998, he was tried by a twelve-member jury and found guilty of two counts of simple robbery and two counts of simple kidnapping. The State filed a multiple bill; and, on August 6, 1998, defendant was adjudged a second offender. The trial court sentenced defendant to fourteen years at hard labor on one count of simple robbery and to seven years at hard labor on the other; additionally, he was sentenced to five years at hard labor on each of the simple kidnapping counts. The court ordered that the sentences be served consecutively.

On appeal, the defendant argues that there was insufficient evidence to convict him, and that the trial court erred in ordering that the terms of his sentence be served consecutively rather than concurrently.

STATEMENT OF THE FACTS

Kimya Holmes testified that in the early morning hours (between midnight and 1:00 a.m.) on January 28, 1997, she and her friend, Denise Brock, went to the Bottom Line Club, but Ms. Holmes was not allowed into the club because she did not have her driver's license with her. When she and Ms. Brock returned to the car, an Altima that belonged to Ms. Holmes' mother, Ms. Holmes realized she had locked the keys inside it. As she walked over to the passenger side to look for the keys, a man, later identified as Earl Points, came up to her and put a gun in her side. He demanded the keys to her car, and she responded that she did not have them. Another man, later identified as the defendant, Kelly Holmes, then approached Ms. Brock, demanded money, and took her cell phone. The defendant walked away, and a third man, later identified as Clarence Jackson, came up to Ms. Brock. Ms. Brock testified that Jackson told the two women to stop playing games. Ms. Holmes said that Points then ordered her to empty her purse to look for the keys. Points took her money and then broke the window of her car to look for the missing keys. Not finding them, Jackson asked Ms. Brock where her car was. When she told him it was at her house, the three men forced the two women, at gunpoint, to get into their own car, a red Cadillac.

Ms. Holmes and Ms. Brock sat in the back with Jackson, while the defendant drove and Points sat in the front. They drove to Ms. Brock's house. Points, who was armed, got out with Ms. Brock, while the defendant, with Jackson and Ms. Holmes still inside the vehicle, drove to the corner. Ms. Brock testified that Points told her if anyone came out of her house, there would be a killing. Points then ordered Ms. Brock to get into her own car, a Cavalier, and drive him to the corner where the Cadillac was parked. At this point, Ms. Holmes and Jackson got into the back seat of the Cavalier, while the defendant remained driving the Cadillac. Ms. Brock was then forced to drive the Cavalier, which had a standard transmission, to New Orleans East, where they all stopped to get gas for the Cadillac. Ms. Brock testified that because none of the three men could drive a standard, she was forced to "drive them around, all night, while they planned to rob this place and that."

Both women testified that both cars were driven to a Circle K on Clearview and the I-10 Service Road, and parked in the vicinity. On Jackson's order, the defendant, Points, and Ms. Holmes went into the Circle K to check for security guards and surveillance cameras. According to Ms. Brock, the defendant had a gun at this point. She said they went into the store, looked around, bought some cigarettes. She also said the defendant

became upset with Points when Points called him by his name in the store. Ms. Brock testified that she did not try to escape at this time because Jackson, who was armed with an AK-47, had her friend in the other car. When the group returned to the cars about ten minutes later, the three men ordered the two women to get into the trunk of the Cadillac. After being driven around for about twenty minutes, they were allowed to get out of the trunk and back into Ms. Brock's Cavalier.

The women then rode in the Cavalier with the defendant and Jackson, while Points drove the Cadillac. They first drove back to the Bottom Line, where Ms. Holmes and the defendant again searched for the keys to Ms. Holmes' car. They left, however, when another individual, apparently upset because the Cadillac was blocking his car, pulled out a gun.

They drove to a spot on Florida Avenue, where Points set the Cadillac on fire. Points then got into the Cavalier, and they went back to the Circle K on Clearview. Ms. Holmes testified that the defendant and Jackson pulled out two guns, entered the Circle K., and returned in about fifteen minutes. They then drove to a convenience store on Jefferson Highway, where Points got out of the car and pretended he was using the pay phone in order to check whether there were security guards and/or people in the store. When Points returned saying there were people in the store, they drove to another

convenience store in the area, where, according to Ms. Holmes, the same thing happened. She testified that they kept going back and forth to the different convenience stores where early morning deliveries were being made. Then, after the sun came up, about 8:30 a.m., they dropped off the defendant and Points near Music and Urquhart Streets. The women did not see the defendant again during their ordeal.

Jackson then said he wanted to have some fun, and asked Ms. Brock to teach him to drive stick-shift car, which she did. Jackson drove the two women “in circles” around the Ninth Ward area of the city. Eventually, they stopped at the Desire housing project, where Jackson, who still had the AK-47, wrapped a blanket around the women and walked them through the project in the pouring rain.

The women convinced Jackson to let them get back in the car shortly after 11:00 a.m., telling him they were cold, hungry and needed to use the bathroom. About noon, they stopped at the Wendy’s on South Carrollton Avenue, where Jackson allowed Ms. Holmes get out of the car to use the restroom. Inside Wendy’s, Ms. Holmes managed to get the attention of an employee, whom she told that she and her friend had been kidnapped. Ms. Holmes returned to the car, at which point Jackson let Ms. Brock get out to use the bathroom. Ms. Brock also told someone inside Wendy’s about the

kidnapping, attempted to give him her driver's license, and did give him her license plate number. She returned to the car, and noticed someone from Wendy's following them as Jackson continued to drive around.

That afternoon, they picked up Points and drove around in Gentilly, looking for a car to steal. Eventually, they went to the parking lot of Southern University, where the two men broke into and stole a white Cadillac. The two women were then released. They first drove to a friend's apartment, but found no one there. They then went to the home of Ms. Holmes' parents and called the police. Ms. Holmes testified that while she and Ms. Brock were at the Third District Police Station, she saw Jackson's picture on the wall and screamed. She told the police that he was one of the perpetrators. She also identified a brown knife that had been recovered from the Cavalier as her father's knife, which he usually kept in the Altima.

Detective Calvin Brazley testified that he investigated a kidnapping involving Kimya Holmes and Denise Brock. While interviewing Ms. Brock, he heard Ms. Holmes yelling from outside his office. He went to see why she had yelled, and she pointed to a photograph of Clarence Jackson as being one of the men who had kidnapped her and Ms. Brock. Brazley stated that he then had the photograph covered up, so that Ms. Brock would not be able to see it before he conducted a photographic lineup. When he showed

the lineup to Ms. Brock, she chose Jackson's picture. Brazley also testified that through his investigation, in which he obtained surveillance tapes from a convenience store, he learned that a juvenile named Earl Points was also one of the perpetrators. Brazley further testified that he later received a telephone call informing him that someone named Kelly, who lived in the 2400 block of North Prieur, was the third perpetrator. By using the motion computer, Brazley learned that this person was the defendant. He then placed the defendant's picture in a photographic lineup, and both Ms. Holmes and Ms. Brock chose his picture.

Julie Davis, the manager of the Wendy's restaurant on South Carrollton Avenue, testified that a young woman pulled one of her employees into the ladies' bathroom to tell the employee that she and her friend had been kidnapped. The young lady also told Ms. Davis the same thing, and Ms. Davis asked her to stay put while she called the police. The young lady refused to do so, saying she had to go back to the car or else her friend would be killed. Ms. Davis then went to call the police, and she asked one of the customers to follow the car. The same customer informed Ms. Davis that one of the young women had tried to give him her driver's license, but he had refused to take it. Ms. Davis testified that the customer followed the car, but lost it in the Calliope Housing Project.

Quinetta Milton testified that she worked for the Crime Lab and that she processed two vehicles. She photographed a Nissan Altima and a Chevrolet Cavalier. She dusted the Cavalier for fingerprints, and also retrieved a green London Fog jacket and a multicolored shirt from the car. She found a box of .38 caliber bullets in the pocket of the jacket, and a brown-handled knife. Officer Glen Burmaster testified that the fingerprint lifted from the Cavalier was not suitable for identification.

Jerome Laviolette testified that he had obtained the surveillance tape from the Circle K on Clearview. He stated that the tape showed Ms. Brock and an unknown black male, later identified as Earl Points, entering the store.

The defendant testified that from January 27 to January 29, he stayed at his aunt's house where his cousin was having a party. He denied robbing and kidnapping Ms. Holmes and Ms. Brock, and he denied knowing either Jackson or Points. He admitted to a prior conviction for possession of cocaine with the intent to distribute.

ERRORS PATENT

A review of the record shows no errors patent.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, defendant complains that the State

failed to prove his guilt beyond a reasonable doubt. He argues that the State failed to show that he used force or intimidation to take anything from the victims or that he forcibly seized and carried the two victims from one place to another without their consent.

Defendant was convicted of two counts of simple robbery and two counts of simple kidnapping. Simple robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation but not armed with a dangerous weapon. La. R.S. 14:65(A). Simple kidnapping is the intentional and forcible seizing and carrying of any person from one place to another without his consent. La. R.S. 14:45(A)(1).

The standard for reviewing a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781; State v. Hawkins, 96-0766 (La. 1/14/97), 688 So. 2d 473. The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So. 2d 1305 (La. 1988).

Additionally, the court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Id. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. State v. Cashen, 544 So. 2d 1268 (La. App. 4 Cir. 1989).

A principal is a person concerned in the commission of a crime, whether present or absent, and whether he directly commits the act constituting the offense, aids and abets in its commission, or directly counsels or procures another to commit the crime. La. R.S. 14:24. Only those persons who knowingly participate in the planning or execution of the crime are principals, and mere presence at the scene is not enough. State v. Graves, 96-1537 (La. App. 4 Cir. 9/10/97), 699 So. 2d 903; State v. Marshall, 94-1282 (La. App. 4 Cir. 6/29/95), 657 So. 2d 1106. One may only be convicted as a principal for a crime for which he personally has the requisite mental state. Id.

In the instant case, the State presented sufficient evidence of defendant's guilt on all four offenses. Clearly, force and intimidation were used by the defendant when he demanded that Ms. Holmes turn over her money and then took her cell phone. Similarly, he participated in the kidnapping of the victims by forcing them into the red Cadillac and driving

the car with them inside, against their will, to Ms. Brock's home for the purpose of taking her car. According to the victims' testimony, the defendant then spent at least seven hours driving around with the two women, during which time he and his two associates held the victims against their will and at gunpoint. We therefore conclude that the trial court did not err in finding the defendant guilty of simple robbery and simple kidnapping.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant complains that the trial court erred in imposing consecutive sentences for crimes arising out of the same criminal transaction. He argues that there was no justification for making the sentences consecutive instead of concurrent because his offenses were not the most serious violations of simple robbery and simple kidnapping.

Defendant did not file a motion for reconsideration of sentence as required by Louisiana Code of Criminal Procedure article 881.1; however, at the conclusion of sentencing, the trial judge noted an objection to the sentence on defendant's behalf. Because an oral objection was made, defendant is relegated to having this court consider the bare claim of

excessiveness. State v. Mims, 619 So. 2d 1059 (La. 1993).

Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Sepulvado, 367 So. 2d 762 (La. 1979). A sentence is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless and needless imposition of pain and suffering, and is grossly out of proportion with the severity of the crime. State v. Lobato, 603 So. 2d 739 (La. 1992); State v. Telsee, 425 So. 2d 1251 (La. 1983). The trial court has great discretion in sentencing within the statutory limits. State v. Trahan, 425 So. 2d 1222 (La. 1983). The reviewing court shall not set aside a sentence for excessiveness if the records supports the sentence imposed. La. Code Crim. Pro. art. 881.4(D).

Generally, the reviewing court must determine whether the trial judge adequately complied with the guidelines set forth in La. Code. Crim. Pro. art. 894.1 and whether the sentence is warranted in light of the particular circumstances of the case. State v. Soco, 441 So. 2d 719 (La. 1983); State v. Quebedeaux, 424 So. 2d 1009 (La. 1982). If adequate compliance with Article 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the

circumstances of the case. State v. Egana, 97-0318 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223. The articulation of the factual basis for the sentence is the goal of Article 894.1, not rigid or mechanical compliance with its provisions; thus, where the record clearly shows an adequate factual basis for the sentence, resentencing is unnecessary even where there has not been full compliance with Article 894.1.

La. Code Crim. Pro. art. 883 provides:

If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be served consecutively unless the court expressly directs that some or all of them be served concurrently. In the case of the concurrent sentence, the judge shall specify, and the court minutes shall reflect, the date from which the sentences are to run concurrently.

Although Louisiana law favors concurrent sentences, the trial judge retains the discretion to impose consecutive sentences on the basis of other factors, including the offender's past criminality, violence in the charged crimes, or the risk that the defendant poses to the general safety of the community. State v. Thomas, 98-1144 (La. 10/9/98), 719 So. 2d 49. When consecutive sentences are imposed for crimes arising out of the same act, the

trial judge must articulate particular justification for such a sentence beyond a mere articulation of the standard sentencing guidelines set forth in article 894.1. State v. Pittman, 604 So. 2d 172 (La. App. 4 Cir. 1992). Consecutive sentences for crimes arising out of the same act are not per se excessive if the trial judge considers other appropriate factors in imposing sentence. Id.

In imposing sentence herein, the trial judge stated that defendant had an impressive record in that at the age of nineteen years, the defendant was already a convicted drug dealer, a convicted robber, and a convicted kidnapper. The judge further stated that he believed the jury had done the defendant a favor in returning the verdicts that it did. The judge also commented:

The facts as I heard them is [sic], these two women were abducted at gun point by you and two other people and then spent approximately the next two days in some sort of hell, because of what you and your other associates did.... [B]ased on the verdicts that were returned I cannot make sure that you never get out of jail. So, someday you will get out of jail. But when you do get out of jail it is my feeling that you will continue to offend and may escalate just as you have escalated in this particular case. I have reviewed the sentencing provisions under Article 894.1 and I've taken those into consideration.

Finally, the trial judge noted that each of the offenses was a crime of violence.

We find that the trial judge adequately articulated the basis for his decision to make the defendant's sentences consecutive, rather than concurrent. He cited the defendant's prior criminal history, the danger to the community posed by the defendant, and the violent nature of the offenses. His comments on the record clearly reveal that the trial judge considered the defendant to be the worst sort of offender of the crimes for which he was convicted. Accordingly, we conclude that the trial court did not err in imposing consecutive sentences on the defendant.

CONCLUSION

Accordingly, for the reasons stated, we affirm the defendant's convictions and sentences.

AFFIRMED

