

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

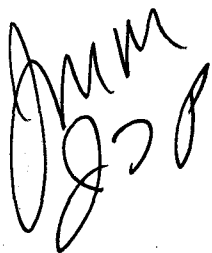
2013 KA 0134

STATE OF LOUISIANA

VERSUS

MICHAEL AYO

Judgment Rendered: JUL 10 2014



APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 505742, DIVISION "H"

HONORABLE ALLISON H. PENZATO, JUDGE


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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.



McCleendon, J. consents and assigns reasons.

McDONALD, J.

The defendant, Michael Ayo, was charged by grand jury indictment with aggravated rape (count one) and attempted aggravated rape (count two), in violation of La. R.S. 14:42 and La. R.S. 14:27. The defendant entered a plea of not guilty. The trial court granted the State's motion in limine to exclude the prior sexual history of the victim from evidence. Following a trial by jury, the defendant was found guilty as charged on both counts.¹ The trial court denied the defendant's motion for postverdict judgment of acquittal and motion for new trial. As to count two, the defendant was adjudicated a second-felony habitual offender and sentenced to fifty years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.² After the defendant filed an appeal, this court remanded the case to the trial court for imposition of a sentence on count one.³ On remand, the trial court sentenced the defendant on count one to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The trial court ordered that the sentences be served concurrently. The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, assigning error as follows:

1. The trial court failed to impose a sentence on count one.
2. The evidence was insufficient to convict the defendant on count one.
3. The evidence was insufficient to convict the defendant on count two.

¹Three codefendants indicted and tried along with the defendant were also convicted as charged and have separate appeals pending in this court: Clayton King (2013-0135), Brett Ward (2013-0137), and Derrick Maise (2013-0136). Having been fully developed in **State v. King**, 2013-0135 (La. App. 1st Cir. __/__/__), __ So.3d __, the facts and full discussion of the issues set forth therein will not be repeated in this case. Herein, only initials will be used to identify the victim (R.P.) in this case, a second female youth (A.L.) who was also victimized, and their immediate family members. See La. R.S. 46:1844(W).

² The defendant's predicate offense consisted of a guilty plea to accessory after the fact to simple burglary of an inhabited dwelling, on March 23, 2007.

³This court also remanded the case for a hearing on another motion for new trial based upon newly discovered evidence that was filed by the defendant after lodging an appeal with this court. On remand, after a hearing, the trial court denied the second motion for new trial and this court reset the briefing deadline.

4. The trial court erred in permitting the State to introduce evidence of another sexual offense by a codefendant.

The defendant has also adopted the following assignments of error raised in codefendant King's supplemental brief filed after the hearing on the second motion for new trial:

1. The trial court applied the wrong evidentiary burden to the second motion for new trial.
2. The trial court failed to distinguish between ordinary impeaching evidence and that where a witness's testimony is essentially uncorroborated and dispositive of the question of guilt or innocence and it appears that had the impeaching evidence been introduced it is likely that the jury would have reached a different result.
3. The trial court erred in failing to find that the testimony of Ms. Strausbaugh would probably have changed the verdicts.
4. The defendant reiterates all of the arguments raised in his original brief to this Court.

For the following reasons, we affirm the convictions and sentences.

ASSIGNMENT OF ERROR NUMBER ONE

In assignment of error number one, the defendant notes in accordance with the sentencing transcript of May 17, 2012, the trial court originally failed to impose a sentence on count one. As noted above, this court has already found merit in this assignment of error and on August 28, 2013, this court remanded the case for sentencing on count one, noting that the trial court sentenced the defendant on count two as a habitual offender following the adjudication on June 14, 2012. On remand, the trial court imposed sentence on count one. Thus, the defendant has been sentenced on both counts and the argument raised in assignment of error number one is moot.

ASSIGNMENTS OF ERROR NUMBERS TWO AND THREE

In assignment of error number two, the defendant contends that the evidence was insufficient to convict him of aggravated rape. The defendant notes that Dr. Atzemis did not testify that the concept of delayed disclosure excuses whimsical

serial falsehoods by an alleged victim. Thus, the defendant argues that Dr. Atzemis's trial testimony did not explain R.P.'s serial falsehoods over the years. The defendant recounts the various statements made by R.P. to Devon Radecker, Detective Schulken, and Detective Oalman. The defendant specifically notes that R.P. repeatedly denied any penetration took place, and that R.P. stated that the defendant was having sex with A.L. The defendant further notes that R.P.'s photographic identification of him includes a handwritten note indicating the defendant was having sex with A.L. while R.P. was being attacked. The defendant argues that R.P.'s trial testimony flowed like a nonsensical dream.

In assignment of error number three, the defendant notes that based on R.P.'s testimony, codefendant King never told R.P. that he wanted to have oral sex with her and that R.P. merely interpreted his actions as such. The defendant argues that since R.P. is not a mind reader, her testimony merely supports a conviction of attempted sexual battery by King. The defendant further contends that R.P.'s testimony did not negate the hypothesis that King was merely attempting to rub his penis on R.P.'s face or have her take notice of it. The defendant notes that R.P. did not claim that King attempted to force his penis into her mouth. The defendant further contends that R.P.'s testimony indicated that only he and Maise had an erection. The defendant concludes no reasonable finder of fact could have found R.P.'s testimony credible enough to find the defendants guilty of aggravated rape or to find that codefendant King attempted to force R.P. to have oral sex. The defendant also contends that there was ample testimony that alcohol, marijuana, and pills were consumed at the gathering, which would negate an assumption of specific intent.

Voluntary intoxication is a defense to a criminal charge only where the circumstances indicate that an intoxicated or drugged condition has precluded the presence of specific intent. La. R.S. 14:15(2). **State v. Boleyn**, 328 So.2d 95 (La.

1976); **State v. Burge**, 362 So.2d 1371 (La. 1978). Thus, the ultimate issue for our determination is whether a rational juror could have found beyond a reasonable doubt that defendant's drug and alcohol-induced intoxication was not so severe as to preclude the presence of specific intent to commit aggravated rape.

We find the arguments herein regarding the sufficiency of the evidence in support of the convictions non-persuasive. Despite the defendant's arguments regarding R.P.'s credibility, conflicting statements, and delayed disclosure, the jury obviously accepted R.P.'s trial testimony. Regarding the evidence in support of an attempt to force R.P. to perform oral sexual intercourse, R.P. specifically testified, "At first he [King] was just holding me down, and then he [King] was trying to get me to give him oral." R.P. confirmed that she was referring to oral sex and that she was certain that codefendant King was trying to force her to perform oral sex because he kept putting his penis in her face. R.P. further explained that King rotated his body and shifted around the top of the futon. Further, while the defendant claims that R.P.'s testimony indicated that only he and Maise had erections, R.P. clarified this issue during her subsequent testimony. Specifically, during cross-examination by King's defense attorney, R.P. was asked, "Were you saying -- were you testifying that Clayton King was one of the individuals that could not get an erection?" R.P. replied, "Huh? I never said that, no, sir." R.P. added, "I said that Brett Ward was not able to get an erection."

Moreover, there was no evidence concerning the specific amount of alcohol or marijuana consumed by codefendant King or the other defendants. We find that a rational trier of fact could conclude beyond a reasonable doubt that King actively desired the prescribed criminal consequences to follow his actions. Thus, King had the requisite specific intent to have non-consensual oral sexual intercourse with R.P. Further, as stated in **State v. Ward**, 2013-0137 (La. App. 1st Cir. __/__/__), __ So.3d __, the jury could have also reasonably concluded that

Ward had the specific intent to have non-consensual sexual intercourse with R.P. and acted toward accomplishing that goal. Likewise, the jury could have reasonably concluded that the defendant and Maise had non-consensual vaginal sexual intercourse with R.P. as she was being held down and beaten. It is clear from R.P.'s testimony that all of the defendants alternated as she was struck and held her down in the commission of rape and attempted rape. Thus, based on the foregoing and as fully developed in **State v. King**, 2013-0135 (La. App. 1st Cir. __/__/__), __ So.3d __, a rational trier of fact could conclude beyond a reasonable doubt that the defendant was guilty of every essential element of aggravated rape and attempted aggravated rape. We find no merit in assignments of error numbers two and three herein.

ASSIGNMENT OF ERROR NUMBER FOUR

In the fourth assignment of error, the defendant argues that the trial court erred and abused its discretion in permitting the State to introduce evidence that codefendant Ward forced A.L. to perform oral sex. The defendant lists several reasons in support of his argument. First, the defendant notes there was no testimony that Ward raped or attempted to rape R.P. and that R.P. clearly stated that Ward was unable to obtain an erection. In that regard, the defendant further notes that the trial court's ruling was not based on La. Code Evid. art. 412. Second, the defendant contends that the evidence at issue cannot be *res gestae* since R.P. testified that she believed the act was consensual. The defendant thus contends that A.L.'s claim of forced oral sex is not remotely an integral part of the narration of events testified to by R.P. and is not relevant to R.P.'s claims of rape and attempted rape. Third, the defendant argues that in violation of La. Code Evid. art. 404(B), A.L.'s claim that she was forced by Ward to have oral sex was interjected into this trial to show or suggest that all the defendants were sexual predators predisposed to using force to obtain sex. Fourth, the defendant contends

that the trial court erred in determining that the probative value of the evidence outweighed its prejudicial effect. Finally, the defendant argues that the State cannot prove that the error by the trial court was harmless beyond a reasonable doubt because the guilty verdicts were all by the minimum margin of ten of twelve jurors.

We note that the Louisiana Supreme Court has left open the question of the applicability of the Article 403 test to integral act evidence admissible under La. Code Evid. art. 404(B)(1). See State v. Colomb, 98-2813 (La. 10/1/99), 747 So.2d 1074, 1076 (per curiam). At any rate, we find that the prejudicial effect to the defendant from the challenged evidence did not rise to the level of undue or unfair prejudice when balanced against the probative value of the evidence. Evidence that Ward had oral sexual intercourse with A.L., whether consensual or non-consensual, was highly probative of his motive, intent, and plan regarding R.P. Moreover, the res gestae doctrine incorporates a rule of narrative completeness by which, “the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt; to convince the jurors a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault.” **State v. Taylor**, 2001-1638 (La. 1/14/03), 838 So.2d 729, 743, cert. denied, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004) (quoting **Old Chief v. United States**, 519 U.S. 172, 188, 117 S.Ct. 644, 654, 136 L.Ed.2d 574 (1997)). For reasons more fully expressed in **State v. King**, 2013-0135 (La. App. 1st Cir. __/__/__), __ So.3d __, we find no abuse of discretion in the trial court’s denial of the motion for mistrial and admission of the evidence at issue. Thus, we find no merit in assignment of error number four herein.

ADOPTION OF CODEFENDANT'S SUPPLEMENTAL BRIEF
ASSIGNMENTS OF ERROR NUMBERS ONE, TWO, THREE, AND FOUR

The defendant simply filed a motion to adopt the supplemental brief filed in **State v. King**, 2013-0135 (La. App. 1st Cir. __/__/__), __ So.3d __, regarding the proceedings on remand for a hearing and ruling on the motion for new trial based on newly discovered evidence filed after the appeal was lodged in this court. For reasons expressed in **State v. King**, 2013-0135 (La. App. 1st Cir. __/__/__), __ So.3d __, we find no abuse of discretion in the trial court's denial of the second motion for new trial. Thus, we find no merit in supplemental assignments of error numbers one, two, three, and four raised by codefendant King and adopted by the defendant herein.⁴

CONVICTIONS AND SENTENCES AFFIRMED.

⁴ Assignment of error number four of codefendant King's supplemental brief adopted herein was not briefed and simply states that the codefendant is reiterating the arguments in his original brief. As the arguments in the codefendant King's original brief lack merit, there is likewise no merit in assignment of error number four of codefendant King's supplemental brief. Further, codefendant King adopted the arguments raised by codefendants Maise and Ward regarding the second motion for new trial. We note that additional arguments regarding the second motion for new trial, as addressed in the respective codefendants cases, have no merit.

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McCLENDON, J., dissenting in part.

Although the evidence is sufficient to warrant a conviction for aggravated rape under the **Jackson** standard, a different standard applies for the granting of a new trial. The motion for a new trial is based on an injustice having been done to the defendant. See LSA-C.Cr.P. art. 851. Based on the reasoning set forth more fully in my dissent in the companion case of **State v. King**, 2013 KA 0135, I find that the law and the interest of justice require the defendant be granted a new trial.