

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 KA 1807

STATE OF LOUISIANA

VERSUS

ELMER ALEXANDER ESQUIVEL RAMOS

Judgment Rendered: MAY 02 2014

Appealed from the
23rd Judicial District Court
In and for the Parish of Ascension, Louisiana
Trial Court Number 30,567

Honorable Thomas Kliebert, Judge

Ricky L. Babin
District Attorney
Donald D. Candell
Asst. District Attorney

Attorneys for Appellee
Plaintiff – State of Louisiana

Mary E. Roper
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Baton Rouge, LA

Attorney for Appellant
Defendant – Elmer Alexander
Esquivel Ramos

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WELCH, J.

The defendant, Elmer Alexander Esquivel Ramos, was charged by grand jury indictment with aggravated rape, a violation of La. R.S. 14:42. The defendant pled not guilty and, following a jury trial, was found guilty as charged. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

On the night of October 28, 2012, seventy-two-year-old G.L. was visiting her friend, Patsy Delacruz, who lived in a trailer on La. Highway 44 in Prairieville. At about 10:00 p.m., the defendant drove up. Patsy's husband, Rodolfo, knew the defendant and went outside to visit with him. Rodolfo and the defendant stayed outside and drank beer. Patsy and G.L. stayed inside and drank daiquiris. G.L. also drank Kahlua. A while later, Rodolfo and the defendant went inside, wherein G.L. met the defendant for the first time. After some socializing, G.L. went to sleep in Patsy's back bedroom, which G.L. normally did when visiting with Patsy. At about 1:00 a.m., before going to bed, Rodolfo invited the defendant to stay and told him he could sleep on the sofa in the living room. In the early morning (October 29), likely some time after 4:00 a.m., the defendant entered the room where G.L. was sleeping. According to G.L.'s testimony at trial, while she was sleeping, the defendant put his hand over her mouth, and pulled her bottoms off. When he took his hand off her mouth, G.L. screamed for Patsy. The defendant told her to shut up and grabbed her throat. As G.L. continued to struggle and scream for Patsy, the defendant repeatedly punched her in the face. The defendant then raped G.L. vaginally and anally. To get away from him, G.L. feigned that she had to urinate. When the defendant let her up to go to the bathroom, G.L. wrapped the bedspread around her lower body. As G.L. walked through the trailer, the

defendant stayed close behind her. When they got to the living room, G.L. elbowed the defendant and ran to the closed door of Patsy's (and Rodolfo's) room. She banged on the door and screamed for help. The defendant left the trailer and drove away. G.L. called 911 and was brought to the hospital by ambulance. At St. Elizabeth Hospital, emergency room physician Bryan Saunders treated G.L. Dr. Saunders testified G.L. had bruising to her face. She also had vaginal tearing and blood in her anus. The following day, the police found the defendant and brought him in for questioning. The defendant admitted to having sex with G.L., but said that it was consensual. When asked about the bruises on G.L.'s face, the defendant said she got those when she woke up and crashed into a television set.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court abused its discretion in denying his motion to continue the trial date.

The defendant's trial began on June 11, 2013. Five days prior to the commencement of trial (June 6), defense counsel filed a motion to continue trial, alleging defense counsel¹ was unable to communicate with the defendant because of a language barrier (the defendant being fluent only in Spanish). This motion was not made part of the appellate record. The following day, the State filed an opposition to the motion to continue alleging, among other things, that counsel for the defendant had known since the inception of the case that the defendant spoke Spanish and that counsel had ample time to secure an interpreter to meet with the defendant. Several days later, on June 10, Dornier filed a supplemental and amended motion to continue, alleging that he was unable to communicate in any meaningful way with the defendant without the assistance of a Spanish interpreter. On June 10, a hearing was held on the matter and the motion to continue was

¹ The defendant had two attorneys, Seth M. Dornier and Susan K. Jones.

denied. Defense counsel filed an emergency writ with this court, which was denied on the showing made. See State v. Ramos, 2013-0994 (La. App. 1st Cir. 6/12/13) (unpublished).

In his brief, the defendant asserts that because he did not speak English, he required the assistance of an interpreter to communicate with his attorney. Because of the difficulty in scheduling an interpreter for meetings with the defendant, defense counsel was unable to adequately prepare for trial. Thus, the trial court's refusal to grant the continuance denied him the right to counsel and due process.

Louisiana Code of Criminal Procedure article 707 provides:

A motion for a continuance shall be in writing and shall allege specifically the grounds upon which it is based and, when made by a defendant, must be verified by his affidavit or that of his counsel. It shall be filed at least seven days prior to the commencement of trial.

Upon written motion at any time and after contradictory hearing, the court may grant a continuance, but only upon a showing that such motion is in the interest of justice.

The decision whether to grant or refuse a motion for a continuance rests within the sound discretion of the trial judge and a reviewing court will not disturb such a determination absent a clear abuse of discretion. State v. Strickland, 94-0025 (La. 11/1/96), 683 So.2d 218, 229. See La. C.Cr.P. art. 712. Whether refusal of a motion for continuance is justified depends on the circumstances of the case. Generally, the denial of a motion for continuance is not grounds for reversal absent a showing of specific prejudice. State v. Roy, 496 So.2d 583, 588 (La. App. 1st Cir. 1986), writ denied, 501 So.2d 228 (La. 1987).

We note initially the defendant could speak some English. According to G.L., when the defendant was attacking her and she screamed Patsy's name, the defendant said, "shut up." Patsy testified that earlier that night when she and G.L. were sitting at the table, the defendant told G.L. that she was beautiful. When

asked if he said this in English, Patsy replied that “he said it pretty good clear that you can understand beautiful. And then he said it in Spanish[.]”

We note as well that neither of the defendant’s motions to continue were timely filed. The untimeliness issue notwithstanding, we see no reason to disturb the trial court’s ruling. The defendant has failed to show how he was prejudiced by the denial of the continuance. Despite the contention that defense counsel had difficulty scheduling meetings with an interpreter, the record indicates that an interpreter was present at pretrial hearings, including the hearing on the motion to continue. As far back as March 25, 2013, at a pretrial hearing to address motions for discovery, bill of particulars, **Brady**² material, as well as other issues, the defendant was present with counsel, Dornier, as well as an interpreter, Alex Urdanetta.³ The interpreter was duly sworn to truthfully interpret on behalf of the defendant. The interpreter was also present at the motion to continue hearing. The trial court noted in writing on the order denying the motion: “The defense has failed to show any prejudice in moving forward after [being] given an opportunity to meet with the defendant and an interpreter for over two hours.” The trial court also noted on the day of trial (following voir dire) that Dornier had been appointed in October of 2012, and the interpreter was present for the defendant’s arraignment in January (January 28, 2013). Furthermore, the same interpreter, Urdanetta, was present with the defendant throughout his entire trial, including voir dire.

The defendant’s motions were untimely, and, moreover, he made no showing of specific prejudice. Accordingly, we find no abuse of the trial court’s discretion in denying the defendant a continuance of his trial.

This assignment of error is without merit.

² **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

³ The precise spelling of the interpreter’s name is not clear from the record. The name also appears as “Alec” and “Urdenetta” in other places in the record.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court abused its discretion in failing to order a presentence investigation report (PSI) prior to sentencing.

Our review of the record reveals that at no time prior to sentencing did the defendant (defense counsel) request a PSI. Where the defendant does not request a PSI, it is not error for the trial court to fail to order one. **State v. Walker**, 540 So.2d 1059, 1061 (La. App. 2nd Cir. 1989). The purpose of a PSI is to assist the sentencing judge in making a proper articulation in accordance with La. C.Cr.P. art. 894.1. The trial court, however, is not required to comply with those sentencing guidelines where the sentence imposed upon the defendant is a mandatory one set by statute. *Id.* Moreover, the determination of whether or not to order a PSI lies within the discretion of the trial court. **State v. Scales**, 558 So.2d 702, 703 (La. App. 1st Cir. 1990); La. C.Cr.P. art. 875(A)(1).

Further, following sentencing, the defendant did not object to the trial court not ordering a PSI; nor did the defendant file a motion to reconsider sentence. An irregularity or error cannot be availed of after verdict unless it was objected to at the time of the occurrence. La. C.Cr.P. art. 841(A). Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based shall preclude the defendant from raising an objection to the sentence. La. C.Cr.P. art. 881.1(E).

Accordingly, notwithstanding the discretion of the trial court, having ordered a PSI would have served no purpose in this case. The sentence imposed upon the defendant—life imprisonment without benefit of parole, probation or suspension of sentence—was mandatory. Regardless of aggravating or mitigating factors, the same sentence would have been imposed upon the defendant. See Walker, 540 So.2d at 1061.

In his brief, the defendant cites **State v. Dorthey**, 623 So.2d 1276 (La. 1993), and its ruling by the Louisiana Supreme Court that if a trial judge were to find that the punishment made no measurable contribution to acceptable goals of punishment, or that the sentence amounted to nothing more than the purposeful imposition of pain and suffering and was grossly out of proportion to the severity of the crime, he had the option, indeed the duty, to reduce such sentence to one that would not be constitutionally excessive. *Id.* at 1280-81. To rebut the presumption of the constitutionality of the mandatory minimum sentence, the defendant would have to clearly and convincingly show that he is exceptional, which means that because of unusual circumstances, the defendant was a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. See **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 676-77.

To the extent the defendant is suggesting in his brief that his mandatory life sentence should have been reduced, he has not proven by clear and convincing evidence that he is exceptional such that the sentence would not be meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. See **Johnson**, 709 So.2d at 676. Moreover, as noted, the issue is not properly before this court because of the defendant's failure to file a motion to reconsider sentence.

This assignment of error is without merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.