STATE OF LOUISIANA	*	**NO. 2000-KA-0507**
VERSUS	*	**COURT OF APPEAL**
LEROY JOHNSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 338-484, SECTION "C"
HONORABLE SHARON K. HUNTER, JUDGE
* * * * * *
JAMES F. MC KAY, III
JUDGE
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge James F. McKay, III, Judge Michael E. Kirby)

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AFFIRMED

STATEMENT OF CASE

On October 19, 1989, the defendant, Leroy Johnson, was indicted one count of aggravated rape in violation of La. R.S. 14:42 and one count of aggravated burglary in violation of La. R.S. 14:60. The defendant entered a plea of not guilty to both counts at his arraignment on November 27, 1989. On the same date, the defendant filed suppression and discovery motions. On January 31, 1990, the trial court denied the defendant's motion to suppress identification. The defendant filed a motion to quash on November 4, 1991. The trial court denied defendant's motion on November 7, 1991. After a jury trial, the defendant was found guilty as charged on both counts. On January 31, 1992, the trial court sentenced the defendant to life imprisonment at hard labor without benefit of parole on the aggravated rape conviction and to twenty-five years at hard labor on the aggravated burglary conviction. This Court subsequently affirmed the defendant's convictions and sentences on two separate occasions. See State v. Johnson, 619 So.2d 1102 (La. App. 4 Cir. 1993), writ denied, 625 So.2d 173 (La. 1993); and State v. Johnson, unpub., 95-KA-1391(La. App. 4 Cir. 9/18/96).

The defendant filed an application for post conviction relief alleging ineffective assistance of counsel on appeal. The defendant was granted an out of time appeal.

STATEMENT OF FACT

On September 22, 1989, at about 2:31 a.m., Lieutenant Alvin Dufrene of the New Orleans Police Department was called to investigate a rape in the 1800 block of Whitney Court. When he arrived on the scene, he spoke with the victim who gave a description of the perpetrator as a black male in his thirties, approximately 5'7", muscular build, a nappy Afro bush, with a mustache and goatee, wearing a pink sleeveless muscle shirt and tan bell-bottom trousers, dark-skinned, and armed with a small silver-colored handgun. Lieutenant Dufrene broadcast the description over the police radio.

At about 2:35 a.m. that same morning, Police Officers Bass, Heindel and Thompson had placed a roadblock in the 1800 block of Thayer Street, two blocks behind the victim's apartment, in connection with an unrelated narcotics traffic stop. When the defendant was told he had to wait at the roadblock, he jumped out of his car and pointed a .25 caliber automatic handgun at the officers. The officers arrested the defendant for the aggravated assault committed upon them.

Within minutes of Lieutenant Dufrene's dispatch concerning the description of the rape perpetrator, there was a call from Officers Bass, Heindel and Thompson reporting that they believed they had the perpetrator. The officers then transported the defendant to the Fourth District Station. Detective Puigh, the rape detective assigned to the case, took the victim to the station where she positively identified the defendant as the perpetrator.

The victim testified that she awoke in the middle of the night when the defendant jumped on top of her. When she awoke, she noticed the house was in darkness although she normally left her kitchen and bathroom lights on overnight for her children. The victim struggled with the defendant, even after he told her he had a gun, and managed to push the defendant off and get out of her bedroom. However, because of the darkness, she ran into a chest in the hallway and hurt her shoulder. The defendant then grabbed the victim around the throat and put a gun to her head. She convinced the defendant to let her check on her children. She put the light on in her children's room and looked into the defendant's face. The defendant realized that the victim was looking at him and turned the light off. He then dragged her to the sofa in the living room where he pulled up her nightgown and raped her.

The victim called 911, and Lieutenant Dufrene and Detective Puigh

responded. She told Detective Puigh that the defendant called her by name although she had never met him. Detective Puigh suggested that the defendant might have seen her driver's license and asked the victim where she kept her purse. The victim then noticed that her purse was not where she left it. She testified that she carries a lot of change because she is a special education teacher and she travels with her students on the bus to teach them how to catch a bus and how to make change. She checked the contents of her purse and saw that all her change was gone. Detective Puigh then took the victim to the Fourth District Police Station where she identified the defendant.

At the trial, Dr. Kenneth Lum testified that he performed the medical examination on the victim. He found no particular trauma to the vaginal area. However, he did find a significant amount of motile sperm, which indicated intercourse within six to eight hours of the exam, and contusions of the left shoulder and right leg.

Medical technologist Patricia Daniels and criminalist Charles Krone both testified that the evidence from the rape kit did not single out the defendant as the perpetrator of the rape. They also testified that no DNA or other testing was ordered which would have narrowed the possible suspects or eliminated the defendant as one of them.

The defendant's brother, Emmanuel Johnson, testified at trial that the defendant did construction work for him that day and was given an advance in pay before he left at about 7:00 p.m. Cynthia Peterson, defendant's former girlfriend, testified at trial that on the night in question the defendant came to her sister's house on Bouny Street near the Canal Street ferry where they watched television and then had sex for about two hours. Ms. Peterson's sister arrived home around 2:00 a.m. The defendant then dressed, washed up and left at about 2:05 a.m. Ms. Peterson also testified that the defendant was wearing an unbuttoned yellow shirt with a sleeveless pink undershirt and brown pants that night.

Detective Heindel testified during trial that the distance from the Canal Street ferry and Bouny area was 1.8 miles from the Whitney and Thayer area and could be traveled at a normal rate of speed in five minutes.

ERRORS PATENT

A review of the record for errors patent reveals none.

DISCUSSION

COUNSEL'S ASSIGNMENT OF ERROR NUMBER 1

The defendant, through appellate counsel, contends that the trial court erred when it denied the defendant's motion to suppress identification. The defendant argues that the "one-on-one" identification was suggestive and

prejudicial. This issue was considered in the defendant's first appeal.

In the present case, the defendant was identified by the victim in a "one-on-one" encounter, which occurred only a short time after the crime. This type of "one-on-one" confrontation between a suspect and the victim is generally not favored but is permissible when justified by the overall circumstances, particularly when the accused is apprehended within a relatively short period of time after the occurrence of the crime and has been returned to the crime scene. State v. Walters, 582 So.2d 317 (La. App. 4 Cir. 1991), writ denied, 584 So.2d 1171 (La. 1991); State v. Peters, 553 So.2d 1026 (La. App. 4 Cir. 1989). These identifications have been upheld because prompt confrontation between the defendant and the victim promotes fairness by assuring the reliability of the identification (while the victim's memory is fresh) and the expeditious release of innocent suspects. State v. Robinson, 404 So.2d 907 (La. 1981); State v. Muntz, 534 So.2d 1317 (La. App. 4 Cir. 1988); State v. Jackson, 517 So.2d 366 (La. App. 5 Cir. 1987).

The present case is typical of "one-on-one" identifications. For example in State v. Valentine, 570 So.2d 533 (La. App. 4 Cir. 1990), a restaurant was robbed in the middle of the night by a man wearing a ski mask. The victims called the police, and the defendant was apprehended

shortly thereafter, only two blocks from the scene of the robbery. The police officer took the defendant to the scene to be identified by the two victims. The victims separately viewed the defendant who was seated in the back of the car. This Court upheld the identification of the defendant because there was no showing of unreliability or suggestiveness. See also, State v. Peters, 553 So.2d 1026 (La. App. 4 Cir. 1989); State v. Cryer, 564 So.2d 1328 (La. App. 4 Cir. 1990); State v. Smith, 577 So.2d 313 (La. App. 4 Cir. 1991); State v. Muntz, 534 So.2d 1317 (La. App. 4 Cir. 1988).

In State v. Brown, 519 So.2d 826 (La. App. 4 Cir. 1988), the victim coincidentally viewed the defendant as he was being led into the police station where the victims had gone to report the robbery. The identifications occurred shortly after the robbery, and the trial court's denial of the motion to suppress the identifications was upheld by this Court.

Likewise, in State v. Guillot, 526 So.2d 352 (La. App. 4 Cir. 1988), writs denied, 531 So.2d 481 (La. 1988), the victim and a witness identified the defendants as they were being led to a police car parked in front of a bar where the crime occurred. The spontaneous identifications occurred within two hours of the crime and, again, the Fourth Circuit upheld the admissibility of these identifications.

When considering if the identification procedures were suggestive,

five factors are considered in determining whether the suggestive identification gave rise to a substantial likelihood of misidentification: 1)the victim's opportunity to view the defendant at the time the crime was committed; 2)the degree of attention paid by the victim during the commission of the crime; 3)the accuracy of any prior description; 4)the level of the victim's certainty displayed at the time of the identification; and 5)the length of time elapsed between the crime and identification. Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

The identification of the defendant at the police station and in handcuffs will not necessarily render the identification procedures suggestive or indicate that there is a "substantial likelihood of misidentification". See State v. Valentine; State v. Robinson; State v. Muntz; State v. Jackson; State v. Williams, 536 So.2d 773 (La. App. 5 Cir. 1988), writ denied, 95-1325 (La. 11/13/95), 662 So.2d 465; State v. Amos, 550 So.2d 272 (La. App. 4 Cir. 1989); State v. Cryer; State v. Walters.

This Court considered this issue in the defendant's first appeal. The Court determined that that identification was not suggestive or prejudicial. The Court noted that

> the only factor which indicates that this identification procedure was suggestive is the fact that the victim was brought to the police station to identify a single suspect. Defense trial counsel attempted to show that because the defendant was in custody on other charges, the police could have waited to do a full line-up

> or a photo line-up with more than one subject. However, Det. Puigh testified that there were exigent circumstances which prevented delaying the identification until a regular line-up could be had. He testified that the charge for which the defendant had been arrested was a misdemeanor which would carry a very small bond, on which the defendant could possibly be released. He further testified that he could not hold the defendant on the rape charge without an identification. He thus felt a one-on-one identification that evening was proper and avoided the risk that the suspect would be released before the full line-up could be arranged for the following day.

State v. Johnson, 619 So. 2d at 1106-1107.

The Court then went on to consider whether the identification procedure, if suggestive, gave rise to a substantial likelihood of misidentification.

> The victim testified that she turned on the light in her children's room, then looked directly at her attacker, not at her children. Although the victim was not wearing her eyeglasses, she explained that she is nearsighted so she only has difficulty seeing far away objects. Her opportunity to view the defendant at the time of the crime and the degree of attention she paid to the appearance of the defendant was therefore considerable. The description given by the victim to the investigating officers was extremely detailed and accurate. The victim was positive in her identification. Finally, only an hour elapsed between the commission of the crime and the identification. Considering those factors, there is no substantial likelihood of misidentification.

State v. Johnson, 619 So.2d at 1107.

The defendant's argument in the present appeal is the same as his argument in his prior appeal. He has not produced any additional evidence

to support his argument. The victim's "one on one" identification of the defendant was not suggestive and would not lead to a substantial likelihood of misidentification. The victim identified the defendant very shortly after the offense and was positive in her identification. She was face to face with the defendant during the crime and had the opportunity to clearly see him. Further, her description of the perpetrator matched the defendant at the time of his arrest. Accordingly, the trial court did not err when it denied the defendant's motion to suppress.

This assignment is without merit.

COUNSEL'S ASSIGNMENT OF ERROR NUMBER 2

The defendant also argues that trial court erred when it denied the defendant's motion to quash based upon the State's failure to proceed to trial within the time limitations of La. C.Cr. P. article 578.

In the case at bar, the defendant was indicted for aggravated rape and aggravated burglary on October 19, 1989. The defendant filed a motion to quash pursuant to La. C.Cr.P. article 578 on November 4, 1991. The trial court denied the motion on November 7, 1991. The defendant ultimately went to trial on January 31, 1992.

La. C.Cr.P. article 578 provides that, in non-capital felony cases, "no trial shall be commenced after two years from the date of institution of the

prosecution." La. C.Cr.P. article 579 provides that the period of limitation set forth in La. C.Cr.P. article 578 shall be interrupted if:

> (1) The defendant at any time, with the purpose to avoid detection, apprehension, or prosecution, flees from the state, is outside the state, or is absent from his usual place of abode within the state; or
> (2) The defendant cannot be tried because of his insanity or because his presence for trial cannot be obtained by legal process, or for any other cause beyond the control of the state; or
> (3)The defendant fails to appear at any proceeding pursuant to actual notice, proof of which appears in the record.

The period of limitation commences to run anew from the date the cause of interruption no longer exists. La. C.Cr. P. article 579.

This Court considered this same issue in the defendant's first appeal. After reviewing the record, the Court concluded that the trial court correctly denied the defendant's motion to quash.

> At th[e] hearing [on defendant's motion to quash], it was established that on March 22, 1990, the defendant appeared for trial attended by counsel. At the request of the defense the matter was continued and reset for May 16, 1990. The defendant was given notice of the new trial date in open court. On May 16, 1990, the defendant failed to appear and an alias capias was issued for his arrest. The state stipulated that the defendant was erroneously released by the sheriff when his sentence on the aggravated assault conviction was completed. The defendant's brother testified that he and the defendant and another brother went to the courthouse the day after the defendant's release and were told that there were no other cases or court appearances pending. He further testified that, after the defendant's release from the aggravated assault conviction, the

> defendant lived with him at a different address on the same street that they lived on prior to the defendant's initial arrest.
>
> The arrest of capias notification indicates that the defendant was rearrested on July 17, 1991. The docket master indicates that he then appeared before the court for a status hearing on July 19, 1991, at which new counsel was appointed. Although the evidence fails to support a finding that the defendant absented himself from his usual place of abode with the purpose to avoid detection, apprehension, or prosecution, it does support a finding that the defendant failed to appear at the proceeding on May 16, 1990, despite actual notice given to him on March 22, 1990. The prescriptive period thus was interrupted until the rearrest of the defendant on July 17, 1991, at which time it began to run anew.

State v. Johnson, 619 So.2d 1108-1109.

The defendant has produced no new evidence in the present appeal to suggest that this Court's prior ruling was erroneous. However, the defendant contends that there is nothing to suggest that the defendant received notice of the new trial date of May 16, 1990. The defendant's argument is without merit. The record reveals that the defendant appeared in court on March 22, 1990 and was informed of the new trial date of May 16, 1990. Therefore, the defendant had actual notice of the trial date. When the defendant did not appear for trial on May 16, 1990, the prescriptive period was interrupted until the defendant's rearrest on July 17, 1991. The prescriptive period then began to run anew. The defendant was tried and convicted on January 21, 1992, within the two-year period of limitation set forth in La. C.Cr. P. article 578. Thus, the trial court did not err in its denial of the defendant's motion

to quash.

This assignment of error is without merit.

DEFENDANT'S PRO SE ASSIGNMENT OF ERROR NUMBERS 1 AND 2

In these assignments, the defendant contends that he received ineffective assistance of counsel during his first two appeals resulting in the deprivation of due process of law. The defendant suggests that the appropriate remedy is the reversal of his convictions. The defendant's arguments are incorrect. The appropriate remedy is a new appeal, which he has been granted. Thus, these assignments are moot.

CONCLUSION

Accordingly, the defendant's convictions and sentences are affirmed.

AFFIRMED