NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0203**
VERSUS	*	**COURT OF APPEAL**
FAISAL PUCKETT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 418-994, SECTION "A"
Honorable Charles L. Elloie, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Steven R. Plotkin and Judge Miriam G. Waltzer)

PLOTKIN, J., - DISSENTING

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CONVICTION AND SENTENCE AFFIRMED.

STATEMENT OF CASE

On 12 January 2001, the defendant was charged by bill of information with armed robbery, a violation of La.R.S. 14:64. He pled not guilty at arraignment. The trial court heard and denied defendant's motion to suppress the identification and found probable cause in April 2001. The State filed a motion to invoke firearm-sentencing provisions. Following trial on 2 October 2001, a jury found the defendant guilty as charged. On 17 October 2001, the trial court denied defendant's motion for new trial and sentenced him to thirty years at hard labor without benefit of parole. Defendant appeals. We affirm defendant's sentence and conviction.

STATEMENT OF FACTS

On 20 August 2000, Officer George Wichser responded to a complaint of an armed robbery at Dat's Supermarket Food Store, at 1600 Magazine Street. On arrival, Wichser met with the two victims, Mr. Vo and Mr. Pham. They related that two armed men wearing bandanas had robbed

them. Lieutenant Christy Williams was assigned the follow up investigation of the robbery. She arrived on the scene shortly after Officer Wichser and learned that Mr. Pham was behind the counter at the cash register and that Mr. Vo was baking cookies when the two men entered. The first man held Mr. Vo at gunpoint, and the second subject held Mr. Pham at gunpoint, demanded the money from the register, and robbed him of his jewelry as well. While the second man was robbing Mr. Vo, his bandana slipped down and the two victims recognized him as a customer. Mr. Vo knew where the subject's mother and stepdaughter lived and he showed Lieutenant Williams the house.

Lieutenant Williams was able to develop a suspect from the description and the location provided, and compiled a photographic lineup from which Mr. Vo positively identified the defendant as the perpetrator of the armed robbery. Lieutenant Williams subsequently obtained an arrest warrant for the defendant, who was arrested without incident on 1 December 2002, at his mother's apartment.

Hoang Van Vo testified that he was in the kitchen area of his establishment when the perpetrators entered. He heard one of the men tell the cashier, "This is not a game. Put all the money in the bag." The other subject came to the kitchen and told him not to move. Mr. Vo tried to hide

from the gun, but the man told him to get up. Mr. Vo stated that the first subject took the bag and then saw a gold chain and told the cashier to "Put the gold chain in the bag too. And empty your pocket." He said that they did not take anything from him because he did not have anything. Mr. Vo said that as the first man was walking out, his bandana dropped down and Mr. Vo was able to see his entire face.

Mr. Vo stated that he had worked at the store for six years and that he had seen the defendant come to the store every night to buy cigarettes. Mr. Vo said that he knew several members of the defendant's family and that he had passed his house on the way to make purchases. He showed the house to the police. Mr. Vo identified the defendant in court.

The defense called Shirley Quest, the defendant's mother. She testified that she learned that there was a warrant for her son's arrest for armed robbery and that she was the one who called and informed the police of his location. Ms. Quest related that she did not want her son possibly hurt when being arrested for a crime she knew he had not committed because he was with her all day.

The defendant took the stand in his own defense and testified that on the day of the robbery he was at his mother's house, where he was living at the time, watching movies with his family. He recalled that the day was

stormy and that his mother, father, and little brother were at the house.

Defendant stated that he had been going to Mr. Vo's store for some eight or nine years. He testified that the store had a number of video cameras on the inside. He stated that he had been to the store on three or four occasions after the date of the robbery.

Shirley Quest also testified that her son had been home at the time of the robbery. She stated that they were watching movies and also recalled that it had been quite stormy that day.

On rebuttal, the state called Clem Hebert, an investigator with the District Attorney's office. He testified that he took a taped statement from Ms. Keisha Edgard, who had been the defendant's girlfriend at the time of the robbery, relative to a conversation she had had with the defendant's mother. The state then played the tape for the jury. On the tape, Ms. Edgard said that Shirley Quest called her and asked her to be a witness for Faisal Puckett, and that she told Ms. Quest that she would not come to court to commit perjury. Ms. Edgard related that Shirley Quest stated she would have a subpoena sent out. Ms. Edgard also related that Shirley Quest delivered a subpoena. She stated she knew this because her neighbor described the truck to her. Ms. Edgard recalled the day of the robbery and stated that she was working and did not see Mr. Puckett until perhaps very

late in the evening.

The defense asked the court to call the courtroom clerk in surrebuttal to introduce the subpoena served on Ms. Edgard. The trial court denied the request.

ERRORS PATENT

A review of the record for errors patent reveals none, with exception of the failure to observe a sentencing delay, which is discussed in Second Assignment of Error.

FIRST ASSIGNMENT OF ERROR: Defendant's right to compulsory process was denied when the trial court ruled that Shirley Quest could not testify regarding the defendant's whereabouts at the time of the robbery.

The record reflects that when defense counsel initially called Shirley Quest the state objected on the basis that the defendant had failed to provide a notice of alibi identifying this witness. The defense argued that the state had failed to make a written demand for notice as provided by La. C.Cr.P. art. 727. While the trial court's ruling on the state's motion allows Ms. Quest to testify as to the alibi defense, it is apparent that defense counsel

considered the court's ruling to be that Ms. Quest could not testify regarding defendant's alibi. However, for whatever reason, Ms. Quest was recalled and did testify that her son was with her at the time of the robbery.

The trial court's ruling is expressed in the following statements from the record:

> **By the Court**: The only thing I'm dealing with right now – I'm going to give you a little hook. I'm going to let her deal with any of the alibi stuff, if it is necessary.
>
> * * *
>
> **By the Court**: I will allow her to testify on this. Anything other than the alibi, Mr. Fazande I will –
>
> **By Mr. Fazande**: Part of her testimony is concerning her sixth sense to call the police and the reason why she called the police.
>
> **By the Court**: That has nothing to do with the alibi. I will allow her to testify relative to the alibi of Mr. Puckett on the day of this incident.

Furthermore, Ms. Quest testified during her first appearance on the stand that she knew that her son did not commit the crime because he was with her. Accordingly, the assignment of error is without merit.

SECOND ASSIGNMENT OF ERROR: The trial court erred in failing to conduct an evidentiary hearing on his motion for new trial and in failing to observe statutory sentencing delays.

Defendant alleges that La. C.Cr.P. art. 852 and art. 853 mandate an evidentiary hearing. Article 852 provides that a motion for a new trial shall be tried contradictorily with the district attorney. Article 853 provides that a motion for a new trial must be filed and disposed of before sentence. The court, on motion of the defendant and for good cause shown, may postpone the imposition of sentence for a specified period in order to give the defendant additional time to prepare and file a motion for a new trial.

Neither article mandates an evidentiary hearing in conjunction with a motion for new trial. Furthermore, the record reflects that the defendant did not request the opportunity to present testimony in conjunction with the motion, nor does he suggest here that he had evidence or testimony to present. Finally, there is nothing to indicate that the defendant was denied the opportunity to argue the motion. This portion of the assignment is without merit

Defendant argues that the sentence must be vacated because the trial court failed to observe the twenty-four hour statutory delay between the denial of the motion for new trial and sentencing. See La. C.Cr.P. art. 873. In *State v. Martin*, 93-1915, (La. App. 4 Cir. 9/29/94) 643 So.2d 830 this court noted that applying La. C.Cr.P. arts. 881.1 through 881.4, when, as

in the instant case, the defendant fails to file a motion to reconsider sentence with the trial court within thirty days of the imposition of sentence, he is precluded from raising an objection to the sentence on appeal. Accordingly, this portion of the assignment of error is also without merit.

THIRD ASSIGNMENT OF ERROR: The trial court erred in allowing the state to play the audiotape of Keisha Edgard.

Defendant contends this tape was inadmissible hearsay. "Hearsay" is a statement other than one made by the declarant while testifying at the present trial or hearing offered in evidence to prove the truth of the matter asserted. La. C.E. Art. 801. The state contends the tape was admissible as it served to impeach the testimony of Shirley Quest and as extrinsic evidence under La. C.E. art. 607 (D)(1) or (D)(2). The substance of Ms. Edgard's statements was clearly relevant to Shirley Quest's credibility and served to impeach her trial testimony, and constitutes evidence tending to show Ms. Quest's bias or corruption. As such, it is admissible under La.C.E. 607(D)(1).

Although defendant observes that the trial court's action allowing the state to play the tape was error, he fails to suggest that he was prejudiced by the admission of the tape, nor does he discuss the impact of the evidence on

whether he received a fair trial. Furthermore, the defense did not ask the trial court to give the jury an instruction limiting Ms. Edgard's statement. See La. C.E. art. 105.

Defendant has not shown and we have not found in our independent review of this record, that the use of the tape recording was erroneous or that, if erroneous, it would not be subject to harmless error analysis.

This assignment of error is without merit.

FOURTH ASSIGNMENT OF ERROR: The trial court erred in denying defendant the opportunity to offer surrebuttal.

The record reflects that defendant wished to call the Division "A" docket clerk relative to the issue of who served the subpoena upon Ms. Edgard.

Defendant contends that in some instances the failure to allow a defendant surrebuttal can be reversible error. In *State v. George*, 95-0110, p. 13 (La. 10/16/95), 661 So.2d 975, 981, the court held that when new facts or issues are adduced on rebuttal, a trial judge has the discretion to permit the introduction of additional defense evidence prior to closing argument. La.Code Crim.P. art. 765(5). An abuse of discretion resulting in prejudice to a defendant's presentation of a defense or impingement of his right to impeach the credibility of state witnesses constitutes reversible error. La.

Const. art. I, § 16; State *v. Harper*, 93-2682, pp. 7, 8 (La. 11/30/94), 646 So.2d 338, 342-43. However, defendant does not assert any basis for a conclusion that this alleged error would require reversal. Rule 2-12.4 of the Uniform Rules of Louisiana Courts of Appeal provides in pertinent part:

> "... All specifications of error must be briefed. The court may consider as abandoned any specification or assignment of error which has not been briefed...."

Because defendant does not address the issue presented and does not demonstrate that the failure to allow the clerk to testify contributed to the verdict, we consider it abandoned and the assignment of error without merit.

FIFTH ASSIGNMENT OF ERROR: Defendant's sentence is excessive.

The record reflects that the defendant failed to file a motion to reconsider sentence or to make an oral objection to the sentence. Therefore he has not preserved this issue for review on appeal. La. C.Cr.P. article 881.1; *State v. Howard*, 2000-2700 (La. App. 4 Cir 1/23/02) 805 So.2d 1247.

This assignment of error is without merit.

SIXTH ASSIGNMENT OF ERROR: Defendant was compelled to take the witness stand by virtue of the fact that the trial court refused to

allow Shirley Quest to present alibi testimony.

As noted in our disposition of defendant's second assignment of error, the trial court did not limit Ms. Quest's testimony as suggested. In any case, defendant contends that when his mother was prevented from testifying regarding the alibi, the option not to testify was taken away from him as he had no other means to present his defense. As noted with respect to the second assignment of error, Shirley Quest did in fact testify on direct examination that she knew her son did not commit the crime because he was with her, and confirmed this testimony on subsequent examination. Nevertheless, the defendant did testify on his own behalf prior to Shirley Quest testifying regarding the defendant's exact whereabouts.

Under the circumstances of this case it is difficult to find that defendant's decision to take the stand and testify in his own defense was made under compulsion. Compulsion necessarily includes the element of being forced against one's will. Defendant was not coerced. He freely made his decision based on the circumstances as they presented themselves. Furthermore, it appears that defendant's chief complaint is that he testified prior to and without the benefit of having heard his mother's testimony.

We find no violation of defendant's privilege. Furthermore, defendant does not suggest any prejudice from having testified. The assignment or

error is without merit.

CONCLUSION

For the foregoing reasons, we affirm defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.