

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2002-KA-1161**
VERSUS * **COURT OF APPEAL**
DON L. JOHNSON * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 418-989, SECTION "B"
HONABLE PATRICK G. QUINLAN, JUDGE

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Chief Judge William H. Byrnes, III

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(Court composed of Chief Judge William H. Byrnes, III, Judge Terri F. Love, and Judge Max N. Tobias, Jr.)

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AFFIRMED

Don L. Johnson appeals his convictions and sentences for violation of La. R.S. 14:42, aggravated rape; La. R.S. 14:44, aggravated kidnapping; and La. R.S. 14:43.4, aggravated oral sexual battery. We affirm.

Statement of the Case

After a hearing on June 15, 2001, the trial court denied the defendant's motion to suppress the statement. On October 24, 2001, at the end of trial a twelve-member jury found the defendant guilty as charged on all counts. He was sentenced on November 5, 2001, to concurrent terms of life imprisonment without benefit of parole, probation, or suspension of sentence on the aggravated rape and the aggravated kidnapping convictions. He was sentenced to ten years at hard labor without benefit of parole, probation, or suspension of sentence on the aggravated oral sexual battery conviction; this sentence is to be served consecutively to the first two sentences. The trial court denied the defendant's motion for reconsideration of sentence and granted his motion for an appeal.

Statement of Facts

At trial C. T., the thirty-five-year-old victim, testified that at the time that she was raped on March 24, 2000, she lived at 1824 Ursulines Street with her family. She does not work but receives disability payments because she has epilepsy. The victim admitted that she smoked a ten-dollar piece of crack and drank about six beers during the afternoon and evening of March 23, 2000, but she denied being high. About 10:30 p.m. her brother and sister-in-law went to bed. Around midnight the victim and her mother began arguing because the victim wanted another beer and her mother would not allow her to have another one. The victim left the house to buy beer and walked towards North Claiborne Avenue. She noticed a crowd of people on the corner near Roosevelt's Bar, her destination, and she decided to turn around to go back home.

She was walking on Derbigny Street near her home when a man, later identified as the defendant, came up from behind her, grabbed her by the neck, placed a hand over her mouth, and said, "B[****], if you scream, I'll kill you." The man turned her around and dragged her the other way on Derbigny Street. A person on a bicycle passed them and asked what was going on, but the defendant told him to keep moving. The victim was too frightened to scream. The defendant dragged her to a spot beneath the Orleans Avenue on-ramp of I-10, where he ordered her to "suck my [****]."

He pushed her down in a spot covered with broken glass, and when she tried to shift her weight off a painful knee, the defendant picked up a piece of glass and held it to her neck. She bit his hand, and he threatened to kill her. After the oral sex, she tried to crawl away, but he beat her head with a brick. She described, "He messed all my teeth up, cuts [sic] in my mouth, my face was swollen, I had blood coming from out my ear, I passed out or either had a seizure... ." The defendant then raped her and dragged her across an area covered with broken glass and raped her again. The victim stated that she got a good look at him because automobile lights were flashing over them. She identified the defendant as the man who forced her to perform oral sex and then raped her twice. Afterwards he told her to put her clothes on and leave. She did not stop for her clothes because she thought that he would kill her if she remained within his reach. She ran back to her home wearing only her socks and tennis shoes. When she got home, she beat on the door and screamed for her brother, who let her into the house and wrapped her in a sheet. Her sister-in-law called the police. She was taken to Charity Hospital by ambulance, given an I.V. and put into a neck brace. Beverly Anderson, a nurse, conducted the rape examination. The victim left the hospital the next day about 10 a.m.; she was in so much pain that she was given morphine. That day she spoke with Detective Joseph Goines and gave

a description of her assailant.

The victim admitted that she lied to Detective Goines about her drug use on the night in question. She was ashamed and also frightened that she might go to prison. The detective showed her several photographic lineups before she was able to recognize anyone; however, on April 5, 2000, she selected the defendant's photo.

W. H., the victim's brother, testified that when he opened the door on March 24, 2000, he saw his sister covered with blood and dirt. She appeared to be bleeding from her mouth, ears and head. He called his mother and wife to take care of his sister, and he got in the car to look for the assailant. He admitted he was convicted of robbery in another state when he was nineteen years old and to possessing heroin recently.

Sergeant Virgil Duplessis testified that while he was responding to a call about a rape, he was flagged down by the victim's brother who directed him to the victim's house. There he saw a woman wrapped in a sheet who had been brutally beaten. Her face was bloody and swollen with many lacerations. She appeared to be in pain. The officer called for an E.M.S. unit.

Detective Clifton Neeley secured the scene under the ramp at Orleans Avenue where the victim's clothing was found. Blood was splattered on the

wall, a brick, and the ground.

Detective Joseph Goines testified that he compiled three different photographic lineups and showed them to the victim. The third contained Don Johnson's picture, which the victim selected. Shortly thereafter, the detective arrested the defendant, who, after being given his *Miranda* rights, stated, "Another crackhead making a charge."

Mr. Deloy Rester, a paramedic for the City of New Orleans, testified that when he arrived at 1824 Ursulines Street, he found the victim nude, beaten and bleeding. He found her blood pressure too low and her pulse too high. Her lower stomach and abdomen were tender. He suspected that she had "serious internal damage to her abdominal cavity." The victim was taken immediately to the hospital because her condition appeared critical.

Ms. Beverly Anderson, a sexual assault nurse examiner, testified that she met the victim at the accident room of Charity Hospital. She noticed that the victim's face was swollen, one of her eyes was bloody, and she had abrasions on her knees, elbows, arms, shoulders, and back. The victim told Ms. Anderson about the rape, and the nurse conducted the exam. She found a bloody drainage from the vaginal area and bruising and redness around the lower part of the pelvic area.

Ms. Nikia Redmond, an expert in forensic DNA analysis, testified that

she tested DNA samples taken from the victim and the defendant. A vaginal swab taken from the victim was tested for semen. Samples of blood and epithelial cells from both the victim and the defendant were also tested. Don Johnson's DNA blood and semen markers were found on the victim.

On appeal, the defendant maintains that the trial court erred in imposing the oral sexual battery sentence to run consecutively to his two life sentences.

The statute governing concurrent and consecutive sentences, La. C.Cr.P. art. 883, provides in pertinent part:

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. . . . (Emphasis added.)

Louisiana law favors concurrent sentences; however, a 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 La. C.Cr.P. art. 894.1. *State v. Pittman*, 604 So.2d 172 (La. App. 4 Cir. 1992), writ denied, 610 So.2d 796 (La. 1993). 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.*

At sentencing in the present case, the trial court stated that life sentences were mandated for the aggravated rape and aggravated kidnapping convictions, and continued:

. . . The aggravated rape life sentence and the aggravated kidnapping life sentence will be concurrent. As to the aggravated oral sexual battery, the defendant chose to do that in addition to the rape and the kidnapping and the Court sees no reason why he should get a concurrent sentence for that. He could have committed his acts without having to do that but he chose to make it consecutive to the other acts he was doing The Court is going to run that sentence consecutive to the life sentences the Court just gave the defendant on the other two counts. The Court would note for the record, obviously, Mr. Johnson can't do life plus ten years but the Court has given you the sentence that way, Mr. Johnson because the court wants to send a message to any future pardon or parole board that in the future might consider your case that this Court at least believes that you are a terror on the streets of the City of New Orleans

The trial judge adequately articulated the basis for his decision to

make the defendant's aggravated oral sexual battery sentence consecutive, rather than concurrent with the other sentences. The trial judge found the defendant a risk to public safety and specifically expressed the opinion that the defendant should never get out of jail. The trial judge believed that defendant was the worst sort of offender of the crimes for which he was convicted. In light of these factors, this Court finds no abuse of discretion in ordering the sentence to be served consecutively. *State v. Lee*, 94-2584 (La. App. 4 Cir. 1/19/96), 668 So. 2d 420, 427, *writ denied*, 96-0477 (La. 5/10/96), 672 So.2d 919.

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

AFFIRMED