STATE OF LOUISIANA	*	**NO. 2002-KA-2147**
VERSUS	*	**COURT OF APPEAL**
RONNIE DAVIS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 429-192, SECTION "J"
HONORABLE LEON CANNIZZARO, JUDGE
* * * * * *
JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay III, Judge Dennis R. Bagneris Sr.)

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AFFIRMED

STATEMENT OF CASE

The defendant, Ronnie Davis, was charged by bill of information on April 1, 2002, with one count of aggravated crime against nature, a violation of La. R.S. 14:89.1, and sexual battery, a violation of La. R.S. 14:43.1. The defendant pleaded not guilty at his April 4, 2002 arraignment. The defendant was found guilty as charged by a twelve-person jury as to both counts on June 7, 2002. The defendant filed a motion to recuse the judge on August 7, 2002, which motion was denied that date by the court. On that same date, the trial court denied the defendant's motion for a new trial. On August 14, 2002, the trial court sentenced the defendant to fifteen years at hard labor without benefit of parole, probation or suspension of sentence on count one, and ten years at hard labor on count two, with both sentences to run concurrently. The trial court denied the defendant's motion to reconsider sentence and granted his motion for appeal. The court subsequently sentenced the defendant to six months in parish prison for

contempt of court at the sentencing hearing, to run consecutively to the other sentences.

FACTS

New Orleans Police Department Sex Crimes Unit Detective James O'Hearn testified that at 1:30 a.m. on August 12, 2001, he responded to a male victim's complaint of a sexual battery at the University of New Orleans. The interior of the apartment smelled of alcohol, and contained signs of beer and other liquor. It was obvious there had been a party. The victim and other witnesses identified the perpetrator as "Ron," and told the detective that "Ron" was staying in a particular apartment in the same complex. Another detective went to that apartment and returned with the defendant. The victim was highly agitated, and had to be restrained from attacking the defendant. The victim had a split lower lip, which he said was inflicted on him by the defendant. The host of the party identified the defendant as the "Ron" who had been at the party.

During cross examination, the defendant, acting as his own counsel, asked Detective O'Hearn to testify to what the victim reported to him. Detective O'Hearn testified that the victim reported that he was asleep and awoke in a groggy intoxicated state in a bedroom to find someone with a

bald head performing fellatio on him. That person then rolled the victim onto his stomach and inserted something, a tongue or a finger, into his anus. At that point the victim got up and went into the kitchen to retrieve a kitchen knife, intending to return to the bedroom to stab the person. The victim was restrained by the host of the party. At that point the victim observed the defendant exit the bedroom into the living room. The victim accused the defendant of the acts, at which point the defendant struck the victim in the face with his fist and left the apartment. The victim told the detective he might have ejaculated. Detective O'Hearn admitted that he did not notify the crime lab of this information, although the crime lab came to the scene.

Kendrick Pullen, at the time of trial a junior at the University of New Orleans, testified that on August 12, 2001 he resided in Apartment 105 of the Privateer Place Apartments, where the crime allegedly occurred. He and his roommate had a barbeque that day, with up to thirty-five to fifty people in attendance at times, including the victim, E.S., one of Mr. Pullen's friends from high school. The defendant purchased some alcohol for them to drink at the barbeque. Mr. Pullen testified that E.S. drank a lot that day. Later in the day, the victim could barely stand, and ended up lying on the floor. Mr. Pullen and two others carried the victim into a bedroom and put him on a bed. When Mr. Pullen left the room, the defendant was there with the

victim; the door was open. The victim was wearing swimming trunks and a tank top-type T-shirt.

Sometime later, Mr. Pullen and his roommate decided to take some photographs of the victim, so they could laugh about it later. However, the door to the bedroom was closed, and Mr. Pullen decided not to bother the victim, who he assumed had closed the door because he did not want anyone to bother him. Approximately five minutes later, the victim burst out of the room and went into the kitchen, looking for a knife. Mr. Pullen and others grabbed him, and the victim broke down and started crying. The victim said that someone in the bedroom with a bald head had been performing fellatio on him. The defendant came out of the room, and the victim told him he was going to kill him. The defendant ran across the room, punched the victim in the head, and put him in a headlock. Mr. Pullen said that he and others jumped on defendant, and kicked him out of the apartment. The victim telephoned police. Mr. Pullen said that the defendant had previously lived with him and his roommate for two months. Mr. Pullen's roommate at the time, Marcus Davis, purportedly was the defendant's nephew. Mr. Pullen testified on cross-examination, as he had on direct, that he only drank between three and five beers the day of the crimes.

The victim, E.S., testified that he became intoxicated, and that when

he awoke he found the defendant performing oral sex on him. E.S. said at first he thought he was dreaming and/or that a woman was doing the act. But when he reached down to touch the head of the person, it was bald. E.S. said he ejaculated. When the defendant realized E.S. had awakened, he turned E.S. onto his stomach and licked his anus. E.S. reared up on his hands and knees, at which time the defendant ceased the assault and lay flat on the floor. E.S. said he stumbled to the door, unlocked it, and ran out of the room. He went straight to the kitchen to get a knife to stab the defendant, but was restrained by others. He later made an on-the-scene identification of the defendant for police. The victim said the door to the bedroom could be locked only from the inside, and E.S. said he did not recall locking it. He recalled being very intoxicated, and that his friends took him into the bedroom. E.S. identified his voice on a recording of his 911 call to police.

The victim admitted on cross-examination that he felt his shorts being lowered, but did not do anything at that point because he was unable. He said the point when he raised himself up on his hands and knees was the first point at which he was able to do something. The victim alluded during his testimony that he had previously suspected that the defendant was a homosexual.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NO. 1
PRO SE ASSIGNMENTS OF ERROR NOS. 1, 7 & 8

In the defendant's first assignment of error, and his first pro se assignment of error, he argues that the trial court erred when it ruled on the defendant's motion to recuse, rather than referring the motion to be heard by another judge. In the defendant's designated seventh pro se assignment of error he claims that the trial court erred by ruling on the motion to recuse itself, in violation of "28-455 Federal Rules." In his designated eighth pro se assignment of error, the defendant alleges that the trial court erred by not giving reasons for denying his motion to recuse.

La. C.Cr.P. art. 674 sets forth the procedure for recusation of a trial judge, and states in pertinent part:

> The motion shall be filed prior to commencement of the trial unless the party discovers the facts constituting the ground for recusation thereafter, in which event it shall be filed immediately after the facts are discovered, but prior to verdict or judgment.

The defendant was convicted on June 7, 2002. The record reflects that he did not file his first motion to recuse until August 7, 2002. The defendant claims in his brief on appeal that he filed an amended motion to

recuse on August 14, 2002. The defendant did not, nor does he, allege when he discovered the facts constituting the grounds for recusation. However, most of the grounds are based on pre-trial rulings and rulings by the trial court during trial, as well as one based on the trial judge's affiliation with UNO as an adjunct professor, which it appears was known by the defendant prior to the time the verdict was rendered on June 7, 2002. Thus, neither of the defendant's motions to recuse was filed "immediately" after the facts constituting the grounds therefore were discovered. His motion was untimely and would have been properly denied on this ground alone, without referring the motion to another trial judge. Cf. State v. Williams, 2000-0011, (La. App. 4 Cir. 5/9/01), 788 So. 2d 515, 525 (a trial court has discretion to determine whether there is valid ground for recusation set forth in the motion, without referring it to another judge).

As for the defendant's seventh and eighth pro se assignments of error, the rules applicable to motions to recuse judges are contained in the Louisiana Code of Criminal Procedure, not in federal statutes or rules of procedure. The defendant cites no authority for the proposition that the trial court was required to state reasons for denying the defendant's motion to recuse.

There is no merit to these assignments of error.

ASSIGNMENT OF ERROR NO. 2

In this assignment of error, the defendant complains that the prosecutor referred in her rebuttal argument to statements made by the defendant in his closing argument, attempting to turn the defendant's argument into evidence, in violation of his right against self-incrimination.

The defendant cites five specific comments by the prosecutor, but only one objection by him, which objection stated no ground. La. C.Cr.P. art. 841(A) requires that a defendant make known the grounds for his objection, and he is limited on appeal to those grounds articulated at trial. State v. Brooks, 98-0693, (La. App. 4 Cir. 7/21/99), 758 So.2d 814, 819. An objection stating no ground presents nothing for review. State v. Richards, 99-0067,(La. 9/17/99), 750 So.2d 940, 942. In the instant case, the defendant's objection stating no ground presents nothing for review.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error the defendant claims that his sentence is unconstitutionally excessive.

La. Const. art. I, § 20 explicitly prohibits excessive sentences; State v. Baxley, 94-2982, (La. 5/22/95), 656 So.2d 973, 977. A sentence is

constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, (La. 3/4/98), 709 So.2d 672, 677. Maximum sentences should be reserved for the most egregious violators of the offense charged. State v. Ross, 98-0283, (La. App. 4 Cir. 9/8/99), 743 So.2d 757, 762; State v. Bonicard, 98-0665, (La. App. 4 Cir. 8/4/99), 752 So.2d 184, 185. Courts have the power under La. Const. art. I, § 20 to declare a sentence excessive, although it falls within the statutory limits provided by the legislature. Id., 97-1906, 709 So.2d at 676. However, when a trial court determines a sentence from a carefully tailored penalty statute, such as the statutes applicable in the instant case, there is a strong presumption that the sentence is constitutional. State v. Bunley, 2000-0405, (La. App. 4 Cir. 12/19/01) 805 So.2d 292, 308, writ denied, 2002-0505 (La. 1/24/03), 836 So.2d 41.

The defendant was sentenced to the maximum sentences for each conviction—fifteen years at hard labor on the aggravated crime against nature conviction, and ten years on the sexual battery conviction. The trial court called the defendant a predator, and lambasted him for taking advantage of the nineteen-year-old victim. The court said that the defendant

had made a mockery of the system. The trial court also noted that the defendant had a conviction for armed robbery from Illinois. The trial court spoke for the victim. The male heterosexual victim was so repulsed and outraged at having been subjected to defendant's homosexual assault on him that he attempted to retrieve a knife and kill defendant. Detective O'Hearn said that the victim had to be restrained from attacking the defendant, even in the presence of police. Kendrick Pullen testified that the victim broke down and cried. The victim testified that he underwent tests to rule out exposure to AIDS and other sexually transmitted diseases, which he said were negative, "thank God."

The defendant points to two cases in which lesser sentences were meted out. In the first case, State v. Hubb, 97-304 (La. App. 5 Cir. 9/30/97), 700 So.2d 1103, two brothers who pleaded guilty to the sexual battery of a ten-year-old girl were sentenced to seven years and six and one-half years at hard labor, respectively. One defendant had inserted his finger into the victim's vagina on numerous occasions, while the other had exposed his penis to the girl and forced her to masturbate him. Both men "French kissed" the girl nightly, and occasionally showed her photographs of nude women. The girl's eleven year-old sister had made similar complaints, and as part of the plea agreement, four counts against the jointly indicted men

were dismissed. The victim's mother testified at the sentencing hearing that the ten-year-old victim did not sleep anymore because one of the defendants told her he would kill her if she ever told the truth. One defendant had no criminal record; the other's consisted of five misdemeanors, and apparently no convictions. The appellate court found the seven year and six and one-half year sentences were not excessive.

In the second case cited by the defendant, State v. Woodberry, 95-2402 (La. App. 4 Cir. 12/27/96), 686 So.2d 984, the defendant was convicted of sexual battery, first degree kidnapping, second degree kidnapping, first degree robbery, simple robbery, and crime against nature. The defendant forced a male and female into the male's car. He robbed the female of $3.00, and struck the male and took his car keys. The male jumped from the car, but the defendant threatened to shoot the female if she attempted to escape. While driving, the defendant noticed the female staring at him, and struck her in the mouth, knocking out one of her teeth. The defendant stopped the car and raped the victim. He demanded and took her jewelry, and drove her to a second location. Along the way, the defendant forced her to perform oral sex on him. He raped her anally at the second location, punching her in the eye during the assault. He ordered her out of the car, threatened to shoot her if she screamed, and drove off. The

defendant was apprehended after a car chase.

The defendant in Woodberry was sentenced to eight years on the sexual battery conviction, two less than the defendant in the instant case received. On the crime against nature conviction, the defendant in Woodberry received the maximum sentence, as the defendant in the instant case received on his aggravated crime against nature conviction. The maximum sentence for the crime against nature offense, however, was five years, not the fifteen-year maximum the defendant received for the aggravated offense in the instant case. The trial court in Woodberry stated for the record that the only mitigating factor it saw was that the defendant had no prior felony convictions.

In State v. Hatcher, 568 So.2d 578 (La. App. 4 Cir. 1990), this Court held that two fifteen-year maximum sentences for aggravated crime against nature, a maximum ten-year sentence for sexual battery, and a maximum forty-year sentence for forcible rape, were not excessive. There was no mention of the defendant's prior criminal record. The crimes were committed on two separate days. On the first occasion, the victim believed she and the defendant were going to a motel to use drugs. She also claimed she attempted to escape from the car before going to a motel, but was prevented from doing so by the defendant. The victim did not adequately

explain why she sat in the car for five minutes while the defendant registered at the motel. She claimed that once in the motel room the defendant choked her with a scarf, hit her in the head with a garbage can, and burned her buttocks with a cigarette. The defendant was convicted of forcible rape and aggravated crime against nature in connection with these events. The victim did not report these incidents until after the defendant assaulted her on the second occasion. On the second occasion, three days later, the defendant telephoned the victim and arranged to meet her. The victim testified that the defendant had threatened to kill her or her family if she did not meet him again. The two drove around in the defendant's car, stopping at various locations before going to the motel where the second assaults occurred.

In the instant case, the defendant did not plead guilty as the defendants did in Hubb. The defendant persisted, even at sentencing, to maintain that he was framed by witnesses who lied at trial. Unlike the defendants in either of the cases cited by the defendant, or in Hatcher, the defendant had a prior conviction, and that conviction was for a violent felony offense, armed robbery. The record in the instant case adequately supports the sentences imposed on the defendant. It cannot be said that the sentences make no measurable contribution to acceptable goals of punishment, are nothing more than the purposeless imposition of pain and

suffering, or are grossly out of proportion to the severity of the crimes.

There is no merit to this assignment of error.

PRO SE ASSIGNMENTS OF ERROR NOS. 2, 3, 4, 5, 6, 10, & 11

The defendant alleges in these assignments that the trial court erred by: (2) denying his motion for a bill of particulars, discovery and inspection; (3) denying him access to transcripts of prior proceedings; (4) violating his right to bail and a fair trial; (5) trying him on charges he was never booked with; (6) forcing an OIDP attorney to assist him after the defendant objected to that attorney assisting him; (10) committing fraud, along with the State; and (11) committing an act of fraud by admitting evidence after denying the defendant's motion for a bill of particulars, discovery and inspection. However, he fails to brief these assignments of error. "Any specification or assignment of error not briefed is considered abandoned." State v. Anderson, 97-2587, (La. App. 4 Cir. 11/18/98), 728 So.2d 14, 20, citing Rule 2-12.4, Uniform Rules Courts of Appeal, State v. Holmes, 95-2249, (La. App. 4 Cir. 10/29/97), 701 So.2d 752, 760. Therefore, as the defendant fails to brief these assignments, they are considered abandoned.

PRO SE ASSIGNMENT OF ERROR NO. 9

In this pro se assignment of error, the defendant claims the evidence was not sufficient to support the verdicts of guilty.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.
>
> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable

> doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, (La. App. 4 Cir. 12/3/97), 703 So.2d 223, 227-228.

The defendant was convicted of aggravated crime against nature and sexual battery. Aggravated crime against nature is proscribed by La. R.S. 14:89.1, and states in pertinent part:

> A. Aggravated crime against nature is crime against nature committed under any one or more of the following circumstances:
>
> * * *
>
> (5) When the victim is incapable of resisting … by reason of stupor or abnormal condition of mind from any cause, and the offender knew or should have known of such incapacity….

La. R.S. 14:89(A)(1) defines crime against nature as the unnatural carnal copulation by a human being with another of the same or opposite sex. Emission is not necessary, and when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime. Oral sex, i.e., oral-genital contact, falls under the definition of crime against nature. State v. Smith, 99-0606, (La. 7/6/00), 766 So.2d 501, 505. In a recent decision by the United States Supreme Court, Lawrence v. Texas, 537 U.S. 1044, 123 S.Ct.2472, 154

L.Ed.2d 514 (2003), 2003 WL 21467086, the court struck down as unconstitutional a Texas statute making it a crime for persons of the same sex to engage in "deviant sexual intercourse," defined in part by the statute as oral-genital contact. Lawrence effectively renders La. R.S. 14:89(A)(1) unconstitutional insofar as it makes it a crime for consenting adults of either sex to engage in private, non-commercial, oral-genital or oral-anal contact. However, Lawrence does not render unconstitutional the statute applicable in the instant case, La. R.S. 14:89.1(A)(5), which makes it a crime, in pertinent part, for a person to engage in oral-genital contact with a person when that second person is incapable of resisting the act by reason of stupor or abnormal condition of mind from any cause, and the offender knew or should have known of such incapacity.

In the instant case, the defendant was observed by Kendrick Pullen to be alone in the bedroom with the victim, who was lying on the bed. Shortly thereafter, Mr. Pullen noticed that the bedroom door, which had a lock on the inside, was closed. Sometime thereafter, the victim dashed out of the room looking for a knife, exclaiming that someone with a bald head had performed oral sex on him. Mr. Pullen then observed the defendant exit the room. The victim immediately accused the defendant. The victim testified at trial that he awoke in the bed to find the defendant performing oral sex on

him. The victim admitted that he ejaculated. The victim testified that he did not consent to either this act or to the defendant inserting his tongue or finger into the victim's anus. The victim alluded during his testimony that he had previously suspected that the defendant was a homosexual. Viewing this and all the record evidence in a light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense of aggravated crime against nature present beyond a reasonable doubt.

The defendant was also convicted of sexual battery, defined in pertinent part by La. R.S. 14:43.1 as the intentional touching of the anus of another person, using any part of the body of the offender, where the victim is not the spouse of the offender, and where the touching is done without the consent of the victim. The victim testified that after he awoke to find the defendant performing oral sex on him, before he could compose himself, the defendant turned him on his stomach and inserted his tongue into his anus. Detective O'Hearn testified that the victim related to him that the defendant had inserted either his tongue or his finger into the victim's anus. Viewing this and all the record evidence in a light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense of sexual battery present beyond a reasonable doubt.

There is no merit to this assignment of error.

For the foregoing reasons, we affirm the defendant's convictions and sentences.

AFFIRMED