

STATE OF LOUISIANA

*

NO. 2003-KA-0549

VERSUS

*

COURT OF APPEAL

KENNETH E. TATE

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

*

*

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 425-769, SECTION "A"
Honorable Charles L. Elloie, Judge

Charles R. Jones
Judge

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

Laura Pavy
LOUISIANA APPELLATE PROJECT
P.O. Box 750602
New Orleans, LA 701750602

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

Kenneth Tate appeals his convictions and sentences for the crimes of carjacking. We Affirm.

The State of Louisiana filed a bill of information on October 26, 2001, charging the defendant with two counts of carjacking, in violation of La. R.S. 14:64.2, and one count of aggravated battery, in violation of La. R.S. 14:34. A twelve-member jury found him guilty as charged on the two counts of carjacking, and not guilty of the aggravated battery charge. He was sentenced to serve seven and one-half years on each conviction. The State filed a multiple bill charging Tate as a third felony offender. He was found to be a third felony offender, and the district court vacated the sentence on count one and imposed a sentence to a term of imprisonment of thirteen years and eight months at hard labor. The motion for appeal by Tate was granted.

At trial, both of the victims of the two-carjacking incidents testified. The first victim, Mary Kelly Swafford, testified that on July 4, 2001, she parked her Pontiac Grand AM on the corner of Esplanade Avenue and Dauphine Street, and as she started to get out, a man approached her, hit her in the face and tried to grab her purse. She testified that she struggled with

him, and he pulled her out of the car by her hair, grabbed the keys to her car from her hand, and threw her to the sidewalk. She testified that the man started her car and drove away. She testified that she jumped in front of her car intending to stop him; however, she was hit by the car as he drove down Dauphine Street toward Marigny Street. Ms. Swafford also testified that her hair was pulled so violently that a clump of it was actually torn from her scalp, which was introduced into evidence. She testified that she was shown a photographic lineup, and she immediately identified Tate's picture and named him as the man who attacked her and took her car.

Carol Erath, the second victim, testified at trial that on July 13, 2001, she was going into a house she was renovating on Kelerec Street. She testified that as she was carrying a case of beer for the people working on the place, Tate walked toward her and then passed her on the sidewalk. As she turned to enter her gate, he "punched" her in the head, knocked her against the gate, and then to the ground. She dropped everything she was carrying including her car keys. She testified that Tate then picked the keys up, ran to her jeep, and opened the door. Then he turned back toward her, and she screamed, "Please don't hurt me." Pamela Rosen and Frank Torode were on the street and came forward. After hearing Ms. Erath scream, Tate got into the jeep and left. Ms. Erath initially thought her jaw was broken, but

she suffered only bruises to her face and hip. She testified that she identified Tate from a photographic lineup. Her Jeep Grand Cherokee was recovered about a week later with \$17,000 worth of damages.

Both Ms. Rosen and Mr. Torode testified at trial that on July 13th they were walking on Kelerec Street when they saw a man attack a woman and take her car. They were about one hundred to one hundred and fifty feet away from the man, and he had his back to them. They both testified that they could not identify the man.

Officer Ed Davis testified that he answered the call on the carjacking at the corner of Dauphine Street and Esplanade Avenue where he met Ms. Swafford. She was grazed by her own car as it was driven away by the assailant. Her face was red and her legs were scratched. He testified that he found a clump of her hair on the ground. The assailant was described as a black male in his mid-twenties, about five feet eight or ten inches tall and weighing about two hundred pounds.

Ms. Monisha Bell, a crime scene technician, testified that when she dusted the Pontiac Grand AM for fingerprints, she lifted three partial latent prints from the vehicle. Also, Officer Terry Bunch, an expert of the N.O.P.D. fingerprint analysis, testified that he identified one of the latent prints as the left index finger of Kenneth Tate.

Further, Detective Michael Eskine, who investigated the two carjackings, testified that he met with each of the victims at the scenes of the crimes. When he received the results of the fingerprint tests, he prepared a photographic lineup, which he showed to each victim. Both victims identified Tate as the assailant, and Tate was arrested.

Ms. Dawana Beasley, the mother of Tate's daughter, testified that on July 4, 2001, she and Tate were at his mother's house attending the birthday party of a one-year-old cousin. Ms. Beasley testified that they arrived at about 12:30 p.m., and they left at about 8 p.m. to watch fireworks. Ms. Deborah Lang also testified at trial that Kenneth Tate, her nephew, was at a birthday party all afternoon on the 4th of July.

A review of the record for errors patent reveals that the district court failed to impose Tate's sentences for carjacking without the benefits of probation, parole, or suspension of sentence as required by La. R.S. 14:64.2. Paragraph (A) of La. R.S. 15:301.1 provides that in instances where the statutory restrictions are not recited at sentencing, they are included in the sentence given, regardless of whether or not they are imposed by the sentencing court. See *State v. Williams*, 2000-1725 (La. 11/28/01), 800 So. 2d 790. Hence, this Court need take no action to correct the district court's failure to specify that the sentences be served without benefit of parole,

probation or suspension of sentence. The correction is statutorily effected.

La. R.S. 15:301.1(A).

In a single assignment of error, Tate argues that his thirteen-year, eight-month sentence is excessive in that he committed only a property crime. However, the first question is whether this issue is preserved for appeal. The record indicates that at sentencing on April 22, 2002, the defense attorney did not object to the sentence, and no motion for reconsideration of sentence was filed. This Court has held that a failure to object to a sentence as excessive at sentencing or to file a motion to reconsider the sentence precludes appellate review of the claim of excessiveness. *State v. Robinson*, 98-1606, p.9 (La. App. 4 Cir. 8/11/99), 744 So.2d 119, 125; *State v. Martin*, 97-0319, p. 1 (La. App. 4 Cir. 10/1/97), 700 So.2d 1322, 1323; *State v. Green*, 93-1432, pp. 5-6 (La. App. 4 Cir. 4/17/96), 673 So.2d 262, 265; *State v. Salone*, 93-1635, p. 4 (La. App. 4 Cir. 12/28/94), 648 So.2d 494, 495-96. Thus, this claim that the sentence is constitutionally excessive is not subject to review, by appeal or otherwise.

Accordingly, for the reasons cited herein, the convictions and sentences of Kenneth Tate are affirmed.

AFFIRMED