NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2008-KA-0104**
VERSUS	*	**COURT OF APPEAL**
RODNEY BAZLEY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 466-105, SECTION "K"
Honorable Arthur Hunter, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay, III, Judge David S. Gorbaty)

Keva Landrum-Johnson
District Attorney
Battle Bell IV
Assistant District Attorney
1340 Poydras Street
Suite 700
New Orleans, LA 70112-1221
COUNSEL FOR STATE OF LOUISIANA

Mary Constance Hanes
LOUISIANA APPELLATE PROJECT
P. O. Box 4015
New Orleans, LA 70178-4015
COUNSEL FOR RODNEY BAZLEY, JR.

AFFIRMED

On July 27, 2006, appellant was charged with one count of first-degree robbery. He entered a not guilty plea on August 8, 2006. On March 5, 2007, the state amended the bill of information to reflect that appellant was charged with attempted first-degree robbery as to count one and added a second count that reflected that he was charged with first-degree robbery. He was arraigned again on March 30, 2007, and he entered a not guilty plea. On that same day, the district court found probable cause and denied the motion to suppress the evidence. Following a judge trial on April 24, 2007, appellant was found guilty as charged. He was sentenced on May 18, 2007 to serve five years at hard labor on count one and ten years at hard labor on count two. The sentences are to be served without benefits and concurrently. Appellant subsequently filed this appeal.

FACTS

Hannah Cummings came to New Orleans from Columbus, Ohio for a retreat involving a nonprofit organization. The retreat began on the evening of June 23, 2006. After the participants at the retreat met and had dinner that night, some of them, including Ms. Cummings, decided to go to Bourbon Street. At approximately 1:00 a.m., she, her brother, Jason, Bridgette Lawson, and Annette

Ensley decided to return to their hotel. Ms. Cummings and Bridgette were walking arm in arm while Jason and Annette walked approximately one half a block ahead of them.

As they were walking along the 600 block of Ursuline Street, appellant rode past them on a bicycle and tried to speak with Ms. Cummings and Bridgette. At some point, he dismounted the bicycle, and he approached the two women and grabbed them. Appellant told the women that he had a gun and that he was going to kill them if they did not give him their purses. He had something under his shirt that the two women thought was a gun. Ms. Cummings was able to jerk away from him, and she screamed. She did not relinquish her purse. Bridgette immediately handed appellant her purse; he also tore her tennis bracelet off of her wrist.

Jason heard the scream and turned to check on the women. He observed appellant punching Bridgette in the face. Jason chased and nabbed appellant before he could mount his bicycle. Appellant was carrying a purse. A struggle ensued; however, Jason and the two women were able to subdue appellant until the police arrived. Bridgette picked up her purse and tennis bracelet that were on the ground.

Officers Burns and Fulgencio responded to the call of a robbery. Once the officers arrived on the scene, they observed Jason and the two women restraining appellant. Because appellant matched the description given over the police radio as the perpetrator of the robbery, Officer Burns handcuffed him. After hearing the victims' story, the officers arrested appellant. The officers observed two knives on the ground near appellant. One of the knives had an ivory handle, and the other

was a pocketknife. Also on the ground were his bicycle, some loose change, and jewelry.[1]

EMS was called to the scene because of the injuries sustained by the victims and appellant during the incident. Appellant had lacerations on his face. Jason was treated for bite marks, and Bridgette was treated for the punches in the face that she received from appellant.

ERRORS PATENT

None.

ASSIGNMENT OF ERROR NUMBER 1

In this assignment of error, appellant argues that the record fails to reflect that he made a knowing and intelligent waiver of his constitutional right to a jury trial. Specifically, he notes that the only indication that he waived his right to a jury trial is contained in the minute entry of trial, and he argues that the minute entry alone is not sufficient to demonstrate a proper waiver. Appellant seeks an evidentiary hearing on the matter because no transcript of the waiver exists, citing State v. Thompson, 2002-1682 (La. App. 4 Cir. 5/21/03), 848 So. 2d 703.

Contrary to appellant's assertions, the district court addressed him prior to trial regarding the waiver of his right to trial by jury, and the colloquy was transcribed.[2]

A defendant charged with an offense other than one punishable by death may knowingly and intelligently waive his right to trial by jury and elect to be tried by the judge. La. C.Cr.P. art. 780(A); State v. Lee, 2001-2082, p. 4 (La. App. 4 Cir. 8/21/02), 826 So. 2d 616, 622. The waiver must be express and is never

[1] The jewelry found on the ground did not belong to any of the victims.
[2] The transcript of the colloquy is separate from the actual trial transcript and was not filed into the record until March 10, 2008.

presumed. State v. Santee, 2002-0693, p. 3 (La. App. 4 Cir. 12/4/02), 834 So. 2d 533, 534. A waiver of the right to trial by jury is valid only if the defendant acted knowingly and voluntarily. State v. Kahey, 436 So. 2d 475, 486 (La. 1983); Santee, supra. However, while the trial judge must determine if the defendant's jury trial waiver is knowing and intelligent, that determination does not require a Boykin-like colloquy.[3] Santee, supra.

In the instant case, the following colloquy occurred between the trial court and appellant:

THE COURT:
This is on Rodney Bazley. Rodney Bazley. Raise your right hand. You swear the testimony you are about to give will be the truth so help you God?

THE DEFENDANT:
I do.

THE COURT:
Alright. Put your hand down. I've been informed by your attorney that you wish to have a trial by judge. Is that correct?

THE DEFENDANT:
It is.

THE COURT:
Do your realize and understand you have the constitutional right to have a trial by jury, but you are waiving that right to have a trial by judge in which I will be deciding the issues regarding your case? Do you understand that?

THE DEFENDANT:
Well, you ran it a little fast, yes, sir. You said it a little fast. I didn't really hear it.

THE COURT:
You have a right to a jury trial, but you can waive that right and have a trial by judge in which I will decide the issues regarding you case. Do you understand that?

THE DEFENDANT:

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[3] Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

I do.

THE COURT:
Alright. Let the record reflect the defendant has knowingly and voluntarily waived his right to a trial by jury. Have a seat.

(Supp. T. 4/24/07 p. 2-3).

In Lee, supra, the trial court questioned the defendant in the presence of his attorney, asking him: "Sir, do you understand you have a right to trial by judge or jury?" Lee, 2001-2082, p. 5, 826 So. 2d at 622. The defendant responded affirmatively. The trial court then asked the defendant: "Tell me what type of trial you elect to proceed by." Id. The defendant replied: "I would like to go with a judge." Id. This court held that this colloquy clearly established that the defendant articulated his desire to waive his right to a jury trial, and it thus rejected his argument that the record failed to show that he made a knowing and intelligent waiver of his right to a jury trial.

In the instant case, the evidence that appellant knowingly and voluntarily waived his right to trial by jury is as strong as it was in Lee, supra. He was apprised of his right to a jury trial, and he acknowledged that by waiving his right, he would be tried by the judge alone. Accordingly, appellant made a knowing and voluntary waiver of his right to trial by jury, and this assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In his final assignment of error, appellant asserts that his sentences are excessive based upon his status as a first offender. Though not mentioned by the state, the initial issue that must be addressed is whether appellant preserved his claim for review.

The sentencing transcript reflects that after appellant's sentence was imposed, defense counsel simply noted his objection without specifying that he

was objecting to the sentences as excessive. (T. 5/18/07 p. 3). Also, no motion to reconsider the sentence was filed.

A line of cases from this court have held that when a defendant fails to lodge a specific objection or move to reconsider the sentence, the claim for excessiveness of sentence was not preserved for review. 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; State v. Robinson, 98-1606 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119.[4]

On the other hand, this court, in a separate line of cases, has found that a simple objection lodged after sentencing was sufficient to preserve the bare claim of constitutional excessiveness. State v Miller, 2000-0218 (La. App. 4 Cir. 7/25/01), 792 So. 2d 104; State v. Thompson, 98-0988 (La. App. 4 Cir. 1/26/00), 752 So. 2d 293.

Appellant argues that he is not precluded from raising his claim of excessive sentences, citing Miller, supra, and State v. Kirkland, 2004-1906 (La. App. 4 Cir. 5/18/05), 904 So. 2d 786, in which this court found that a letter submitted by Kirkland after he was sentenced as a multiple offender and in which he sought reconsideration of his sentence was sufficient to preserve the issue of excessiveness of sentence on appeal.[5] Regardless of the differing opinions, appellant's claim that his sentences are excessive is without merit.

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[4] More recently, a specific objection was required in State v. Sylve, unpub., 2004-0063 (La. App. 4 Cir. 7/21/04).

[5] Appellant also cites State v. Mims, 619 So. 2d 1059 (La. 1993). In Mims, the appellate court refused to review the defendant's excessive sentence claim because, while the defendant had asserted in his motion to reconsider sentence that the sentence was excessive, he had not alleged any reasons why it was allegedly excessive. The Louisiana Supreme Court reversed the appellate court in a per curiam decision, noting that under Article 881.1, the defendant must file a motion to reconsider and set forth the "specific grounds" upon which the motion is based in order to raise an objection to the sentence on appeal. However, in order to preserve a claim of constitutional excessiveness, the defendant need not allege any more specific ground than that the sentence is excessive.

In State v. Smith, 2001-2574, p. 7 (La. 1/14/03), 839 So. 2d 1, 4, the Court set forth the standard for evaluating a claim of excessive sentence:

> Louisiana Constitution of 1974, art. I, § 20 provides, in pertinent part, that "[n]o *law* shall subject any person to ··· *excessive*··· *punishment.*" (Emphasis added.) Although a sentence is within statutory limits, it can be reviewed for constitutional excessiveness. *State v. Sepulvado,* 367 So.2d 762, 767 (La.1979). A sentence is unconstitutionally excessive when it imposes punishment grossly disproportionate to the severity of the offense or constitutes nothing more than needless infliction of pain and suffering. *State v. Bonanno,* 384 So.2d 355, 357 (La.1980). A trial judge has broad discretion when imposing a sentence and a reviewing court may not set a sentence aside absent a manifest abuse of discretion. *State v. Cann,* 471 So.2d 701, 703 (La.1985). On appellate review of a sentence, the relevant question is not whether another sentence might have been more appropriate but whether the trial court abused its broad sentencing discretion. *State v. Walker,* 00-3200, p. 2 (La.10/12/01), 799 So.2d 461, 462; *cf. State v. Phillips,* 02-0737, p. 1 (La.11/15/02), 831 So.2d 905, 906.

See also State v. Johnson, 97-1906 (La. 3/4/98), 709 So. 2d 672; State v. Baxley, 94-2982 (La. 5/22/95), 656 So. 2d 973; State v. Landry, 2003-1671 (La. App. 4 Cir. 3/31/04), 871 So. 2d 1235.

An appellate court reviewing a claim of excessive sentence must determine whether the trial court adequately complied with the statutory guidelines in La. C.Cr.P. art. 894.1, as well as whether the facts of the case warrant the sentence imposed. Landry, p.8, 871 So.2d at 1239; State v. Trepagnier, 97-2427 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181. However, as noted in State v. Major, 96-1214, p. 10 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813:

> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. *State v. Lanclos*,

> 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La.C.Cr.P. art. 881.4(D).

If the reviewing court finds adequate compliance with art. 894.1, it must then determine whether the sentence the trial court imposed is too severe in light of the particular defendant as well as the circumstances of the case, "keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged." Landry, at p. 8, 871 So. 2d 1235, 1239. See also State v. Bonicard, 98-0665 (La. App. 4 Cir. 8/4/99), 752 So. 2d 184.

Although the court did not enumerate or refer to any of the sentencing factors listed in La. C.Cr.P. art. 894.1, the record appears to support the sentences imposed.

Notably, appellant's ten-year sentence is considerably less than the forty-year maximum sentence allowed by La. R.S. 14:64.1. Likewise, his five-year sentence is considerably less than the twenty-year maximum sentence allowed by La. R.S. 14:27(64.1).

In State v. Wallace, 522 So. 2d 1184, (La. App. 4 Cir. 1988), this court found that concurrent sentences of forty and thirty years imposed on a first-time offender convicted of first-degree robbery and attempted second-degree murder were not excessive where evidence showed that Wallace pointed a pistol at the women, whose car he had commandeered, as he was fleeing.

Citing Wallace, this court found that a ten-year sentence imposed on the defendant to run consecutively to a twenty-year sentence imposed for armed robbery was not excessive. The defendant robbed the victim while his accomplice held a gun to the victim. The court also noted that he had one adult felony

conviction and a juvenile record. State v. Davis, 596 So. 2d 358 (La. App. 4 Cir. 1992).[6]

In State v. Pitts, 97-2097 (La. App. 4 Cir. 3/31/99), 739 So. 2d 230, this court found that a fifteen-year sentence imposed on Pitts for attempted first-degree robbery was not excessive. He and two accomplices attempted to rob a cab driver. The three men fled when the cab driver pulled out a pistol, which he dropped, and he grabbed a second pistol. Pitts fled with the dropped weapon and shot the cab driver, who was chasing him. Pitts also had an extensive criminal record.

Based on the cases above, we find that the district court did not abuse its discretion in sentencing appellant to concurrent sentences far less than the maximum that he could have received. The facts reflect the violent nature of the crimes. Specifically, appellant threatened to kill two tourists. He forcibly grabbed Ms. Cummings. Even though Bridgette Lawson immediately turned over her purse, he punched her in the face and tore her tennis bracelet from her wrist. The resulting injuries required medical attention.

CONCLUSION

Accordingly, for the foregoing reasons, the convictions and sentences are affirmed.

AFFIRMED

[6] In State v. Taylor and Curtis, unpub., 2001-1993 (La. App. 4 Cir. 3/18/02), this court affirmed concurrent thirty-five year sentences imposed on Curtis as a first offender for two counts of first-degree robbery. In the case, he robbed two individuals and pistol whipped one of them.