

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2012-KA-0911**  
**VERSUS** \*  
**IRVING NAQUIN** \* **COURT OF APPEAL**  
\* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
\* \* \* \* \*

**APPEAL FROM**  
**CRIMINAL DISTRICT COURT ORLEANS PARISH**  
**NO. 502-534, SECTION "L"**  
**Honorable Franz Zibilich, Judge**

\* \* \* \* \*

**Judge Terri F. Love**

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(Court composed of Judge Terri F. Love, Judge Edwin A. Lombard, Judge Daniel L. Dysart)

**DYSART, J., CONCURS IN THE RESULT**

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**COUNSEL FOR DEFENDANT/APPELLANT**

**AFFIRMED**  
**MAY 22, 2013**

Irving Naquin appeals his conviction and sentence for forcible rape, requesting only a review of the record for errors patent. Finding no errors that require this Court's action, we affirm Mr. Naquin's conviction and sentence, and we grant counsel's motion to withdraw.

#### ***PROCEDURAL HISTORY***

The State of Louisiana charged Mr. Naquin with one count each of forcible rape and second degree kidnapping that allegedly occurred on October 22, 2010. He subsequently pled not guilty to these charges. The trial court denied his motion in limine to prohibit the State from introducing *Prieur* evidence. This Court denied Mr. Naquin's writ from this ruling. *State v. Naquin*, 11-0662 (La. App. 4 Cir. 6/1/11) (*unpub.*). Mr. Naquin waived his right to a jury and proceeded with a judge trial, at the conclusion of which the court took the matter under advisement. The court found Mr. Naquin guilty as charged of forcible rape but not guilty of second degree kidnapping. Mr. Naquin moved for a new trial, which the court denied. The court then sentenced him to serve eight years at hard labor, the first two years without benefit of parole, probation, or suspension of sentence. The

State filed a multiple bill against Mr. Naquin. Mr. Naquin pled guilty to being a second offender. The court vacated the original sentence and sentenced Mr. Naquin to serve thirty-five years at hard labor without benefits. The court also granted Mr. Naquin's motion for appeal.

### ***FACTUAL BACKGROUND***

Mr. Naquin was convicted of the forcible rape of T.H.<sup>1</sup>

#### **Detective Kurt Coulon Testimony**

Detective Kurt Coulon of the N.O.P.D. Sex Crimes Unit testified that he investigated the rape of T.H. that occurred at 1125 Burgundy Street. He stated that the victim told him that she got off work on Bourbon Street at approximately 3:00 a.m., and her boyfriend Irving Naquin was waiting outside to walk her home. She stated they walked to her apartment, and then they became embroiled in an argument that stemmed from the victim having spoken with a male coworker, and Mr. Naquin accused her of having sex with other men. She told the officer that Mr. Naquin slapped her, forced her onto her bed, pulled her shorts off of her, and penetrated her vagina with his penis. She stated that she tried to get away from Mr. Naquin, but he pulled her back into the bedroom. She also indicated that Mr. Naquin broke her cell phone by throwing it against the wall to keep her from calling the police. She stated that Mr. Naquin only stopped assaulting her when she stopped struggling, at which time he lost his erection.

Detective Coulon testified that T.H. told him that she then lay on the floor and fell asleep, and she believed that Mr. Naquin also fell asleep. She stated that later that morning, a maintenance man came to the apartment. At that time, Mr. Naquin left, and she used the maintenance man's cell phone to

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<sup>1</sup> Due to the nature of the offense, this opinion will refer to the victim only by her initials.

call the police. Detective Coulon stated that crime lab personnel took photographs and the sheets from the bed. He seized the broken cell phone. He identified photographs taken from the scene, including one that he described as depicting a mark on the wall where the victim indicated that Mr. Naquin threw her cell phone. Detective Coulon stated that he took the victim to University Hospital, where she underwent a sexual assault examination.

On cross-examination, Detective Coulon identified the shorts that the victim stated she was wearing on the night of the assault. He admitted that he did not seize the cell phone when he first visited the victim's apartment, but he went back about a month later to retrieve it. He testified that when he first arrived on the scene, he observed redness on the victim's face and arms that were consistent with her having been slapped.

### **David Reagan Testimony**

David Reagan testified that on the day of the incident he was employed as a maintenance man at 1125 Burgundy. He arrived at the apartment on that date somewhere between 8:00 and 8:30 a.m., and he heard a lot of yelling and what sounded like furniture being moved. He knocked on the door, and a woman came out and asked to use his cell phone. He did not remember if he or the woman called the police. The woman was crying, and she stayed outside with him until the police arrived a short while later. On cross-examination, Mr. Reagan testified that he did not know the woman's name, and he did not recall if she told him that she had been raped.<sup>2</sup> He described the apartment as having hard wood and tile floors, and

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<sup>2</sup> Mr. Reagan testified that he gave a statement to the defense investigator, but because the defense failed to produce the statement prior to trial, the court would not allow its admission.

its walls were fairly thin.

### **Mary Kathleen Langan Testimony**

Mary Kathleen Langan testified that she is a sexual assault nurse examiner (SANE), and the court qualified her as an expert in sexual assault examinations. She conducted a sexual assault examination on T.H. on the morning of October 22, 2010. At that time, T.H. told her that she had gotten off work at approximately 2:30 a.m., and at that time her boyfriend walked her home. T.H. told the nurse that her boyfriend became mad at her, accusing her of having sex with other men, and she asked him to leave the apartment. He refused to do so and hit her on the head several times. She told the nurse that her boyfriend broke her cell phone and told her that he wanted to have sex with her. The victim said that she was in a fetal position on the bed at that time, and he grabbed her ankles. She tried to kick him, but he pulled off her shorts and had vaginal intercourse with her. She told the nurse that her boyfriend also rubbed his penis on the back of her thighs and put his mouth on her neck. The victim stated that her boyfriend left when a maintenance man appeared, and she stated that her boyfriend threatened to kill her before leaving.

Ms. Langan identified several photographs that she took of the victim during the exam that showed her injuries. She took swabs of the back of the victim's thighs, her neck, and her internal and external genitalia. Ms. Langan observed redness and a four-centimeter scratch on the victim's chest, a bruise and a scratch on her left arm, a bruise and redness on her right elbow, a scratch on her right forearm, and redness and tenderness behind her left ear. Ms. Langan testified that damage to the victim's vagina was inconclusive, which she stated is normal in most sexual assault cases; she noted that the victim had delivered three children. On cross-examination,

she testified that she had noted no tearing, redness, or swelling in the victim's vaginal area. She stated that she had no reason to conduct a drug test on the victim.

#### **Officer John Richard Testimony**

Concerning a prior incident involving T.H. and Mr. Naquin, Officer John Richard testified that in June of 2010, he responded to a call concerning a battery on T.H. He testified that she was crying and had lacerations because she had been beaten. Officer Richard identified photographs he took of the victim's injuries, which included swollen eyes and lacerations on her head. T.H. identified Mr. Naquin as the man who beat her. Officer Richard testified that after being advised of his rights, Mr. Naquin admitted that he had a fight with the victim and punched her several times.

#### **Officer Letreina Johns**

Officer Letreina Johns testified that she investigated a call received two days after the incident, concerning Mr. Naquin's violation of a protective order that the victim had against him.

#### **Lisa Kotnik**

Lisa Kotnik testified that she is a friend of the victim. She stated that the victim stopped at her house on two days after the incident between the victim's two jobs and asked her to call the police. She stated that T.H. was nervous and left Ms. Kotnik's apartment before the police arrived. She directed the police to T.H.'s second job. She identified a 911 tape that contained her call to the police, and the State played the tape.

On cross-examination, Ms. Kotnik affirmed that her call indicated that T.H. told her that Mr. Naquin called her at her job that day and threatened to kill her. Ms. Kotnik denied having a sexual relationship with the victim.

Ms. Kotnik stated that she kept a journal that included references to this event, but she admitted that she did not bring it to court.

### **T.H. Testimony**

T.H. testified that in June of 2010, Mr. Naquin beat her up after accusing her of sneaking out to see her ex-boyfriend while he was sleeping. She testified that he hit her with his hands and with other objects in the apartment. She stated that she received cuts, bruises, and knots as a result of the beating, and Mr. Naquin went to jail.

T.H. stated that in October 2010, she and Mr. Naquin were not living together, but he would sometimes stay at the apartment because they were getting along well. Mr. Naquin would often be waiting outside when she got off work to walk her home. She stated that on the date of the incident, Mr. Naquin appeared at her work earlier and tried to talk with her while she was taking a break, but the doorman was standing near her while she was standing outside, and Mr. Naquin became angry that she was not alone. She testified that Mr. Naquin, whom she called Charlie, and the doorman had a fight before this, and Mr. Naquin believed that the doorman was standing near the victim in retaliation so that Mr. Naquin would not come near her.

T.H. testified that when she left work later, Mr. Naquin walked her home. After they went inside, Mr. Naquin told her that he did not want her associating with the doorman any more. She stated that she told him that she did not associate with the doorman and his girlfriend outside of work, but because he was her coworker, she would not avoid him. T.H. testified that Mr. Naquin then got mad, and she told him to leave. He then pushed her, and when she tried to leave, he picked her up and threw her on the bed, telling her that she was not going anywhere. She stated that he told her that he was not going to kill her because he enjoyed torturing her. He also threw

her cell phone against the wall and broke it. She stated that when she struggled with him, he hit her in the head, put his hands around her throat, and tried to strangle her. She stated that he threw her on the bed, and she fell to the floor, injuring her right elbow. She told him that she needed to go to the hospital, and he then grabbed her other arm and twisted it, telling her that he would break that arm as well.

T.H. testified that at some point, she lay still, and Mr. Naquin stopped beating her. After a time, she thought that he had gone to sleep, and she tried to sneak out of the apartment. She stated that the floor creaked, and Mr. Naquin caught her at the door before she could open all of the locks on it. She testified that he dragged her back to the bed, pulled her legs up to her shoulders, and rubbed his penis on the backs of her thighs. He then penetrated her vagina, and when she stopped struggling, he stopped raping her.

T.H. stated that Mr. Naquin remained in the apartment until the maintenance man knocked on the door later that morning. She stated that Mr. Naquin panicked, running around the apartment and gathering his clothes. She stated that she opened the door and asked the maintenance man to use his cell phone to call the police. She identified her voice on the 911 call that she made, which the State played. When the police arrived, she told them what happened, and an officer took her to the hospital, where she underwent an examination. She also told the nurse who conducted the exam what happened. T.H. insisted that she resisted Mr. Naquin during the attack.

T.H. testified that Mr. Naquin called her at her work sometime after the rape and told her that he would make her pay. She stated that he repeatedly called her at work despite the restraining order she obtained



against him. She went to her friend Lisa's apartment between her two jobs and had Lisa call the police.

On cross-examination, T.H. testified that she and Mr. Naquin had been dating a few months prior to the rape, and she admitted that they were sexually active. She testified that during the rape, Mr. Naquin asked her what the problem was because it was only sex; she admitted that she had said the same thing to him in the past, but she insisted that this was a joke that she often told him because their sex life was so active. She stated that although Mr. Naquin often slept at her apartment, he did not live there; he only stayed when she wanted to have sex with him. She insisted that she told the maintenance man that Mr. Naquin had raped her. Although defense counsel attempted to question T.H. about other supposed sexual conduct in which she engaged, the court sustained the State's objections to the relevancy of these questions. She admitted that she had once tried to bond Mr. Naquin out of jail. She also denied taking Xanax or having taken it on the night of the rape. She admitted having a prior marijuana conviction and some domestic violence arrests from incidents arising out of fights with her ex-husband, which included a conviction for battery.

During further cross-examination on the second day of trial, T.H. admitted that she had taken Xanax in the past and had a prescription for it. She stated that she pretended to fall asleep prior to the rape, hoping that Mr. Naquin would fall asleep too, and then she could escape, but he awakened while she was trying to get out the door. She stated that she did not try to get help from the maintenance man when he arrived the next morning because he was old and frail; instead, she merely asked to use his phone. She admitted that she knew that Mr. Naquin was planning to move to California in order to help raise his daughter, but she stated that he kept changing his

mind about the move. She stated that Mr. Naquin pled guilty to domestic battery in connection with the earlier beating, and he told her that he was sorry and would spend the rest of his life making it up to her. She insisted that Mr. Naquin raped her; she denied that she had made up the story of the rape to get back at him for his intention to leave. She explained that she did not try to attack him while he was asleep because he is so much bigger than she is. With respect to her 2007 battery conviction, T.H. stated that she and her ex-husband fought, and both were arrested. She indicated that she actually did not serve any prison time in connection with the conviction. She admitted that she and Mr. Naquin engaged in consensual sex many times, but the sexual relations on the date of the incident, were not consensual.

The parties stipulated that swabs taken from the victim's neck matched a swab taken from Mr. Naquin.

#### **Marcus Martinez Testimony**

After the State completed its case, and the court denied the defense motion for judgment of acquittal, the defense called Marcus Martinez, who lived at 1123 Burgundy, the other half of the house where T.H. lived. Mr. Martinez described the walls in the building as thin, and he stated that he can hear noises coming from the other side of the double. He testified that he usually is up all night. He stated that on the date of the incident, he was awake at 3:00 a.m., playing video games, and he denied hearing any cries for help, screams, or any loud thuds. He testified that the next morning, after Mr. Naquin had left for work, the victim called the police. The court sustained objections to defense questions concerning whether the victim had men in her apartment in the days after the rape. Mr. Martinez stated that the

victim never told him that she had been raped. He admitted that he used drugs with her.

On cross-examination, Mr. Martinez admitted that he was under the influence of drugs while testifying, and he had used marijuana on the night that the alleged rape occurred. He insisted that he stayed up all night and did not go to sleep until around noon. He testified that the victim and Mr. Naquin moved into the apartment in September 2010. On redirect, Mr. Martinez testified that on the day before the incident, Mr. Naquin borrowed “tools and stuff” from him several times in order to fix up the apartment.

### **Irving Naquin Testimony**

Irving Naquin testified that he worked as a chef and a security man in the French Quarter. He stated that T.H. was his girlfriend, and they lived together for about nine months prior to this incident. He stated that he met her at a bar after having gotten out of jail on outstanding warrants. T.H. was a bartender, and after they talked, she suggested that they go to her apartment to have sex. He admitted that they enjoyed an active sexual relationship, but he denied raping her. He stated that T.H.’s ex-husband had trained her in martial arts. He also insisted that T.H. abused Xanax.

Mr. Naquin testified that he had a daughter in California, and he had been planning to move there after he got paid at the end of October in 2010. He stated that when he told T.H. that he planned to move, she got upset. He explained that she had also spoken with his daughter’s mother about the move. He insisted that on the date of the incident, he did not prevent T.H. from leaving the apartment; instead, he packed to leave on that night. He admitted that he pled guilty to domestic battery against T.H. in June 2010 and was sentenced to serve forty-five days in jail. He admitted also having

prior convictions for two counts of simple robbery and one count of theft of good valued over \$100.

On cross-examination, Mr. Naquin admitted that his prior guilty plea to battery was the result of beating T.H. He stated that on the date of the incident, he walked her home, and he left the apartment at 6:00 a.m. He admitted that he threw her phone against the wall and broke it. However, he denied that they had sex that night. He admitted that they argued, but he insisted that he did not hit her. The State then played a portion of a tape, presumably of a jailhouse phone conversation he had with his daughter's mother, wherein he told the mother that T.H. had to have been "torn" because they had sex. He insisted that he lied in this conversation.

#### ***ERRORS PATENT***

By his sole assignment of error, Irving Naquin requests a review of the record for errors patent. Counsel complied with the procedures outlined by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), as interpreted by this Court in *State v. Benjamin*, 573 So. 2d 528 (La. App. 4 Cir. 1990). Counsel filed a brief complying with *State v. Jyles*, 96-2669 (La. 12/12/97), 704 So. 2d 241. Counsel's detailed review of the procedural history of the case and the facts of the case indicate a thorough review of the record. Counsel moved to withdraw because she believes, after a conscientious review of the record, that there is no non-frivolous issue for appeal. Counsel reviewed the record and found no trial court ruling that arguably supports the appeal. A copy of counsel's brief was forwarded to Mr. Naquin, and this Court informed him that he had the right to file a brief in his own behalf within forty-five days of the order. However, no *pro se* brief was filed. Thus, this Court's review is limited to errors on the face of the record. La. C.Cr.P. art. 920.

As per *State v. Benjamin, supra*, this Court performed an independent, thorough review of the pleadings, minute entries, and the bill of information in the appeal record. Mr. Naquin was properly charged by bill of information with forcible rape and second degree kidnapping in violation of La. R.S. 14:42.1 and 14:44.1, and the bill of information was signed by an assistant district attorney. Mr. Naquin was present and represented by counsel at arraignment, during trial, and at sentencing. The court's verdicts of not guilty of the kidnapping charge and guilty as charged of forcible rape are legal in all respects, as is Mr. Naquin's sentence. Furthermore, a review of the trial transcript shows that the State provided sufficient evidence to prove beyond a reasonable doubt that Mr. Naquin was guilty of forcible rape, the verdict rendered by the court.

The only patent error noted by this Court is that there is no indication that Mr. Naquin waived his right to a twenty-four-hour delay between the denial of his motion for new trial and his sentencing as mandated by La. C.Cr.P. art. 873. However, this error was corrected when Mr. Naquin subsequently admitted he was a second felony offender as alleged in the multiple bill, and the court vacated the original sentence and imposed a sentence as a second offender. In addition, as per *State v. Collins*, 584 So. 2d 356 (La. App. 4 Cir. 1991), the failure to observe the twenty-four-hour delay mandated by La. C.Cr.P. art. 873 is harmless where the defendant does not complain of his sentence on appeal. See also *State v. Pleasant*, 11-1675 (La. App. 4 Cir. 10/17/12), 102 So. 3d 247. Here, Mr. Naquin does not complain of his sentence, which was the result of a plea agreement.

### **DECREE**

This Court's review reveals no other patent error and no non-frivolous issue or trial court ruling that arguably supports the appeal. Therefore, we

affirm Irving Naquin's conviction and sentence. We also grant appellate counsel's motion to withdraw.

**AFFIRMED**