NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1050

STATE OF LOUISIANA

VS.

GREGORY DAVID

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JUDGMENT RENDERED: FEBRUARY 9, 2007

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ON APPEAL FROM THE
EIGHTEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 496-97, DIVISION A
PARISH OF IBERVILLE, STATE OF LOUISIANA

HONORABLE JAMES J. BEST, JUDGE

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GREGORY DAVID

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

MCDONALD, J.

The defendant, Gregory David, was charged by grand jury indictment with aggravated oral sexual battery, a violation of former La. R.S. 14:43.4(3),[1] and sexual battery, a violation of La. R.S. 14:43.1. He pled not guilty. The defendant filed a motion for change of venue and a motion to suppress the evidence and the identification. At a hearing on the motions, the trial court granted the motion to suppress the identification and took the motion for change of venue and motion to suppress the evidence under advisement. On September 26, 2000, in a written judgment, the trial court denied both motions. On July 18, 2005, a jury trial commenced. The matter ended with a mistrial granted during voir dire. The defendant was subsequently tried by an Iberville Parish jury, January 18-20, 2006, and was convicted as charged. The trial court denied the defendant's motion for a new trial and his motion for post verdict judgment of acquittal. The defendant was sentenced to imprisonment at hard labor for seventeen and one-half years on count one and seven and one-half years on count two.[2] The trial court ordered that the sentences be served consecutively. The defendant now appeals, urging the following assignments of error:

1. The trial court erred in denying the defense's motion for a change of venue where the crime was publicized throughout the parish and the surrounding areas on television, radio, and in the newspaper, and the facts of the case were sensational, racially explosive and very difficult to forget – a white male member of the KKK was alleged to have sexually humiliated, assaulted and threatened to kill a black man while impersonating a police officer.

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[1] Louisiana Revised Statute 14:43.4 was repealed by 2001 La. Acts No. 301, § 2, effective August 15, 2001. Such conduct now constitutes either aggravated rape or forcible rape. See La. R.S. 14:42(A) and 14:42.1(A), as amended by 2001 La. Acts No. 301, §1.

[2] The record reflects that the trial court failed to order that the defendant's sentences be served without probation, parole or suspension of sentence. However, under La. R.S. 15:301.1 the sentences are deemed to contain this restriction.

2. The trial court erred in denying the defense's motion to suppress the evidence where the evidence was discovered as a result of a warrantless and unauthorized entry into the defendant's bedroom lacking in exigent circumstances.

3. The trial court abused its discretion by giving Mr. David excessive sentences.

4. The trial court erred in failing to grant the defense's motion to reconsider sentence.

5. The trial court erred in incorrectly stating the time delays for filing an application for post-conviction relief.

Finding no merit in the assigned errors, we affirm the defendant's convictions and sentences.

FACTS

During the late night hours of January 27, 1997, the Iberville Parish Sheriff's Office was dispatched to the Fousse residence on Intracoastal Road in Plaquemine, Louisiana, to investigate a reported rape. Jackie Fousse made the report. Mrs. Fousse had called 911 and indicated that a nude black male arrived at her residence and requested assistance indicating that he had been raped. According to Mrs. Fousse, the male victim, subsequently identified as E.G.,[3] was visibly shaken and afraid. Lieutenant Joseph Edwards and Officer Wyatt Neely responded to the call. Upon arriving at the residence, the officers made contact with E.G.

E.G. advised the officers that he had been walking down La. Highway 1 in Plaquemine when he observed an individual, subsequently identified as the defendant, using a pay telephone. The defendant asked E.G. for spare change so that he could continue his telephone call. According to E.G., in exchange for the spare change he provided, the defendant offered to give

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[3] We reference this victim only by his initials. See La. R.S. 46:1844(W).

E.G. a ride home. E.G. accepted the offer. Inside the vehicle, the defendant impersonated a police officer and requested information regarding drugs and drug dealers. When E.G. declined to provide the requested information, the defendant brandished a butterfly knife and threatened to kill E.G. The defendant then, according to E.G., drove to a secluded area and ordered E.G. out of the vehicle. Now armed with a gun, the defendant instructed E.G. to remove his clothing. E.G. complied. The defendant forced E.G., at knifepoint, to perform oral sex on him. Again, E.G. complied. The defendant then told E.G. to bend over the side of the truck. When E.G. complied, the defendant inserted his fingers into E.G.'s anus. The defendant also attempted to penetrate E.G.'s anus with his penis. According to E.G., the attempt was unsuccessful because E.G. resisted by tightening his buttocks. The defendant, enraged, then grabbed E.G. by the penis and threatened to "cut [it] off." E.G. managed to free himself from the defendant and run, although he was frightened and nude. E.G. ran directly over to the Fousse residence located nearby. E.G. was later transported to a local hospital where a rape kit was performed. The rape kit did not result in any evidence of rape.

E.G. directed the officers to the secluded area where the offenses allegedly occurred. At the scene, the officers recovered the defendant's black and silver wallet with his driver's license inside and a Dishman Bennett log book belonging to the defendant. Several items of E.G.'s clothing were also discovered at the scene. The officers proceeded to the defendant's residence for further investigation. The defendant was arrested after he was unable to produce his driver's license and the officers observed, in plain view on his bedroom floor, clothing that matched the description of the clothing E.G. indicated the perpetrator had been wearing. The defendant

denied any involvement in the sexual assault of E.G. He claimed he might have dropped the wallet in the area earlier that night when he stopped there to urinate. The defendant claimed he did not realize that his wallet was missing until he went to look for it for the police.

ASSIGNMENT OF ERROR 1
DENIAL OF MOTION FOR CHANGE OF VENUE

In assignment of error number one, the defendant contends the trial court erred in denying his motion for change of venue. The defendant argues that pretrial publicity, coupled with the "racially explosive" facts alleged in this case, caused preconceived public prejudice against the defendant and made it impossible for him to receive a fair trial in Iberville Parish. Specifically, the defendant argues that the fact that he, an admitted member of the Ku Klux Klan (KKK), was charged with sexually humiliating and assaulting a black man made it likely that he would be convicted due to his affiliation with the KKK rather than on the evidence adduced at trial. Thus, he argues, the extent of the preconceived public prejudice against him necessitated a change of venue.

Louisiana Code of Criminal Procedure article 622 provides:

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.
>
> In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial.

Although a defendant is not entitled to a jury that is totally ignorant of the case to be heard, the Louisiana Constitution grants the accused the right to trial by an impartial jury. **State v. Huls**, 95-0541, p. 14 (La. App. 1st Cir.

5/29/96), 676 So.2d 160, 171, writ denied, 96-1734 (La. 1/6/97), 685 So.2d 126; see La. Const. art. I, § 16. The burden of proof is on the defendant to show that such prejudice exists in the collective mind of the community that a fair trial is impossible. **Huls**, 95-0541 at pp. 14-15, 676 So.2d at 171.

Factors to consider in determining whether or not a change of venue is appropriate include: (1) the nature of the pretrial publicity and the particular degree to which it has circulated in the community; (2) the connection of governmental officials with the release of the publicity; (3) the length of time between the dissemination of the publicity and the trial; (4) the severity and notoriety of the offense; (5) the area from which the jury is to be drawn; (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant; and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire examination. **State v. Bell**, 315 So.2d 307, 311 (La. 1975).

Whether or not a defendant has made the showing required for a change of venue is a question addressed to the trial court's sound discretion, which will not be disturbed on appeal absent an affirmative showing of error and abuse of that discretion. **State v. Wilson**, 467 So.2d 503, 512 (La.), cert. denied, 474 U.S. 911, 106 S.Ct. 281, 88 L.Ed.2d 246 (1985); **State v. Morris**, 99-3075, p. 8 (La. App. 1st Cir. 11/3/00), 770 So.2d 908, 915, writ denied, 2000-3293 (La. 10/12/01), 799 So.2d 496, cert. denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002). Although the trial court possesses a broad range of discretion in this area, the reviewing court is required to make an independent evaluation of the facts to determine whether or not the accused received a fair trial unfettered by outside influences. **State v. Daniels**, 628 So.2d 63, 70 (La. App. 1st Cir. 1993), writ denied, 94-3044 (La. 11/15/96), 682 So.2d 752.

The record in this case reflects that the instant offenses allegedly occurred in the late night hours of January 27, 1997, and the early morning hours of January 28, 1997. The indictment specifies January 28, 1997. On March 17, 2000, the defendant moved for a change of venue. A hearing was held on the venue motion on September 6, 2000. At the conclusion of the hearing, the trial court took the matter under advisement. Thereafter, on September 26, 2000, the trial court rendered a written judgment denying the motion for change of venue. The trial court did not include any reasons for its ruling.

We have thoroughly reviewed all of the evidence submitted by the defendant in support of the venue motion. The record reveals that the defendant failed to prove that a change of venue was necessary in this case. While the defendant successfully showed that there was initially some media coverage and general knowledge within the community about the case, he failed to present sufficient evidence of an overriding prejudice within the community's collective mind that prevented him from receiving a fair trial.

At the venue hearing, in support of his contention that local publicity and preconceived public prejudice against him made it impossible for him to receive a fair trial, the defendant introduced eleven newspaper articles. The defendant also testified that following his arrest for the offenses, he and his wife received numerous threats on their lives. He claimed they were forced to discontinue doing business in Plaquemine based upon threats received while shopping. The defendant further stated that he and his wife received threatening telephone calls at their home concerning the defendant's affiliation with the KKK and his alleged involvement in the instant offenses. The defendant further claimed that several news stations and newspapers contacted him regarding the incident. The defendant denied doing any

personal television interviews but stated that he remembered the story being aired on Channel 9 News. The defendant claimed that because of the media coverage of the incident, he was unable to go anywhere in Plaquemine without someone recognizing him. He claimed he repeatedly received comments and harassment.

On cross-examination, however, the defendant admitted that although he initially received quite a few telephone calls after the incident, the number of calls decreased as time passed. The defendant did not report the calls nor did he change his telephone number. He simply disregarded the calls. The defendant further admitted that, after the instant offenses but prior to the venue hearing, he received media attention based upon his appearance at a West Baton Rouge Parish court (on unrelated charges) clad in a KKK uniform. The defendant denied that his appearance in West Baton Rouge was an attempt to create publicity to substantiate his request for a change of venue in the instant case.

Ronald David, the defendant's father, also testified regarding the pretrial publicity attendant to the case. Mr. David testified that on several occasions he personally observed several people he knew discussing the facts of the case. He claimed that people as far away as Opelousas were discussing the case. He claimed these people learned of the case from radio and television news broadcasts. Mr. David admitted, on cross-examination, that all of the people that he heard commenting on or discussing the case were people with whom he and/or the defendant were personally acquainted. Mr. David denied receiving any threats or other contact regarding the case.

In response, the state specifically noted that newspaper articles introduced into evidence, which were not voluminous, dealt primarily with the defendant's KKK affiliation and did not elaborate on the facts of the

instant offenses. Thus, the state argued that the media publicity surrounding this case was minimal and did not warrant a change of venue. Our review of the articles in question reveals that the state was correct in its assertion. Most of the articles introduced as evidence dealt primarily with unrelated controversial actions by the defendant and his affiliation with the KKK. Any mention of the instant case was factual in nature and merely tracked the progress of the case.

Furthermore, although the aggravated oral sexual battery and sexual battery of a black male by a white male member of the KKK are certainly crimes likely to gain some local notoriety, we note that the defendant's trial took place almost nine years after the offenses. At the venue hearing, held in September 2000, the defendant admitted that the level of public attention attendant to the case had already decreased. By the time of the January 2006 trial of this case, the local publicity of the case was virtually nonexistent.[4] The passage of such a significant amount of time mitigated any potential prejudice to the defendant's trial rights that may have been caused by either pretrial publicity and/or notoriety of the offenses. During the voir dire in this case, there was absolutely no mention of media coverage of the case. Neither the state nor the defense questioned the prospective jurors regarding any knowledge of the case they may have gained from the media in the prior years. There were only two prospective jurors who indicated they could not be impartial. Both of these jurors explained to the court that they had preconceived prejudices based upon personal knowledge of the victim and not the defendant.[5] Therefore, while the record reveals that the defendant

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[4] We note that the latest date of the articles introduced into evidence was April 20, 2000.

[5] Both of these prospective jurors were excused for cause.

and the case initially received some local publicity, there appears to have been no collective attitude of the community in general towards this defendant. Therefore, as previously noted, the defendant has failed to demonstrate the existence of an overriding prejudice in the community that prevented him from receiving a fair trial. As such, the trial court did not err or abuse its discretion in denying the motion for change of venue. See **Huls**, 95-0541 at p. 15, 676 So.2d at 171. This assignment of error lacks merit.

ASSIGNMENT OF ERROR 2
DENIAL OF MOTION TO SUPPRESS

In this assignment of error, the defendant claims the evidence seized from his bedroom should have been suppressed. Specifically, he asserts that the evidence seized was a result of the warrantless and unlawful entry into his bedroom by the police. The defendant asserts that while admittedly his father granted the officers permission to enter the residence, no one gave the officers permission to follow the defendant into his private bedroom area of the home. The defendant further argues that the fact that neither he nor his father objected to the police leaving the living room area and entering the defendant's bedroom did not confer permission. Thus, the defendant contends the evidence observed in plain view inside his bedroom was unlawfully seized because the officers did not have a right to be in the area where the evidence was observed.

Both the Federal and State constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; La. Const. art. I, § 5. A search conducted without a warrant is per se unreasonable unless justified by one of the specifically established exceptions. **Schneckloth v. Bustamonte**, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973); **Coolidge v. New Hampshire**, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971); **State v. Hubbard**, 506 So.2d 839, 841 (La. App. 1st Cir. 1987).

The plain view doctrine is an exception to the rule that a search and seizure conducted without a warrant is presumed unreasonable. See **Coolidge**, 403 U.S. at 465, 91 S.Ct. at 2037. Seizure of evidence under the plain view doctrine is permissible when: (1) there is prior justification for an intrusion into the protected area; and (2) it is immediately apparent without close inspection that the items are evidence or contraband. **Horton v. California**, 496 U.S. 128, 135-136, 110 S.Ct. 2301, 2307, 110 L.Ed.2d 112 (1990). "Immediately apparent" requires no more than probable cause to associate the property with criminal activity. **State v. Howard**, 2001-1487, p. 8 (La. App. 1st Cir. 3/28/02), 814 So.2d 47, 53, writ denied, 2002-1485 (La. 5/16/03), 843 So.2d 1120.

At the hearing on the motion to suppress, Officer Neely testified that, upon arriving at the residence where the defendant lived with his parents, he made contact with the defendant's father, Mr. David. Mr. David invited Officer Neely and the accompanying officers inside the residence. The officers entered the residence to speak with the defendant regarding the evidence found at the crime scene. In connection with the questioning, Officer Neely asked the defendant to produce his driver's license. The defendant indicated that his license was inside the pocket of his clothing, which was located inside his bedroom. Officer Neely and Deputy Mark Burgess accompanied the defendant to his bedroom to retrieve his license. Officer Neely explained that he did not allow the defendant to go into his bedroom alone in the interest of officer safety.

Inside the bedroom, the defendant picked up a pair of pants that fit the description of the clothing worn by the perpetrator. A shirt that matched the description was also observed. The defendant could not find his wallet. Officer Neely asked the defendant if he possessed a gun and/or knife. The

defendant indicated he had a knife. The defendant turned over a "butterfly knife" that fit the description of the knife given by the victim. When Officer Neely told the defendant that he would need to seize that knife and the clothing, the defendant stated, "fine." Officer Neely explained that immediate seizure of the evidence was necessary to prevent destruction.

In the instant case, the trial court was correct in denying the motion to suppress because the facts of this case justify the application of the plain view exception to the warrant requirement. The prior justification for the police intrusion into the residence was the consent of the defendant's father. Given the nature of the offenses and the fact that the victim indicated that the defendant was armed with a knife and a gun, the officers had a basis for being concerned for their safety. Thus, the officers' presence in the defendant's bedroom was justified for officer safety. The clothing was observed, in plain view, while the defendant was searching for his wallet. The defendant voluntarily relinquished the knife. Based upon the physical description of the offender, the weapon reportedly used, the description of the clothing worn by the offender, and the recovery of the defendant's wallet from the crime scene, Officer Neely had probable cause to believe the items in question were evidence of the crimes. The plain view exception to the warrant requirement is applicable. The entry of defendant's home and the seizure of the clothing and knife from defendant's bedroom did not infringe upon the defendant's constitutional rights to be free from unreasonable searches and seizures. This assignment of error is without merit.

ASSIGNMENTS OF ERROR 3 AND 4
EXCESSIVE SENTENCES

In his third assignment of error, the defendant contends the trial court erred in imposing excessive sentences. In his fourth assignment of error, the

defendant contends the trial court erred in failing to grant his motion to reconsider the sentences.

The procedural requirements for objecting to a sentence are provided in La. C.Cr.P. art 881.1, which provides, in pertinent part, as follows:

> A. (1) In felony cases, within thirty days following the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence.
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> * * *
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> B. The motion shall be oral at the time of sentence or shall be in writing thereafter and shall set forth the specific grounds on which the motion is based.
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> * * *
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> E. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, **shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review**. (Emphasis added).

Following the imposition of sentence herein, defense counsel stated, "I would make an oral motion for reconsideration of sentence, and I'll make sure that that's followed up by a written motion." Thereafter, counsel for the defendant failed to file a written motion to reconsider sentence.

In **State v. Jones**, 97-2521, pp. 1-2 (La. App. 1st Cir. 9/25/98), 720 So.2d 52, 53, this court held that a defendant who made a general oral motion to reconsider his armed robbery sentence at sentencing and later timely filed a written motion to reconsider sentence urging in the written motion only that he had been convicted of the offense and sentenced to thirty years imprisonment at hard labor, was precluded from obtaining appellate review of his assignment of error alleging an excessive sentence. We found that the defendant's failure to urge a claim of excessiveness or any other specific ground for reconsideration of sentence by his oral or written motion

precluded review of his assignment of error. See also **State v. Green**, 94-617, p. 8 (La. App. 3rd Cir. 12/7/94), 647 So.2d 536, 540-541.

Herein, like the defendant in **Jones,** the defendant did not urge a claim of excessiveness or any other specific ground for reconsideration of the sentences. Therefore, the defendant is procedurally barred by La. C.Cr.P. art. 881.1(E) from raising any objection to the sentences on appeal, including a claim of excessiveness. **State v. Felder**, 2000-2887, p. 10 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173; **State v. Duncan**, 94-1563, p. 2 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam).

ASSIGNMENT OF ERROR 5
INCORRECT 930.8 ADVICE

In his final assignment of error, the defendant asserts that at the time of sentencing, the district court failed to properly advise him of the two-year time limitation contained in La. C.Cr.P. art. 930.8(A) for the filing of post-conviction relief applications. The defendant argues that the trial court should be directed to provide the defendant with written notice of the correct prescriptive period within ten days of the rendition of this court's opinion. The record reflects that upon imposition of sentence, the trial court advised the defendant that he had "two years to file any Post-Conviction Relief. Your delays for Appeal and for Post-Conviction Relief begin today." However, La. C.Cr.P. art. 930.8(A) provides, in pertinent part: "[n]o application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years *after the judgment of conviction and sentence has become final* under the provisions of Article 914 or 922[.]" (Emphasis added). Section C of article 930.8 states that at the time of sentencing, the trial court shall inform the

defendant of the prescriptive period for seeking post-conviction relief. Thus, we concur in the defendant's observation that the trial court incorrectly informed him of the article 930.8 prescriptive period.

As the issue has been raised herein, it is apparent that the defendant has notice of the limitation period and/or has an attorney who is in the position to provide him with such notice. Although we have done so in the past, we decline to remand for the trial court to provide such notice. Instead, out of an abundance of caution and in the interest of judicial economy, we note that La. C.Cr.P. art. 930.8(A) generally provides that no application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of La. C.Cr.P. arts. 914 or 922. See **State v. Godbolt**, 2006-0609, pp. 7-8 (La. App. 1st Cir. 11/3/06), __ So.2d __, __, 2006 WL 3103380.

CONVICTIONS AND SENTENCES AFFIRMED.