NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 1970

STATE OF LOUISIANA

VERSUS

JESSE DAMONE ENGLETON

DATE OF JUDGMENT: March 26, 2008

ON APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT
(NUMBER 2005-167059), PARISH OF ST. MARY
STATE OF LOUISIANA

HONORABLE PAUL J. deMAHY, JUDGE

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State of Louisiana

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Counsel for Appellant
Jesse Damone Engleton

* * * * * *

BEFORE: PARRO, KUHN AND DOWNING, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

KUHN, J.

Defendant, Jesse Damone Engleton, was charged by grand jury indictment with second degree kidnapping (count one), aggravated rape (count two), and attempted second degree murder (count three), violations of La. R.S. 14:44.1, La. R.S. 14:42, La. R.S. 14:30.1, and La. R.S. 14:27. Defendant entered a plea of not guilty as to each count. After a trial by jury, defendant was found guilty as charged as to each count. The trial court denied defendant's motion for new trial. As to count one, defendant was sentenced to thirty years imprisonment at hard labor.[1] As to count two, defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. As to count three, defendant was sentenced to forty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The trial court ordered that the sentences be served consecutively. The trial court denied defendant's motion to reconsider sentence. Defendant now appeals, raising the following assignments of error:

> 1. The trial court erred in precluding the defendant from introducing evidence of a past and ongoing sexual relationship between the defendant and the victim without first conducting a hearing to determine whether the severest sanction of preclusion of the evidence was appropriate due to the defense attorney's failure to file a pre-trial motion to introduce the evidence.
>
> 2. The trial court erred in denying defendant a recess of the trial when defendant's trial attorney learned during *voir dire* from a prospective juror that one or more witnesses would provide exculpatory testimony.
>
> 3. The trial court erred in imposing three excessive sentences and running the sentences consecutively for offenses arising out of the same act or transaction.

For the following reasons, we affirm the convictions and sentences.

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[1] Under La. R.S. 14:44.1C, the trial judge was required to impose at least two years of the second degree kidnapping sentence without benefit of probation, parole, or suspension of sentence. However, because the trial court's failure to restrict parole eligibility was not raised by the state in either the trial court or on appeal, we are not required to take any action. See ***State v. Price***, 05-2514, p. 22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 124-25 (en banc), writ denied, 07-0130 (La. 2/22/08), --- So.2d ----. As such, we decline to correct the illegally lenient sentence.

FACTS

On or about March 17, 2005, Officer Gary Keller of the Morgan City Police Department was dispatched to 1409 Ellzey Street in Morgan City. Only the victim, A.H.,[2] was present upon the officer's arrival. The victim's left cheek was swollen and red, and the top of her head was bleeding. She was crying and appeared very upset.

According to the victim, defendant (the victim's ex-boyfriend with whom she shared a child) was at her home when she arrived at approximately 12:30 p.m. on March 17, 2005. Defendant held a long-barrel pistol to the victim's back and demanded entry into the home. Defendant led the victim to her parents' bedroom. Defendant lifted the mattress and retrieved a second, smaller pistol. Defendant instructed the victim to remove her clothing, and she ultimately complied after further commands, profanities, and weapon brandishing. Defendant retrieved keys from the victim's person to open the victim's storage chest to obtain a condom. Defendant placed the condom on his penis and, at gunpoint, forced the victim to perform oral sex. Defendant then forced the victim to have vaginal intercourse with him.

Defendant struck the victim in the face when she attempted to exit the home. Defendant ultimately instructed the victim to hold her head on top of a pillow and placed another pillow on top of her head before shooting the victim in the head. The victim, still conscious, observed defendant as he grabbed the condom wrapper and the pistols and fled out of the home. The bullet was lodged between two bone tables of the victim's skull and remained so at the time of the trial.

ASSIGNMENT OF ERROR NUMBER ONE

Defendant asserts that the trial court erred in precluding him from introducing evidence of a past and ongoing sexual relationship between the victim

[2] See La. R.S. 46:1844W.

and him without conducting a hearing. Noting that trial counsel failed to file a pre-trial motion to introduce the evidence, defendant contends that the trial court should have conducted a hearing to determine if preclusion was the appropriate sanction. Defendant contends that he was denied his right to present a defense.

Before a person accused of committing a crime that involves sexually assaultive behavior may offer evidence of the victim's past sexual behavior, the accused shall make a written motion to offer such evidence, accompanied by a written statement of evidence setting forth the names and addresses of persons to be called as witnesses. La. C.E. art. 412C(1). The motion shall be made within the time for filing pre-trial motions specified in La. C.Cr.P. art. 521, except that the trial court may allow the motion to be made at a later date. La. C.E art. 412D. After the motion is filed, the trial court determines the admissibility of the evidence at a hearing. La. C.E. art. 412E.

In ***Michigan v. Lucas***, 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991), the U.S. Supreme Court held that a Michigan court of appeals erred in adopting a *per se* rule that Michigan's notice-and-hearing requirement violates the Sixth Amendment in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a defendant. The Court stated, "[t]he Sixth Amendment is not so rigid. The notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay." ***Michigan v. Lucas***, 500 U.S. at 152-53, 111 S.Ct. at 1748. The Court further held that failure to comply with the notice-and-hearing requirement may in some cases justify even the severe sanction of preclusion. ***Id.***

In this case, there is no evidence in the record that defendant complied with the notice requirement, and defendant concedes that a pre-trial motion was not filed. Defendant was not prejudiced by the restriction because defense counsel succeeded in eliciting testimony from the victim regarding her sexual activity with

defendant after their child was born and leading up to the date of the offense. Defense counsel initially elicited a statement from the victim that she and defendant continued a relationship after their child was born. Although the trial court sustained the State's objection to this line of questioning, the victim also specifically testified, "Me and Jesse had sex between November [2004] and March [2005]." Any further testimony on this issue would have been cumulative. Thus, we find that the guilty verdict was surely unattributable to any error as to the ruling at issue. La. C.Cr.P. art. 921; ***Sullivan v. Louisiana***, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

Defendant contends next that the trial court erred in denying his motion for a recess made after the defense attorney learned (during *voir dire*) from a potential juror that one or more witnesses could provide exculpatory testimony. He urges that the denial of the motion was an abuse of discretion. Defendant maintains that the potential juror's boyfriend's testimony would have been used to impeach the victim, as she told him that she had not been raped, with defendant noting that the defense attorney referred to the motion as a motion for a continuance instead of properly naming it a motion for a recess. Defendant suggests that the trial court, in all likelihood, would have granted the motion had it been properly referenced.

La. C.Cr.P. art. 709 sets forth the following requirements for a motion for a continuance to locate witnesses:

> (1) Facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial;
>
> (2) Facts and circumstances showing a probability that the witness will be available at the time to which the trial [or in this case hearing on the motion for a recess] is deferred; and
>
> (3) Facts showing due diligence used in an effort to procure attendance of the witness.

The decision to grant a continuance is placed in the discretion of the trial court and will not be disturbed absent an abuse of discretion. ***State v. Washington***, 407 So.2d 1138, 1148 (La. 1981). While La. C.Cr.P. art. 707 requires that a motion for continuance be in writing, where the occurrences that allegedly made the continuance necessary arose unexpectedly, and the defendant had no opportunity to prepare a written motion, the trial judge's denial of the defendant's motion for a continuance is properly before this court for review. ***State v. Parsley***, 369 So.2d 1292, 1294 n.1 (La. 1979).

In moving for a continuance on the third day of the trial (after jury selection), the defense attorney stated he received some information during a bench conference on the second day of the trial regarding "new" material witnesses. The defense attorney added that he could not procure the presence of all of the witnesses in time for the trial "today or tomorrow." In denying the motion, the trial court concluded that a thorough investigation would have revealed the existence of the witnesses. The trial court noted that the potential juror stated that "it was all over Morgan City, people were talking about it." The trial court stated that family members or other witnesses would have known about the alleged statements.

Since the motion was made after the trial commenced, it was more properly a motion for a recess, a temporary adjournment of a trial or hearing after it has commenced. La. C.Cr.P. art. 708. Regardless of how the motion was styled, the court may consider the motion as though it had been properly denominated. A motion for recess is evaluated by the same standards as a motion for a continuance. ***State v. Warren***, 437 So.2d 836, 838 (La. 1983).

In this case, the record shows that defendant did not satisfy the requirements of La. C.Cr.P. art. 709. The trial court was apparently aware of the information referenced by the prospective juror during a bench conference. Nonetheless,

defense counsel did not state for the record facts to which the absent witnesses were expected to testify, showing the materiality of the testimony and the necessity for the presence of the witnesses at the trial in moving for the continuance as required by La. C.Cr.P. art. 709(1). The defense attorney simply stated that the witnesses "are critical to our ability to present a defense . . . And, as I say, it's essential to the defense of our case." According to the defense attorney, after the bench conference, she learned of other individuals who had firsthand knowledge of the information referenced by the potential juror. But she failed to state facts and circumstances showing a probability that the witnesses would be available at the time to which the trial is deferred as required by La. C.Cr.P. art. 709(2). Finally, defense counsel did not present facts showing due diligence was used in an effort to procure attendance of the witnesses as required by La. C.Cr.P. art. 709(3). It appears that the motion to continue was based on investigatory purposes. There was no indication that defense counsel ever interviewed the potential witnesses in order to find out whether they could actually provide any material evidence. Based on the record before us, we find no abuse of discretion. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

Lastly, defendant argues that the trial court erred in imposing maximum, consecutive sentences. Noting that the offenses arose out of one transaction, defendant contends that the trial court failed to give an analysis or explanation for imposing consecutive sentences. Defendant points out that a pre-sentence investigation was not conducted and contends that the trial court disregarded the following mitigating factors: he has social and moral values; he has potential for rehabilitation; he was youthful at the time of the offenses; and he had no significant criminal record. Defendant also claims the sentences will cause excessive hardship on his family and dependents.

Article I, section 20 of the Louisiana Constitution explicitly prohibits excessive sentences. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. In reviewing a sentence for excessiveness, the appellate court must consider the punishment and the crime in light of the harm to society and gauge whether the penalty is so disproportionate as to shock its sense of justice or that the sentence makes no reasonable contribution to acceptable penal goals and, therefore, is nothing more than the needless imposition of pain and suffering. See ***State v. Guzman***, 99-1753, p. 15 (La. 5/16/00), 769 So.2d 1158, 1167. The trial court has wide discretion in imposing a sentence within the statutory limits and such a sentence will not be set aside as excessive in the absence of manifest abuse of discretion. ***State v. Loston***, 03-0977, pp. 19-20 (La. App. 1st Cir. 2/23/04), 874 So.2d 197, 210, ***writ denied***, 04-0792 (La. 9/24/04), 882 So.2d 1167.

La. C.Cr.P. art. 894.1 sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. ***State v. Leblanc***, 04-1032, p. 10 (La. App. 1st Cir. 12/17/04), 897 So.2d 736, 743, ***cert. denied***, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005). Thus, where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary, even where there has not been full compliance with La. C.Cr.P. art. 894.1. ***State v. Holmes***, 99-0631, p. 4 (La. App. 1st Cir. 2/18/00), 754 So.2d 1132, 1135, ***writ denied***, 00-1020 (La. 3/30/01), 788 So.2d 440.

Concurrent rather than consecutive sentences are the general rule for multiple convictions arising out of a single course of criminal conduct. See La. C.Cr.P. art. 883. However, even if convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive; other factors must be

taken into consideration in making this determination. For instance, consecutive sentences are justified when the offender poses an unusual risk to the safety of the public. See ***State v. Crocker***, 551 So.2d 707, 715 (La. App. 1st Cir. 1989).

As to count one, second degree kidnapping, defendant was exposed to a sentencing range of not less than five nor more than forty years at hard labor with at least two years to be served without benefit of probation, parole, or suspension of sentence. La. R.S. 14:44.1C. As to count two, aggravated rape, defendant was exposed to a mandatory life sentence at hard labor. La. R.S. 14:42D(1). As to count three, attempted second degree murder, defendant was exposed to a sentencing range of not less than ten nor more than fifty years at hard labor without benefit of parole, probation, or suspension of sentence. La. R.S. 14:30.1B and La. R.S. 14:27D(1)(a). The trial court imposed a sentence of thirty years imprisonment at hard labor on count one, the mandatory life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence on count two, and forty years imprisonment at hard labor without benefit of probation, parole, or suspension of sentence on count three. Thus, defendant is incorrect in stating that the trial court imposed maximum sentences.

In sentencing defendant, the trial court considered the sentencing guidelines. The trial court stated that there was an undue risk that during a period of a suspended sentence or probation, defendant would commit another crime. The trial court noted that the instant crimes were committed while defendant was on probation. The trial court further stated that any lesser punishment would deprecate the seriousness of the offenses. As aggravating factors, the trial court considered the use of threats of violence and actual violence used by defendant in committing the offenses, the injury to the victim, and the dangerous weapons used in committing these offenses. The trial court further determined that the mitigating factors listed in paragraphs 22 through 32 of La. C.Cr.P. art. 894.1B were

inapplicable. The trial court noted that the defendant "bragged about how he beat the victim" during his trial testimony.

We find that the trial court adequately considered the facts of the case. Under these circumstances, the imposition of consecutive sentences does not render these sentences excessive. Considering the suffering the victim endured, defendant's lack of remorse, and the brutal facts of the offenses, the sentences imposed are not disproportionate or shocking. To the extent that the defendant contends that the mandatory minimum sentence imposed on count two was unconstitutionally excessive, we find that defendant has not made a showing of exceptional circumstances, which is required to justify a downward departure from the minimum sentence mandated by the statute. Defendant has failed to rebut the presumption that the mandatory life sentence for the aggravated rape conviction is constitutional. See ***State v. Johnson***, 97-1906, p. 8 (La. 3/4/98), 709 So.2d 672, 676. Thus, we find that the record supports the sentences imposed, and the trial court did not abuse its discretion in imposing the consecutive sentences or err in denying the motion to reconsider sentence. This assignment of error also lacks merit.

DECREE

For these reasons, we affirm the convictions of and sentences imposed on defendant, Jesse Damone Engleton.

CONVICTIONS AND SENTENCES AFFIRMED.