

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008/KA/0774

STATE OF LOUISIANA

VS.

ONTARIO LLOYD

JUDGMENT RENDERED: NOV 14 2008

**ON APPEAL FROM
THE NINETEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 05-06-0337, SECTION 5
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA**

THE HONORABLE LOUIS DANIEL, JUDGE

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BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ

McDONALD, J.

The defendant, Ontario Lloyd, was charged by grand jury indictment with aggravated rape (count one) and attempted second degree murder (count two), violations of La. R.S. 14:42, La. R.S. 14:27, and La. R.S. 14:30.1. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged on count one and guilty of the responsive offense of attempted manslaughter (La. R.S. 14:27 and La. R.S. 14:31) on count two. The trial court denied the defendant's motion for new trial and a motion for post verdict judgment of acquittal. The defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence on count one, and to twenty years imprisonment at hard labor on count two, with the sentences to be served concurrently. The defendant now appeals, raising error as to the constitutionality of the non-unanimous verdict on count one (aggravated rape). For the forthcoming reasons, we affirm the convictions and sentences.

FACTS

The facts of the instant offenses are not relevant to the issue raised in the instant appeal. We note that the convictions are based upon the defendant's strangling, beating to the point of momentary unconsciousness, and raping of the victim (C.M.) at her home on or about May 7, 2006. The victim had met the defendant during the previous month and the two became acquaintances. The defendant testified that he had consensual sex with the victim and that she slapped him and pulled a knife out on the night in question. The defendant further testified that he was cut on his nose and chin, and that he hit the victim in self-defense.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant notes that pursuant to La. Code Crim. P. art. 782 he was convicted by a jury concurrence of ten of twelve on count

one (aggravated rape). The defendant argues that Article 782 violates the United States Constitution Sixth Amendment right to a jury trial when considered in combination with the Fourteenth Amendment right to due process of law. The defendant concludes that the verdict should be declared invalid.

Louisiana Constitution Article I, § 17A and Article 782A provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); *State v. Belgard*, 410 So.2d 720, 726 (La. 1982); *State v. Shanks*, 97-1885, pp. 15-16 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 164-65.

The Supreme Court decisions relied upon by the defendant, *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), do not address the issue of the constitutionality of a non-unanimous jury verdict. Rather, they address the issue of whether the assessment of facts in determining an increased penalty of a crime beyond the prescribed statutory maximum is within the province of the jury or the trial judge, sitting alone. These decisions stand for the proposition that any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. See *Apprendi v. New Jersey*, 530 U.S. at 490, 120 S.Ct. at 2362-63.

The defendant argues that the above Supreme Court decisions implicitly overrule *Apodaca*, and that the non-unanimous verdict before us on appeal is

unconstitutional. However, this court has previously rejected that argument. **State v. Smith**, 2006-0820, p. 24 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 2007-0211 (La.9/28/07), 964 So.2d 352. Louisiana Constitution article I, § 17A and Article 782A are not unconstitutional, and a conviction by a concurrence of ten members of a twelve member jury is not in violation of the defendant's Sixth Amendment right to trial by jury, or his Fourteenth Amendment due process rights.

CONVICTIONS AND SENTENCES AFFIRMED.