NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 1108

STATE OF LOUISIANA

VERSUS

CLIFFORD JOSEPH ETIENNE, JR.

DATE OF JUDGMENT: DEC 2 3 2008

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
(NO. 09-05-0506, SEC. 8), PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILSON FIELDS, JUDGE

* * * * * *

Honorable Doug Moreau
District Attorney
Kory J. Tauzin
Jacyln C. Chapman
Baton Rouge, Louisiana

Counsel for Plaintiff-Appellee
State of Louisiana

Autumn Town
Baton Rouge, Louisiana

Counsel for Defendant-Appellant
Clifford Joseph Etienne

* * * * * *

BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

Disposition: CONVICTIONS AFFIRMED; HABITUAL OFFENDER ADJUDICATION AND SENTENCES VACATED; REMANDED FOR FURTHER PROCEEDINGS.

Guidry, J. concurs.

KUHN, J.

Defendant, Clifford Joseph Etienne, was charged by grand jury indictment with the following offenses: one count of felon in possession of a firearm, a violation of La. R.S. 14:95.1; one count of illegal use of a weapon, a violation of La. R.S. 14:94; two counts of armed robbery while armed with a dangerous weapon, violations of La. R.S. 14:64 and 64.3; one count of attempted carjacking, a violation of La. R.S. 14:27 and 64.2; two counts of attempted first degree murder, violations of La. R.S. 14:27 and 30(A)(2)(3); one count of attempted second degree murder, a violation of La. R.S. 14:27 and 30.1; and two counts of second degree kidnapping, violations of La. R.S. 14:44.1.

Defendant pleaded not guilty and not guilty by reason of insanity to all charges. A sanity commission was convened and the trial court determined defendant was competent to stand trial. Prior to trial, the State dismissed the original Count 1, possession of a firearm by a convicted felon, and defendant proceeded to trial before a jury on the remaining nine counts. The jury returned the following verdicts on those counts:

Count 1: Illegal use of a weapon- guilty;

Count 2: Armed robbery with a firearm of Lydia Key- guilty;

Count 3: Attempted carjacking- guilty;

Count 4: Attempted first degree murder of Barron Bryant- guilty of attempted second degree murder;

Count 5: Attempted first degree murder of Richard Gill- guilty of attempted manslaughter;

Count 6: Attempted second degree murder of Alex Griffin- guilty of attempted manslaughter;

Count 7: Armed robbery with a firearm of Alex Griffin- guilty;

Count 8: Second degree kidnapping of minor K.B.- guilty;

Count 9: Second degree kidnapping of minor J.B.- guilty.

The trial court subsequently sentenced defendant as follows:

Count 1 - Two years at hard labor, concurrent with any other sentence being served;

Count 2 - Fifty years at hard labor to be served without benefit of probation, parole, or suspension of sentence. The trial court noted that this offense was committed with a firearm and ordered the sentence enhanced by five years in addition to the previously stated sentence, which would run consecutively for a total of 55 years on this count;

Count 3 - Ten years at hard labor to be served without benefit of probation, parole, or suspension of sentence, to run concurrently with Counts 1 and 2;

Count 4 - Twenty years at hard labor to run consecutively to Counts 1, 2, and 3;

Count 5 - Five years at hard labor to run consecutively to Counts 1, 2, 3, and 4, and consecutive to any time being served;

Count 6 - Five years at hard labor to be served without the benefit of probation, parole, or suspension of sentence, and to run concurrently with Counts 1, 2, 3, 4, 5, and 6 and other time being served.

Count 7 - Fifty years at hard labor to be served without benefit of probation, parole, or suspension of sentence and to run concurrently with Counts 1, 2, 3, 4, 5, and 6. The court noted that this offense was committed with a firearm and ordered this sentence to be enhanced by five years in addition to the previously stated sentence, to run consecutively for a total of 55 years on this count;

Count 8 - Ten years at hard labor to run consecutively to Counts 1, 2, 3, 4, 5, 6, and 7, and consecutively to any other time being served;

Count 9 - Ten years at hard labor to run consecutively to Counts 1, 2, 3, 4, 5, 6, 7, and 8, and consecutively to any other time being served.

The State instituted habitual offender proceedings seeking to have defendant adjudicated a second felony habitual offender. Defendant admitted the

allegations of the habitual offender bill and the trial court resentenced defendant for his conviction on Count 2 to an additional 55 years (making 110 years the total sentence for Count 2). The trial court noted that defendant's total sentences for these convictions totaled 160 years.

Defendant appeals, citing the following as error:

1. Whether defendant was denied his right to due process of law as there was insufficient evidence to support the guilty verdicts in Counts 8 and 9.

2. Whether defendant was denied his right to a fair trial and his right to due process of law when the trial court denied a motion for change of venue, and permitted the prosecution to argue highly prejudicial and irrelevant facts of an unrelated murder.

3. Whether defendant's right to due process was violated when the State made improper and prejudicial comments throughout the trial.

4. Whether defendant's right to due process was violated when the trial court allowed an incorrect 911 transcript to be shown to the jury at trial containing prejudicial 404B information.

5. Whether defendant's total sentence is cruel and unusual as he was sentenced to 160 at hard labor.[1]

6. Whether there are any errors discoverable under La. C.Cr.P. art. 920(2).

FACTS

On August 10, 2005, Lydia Key was working at the Ready Cash payday loan store located on the corner of Florida Boulevard and Acadian Thruway in Baton Rouge. Key was working a 5:00 to 7:00 p.m. shift, while her four minor

[1] The Louisiana Appellate Project also filed a brief on defendant's behalf raising the issue of excessive sentence.

children, ranging in ages from ten to three years old, watched television in another room of the store. At approximately 6:35 p.m., defendant entered the lobby and, holding a gun, demanded that Key open the door to the room where the safe was located (Key's children were also in that room). When Key failed to open the door, defendant fired his weapon into the door, and then kicked the door to gain access to the room. Key's children had fled the room just prior to the shot being fired. Defendant demanded that Key open the safe and give him all the money. Key gave defendant the money in the cash drawer near her and also gave him the money orders and checks that she retrieved from the safe. Defendant left the store, and Key went outside to contact a police officer who was across the street at a service station.

Neil Porter, an officer with the Baton Rouge City Police Department, was at an Exxon station across the street from the Ready Cash store when he received a report of an armed robbery in progress. Officer Porter also observed Key, visibly panicked, running from the Ready Cash lobby. Officer Porter crossed the street and spoke with Key. Officer Porter also located defendant in the parking lot behind the store. When Officer Porter announced his presence, defendant fled. Officer Porter gave chase and was soon joined by other police officers in the vicinity who responded to the armed robbery radio call.

Defendant ran through a wooded area to a gray vehicle parked outside the Beauty Giant store. The gray vehicle was owned by Phyllis Carter, who had briefly gone into the store while her two children, ages twelve and six, remained in the vehicle. P.C., Carter's twelve-year old son, testified that defendant entered the vehicle with a gun, saw that the keys were not in the ignition, and immediately

exited. When defendant exited the gray vehicle, he aimed his weapon at Baton Rouge Police Officers Barron Bryant and Richard Gill, who had joined the pursuit. Although defendant squeezed the trigger of his weapon, the weapon jammed and failed to fire.

Defendant then ran to a gold Pontiac Grand Am, opened the door of the car, and forced its driver, Alex Griffin, out at gunpoint, despite Griffin's protests that his fiancée's two young children, K.B. and J.B., were in the vehicle. Defendant got into the car and began to drive away in reverse at a high rate of speed. Defendant drove approximately sixty feet before the vehicle struck a curb and stalled. Officers approached the vehicle with weapons drawn and apprehended defendant. It was later determined that defendant had stolen $1,977.00 in cash from the Ready Cash store.

Defendant did not testify at trial. However, the defense presented testimony from James McCoenico, an expert in drug rehabilitation, opining that defendant may have been suffering from a cocaine-induced psychosis during this incident.

SUFFICIENCY OF THE EVIDENCE

Defendant asserts that there was insufficient evidence to support his convictions for the second degree kidnappings of K.B. and J.B. Specifically, defendant alleges the record fails to support a finding that he knew the two children were in the vehicle when he took it.

In reviewing claims challenging the sufficiency of the evidence, this court must consider whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 319, 99

S.Ct. 2781, 1789, 61 L.Ed.2d 560 (1979); see also La. C.Cr.P. art. 821(B); ***State v. Tabor***, 2007-0058, p. 12 (La. App. 1st Cir. 6/8/07), 965 So.2d 427, 434.

Louisiana Revised Statutes 14:44.1 provides in pertinent part:

> A. Second degree kidnapping is the doing of any of the acts listed in Subsection B wherein the victim is:
>
> * * *
>
> (5) Imprisoned or kidnapped when the offender is armed with a dangerous weapon or leads the victim to reasonably believe he is armed with a dangerous weapon.
>
> B. For purposes of this Section, kidnapping is:
>
> (1) The forcible seizing and carrying of any person from one place to another; or
>
> * * *
>
> (3) The imprisoning or forcible secreting of any person.

The provisions of this statute apply when any one occurrence mentioned in Subsection B combines with any one occurrence mentioned in Subsection A. The statute does not require that the distance traveled during the forcible seizure be any particular length. ***State v. Steward***, 95-1693, p. 10 (La. App. 1st Cir. 9/27/96), 681 So.2d 1007, 1013.

In support of his argument that the State failed to establish he was aware the children were in the vehicle when he took it, defendant points to the testimony of Alex Griffin, the driver of the vehicle. According to the portions of Griffin's testimony cited by defendant, when Griffin relayed to defendant that the children were in the vehicle, the windows and doors were closed, and the engine was running. Griffin also testified that although defendant looked right at him when he

was telling him about the children in the vehicle, defendant looked "high or something."

According to the testimony of Griffin, he watched defendant get into the gray car that was parked beside his car, and immediately get out. Defendant then looked at Griffin and "hesitated" before telling him to "Get the fuck out of the vehicle." Griffin admitted that although he could not hear defendant's voice, he could read his lips. Griffin testified he did not immediately get out of his vehicle because of the two children, but defendant kept yelling at him and he feared defendant's gun was going to discharge.

The verdict rendered against defendant indicates the jury accepted the testimony of the State's witnesses, including Griffin's that he was able to communicate to defendant that children were in the vehicle. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. ***State v. Johnson***, 99-0385, p. 9 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. ***State v. Glynn***, 94-0332, p. 32 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. Further, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See ***State v. Ordodi***, 2006-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662.

Despite the closed windows and doors of the vehicle, and the running engine, Griffin was able to understand that defendant wanted to take his vehicle. The jury had a reasonable basis to conclude that defendant's initial hesitancy in

seeking Griffin's vehicle, in light of Griffin's protests and reluctance to give up the vehicle, were due to the fact defendant knew children were inside the vehicle. Accordingly, we conclude the evidence supports these convictions for second degree kidnapping.

This assignment of error is without merit.

CHANGE OF VENUE

Defendant contends the trial court erred in denying a motion for a change of venue and permitting the prosecution to set forth highly prejudicial and irrelevant facts of an unrelated murder. Specifically, defendant claims that the State was improperly allowed to make references throughout the trial to the murder of Officer Terry Melancon, which occurred the same day as these offenses.

The record reflects defendant filed a motion for change of venue. However, the minute entry of February 23, 2006 indicates that this motion was withdrawn by the defense. There is no indication in the record that this motion was resubmitted before the trial court.

After reviewing the record, we find that at no time did defendant object to any of the references to Officer Melancon's murder. We note that these references were presented in a manner that merely explained why so many police officers were in the vicinity of Ready Cash at the time defendant committed the armed robbery of Key.

An irregularity or error cannot be availed of after the verdict unless it was objected to at the time it occurred since a contemporaneous objection is required to preserve an error for appellate review. La. C.E. art. 103(A)(1); La. C.Cr.P art.

841(A); ***State v. Trahan***, 93-1116, p. 15 (La. App. 1st Cir. 5/20/94), 637 So.2d 694, 703.

Moreover, we note that any potentially erroneous admission of these references would be considered harmless error. As previously discussed, the evidence supporting defendant's convictions is supported by the eyewitness testimony of multiple witnesses, including many who were victims of the offenses. The testimony of a victim is sufficient to establish the elements of the offense. ***State v. Johnson***, 94-1561, p. 4 (La. App. 1st Cir.10/6/95), 664 So.2d 141, 144, writ denied, 95-2988 (La. 3/15/96), 669 So.2d 426. Thus, under the circumstances presented in this case, we find the guilty verdicts rendered in this matter are surely unattributable to any references concerning Deputy Melancon's murder. See ***Sullivan v. Louisiana***, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

IMPROPER AND PREJUDICIAL COMMENTS

Defendant maintains the State elicited testimony concerning defendant's prior conviction, despite the fact that the State dropped the charge of possession of a firearm by a convicted felon. Specifically, on cross-examination of defendant's brother-in-law, Anthony Brown, the prosecutor questioned the witness whether there were any firearms in defendant's home. Brown responded that it was his understanding defendant could not own a firearm because he was a convicted felon.

The record reflects defendant failed to object to Brown's response, which indicated that defendant was a convicted felon, or ask for any type of instruction. As we stated previously, an irregularity or error cannot be availed of after the

verdict unless it was objected to at the time it occurred, since a contemporaneous objection is required to preserve an error for appellate review. La. C.E. art. 103(A)(1); La. C.Cr.P. art. 841(A); ***State v. Trahan***, 93-1116 at p. 15, 637 So.2d at 703.

Because defendant failed to object to this testimony, the issue has not been preserved for appellate review. Moreover, we note that Brown's reference to defendant as a convicted felon was not responsive to the question posed by the prosecutor. The prosecutor merely inquired whether Brown was aware of firearms in defendant's residence, which anticipated a yes or no answer. Brown's explanation that defendant could not own a firearm because of his previous felony conviction was an explanation offered by the witness, and such reference cannot be attributable to the prosecutor. See ***State v. Fowlkes***, 352 So.2d 208, 212 (La. 1977).

INTRODUCTION OF 911 TRANSCRIPT

Defendant urges the trial court erred in allowing a questionable 911 transcript, which contained prejudicial La. C.E. art. 404(B) information, to be shown to the jury. Specifically, defendant contends that the transcript contained extraneous comments attributed to defendant, which made it incorrect.

Generally, courts may not admit evidence of other crimes to show a defendant is a man of bad character who has acted in conformity with his bad character. But under La. C.E. art. 404(B)(1), evidence of other crimes, wrongs, or acts may be introduced when it relates to conduct formerly referred to as *res gestae*, that "constitutes an integral part of the act or transaction that is the subject of the present proceeding." *Res gestae* events constituting other crimes are

deemed admissible because they are so nearly connected to the charged offense that the State could not accurately present its case without reference to them. A close proximity in time and location is required between the charged offense and the other crimes evidence to insure that the purpose served by admission of other crimes evidence is not to depict the defendant as a bad man, but rather to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. ***State v. Colomb***, 98-2813, p. 3 (La. 10/1/99), 747 So.2d 1074, 1076 (per curiam).

The *res gestae* doctrine in Louisiana is broad and includes not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed before, during, or after the commission of the crime, if a continuous chain of events is evident under the circumstances. ***State v. Kimble***, 407 So.2d 693, 698 (La. 1981). Integral act (*res gestae*) evidence in Louisiana also incorporates a rule of narrative completeness without which the State's case would lose its narrative momentum and cohesiveness. See ***State v. Colomb***, 98-2813 at p. 4, 747 So.2d at 1076. The Louisiana Supreme Court has held that evidence of multiple crimes committed in a single course of conduct is admissible as *res gestae* at the trial of the accused for the commission of one or more, but not all, of the crimes committed in his course of conduct. ***State v. Washington***, 407 So.2d 1138, 1145 (La. 1981); ***State v. Meads***, 98-1388, p. 7 (La. App. 1st Cir. 4/1/99), 734 So.2d 792, 797, writ denied, 99-1328 (La. 10/15/99), 748 So.2d 465.

Defendant's argument on this issue is twofold. First, defendant claims the transcript of the 911 call is inaccurate because it contains threats purportedly made

by defendant toward Key; yet Key's testimony contradicted the fact defendant threatened her during the commission of the armed robbery. Second, defendant asserts the State failed to provide notice of this other crime as required by ***State v. Prieur***, 277 So.2d 126 (La. 1973), and La. C.E. art. 404(B)(1).

Regarding the accuracy of the transcript, the State introduced testimony from Thomas Sanders, the 911 operator who received Key's call. According to Sanders, he could hear a voice in the background making threatening statements toward Key as she was on the phone with him. Moreover, we note the actual 911 tape was played for the jury. The fact that Key testified she was not directly threatened by defendant goes more to the weight of the evidence as opposed to its admissibility. The jury was aware that Key was on the phone with the 911 operator as these statements were made, and may not have recalled whether defendant specifically threatened her. Further, the fact that defendant was armed when he robbed the Ready Cash and used the weapon during the armed robbery, clearly provides a reasonable basis to support a finding that Key was threatened during the commission of this offense. Finally, because the evidence of defendant's threats against Key constituted an integral part of the commission of the armed robbery, the State was not required to provide ***Prieur*** notice. ***State v. Millen***, 2002-1006, p. 11 (La. App. 1st Cir. 2/14/03), 845 So.2d 506, 514.

Further, we note that the erroneous admission of "other crimes" evidence is subject to a harmless-error analysis. ***State v. Morgan***, 99-1895, p. 5 (La. 6/29/01), 791 So.2d 100, 104 (per curiam). As previously mentioned, the test for determining harmless error is whether the verdict actually rendered in the case was

surely unattributable to the error. See ***State v. Morgan***, 99-1895 at p. 6, 791 So.2d at 104; see also ***Sullivan v. Louisiana***, 508 U.S. at 279, 113 S.Ct. at 2081.

As previously discussed, defendant's convictions are supported by the eyewitness testimony of Key, Carter, Griffin, and Officers Porter, Bryant and Gill, and Griffin. The testimony of these witnesses described the acts defendant committed on this date. In determining defendant was guilty of nine separate offenses, it is obvious the jury chose to accept the testimony of the State's witnesses. Under the facts of this case, any potentially erroneous admission of the 911 transcript would be considered harmless error. In light of Key's testimony, the guilty verdicts were surely unattributable to the admission of the 911 transcript.

This assignment of error is without merit.

REVIEW FOR ERROR

In conducting a review of the record for error pursuant to La. C.Cr.P. art. 920(2), we note the existence of an error involving defendant's habitual offender adjudication. The record indicates that following defendant's convictions, the State instituted habitual offender proceedings seeking to have defendant adjudicated a second felony habitual offender based on a 1992 conviction for attempted armed robbery. Defendant stipulated to the allegations contained in the habitual offender bill. At no time did the trial court advise defendant of the specific allegations of the bill or his rights.

Prior jurisprudence and codal authority have held that before a defendant pleads guilty or stipulates to the allegations in a habitual offender bill of information, the trial court must advise the defendant of the specific allegations

contained in the habitual offender bill of information, his right to be tried as to the truth thereof, and his right to remain silent. See La. R.S. 15:529.1(D)(1), ***State v. Mickey***, 604 So.2d 675, 678 (La. App. 1st Cir. 1992), writ denied, 610 So.2d 795 (La. 1993). Such errors were deemed harmless when defendant did not plead guilty or stipulate to the charges in the habitual offender bill if there was a hearing wherein the State proved the truth of the allegations of the bill and the defendant's identity. See ***State v. Mickey***, 604 So.2d at 678. However, in the present case, there was no hearing on defendant's habitual offender status. Thus, we cannot say the trial court's failure to advise him of the specifics of the habitual offender bill or his rights was harmless.

Accordingly, we vacate defendant's habitual offender adjudication and sentences, and remand the matter for further proceedings. Defendant's assignments of error concerning his sentences are pretermitted.

CONVICTIONS AFFIRMED; HABITUAL OFFENDER ADJUDICATION AND SENTENCES VACATED; REMANDED FOR FURTHER PROCEEDINGS.