

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0989

STATE OF LOUISIANA

VERSUS

KELLY KEAGHEY

Judgment Rendered: December 22, 2010

**Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Case No. 701664**

The Honorable W. Ray Chutz, Judge Presiding

**Scott M. Perrilloux
District Attorney
Patricia Parker
Assistant District Attorney
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**Counsel for Appellee
State of Louisiana**

**Bertha M. Hillman
Thibodaux, Louisiana**

**Counsel for Defendant/Appellant
Kelly Keaghey**

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

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GAIDRY, J.

The defendant, Kelly Keaghey, was charged by bill of information with unauthorized entry of a place of business, a violation of La. R.S. 14:62.4 (count 1); and simple burglary, a violation of La. R.S. 14:62 (count 2). He pled not guilty and, following a jury trial, was found guilty as charged on both counts. For the unauthorized entry of a place of business conviction (count 1), the defendant was sentenced to six years at hard labor. For the simple burglary conviction (count 2), the defendant was sentenced to twelve years at hard labor. The sentences were ordered to run concurrently. The defendant now appeals, designating one assignment of error. We affirm the convictions and sentences.

FACTS

On November 10, 2006, a red Ford F-150 pickup truck was stolen from Gateway Ford (Gateway), an automobile dealership in Ponchatoula. The truck belonged to a customer who had brought it to Gateway for body work. Ponchatoula Police Detective John Cieutat obtained and viewed the surveillance video of the theft. He testified at trial that the video showed a white male loosening the lock on the sliding gate and another white male driving the truck out of Gateway. The male at the gate closed the gate and entered the truck, and together they left the premises. The burglary was at night and the Gateway lighting was low. As such, the quality of the video was poor, and Detective Cieutat could not identify the two individuals.

Subsequently, the stolen truck was stopped by the police in Mississippi. Ronald Lumbley, who was in the truck, was arrested. Detective Cieutat interviewed Lumbley, who provided a written statement. Lumbley testified at trial that he and the defendant went to Gateway, and Lumbley loosened the bolt on the gate with channel lock pliers, entered

Gateway, and took the Ford truck. As Lumbley drove around to the front, the defendant opened the gate to allow Lumbley to exit the premises. Lumbley and the defendant then rode around in the truck and smoked "crack." Lumbley was asked at trial to read the written statement that he provided to Detective Cieutat to the jury. Complying with the request, Lumbley stated:

I was with Kelly Keaghey, Red, when we went into Gateway Ford in Ponchatoula, Louisiana. I drove a red Ford F-150 to the gate where Kelly had it opened waiting. We then left Ponchatoula and traveled to Picayune, Mississippi, where the vehicle was towed and impounded by the Picayune Police Department.

Teresa Anthony, the owner of the stolen truck, testified at trial that after she settled with her insurance company, which at that point owned the truck, she was asked to remove any possessions she had remaining in the truck. At the tow yard, she found a lot of property in the truck which did not belong to her, such as cigarettes, men's clothing, and tools, including a tool that "looked like a chain cutter or bolt cutter[.]" She also found a paycheck stub with the name "Keaghey" on it.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his sole assignment of error, the defendant argues the trial court erred in denying his motion for a mistrial. Specifically, the defendant contends the trial court should have granted his motion for a mistrial because a State's witness made references to other crimes evidence. The defendant also contends the trial court failed to admonish the jury.

The relevant exchange took place on cross-examination between defense counsel and Detective Cieutat:

Q. Now, when he indicated to you that Kelly Keaghey was the guy with him at Gateway, which you couldn't tell by the video,

did you do anything to confirm or corroborate what he was saying?

A. I tried to locate Mr. Keaghey several times, to no avail and then I did receive some information that placed Mr. Keaghey and Mr. Lumbley in the vehicle together at a different location, which I did physically view.

Q. Did you indicate that in the report?

A. I am not sure. It may have taken place after the fact. You can get that information from the Hammond Police Department though.

Q. Was Hammond PD involved in this other than trying to enhance --

A. -- Hammond Police Department was working several newspaper box burglaries, where they -- we had a rash of them, where they would go to the front of a convenience store and steal the newspaper box in an attempt to break it open to get the chance to get funds and that is how I was contacted.

Q. And that is Mr. Lumbley, is what you [sic] brought you to Hammond P.D.'s attention?

A. Well, the vehicle was seen at a convenience store -- that was their suspect vehicle, was a red Ford pick-up, so that is what brought it to my attention. I advised them we had a red Ford pick-up truck stolen. And then once we looked at one of the videos, we knew who was in the vehicle, but that was already after this incident had taken place.

Q. And that was the vehicle Mr. Lumbley stole?

A. It was the red Ford pick-up truck that was stolen from Gateway Ford.

At this point, the jury was retired, and defense counsel moved for a mistrial "based on the witness' testimony about another offense." Following argument, the trial court denied the motion for mistrial.

Louisiana Code of Criminal Procedure article 775 provides that a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771. The defendant contends that a

mistrial was warranted pursuant to La. Code Crim. P. art. 771¹ which states, in pertinent part:

In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:

* * * * *

(2) When the remark or comment is made by a witness or person other than a judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.

In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

A mistrial under the provisions of La. Code of Crim. P. art. 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness or of the prosecutor make it impossible for the defendant to obtain a fair trial. *See State v. Miles*, 98-2396, p. 4 (La. App. 1st Cir. 6/25/99), 739 So.2d 901, 904, writ denied, 99-2249 (La. 1/28/00), 753 So.2d 231. However, a mistrial is a drastic remedy which should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal without abuse of that discretion. *State v. Berry*, 95-1610, p. 7 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

According to the defendant, the testimony of Detective Cieutat “implicated the defendant in other crimes and was therefore highly

¹ Since the witness was not a court official, La. Code Crim. P. art. 770 does not apply. *State v. Jackson*, 396 So.2d 1291, 1294 (La. 1981).

prejudicial.” We do not agree. Detective Cieutat’s testimony did not refer to other crimes committed by the defendant. His testimony merely indicated that, in viewing a convenience store videotape involving incidents (newspaper box “burglaries”) wholly unrelated to the instant burglary, he observed Lumbley and the defendant sitting together in the stolen Ford pickup truck from Gateway. Detective Cieutat’s explanation of how he came to view the defendant and Lumbley together in the same stolen truck was in direct response to defense counsel’s inquiry of what action Detective Cieutat took to corroborate Lumbley’s account that the defendant was the person who was with him at Gateway. As such, Detective Cieutat’s responses to the questions asked of him were neither irrelevant nor immaterial.

Moreover, defense counsel, not the State, elicited the testimony from Detective Cieutat about which the defendant now complains. Such testimony is not chargeable against the State so as to provide a ground for reversal of a conviction. *State v. Jones*, 451 So.2d 1181, 1184 (La. App. 1st Cir. 1984). Further, there is no suggestion or indication that Detective Cieutat’s statement about newspaper box burglaries was made in order to prejudice the defendant; rather, he made the statement by way of explaining his actions in the course of his investigation. See *Jones*, 451 So.2d at 1184. See also *State v. Tribbet*, 415 So.2d 182, 184-85 (La. 1982); *State v. Henson*, 351 So.2d 1169, 1170-71 (La. 1977).

The defendant also contends the trial court erred in failing to admonish the jury to disregard Detective Cieutat’s testimony. However, defense counsel never requested an admonition by the trial court. Louisiana Code of Criminal Procedure article 771 mandates a request for an admonishment. As such, the trial court’s failure to instruct the jury to

disregard the remarks referring to Detective Cieutat's investigation of the defendant, absent a request, was not, in itself, reversible error. See State v. Pooler, 96-1794, pp. 38-39 (La. App. 1st Cir. 5/9/97), 696 So.2d 22, 48, writ denied, 97-1470 (La. 11/14/97), 703 So.2d 1288.

We do not find any prejudice to the defendant by Detective Cieutat's testimony. Accordingly, the trial court did not abuse its discretion in denying the defendant's motion for a mistrial.

The assignment of error is without merit.

REVIEW FOR ERROR

Under La. Code Crim. P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have found a sentencing error.

At sentencing, defense counsel informed the trial court that he had outstanding written motions for post-verdict judgment of acquittal and new trial, as well as a motion in arrest of judgment. The trial court denied the motions and immediately imposed sentences on the defendant. There is no indication from the record that the defendant waived sentencing delays. Pursuant to La. Code Crim. P. art. 873, the trial court was required to delay sentencing for twenty-four hours after denying the new trial, in arrest of judgment and postverdict judgment of acquittal motions.² However, where the defendant has not challenged the sentence imposed, the statutory mandate of a twenty-four hour delay is not so imperative as to require a

² Article 873 requires a 24-hour delay in sentencing after denial of a motion for new trial or in arrest of judgment, unless the defendant waives the delay. The article does not explicitly require a 24-hour delay in sentencing after a motion for a post-verdict judgment of acquittal has been denied. However, this court has applied the 24-hour delay in Article 873 to motions for post-verdict judgment of acquittal. See State v. Coates, 2000-1013, p. 5 (La. App. 1st Cir. 12/22/00), 774 So.2d 1223, 1226; State v. Jones, 97-2521, p. 2 (La. App. 1st Cir. 9/25/98), 720 So.2d 52, 53.

resentencing where the defendant cannot show that he suffered prejudice from the violation. See, *State v. White*, 404 So.2d 1201 (La. 1981). In this case, the defendant has not assigned as error the trial court's failure to observe the twenty-four hour delay, has not contested the sentences imposed, and has not shown he was prejudiced. Accordingly, this sentencing error is harmless beyond a reasonable doubt and does not require a remand for resentencing. See *State v. Brown*, 2003-1076, pp. 16-17 (La. App. 1st Cir. 12/31/03), 868 So.2d 775, 786, writ denied, 2004-0269 (La. 6/4/04), 876 So.2d 76; *State v. Ducre*, 604 So.2d 702, 709 (La. App. 1st Cir. 1992).

CONVICTIONS AND SENTENCES AFFIRMED.