

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 1824

STATE OF LOUISIANA

VERSUS

ERIC ANTOINNE CATES

Judgment Rendered: JUN 07 2013

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 01-09-0202

Honorable Don Johnson, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

WJW
TMT
JMC

HIGGINBOTHAM, J.

The defendant, Eric Antoine Cates, was charged by bill of information with one count of illegal possession of stolen firearms, a violation of La. R.S. 14:69.1 (count 1), one count of illegal carrying of a weapon while in the possession of a controlled dangerous substance, a violation of La. R.S. 14:95E (count 2), and one count of possession of a firearm or carrying a concealed weapon by a person convicted of certain felonies, a violation of La. R.S. 14:95.1 (count 3).¹ He pled not guilty and, following a jury trial, was found guilty as charged. The state filed a multiple offender bill of information. Following a hearing, the defendant was adjudicated as a second-felony habitual offender on count 3 and a third-felony habitual offender on count 2.² For each count, he was sentenced to fifteen years at hard labor to be served without the benefit of probation, parole, or suspension of sentence. The district court instructed that his sentences were to run concurrently with each other and any other time that he was serving. On the same day, the defendant filed a motion for new trial, which was denied. He later filed a motion to reconsider sentence, which was also denied. The defendant now appeals, arguing that the district court erred in denying his motion for mistrial. For the following reasons, we affirm the defendant's convictions, habitual offender adjudications, and sentences.

FACTS

On October 8, 2008, around 3:00 a.m., Baton Rouge City Police Corporal Thomas Banks and Corporal Jarod Averette were patrolling Interstate 10 near the College Drive exit when they came upon a vehicle driven by the defendant. The

¹ Count 1 was dismissed prior to trial.

² The defendant's habitual offender predicate offenses for count 2 were his May 14, 2003 conviction under Criminal District Court, Parish of Orleans, Docket 436-731E for possession of cocaine and his July 8, 2002 conviction under Criminal District Court, Parish of Orleans, Docket 428-909J for possession of marijuana second-offense and possession of cocaine. The predicate offense for count 3 was set forth as the defendant's July 8, 2002 conviction under Criminal District Court, Parish of Orleans, Docket 428-909J for possession of marijuana second-offense and possession of cocaine.

defendant was driving the vehicle approximately fifteen miles over the speed limit and drove across three lanes of traffic without signaling. Averette activated the police car lights, and the defendant pulled his vehicle over to the shoulder. Banks ordered the defendant out of his vehicle and met him at the front of the police car. Banks smelled the odor of marijuana on the defendant's breath and saw a clear plastic bag containing marijuana on the front driver's seat. After reading the defendant his **Miranda** rights, Banks took the defendant into custody. Banks then walked back to the defendant's vehicle to retrieve the bag of marijuana. When he reached down to get the bag, he saw a gun lying under the front driver's seat. He also saw a large amount of cash bundled up with rubber bands. He collected the bag of marijuana, the gun, and the money. The defendant acknowledged ownership of all of the items recovered.

MOTION FOR MISTRIAL

In his sole assignment of error, the defendant argues that the district court erred in denying his motion for mistrial. Specifically, the defendant contends that evidence that had previously been ruled inadmissible pursuant to a motion in limine was presented to the jury and prejudiced it into believing he was a "major drug dealer."

During the preliminary examination hearing, Corporal Banks testified that in addition to the marijuana and gun he found in the defendant's car, he also found five grams of "uncollectible" marijuana in the form of ashes and "roaches" in the ashtray and \$5,020.00 bundled up with rubber bands underneath the front driver's seat. The defendant filed a motion in limine to prohibit any testimony at trial with regard to the money found. The district court granted the motion and stated that it did not think the money was relevant.

At trial, in response to the prosecutor's question regarding what items he observed Banks collect, Averette stated, "I saw a small bag of marijuana, I saw a

Ruger .45 caliber semi-automatic handgun, and I saw a large bundle of cash.” Defense counsel moved for a mistrial on the basis that evidence that was previously ruled inadmissible had been disclosed to the jury. The prosecutor responded by saying that she instructed the officers not to discuss the money found. The district court denied defendant’s motion and issued an admonishment to the jury.

Under Louisiana Code of Criminal Procedure article 770(2), a mistrial shall be ordered when a remark or comment made within the hearing of the jury by the judge, district attorney, or a court official during trial or argument refers directly or indirectly to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible. As a general rule, Article 770 does not apply to testimony by a state witness, since a witness is not considered a “court official.” See State v. Boudreaux, 503 So.2d 27, 31 (La. App. 1st Cir. 1986). Article 770 is inapplicable in this case because the witness in question was not among the listed group of persons under the article whose remarks mandate a mistrial.

The controlling provision is Louisiana Code of Criminal Procedure article 771, which provides, 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 the 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.

Because Averette's response falls within the scope of Article 771, the granting of a mistrial was in the broad discretion of the district court. See State v. Johnson, 2006-1235 (La. App. 1st Cir. 12/28/06), 951 So.2d 294, 300. Louisiana Code of Criminal Procedure article 775 provides in part that "[u]pon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, 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." As a general matter, mistrial is a drastic remedy that should only be declared upon a clear showing of prejudice by the defendant; a mere possibility of prejudice is not sufficient. In addition, a district court judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial. State v. Ducre, 2001-2778 (La. 9/13/02), 827 So.2d 1120, 1120 (per curiam). A reviewing court should not reverse a defendant's conviction and sentence unless the error has affected the substantial rights of the accused. See La. Code Crim. P. art. 921.

Despite the granting of the defendant's motion in limine, the witness made a statement indicating that money was found in the defendant's vehicle. However, there is no evidence to suggest that the state prompted the witness to discuss the money. Banks, the officer who actually collected the money from the defendant's vehicle, made no reference to it during his testimony. Although the prosecutor asked Averette to testify as to what items he observed Banks collect, she had instructed him before trial not to discuss the money. Unsolicited and unresponsive testimony is not chargeable against the state to provide a ground for mandatory reversal of a conviction. State v. Thompson, 597 So.2d 43, 46 (La. App. 1st Cir.), writ denied, 600 So.2d 661 (La. 1992).

While Averette's reference to the money was technically a violation of the motion in limine, it was not a direct reference to other crimes evidence. Ambiguous or obscure references to other crimes made without explanation or

elaboration do not prejudice the defendant. **State v. Friday**, 2010-2309 (La. App. 1st Cir. 6/17/11), 73 So.3d 913, 933, writ denied, 2011-1456 (La. 4/20/12), 85 So.3d 1258. Because the money by itself is not evidence of other crimes and no testimony about the other marijuana found in the vehicle was presented, we disagree with the defendant that the jury would believe he was a “major drug dealer” based on Averette’s testimony. Moreover, the district court admonished the jury that it was to “disregard the question and response that it just heard regarding the finding of the cash.” This admonishment was sufficient to afford the defendant a fair trial, and there is no showing of a clear prejudice to the defendant. Therefore, a mistrial was not mandated under Articles 770 or 771, and we find no abuse of discretion in the district court’s denial of the motion for mistrial.

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to Louisiana Code of Criminal Procedure article 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and “error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.” La. Code Crim. P. art. 920(2).

The district court did not wait twenty-four hours after denying the motion for new trial before imposing sentence. See La. Code Crim. P. art. 873. However, the issue was neither assigned as error, nor was the sentence challenged, nor does the defendant cite any prejudice resulting from the court’s failure to delay sentencing. Thus, any error which occurred is not reversible. See State v. Augustine, 555 So.2d 1331, 1334-35 (La. 1990).

CONVICTIONS, HABITUAL OFFENDER ADJUDICATIONS, AND SENTENCES AFFIRMED.