NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0078**
VERSUS	*	**COURT OF APPEAL**
JERRY LEWIS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-829, SECTION "A"
HONORABLE CHARLES L. ELLOIE, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF JUDGE CHARLES R. JONES, JUDGE MICHAEL E. KIRBY, AND JUDGE MAX N. TOBIAS, JR.)

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CONVICTION AND SENTENCE AFFIRMED.

On 21 September 2000, the defendant, Jerry Lewis, was charged by bill of information with four counts of armed robbery, two counts of attempted armed robbery, and possession of a firearm by a convicted felon. He pled not guilty at his arraignment. Several hearings were held on defense motions, and the trial court denied the motions to suppress the identifications and found probable cause on all counts.

On 27 September 2001, counts three, six and seven of the bill of information, dealing with armed robbery, were tried to a jury. Lewis was found guilty as charged of armed robbery on each count. On 6 November 2001, the trial court sentenced the defendant to thirty years at hard labor without benefit of parole, probation, or suspension of sentence as to each count. The sentences were to run concurrently. The trial court granted defendant's motion for appeal.

STATEMENT OF FACTS

On 22 May 2000, Kenneth Smith, the victim, was entering his Burgundy Street home when a subject came from across the street with a gun. The assailant pointed a gun at Mr. Smith and told him not to yell. He asked for money, and Mr. Smith gave him what he had in his front pocket. The perpetrator patted the victim's pockets and told him to retrieve his wallet. The victim opened his wallet and showed the gunman that it did not contain any money. The gunman then requested the victim's watch. Mr. Smith removed it and handed it to the gunman, who then told Mr. Smith to go into his house.

Mr. Smith described the perpetrator as being five feet eleven inches tall, 170 pounds, medium complexion with short hair. Mr. Smith believed he was an older person and that he had missing teeth.

On 7 June 2000, Michael McDonald and Brian Thompson were walking on Mandeville Street near the intersection of Burgundy Street. A subject was walking on the opposite side of the street, who then crossed over and began walking in their direction. When the perpetrator was some four to five feet in front of the two he suddenly stopped, and Mr. McDonald realized he had a gun. The perpetrator told them to give him their money. Mr.

McDonald gave the assailant his pocket change. Mr. Thompson opened his billfold and threw a few dollars onto the ground. The perpetrator demanded that he pick up the money, but he refused. Mr. McDonald then picked up the money and gave it to the robber. While Mr. McDonald was retrieving the money from the ground, the perpetrator put his gun in Mr. Thompson's back and checked his pockets. The perpetrator then told the two to turn around and start walking and not to look back. After going only a few paces, Mr. McDonald realized that his friend had stopped and turned around. Mr. McDonald then heard a gunshot and he ducked and hid behind a car. He then tried to grab and pull Mr. Thompson down. Mr. Thompson testified that when the perpetrator was in the middle of Mandeville Street, he turned and fired a shot at he and Mr. McDonald. Mr. Thompson hid behind a tree. At that point, the perpetrator began running, and Mr. Thompson chased after him briefly.

Mr. McDonald described the perpetrator as being older, or approximately fifty years old, with a large belly, very bad teeth, and wearing a New York Yankees baseball hat.

On 13 June 2000, Detective Harrison Gordon and his partner were on patrol in the Faubourg-Marigny section of New Orleans when Detective Gordon saw the defendant discard a handgun and a baseball cap to the

ground as the officers approached. The defendant was immediately detained, and the gun and hat were recovered.

Detective David Hunter, assigned to the Fifth District robbery squad, conducted the follow-up investigation of the McDonald/Thompson robbery. Detective Hunter learned of the defendant's arrest and because Lewis fit the description of the perpetrator and was in possession of a New York Yankees baseball cap, he compiled a photographic lineup. Upon viewing the lineup, both victims positively identified the defendant. At trial, both victims identified Lewis as the man who robbed them.

On 15 June 2000, Detective Chris Cambiotti compiled a photographic lineup containing the defendant. Detective Cambiotti showed the lineup to Mr. Smith at Mr. Smith's home, and he positively identified Lewis as the man who robbed him. Mr. Smith also identified Lewis at trial.

ERRORS PATENT

A review of the record for errors patent reveals none.

ASSIGNMENT OF ERROR

In his sole assignment of error the defendant contends the trial court erred in denying his motion for mistrial based upon the prosecution's reference to other crimes during closing argument. The following statement

was made by the prosecutor:

> BY MR. BURNS: … What he wants you all to do is provide the
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> > excuses, provide the holes, provide reasonable doubt in a case where all the witnesses have come in and said “that’s the man who robbed us” early on. And the witnesses have testified that they never, ever, ever, wavered in who they said robbed them. One of the gentlemen even said that he wouldn’t want the wrong person to be convicted. But he said, “That man sitting over there is the person that robbed me.” “Well how does he look different?” “He’s much more clean-shaven today.” His hair is different. They described that. Mr. Kenneth Smith even told you that it’s forever burned in his mind and in his memory. Let somebody stick a gun in your face at 10, 11, 12 o’clock at night and tell you to give it up. You think you’re not going to remember what they looked like? You think you’re not going to remember something about him? As he stood there holding the gun in my face, I noticed he had a bruise on his nose. As he stood there holding the gun in my face, I noticed a mole on his lip. As he stood there holding a gun in my face, I noticed he had braces. And then when you sit down and they show you that photo lineup, “That’s him right there.” If this were a rape case, these same questions would be asked. Why didn't you fight the guy off? You consented, didn't you? Now you’re just saying he raped you.
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> BY MR. FONTENELLE: Your Honor, I would object to bringing in any type of rape case.
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> BY THE COURT: Overruled. This is argument, Mr. Fontenelle.
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> BY MR. FONTENELLE: But, Judge, to bring in a rape matter is a highly emotional issue.
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> BY THE COURT: No, he's not bringing in a rape matter. He's just

dealing with an analogy.

BY MR. FONTENELLE: I just don't want a rape analogy anywhere near this case. It's too emotional.

* * *

BY MR. BURNS: … Same cap. Bold and brazen enough to still have the same cap on when he committed the armed robberies. They don't care. "They not going to come to court to testify. They scared of me. Because they remember I pulled that gun out on them. I told them, 'Don't look at me.' I even called them outside their names." The infamous "B" word. Trip and get flipped like a pancake. The DA will be representing you in court after they bring flowers to your wake for being murdered during the course of an armed robbery.

BY MR. FONTENELLE: Your Honor, again I'm going to object to a murder being brought up here in an armed robbery. Same issue.

La. C.Cr.P. art. 770 mandates a mistrial, upon motion of a defendant, "when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in 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."

The prosecution's remarks were not "direct or indirect" references to other crimes committed by defendant. La.C.Cr.P. art. 770. As the colloquy reflects, the statements were mere analogies between the crime of armed

robbery and other crimes. Furthermore, defense counsel did not request a mistrial on the basis of "other crimes evidence," but entered a general objection based on the emotional character of the statements.

Lewis further contends that the arguments violated La. C.Cr.P. art. 774, which provides that the scope of closing argument "shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case. The argument shall not appeal to prejudice. The state's rebuttal shall be confined to answering the argument of the defendant." However, a prosecutor retains "considerable latitude" when making closing arguments. *State v. Taylor*, 93-2201 (La.2/28/96), 669 So.2d 364, 374. Further, the trial judge has broad discretion in controlling the scope of closing arguments. *State v. Casey*, 99-0023, p. 17 (La.1/26/00), 775 So.2d 1022, 1036. Even if the prosecutor exceeds the bounds of proper argument, the court will not reverse a conviction unless "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. *Id*.; *State v. Ricard*, 98-2278, p. 5 (La. App. 4 Cir. 1/19/00), 751 So.2d 393, 396.

Although the prosecutor's comments were not relevant, they are not an attempt to suggest to the jury that if they did not convict the defendant "more ominous events could transpire –perhaps a rape or murder," as the defendant

suggests. The last comments by the prosecutor, although difficult to characterize, appear to be an attempt to suggest that the defendant fired the gun in an effort to dissuade the victims from reporting the crime or testifying in court. Even as such, they are irrelevant. This case concerned armed robberies. Although the defendant fired his weapon during one of the robberies, one cannot see the pertinence of discussing either murders or rapes during argument in this case. However, the evidence of the defendant's guilt presented at trial was substantial, and other than the reference to "more ominous events," the defendant does not suggest how the prosecutor's comments influenced the jury or contributed to the verdict. Thus, the error, if any, was harmless. La. C.Cr.P. art. 921. The assignment of error lacks merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.