NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2009-KA-0964**
VERSUS	*	
		COURT OF APPEAL
ROBERT L. WILLIAMS	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 476-208, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., and Judge David S. Gorbaty)

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CONVICTION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING; MOTIONS DENIED.

NOVEMBER 24, 2010

Defendant Robert Williams was charged by bill of information on February 26, 2008, with two counts of armed robbery with a dangerous weapon, a handgun, a violation of La. R.S. 14:64/64.3. Defendant pleaded not guilty at his February 29, 2008 arraignment. The trial court denied defendant's motion to suppress the evidence at a June 6, 2008 hearing. Defendant was tried by a twelve-person jury on November 3 and 5, 2008, and found guilty as charged as to both counts. The trial court denied defendant's motion for new trial on November 25, 2008. The trial court denied defendant's motion for post-verdict judgment of acquittal on December 4, 2008, and on that date sentenced defendant to ninety-nine years at hard labor on each of the two counts, without benefit of parole, probation or suspension of sentence, with both counts to run concurrently. That same date the trial court denied defendant's oral motion for reconsideration of sentence. Defendant filed a notice of appeal on December 12, 2008, on which date the trial court granted it.

The record was lodged with this court on July 22, 2009 and supplemented on January 2010 with transcripts of various proceedings.

Defendant filed a pleading in this court on January 6, 2010, entitled "Previously Filed Motion to Remand Supplemental Exhibits 'I,' 'J,' 'K,' 'L,' 'M' and 'N'." He filed a second one in this court on January 20, 2010, entitled "Motion for Rehearing and/or Request for Reconsideration of the Previously Denied Motion to Remand and/or Request for Review of this Particular Pleadings [sic], Before a Three Judge Panel." A third pleading filed by defendant in this court, on May 7, 2010, was entitled "Previously filed Motion to Remand 2nd Supplemental Exhibits 'O, P, Q, R and S'."

FACTS

Defendant was convicted for the January 21, 2008 armed robberies of Paul Currer and Andrew Francis, while defendant was armed with a firearm.

New Orleans Police Department Senior Police Dispatcher Stephanie Briscoe identified an audiotape of a 911 call from Andrew Francis about an armed robbery with a gun. The call was received at 8:54 a.m. on January 21, 2008. The tape was played for the jury.

Paul Currer testified that on January 21, 2008, he was working with a group from his Alexandria, Virginia church with the Episcopal Diocese of Louisiana to repair homes in the New Orleans area damaged during Hurricane Katrina. Currer and another individual, Andy Francis, picked up some framing lumber that day in a pickup truck and drove it to a home being repaired. Both men went inside, but Francis left to begin carrying in the lumber. Currer heard someone outside say "stop." He walked to the front room and observed defendant pointing a semiautomatic handgun at Francis. Currer said he looked at defendant and, because defendant had a pretty clean cut appearance, Currer initially thought defendant was a neighbor who perhaps thought that Currer and Francis had gotten

into the house illegally. He told defendant they were there to drop off lumber and would be happy to leave if he wanted them to. At that point defendant told them to back up, and they backed up into the inner room. He told the men that they did not come into his neighborhood unless they paid him money. Defendant ordered the men to give them their stuff. Francis tossed his wallet at defendant's feet; defendant picked it up and asked if the fifteen dollars inside was all he had. Currer told defendant not to worry, that he had money. He took out his wallet and put about one hundred dollars in cash at defendant's feet. Defendant asked if that was all they had, and they replied in the affirmative.

Defendant again told the men not to come into his neighborhood unless they paid money. He ordered the two to stay there, not to do anything stupid, and not to call the police. Currer and Francis left shortly thereafter and drove away. Francis contacted his boss, and they were directed to a McDonald's Restaurant where police were waiting for them. He described defendant to the officers as being about 5'8" to 5'9" tall, in his late twenties, with short hair. Several hours later police contacted him, and he went to a location where officers had an individual in custody. Currer identified defendant when he got to within approximately thirty yards of him. He said he was absolutely certain defendant was the person who robbed him.

Currer said the lighting was good; that it was a bright clear day; and that the lighting was also good after defendant backed them further into the residence. He said defendant had a pretty clean cut appearance, with short hair. Defendant was wearing a white jacket with red stripes on the top, extending down the sleeves. He said it was open, and he could see some type of writing on the inside. Currer identified a jacket shown to him as the one defendant was wearing at the time of

the robbery. The jacket presented to him in court had stripes on the shoulders and sleeves and writing on the inside.

Currer testified that he was absolutely convinced defendant was the person who robbed him. He conceded on recross examination that at some point in his life he had mistakenly seen someone and believed it was a friend, only to realize it was not.

Andy Francis, a college student from Iowa who, on the day of the robbery, was working with the Episcopal Diocese disaster response leading crews rebuilding homes in New Orleans, testified similarly to Paul Currer. He recalled it being pretty light outside, and that it was about 8:30 a.m. He described the robber as being approximately six feet tall, weighing about two hundred pounds, wearing a white zippered jacket with red writing across it, dark baggy pants, and dark shoes. The robber was clean cut with short hair. Francis identified defendant in court. Francis stated that defendant was about thirty feet away when defendant first got out of the police car at the one-on-one identification procedure. He said that at that time he was pretty sure defendant was the robber, but was not one hundred percent certain. When the officers moved defendant to about fifteen feet away, he still was not one hundred percent certain. Francis said defendant was kind of hunched over. Francis positively identified defendant after police officers told defendant to stand up straight. Francis said he was one hundred percent certain defendant was the person who robbed him. He said defendant had the same face, the same build, was clean cut, and was wearing a white jacket with a zipper and red writing, baggy pants, and dark shoes. Francis identified the white jacket with the red writing across the front of it. Francis admitted that he did not notice

that the jacket the robber was wearing had red stripes going down the sleeves, like the one in evidence.

On cross examination Francis conceded that, although he had described to police the pants the robber was wearing as baggy and black, the ones in evidence were not black or extremely dark colored. Nor did he notice embroidery on the fly area and cuffs of the jeans in evidence. Francis said he was more focused on the gun. Francis stated that the lighting in the room of the residence where he was robbed came from four windows, two on each side of the room. Francis confirmed that when the police came to pick him up to view defendant, an officer told him they had somebody who fit the description. Defendant was handcuffed during the viewing. Francis confirmed that there were ten to fifteen police cars at the viewing and an estimated thirty to thirty-five police officers, all surrounding defendant, with three of four officers standing with him. He said Currer was removed from his presence before Francis made an identification of defendant. He confirmed that the police essentially told him that unless he was one hundred percent certain defendant was the person who robbed him, defendant would not be prosecuted. Francis confirmed that he was sure that in his lifetime he had seen someone he had mistakenly believed was a friend.

New Orleans Police Detective Mary Colon[1] conducted the follow-up investigation in the robbery of Paul Currer and Andy Francis. She took the victims' statements at a McDonald's restaurant, then drove to the scene and canvassed the area for suspects, having other units do the same. She had returned to the station to type her report when she was notified that officers had a suspect

[1] Although Det. Colon's last name is spelled "Cologne" in the trial transcript, she spelled it "Colon" throughout her supplemental police report that is contained in the record.

that fit the description. She was present when the two victims viewed the defendant, each positively identifying him as the person who robbed them. She recalled that defendant was wearing dark blue denim jeans and a white sweatshirt with red writing on it. She said he did not have anything under the sweatshirt at the time the identifications were made. But she said he had been wearing a white undershirt and red tee-shirt under the sweatshirt.

Det. Colon confirmed that after she spoke to the victims she broadcast a description of the robber as a light complected black male, five feet eight inches to five feet nine inches tall, twenty-eight to thirty years old, weighing approximately one hundred and eighty pounds, wearing dark baggy jeans and a white sweatshirt with red writing. She confirmed on redirect examination that the 911 operator's incident log did not reflect that Andy Francis had reported the robber as a light-skinned black male. Det. Colon confirmed that the victims did not say anything about yellow and red stitching on the pants defendant was wearing at the time he was arrested. She was shown the jacket defendant was wearing at the time he was arrested, and she described the writing on it as looking like red and black. Det. Colon confirmed that neither of the victims said anything about a red stripe on the jacket running from the collar to the wrist. She confirmed that, in her opinion, the red stripes covered a greater area of the garment than any red writing. The victims described dark shoes, with no mention of white soles. Det. Colon said there were perhaps eight or nine police cars at the location where the victims made their identifications. She did not recall Andy Francis say: "I cannot tell you that's him." She did not recall Francis telling her to make defendant stand up straighter. She did not recall defendant being in shackles, only handcuffs. She recalled Paul

Currer trying to identify defendant as soon as he got out of the vehicle, before he had walked closer to defendant.

Det. Colon confirmed on cross examination that neither victim mentioned to her that they believed the robber was left-handed. Neither said anything about the robber stuttering, although both clearly said he told them that they did not come into his neighborhood without paying him. The detective confirmed that the address recorded as defendant's home address was uptown, and that the robbery occurred on Duels Street around North Broad Street. Defendant was arrested on North Prieur Street, approximately eight blocks from the McDonald's restaurant on Elysian Fields Avenue and Interstate 10 where the victims identified him. Det. Colon confirmed that upon arresting defendant she noted that he had a gold tooth. She confirmed on redirect examination that she asked the victims whether or not the robber had gold teeth, and that they said they did not know. She said the victims were shaken up. Det. Colon confirmed that defendant had no money or a gun on his person when arrested. Det. Colon said she did not look at defendant's cell phone to see what kind of activity had been taking place on that cell phone at about the time of armed robbery.

Bobbie Williams, defendant's mother, testified that she sat overnight for an elderly man who lived near the intersection of Audubon and Broadway Streets. On January 21, 2008, she got off work at 8:05 a.m. or 8:10 a.m. and went home. Williams identified a copy of a paycheck purportedly issued to defendant, dated "the 18th." She testified that the check had not been cashed at the time defendant was arrested. Defendant came in with someone named 'Diego" between 8:10 and 8:15 a.m. They all ate some leftover soup. She said they finished eating around 9:00 or 9:30 a.m., and that defendant left the house between 9:45 and 10:00 a.m.

Williams recognized the clothes defendant was wearing at the time he was arrested—his jacket, shirt, pants and belt—and said he was wearing them when he left the house that morning after breakfast. Williams denied that she would commit perjury or make up a false paycheck story. Four individuals came into the courtroom and were identified by Ms. Williams—two of her granddaughters, Lakenia and Lashaye Williams; her niece, Alicia Bester; and Charles Yates, defendant's friend. Williams confirmed that all four of these individuals were at her home on the morning of January 21, 2008, with defendant.

Alisa Bester, defendant's cousin, testified that she first saw defendant around 6:30 or 7:00 a.m. on January 21, 2008, at her aunt's house trailer, which was located at 9001 Belfast Street. She was talking to defendant's mother at about 8:20 a.m. and heard her fussing at someone, whom defendant's mother identified to her as defendant, for not bringing a bowl back to her residence. Bester later saw defendant at his mother's home, where she went to get some leftover soup. Bester went there about 8:30 a.m. When asked who was there, she said it was Lakenia and Lashaye Williams, Charles Gates or Yates, and herself. She did not say defendant was there when she got there, or when he came in. She said he left around 9:25 a.m. She was asked why she went to see defendant. Bester replied that it was because she asked him for a couple of dollars; that she always asked him for money; and that he always gave her money. She said he worked at the river, with Coastal Cargo. Bester admitted having a prior conviction for possession of marijuana. Asked on redirect examination where defendant was at 8:30 a.m. on January 21, 2008, Bester replied that he was at his mother's home eating a bowl of soup.

ERRORS PATENT

A review of the record reveals one error patent on the face of the record. The trial court either failed to sentence defendant to an additional period of five years imprisonment pursuant to La. R.S. 14:64.3, or failed to specify that it did so. Thus, the sentence is illegally lenient.

Defendant was convicted of two counts of armed robbery with a dangerous weapon, a handgun, a violation of La. R.S. 14:64 and 64.3. He was properly sentenced under La. R.S. 14:64, the armed robbery statute, to the maximum term of imprisonment, ninety-nine years on each count, without benefit of parole, probation or suspension of sentence, the two sentences to run concurrently.

La. R.S. 14:64.3 is a sentencing enhancement statute that states, in pertinent part:

> A. When the dangerous weapon used in the commission of the crime of armed robbery is a firearm, the offender shall be imprisoned at hard labor for an additional period of five years without benefit of parole, probation, or suspension of sentence. The additional penalty imposed pursuant to this Subsection shall be served consecutively to the sentence imposed under the provisions of R.S. 14:64.

In an unpublished opinion, State v. Hayes, unpub., 2007-1280 (La. App. 4 Cir. 5/28/08), the defendant was convicted of an armed robbery committed with a firearm and was sentenced to ten years imprisonment, the minimum sentence under La. R.S. 14:64. Because the minimum sentence under La. R.S. 14:64 had been imposed, it was clear the trial court had not imposed an additional five-year sentence under La. R.S. 14:64.3 for commission of the armed robbery with a firearm. This court remanded the matter to the district court for imposition of the additional five-year sentence under La. R.S. 14:64.3.

In State v. Burton, 2009-0826 (La. App. 4 Cir. 7/14/10), --- So. 3d ---, 2010 WL 2780383, this court distinguished Hayes, in that the defendant in Burton was sentenced to thirty years in prison after being convicted of armed robbery with a firearm. As in the instant case the trial court either failed to sentence the defendant to an additional five years in prison pursuant to La. R.S. 14:64.3 or did not specify that it had done so. This court noted that in cases where the minimum sentence had not been imposed the Louisiana Second, Third, and Fifth Circuit Courts of Appeal had held that the sentences were indeterminate, requiring that they be vacated and the cases "remanded for resentencing according to law for clarification of whether the defendant's sentence includes any additional punishment under La. R.S. 14:64.3." Burton, 2009-0826 at p. 2, --- So. 3d at ---, 2010 WL 2780383 at p. 2, citing State v. Weaver, 38,322 (La. App. 2 Cir. 5/12/04), 873 So. 2d 909; State v. McGinnis, 2007-1419 (La. App. 3 Cir. 4/30/08), 981 So. 2d 881; State v. Price, 04-812 (La. App. 5 Cir. 3/1/05), 909 So. 2d 612. In Burton, this court vacated the defendant's sentence and remanded the matter for resentencing.

Therefore, in the instant case, for the foregoing reasons, we hereby vacate the defendant's sentence and remand the matter for resentencing.

ASSIGNMENT OF ERROR NO 1

In his first assignment of error defendant argues that the trial court erred in denying his motion to suppress the identification.

A trial court's determination of the admissibility of identification evidence is entitled to great weight and will not be disturbed in the absence of an abuse of discretion. State v. Stovall, 2007-0343, p. 17 (La. App. 4 Cir. 2/6/08), 977 So. 2d 1074, 1085.

The defendant bears the burden of proving that an out-of-court identification was suggestive and that there was a substantial likelihood of misidentification as a result of the identification procedure. State v. Ballett, 98-2568, p. 17 (La. App. 4 Cir. 3/15/00), 756 So. 2d 587, 597; State v. Martello, 98-2066, p. 8 (La. App. 4 Cir. 11/17/99), 748 So.2d 1192, 1198. A defendant must first prove that the identification was suggestive. State v. Thibodeaux, 98-1673, pp. 20-21 (La. 9/8/99), 750 So. 2d 916, 932. An identification procedure is suggestive if it focuses attention on the defendant. State v. Laymon, 97-1520, p. 16 (La. App. 4 Cir. 3/15/00), 756 So. 2d 1160, 1172.

Thus, one-on-one identifications, like the one utilized by police in the instant case, are generally not favored, although such identification procedures are permissible under certain circumstances. State v. Nelson, 2008-0584, p. 5 (La. App. 4 Cir. 12/17/08), 3 So. 3d 57, 60. One-on-one identifications are permissible, for example, when the accused is apprehended within a relatively short period of time after the occurrence of the crime and is returned to the scene for immediate identification. State v. Robinson, 2009-0922, p. 2 (La. App. 4 Cir. 3/3/10), --- So. 3d ---, ---, 2010 WL 830964, p. 1. Immediate confrontation assures the reliability of the identification (given that the perpetrator's appearance is fresh in the witness's mind), lessens the possibility that the perpetrator's clothes or appearance will be changed, and insures early release of innocent subjects. Nelson, 2008-0584, pp. 5-6, 3 So. 3d at 61.

In addition to suggestiveness, a defendant must prove that there was a substantial likelihood of misidentification as a result of the identification procedure. Robinson, 2009-0922 p. 3, --- So. 3d at ---, 2010 WL 830964 at p. 2. Despite the existence of a suggestive pretrial identification, an identification may

be permissible if there does not exist a "very substantial likelihood of irreparable misidentification." In Manson v. Brathwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 2254, 53 L.Ed.2d 140 (1977); State v. Leger, 2005-0011, p. 59 (La. 7/10/06), 936 So. 2d 108, 151. Under Manson, the factors which courts must examine to determine, from the totality of the circumstances, whether the suggestive identification presents a substantial likelihood of misidentification include: 1) the witness's opportunity to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of his prior description of the criminal; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and the confrontation. Manson, 432 U.S. at 114-115, 97 S. Ct. at 2254.

In the instant case, the one-on-one identifications by the two armed robbery victims were made, according to victim Paul Currer, several hours after the robbery. Andy Francis confirmed that police told him that they had a suspect fitting the description of the person who robbed him and Currer. Defendant was the sole suspect at the one-on-one identification viewing conducted on the street, with a number of police cars and police officers present.

In Robinson, supra, the victim was robbed of his truck at gunpoint by two men while he was stopped at an intersection. While he was reporting the crime in a 911 call an officer arrived at the scene and informed him that his truck had crashed; the two occupants had fled; and that one of them had been apprehended. The victim was transported to the crash scene by a friend. Some twenty to twenty-five minutes later an officer informed him that one of his assailants had been captured and drove the victim to a location one block away where he viewed the defendant bleeding, handcuffed, and shirtless, standing on the St. Claude Avenue

neutral ground surrounded by twenty police officers and many National Guardsmen. A light was shone upon the defendant. The victim positively identified the defendant without hesitation.

The defendant in Robinson was convicted and, on appeal, argued that the trial court had erred in denying his motion to suppress the identification. This court found the one-on-one or "showup" identification "was clearly suggestive," given that the defendant was placed, handcuffed and bleeding and surrounded by police and National Guardsmen, in the middle of a neutral ground for the victim to identify, and that shortly before the identification one of the officers told the victim that the police had apprehended one of the men who robbed him. Robinson, 2009-0922, p. 11, --- So. 3d at ---, 2010 WL 830964, p. 6. However, this court went on to find that, even though the identification procedure was suggestive, there was not a substantial likelihood of misidentification, considering the totality of the circumstances and the factors enumerated in Manson, supra.

The identification procedure employed in the instant case was similar to that employed in Robinson, and the circumstances were similar, except that in the instant case police did not inform either of the two witnesses that in fact, they had the perpetrator, only that they had a suspect fitting the description given by one or both of the victims. Even assuming the identification procedure in the instant case was suggestive, for the following reasons it cannot be said that, considering the totality of the circumstances, in light of the five Manson factors, there was a substantial likelihood of misidentification.

The first Manson factor is the witness's opportunity to view the criminal at the time of the crime. Victim Paul Currer testified at trial that the lighting was good when he first saw defendant in the front room of the residence; that it was a

bright clear day; and that the lighting was also good after defendant backed them further into the residence. Currer estimated he was only ten to fifteen feet away from defendant when he first observed him holding a gun on Francis. Currer testified that he viewed defendant from the front. Victim Andy Francis testified at trial that the lighting in the room of the residence where he was robbed came from four windows, two on each side of the room. He also said light was coming in through the front door. He was facing defendant. Francis estimated that from the time he first encountered defendant to when defendant left ten or fifteen minutes elapsed. The witnesses observed defendant bend down twice, first to pick up Francis's wallet and then to pick up Currer's wallet. Currer testified that he viewed defendant from the front. The evidence shows that the witnesses had an excellent opportunity to view the criminal at the time of the crime.

As for the degree of attention by the victims at the time of the crime, and the description of the robber given by the victims, Paul Currer testified that after the robber left Andy Francis was shaking. However, Francis testified that he paid attention to defendant's face and the gun. It was obvious from the testimony that the victims paid attention to the clothing worn by and the physical attributes of the robber. Both Francis and Currer testified to general details of the robber's appearance that led to police apprehending defendant. Paul Currer reported that the robber was wearing dark pants, while Andy Francis described them as black. Francis testified at trial that on the day of the robbery they looked black to him.

Both victims said the robber was wearing a white jacket with red writing on it. The red writing on the jacket was red lettering with a black outline. Neither victim noticed the black outlining, although Det. Mary Colon confirmed in her testimony that her view of the lettering was that it was red and black. Nor did

either victim notice that a red stripe ran from the collar of the white jacket down the entire length of the sleeve to the cuff, although Det. Colon confirmed during her cross examination that in her opinion the red stripes covered a greater area of the garment than any red writing. However, Paul Currer testified that he noticed red stripes on the shoulder of the jacket that extended to the sleeves, and both victims identified during trial a jacket with red and black lettering and red stripes running down the sleeves as the one defendant was wearing at the time of the robbery. Andy Francis apparently initially reported to the 911 operator that the robber was light-complected, but conceded at trial that defendant was dark-complected.

Neither victim noticed that the jeans defendant was wearing at the time of his arrest had contrasting color embroidery on the fly, rear pockets and the cuffs. Defendant was wearing navy-colored shoes with white soles at the time of his arrest. Neither victim noticed that the robber's shoes had white soles, although both described the shoes as dark. Neither victim noticed that the robber had a gold tooth, although Det. Colon specifically asked them if they noticed whether the robber had any gold teeth. The detective said defendant had one gold tooth.

Paul Currer described the robber as being in late twenties, about 5'8" tall, and weighing approximately 160 pounds. The robber had a clean cut appearance, which struck Currer. Francis confirmed on cross examination at trial that he had described the robber as 5'8" to 5'9" tall, 28 to 30 years old, and weighing 180 pounds. Francis conceded at trial that defendant was dark-complected. Det. Colon conceded at trial that after she spoke to the witnesses she gave a description of the robber as a black male with a light complexion, 5'8" to 5'9" tall, 28 to 30 years

old, about 180 pounds. However, there was no independent evidence introduced by either the State or defendant as to defendant's height, weight or age.

The record reflects that the victims paid average attention to defendant during the robbery, and that their descriptions were fairly accurate. Both victims were positive of their identifications of defendant at the confrontation. Andy Francis testified that when he first saw police take defendant out of a police car, and he was about thirty feet away, he was pretty sure defendant was the robber, but was not one hundred percent certain. When the officers moved defendant to about fifteen feet away, he still was not one hundred percent certain. Francis said defendant was kind of hunched over. Police officers told defendant to stand up straight and Francis positively identified him. The identifications were made several hours after the robbery.

A review of the totality of the circumstances in light of the five Manson factors does not show that there was a substantial likelihood of misidentification of defendant. Therefore, the trial court properly denied defendant's motion to suppress the identification.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error defendant argues that the trial court erred in denying his motion in limine seeking to have the victims' status as "church volunteers" excluded. The victims were out-of-state volunteers working with different Episcopal Church groups rebuilding homes damaged by Hurricane Katrina.

Defendant argues that the prejudicial impact of having Francis and Currer's testimony "buttressed" by their status as "Christians" helping New Orleans rebuild "outweighed the marginal, if any relevance, [sic] their status had."

Defendant cites La. C.E. art. 401, defining relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Defendant also cites La. C.E. art. 403, providing that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."

A trial court's ruling as to relevancy will not be disturbed absent a clear abuse of discretion. State v. Bell, 2005-0808, p. 12 (La. App. 4 Cir. 12/6/06), 947 So. 2d 774, 781; State v. Lewis, 97-2854, p. 20 (La. App. 4 Cir. 5/19/99), 736 So. 2d 1004, 1017. A trial court is vested with much discretion in determining whether the probative value of relevant evidence is substantially outweighed by its prejudicial effect. Bell, supra; State v. Hall, 2002-1098, p. 8 (La. App. 4 Cir. 3/19/03), 843 So. 2d 488, 496.

The evidence that the victims were working with their church organizations to rebuild homes in New Orleans following Hurricane Katrina's devastation, and in particular, the home in which they were present when robbed, was relevant in that it had a tendency to make the existence of other facts that were of consequence to the determination of the action more probable than it would be without the evidence simply because the evidence explained why the two victims were present in the home in which they were robbed. Had the jury simply been informed that these two individuals from out of state were robbed while in a residence at 1814

Duels Street, the jury might have inferred something negative, thus affecting the State's case.

Closely related to this line of thought is that the evidence was part of the *res gestae*, and was necessary "to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." State v. Brewington, 601 So.2d 656, 657 (La. 1992), citing McCormick, Law of Evidence 448 (2d ed. 1972). The test of *res gestae* or integral act evidence is not simply whether the State might somehow have structured its case to avoid any mention of the evidence, but whether doing so would have deprive its case of narrative momentum and cohesiveness, "with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict." State v. Colomb, 98-2813, p. 4 (La. 10/1/99), 747 So. 2d 1074, 1076, quoting Old Chief v. United States, 519 U.S. 172, 186, 117 S. Ct. 644, 653, 136 L.Ed.2d 574 (1997).

In addition, even assuming the trial court erred in denying defendant's motion in limine as to this evidence, the error was harmless, given that defendant fails to suggest how the guilty verdict rendered in this case was attributable in any way to such evidence. See State v. Robertson, 2006-1537, p. 9 (La. 1/16/08), 988 So. 2d 166, 172 (an error is harmless if it can be said beyond a reasonable doubt that the guilty verdict rendered in the case was surely unattributable to that error). Considering the record evidence in the case, it can be said beyond a reasonable doubt that the guilty verdict rendered in this case was surely unattributable to the admission of testimony that the victims were in New Orleans working with their church groups rebuilding homes damaged by Hurricane Katrina.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, defendant argues that the trial court erred in refusing to permit him to "adduce the Text Messages and Their Time Stamps into Evidence."

Defendant admits that the trial court allowed into evidence the cellular telephone call log provided by the cellular provider. This call log reflected the times of calls and text messages. Defendant argues that the "internal call record" could have and would have been matched to this call log. The record contains a post-verdict November 26, 2008 *per curiam* in which the trial court read into the record the text messages at issue. All of the text messages sent that morning before and after the robbery (eight of them, one being a repeat send) were apparently sent by defendant to his girlfriend.

Defendant submits that the trial court's action prevented him from "being able to demonstrate to the jury that shortly before and after the robbery he was alleged to have committed, that he was texting **love messages** to his girlfriend." (Emphasis in original).

Defendant apparently sought to admit the text messages to show that he had a loving character and/or would not have committed a double armed robbery shortly after sending loving text messages to his girlfriend. However, as the State notes, if offered to establish defendant's good character the evidence clearly would have been inadmissible if for no other reason than that under the circumstances of the instant case proof of character has to be made by testimony as to general reputation only. La. C.E. art. 412. In addition, defendant fails to establish that the content of "love messages" was relevant to the issue of whether he committed the

armed robberies, independent of the date and times the messages were sent, which the jury was apprised of via the cellular phone records.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 4

In his fourth assignment of error, defendant argues that the trial court erred in refusing to permit Det. Colon to testify what defendant told her about where he lived and as to what he stated in response to the accusation that he committed the armed robbery.

During his cross examination of Det. Colon, defense counsel asked her whether defendant told her that he lived at 1338 South Genois Street. Det. Colon was uncertain and was presented a rights-of-arrestee form by defense counsel marked as Defense Exhibit 4. Defense counsel asked if the form contained defendant's address, and Det. Colon replied that the address was recovered off of his last arrest history. Defense counsel immediately moved for a mistrial, which was denied.

After the trial court admonished the jury to disregard any alleged check of an alleged arrest record, defense counsel again sought to elicit testimony from Det. Colon about defendant's address, asking the detective if she was going to tell the jury under oath that she did not recall talking with defendant about where he lived. Defense counsel asked a leading question to that end, and the State objected on the ground of hearsay—as to what defendant told the detective about where he lived. The trial court sustained the objection. Defendant sought to present evidence that he told the officer he lived uptown, a good distance away from the scene of the robbery.

In sustaining the objection the trial court noted the self-serving nature of the hearsay testimony, citing, *inter alia*, State v. Guillory, 373 So. 2d 133 (La. 1979). In Guillory, the State gave pretrial notice that it intended to introduce two statements by the defendant. In the first statement the defendant denied any implication in the brutal rape and shooting death of the victim. In the second statement the defendant admitted raping and shooting the victim. At trial the State introduced the second statement, but not the first. When the defendant sought to introduce the first statement, the State objected, and the trial court sustained the objection.

On appeal, the defendant argued, *inter alia*, that to introduce one statement and not the other was contrary to La. R.S. 15:450, which states:

> Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford.

The Louisiana Supreme Court rejected that argument, citing authority for the proposition that La. R.S. 15:450 applied only to declarations made at one time or those having some connection with one another, noting that the two declarations at issue were not made at the same time—they were made one day apart—and their content was entirely different. The court noted that one sprung from a motive of self-interest and was exculpatory, while the other was a confession inculpating the defendant, an exactly opposite and different statement. The court went on to state:

> There is, moreover, another sound reason for not permitting the defendant to introduce his pretrial self-serving exculpatory statement. By doing so he would, in effect, bring his statements before the jury without subjecting himself to cross-examination.

Guillory, 373 So. 2d at 135.

Defendant in the instant case cites La. R.S. 15:450. However, notably, by its own terms, that statute applies solely to confessions, admissions or declarations "sought to be used against any one." In the instant case the State did not elicit from Det. Colon any testimony about where defendant told her he lived. The State did not introduce evidence of any statements by defendant. It was defense counsel who elicited or sought to elicit the evidence as to where defendant told Det. Colon he lived, and of course that evidence was for exculpatory purposes. Moreover, that evidence, that defendant lived uptown, came out in testimony presented by defense witnesses later in the trial.

The trial court properly sustained the State's hearsay objection.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 5

In his fifth assignment of error, defendant argues that the trial court erred in denying defendant's motion for a mistrial, on the ground of alleged improper, inflammatory and unprofessional conduct by the prosecutor during rebuttal argument.

In the Statement of the Case in his appellate brief defendant cites various portions of the State's rebuttal argument. In arguing the instant assignment of error defendant refers to his Statement of the Case, stating that he had previously set forth the content and the nature of the misconduct that took place during rebuttal argument.

In only two instances did defense counsel move for a mistrial. The failure to move for a mistrial precludes urging error on the part of the trial court for failing to grant a mistrial. State v. Galindo, 2006-1090, p. 14 (La. App. 4 Cir. 10/3/07), 968 So. 2d 1102, 1112; State v. Keyes, 99-0418, p. 10 (La. App. 4 Cir. 11/8/00), 772

So. 2d 918, 923. Thus, at most, only the two instances in which defendant actually moved for a mistrial will be reviewed.

Further, defendant does not articulate any argument as to how the prosecutor's comments warranted a mistrial. As noted, he simply quotes the alleged improper comments in his statement of the case, and in the one-half page "argument" section of his appellate brief addressing this assignment of error he simply refers to a couple of specific instances of alleged improper comments by the prosecutor.

In State v. Clark, 2001-2087 (La. App. 4 Cir. 9/25/02), 828 So. 2d 1173, the defendant raised as an assignment of error on appeal that the trial court had erred in denying four of his motions for mistrial. This court noted that, although the defendant argued that the errors prompting his objections and motions for mistrial––the prosecutor's reference to alleged other crimes and improper argument—constituted reversible error, the defendant failed to present any argument tending to show that the proper remedy for the alleged errors was a mistrial. This court held that because of his failure to present any such argument, the defendant was deemed to have abandoned—citing Rule 2-12.4 of the Uniform Rules of Louisiana Courts of Appeal—any complaint he might have had concerning the failure of the trial court to grant him a mistrial. Nevertheless, this court went on to address the merits of the defendant's arguments.

Similarly, in the instant case, although it can be considered that defendant has abandoned his claims in this assignment of error by failing to present any argument tending to show that the proper remedy for the alleged errors was a mistrial, the two claims of error in which defendant moved for mistrial, which motions were denied, will be addressed.

La. C.Cr.P. art. 774 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.

Prosecutors have wide latitude in choosing closing argument tactics. State v. Casey, 99-0023, p. 17 (La. 1/26/00), 775 So. 2d 1022, 1036. Even where the prosecutor's statements are improper, credit should be accorded to the good sense and fair-mindedness of the jurors who have heard the evidence. State v. Ricard, 98-2278, p. 4 (La. App. 4 Cir. 1/19/00), 751 So. 2d 393, 397; State v. Williams, 96-1023, p. 15 (La. 1/21/98), 708 So.2d 703, 716.

La. C.Cr.P. art. 775 states that upon motion by a defendant 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 La. C.Cr.P. art. 770 (mandatory mistrial upon motion of the defendant when prejudicial comment made within hearing of the jury by the judge, district attorney, or a court official referring to, *inter alia*, the failure of the defendant to testify in his own defense) or La. C.Cr.P. art. 771 (the trial court may grant a mistrial upon motion of the defendant if the court is satisfied that an admonition is not sufficient to assure the defendant of a fair trial when a remark or comment made within the hearing of the jury during trial or in argument is of such a nature that it might create prejudice against the defendant in the mind of jury).

Mistrial is a drastic remedy which should only be declared upon a clear showing of prejudice by the defendant. State v. Leonard, 2005-1382, p. 11 (La.

6/16/06), 932 So. 2d 660, 667. The mere possibility of prejudice is insufficient to warrant a mistrial. Id. "Mistrial is a drastic remedy, and is warranted only when the defendant has suffered substantial prejudice such that he cannot receive a fair trial." State v. Wessinger, 98-1234, p. 24 (La. 5/28/99), 736 So. 2d 162, 183. "The determination of whether actual prejudice has occurred, and thus whether a mistrial is warranted, lies within the sound discretion of the trial judge, and this decision will not be overturned on appeal absent an abuse of that discretion." Id.

The first instance in which defendant moved for a mistrial was when the prosecutor was addressing defendant's alibi defense that he was at his mother Bobbie Williams' uptown home from approximately 8:10 or 8:15 a.m. to 9:30 a.m. on the morning of the robberies, which occurred at 1814 Duels Street around 8:30 a.m. The prosecutor stated:

> From 1814 Duels Street to Bobbie Williams' house, that's 3.5 miles, you can get there in nine minutes.

Defense counsel objected on the ground that the prosecutor was commenting on facts that had not been introduced into evidence, as to the distance and the time. The trial court stated that it believed the prosecutor was allowed to argue what "he believes" the distance might be, and that it was up to the jurors to assess whether or not it was accurate.

The jury heard the trial court state that the time and distance was what the prosecutor believed it to have been, but that they, the jurors themselves, would have to assess the accuracy of that information. Thus, the jury was aware that this information had not been introduced in evidence. Under these circumstances, it cannot be said that the trial court would have abused its discretion by finding that the argument by the prosecutor, even if improper, was not such that the defendant

suffered substantial prejudice from it to the extent that he could not have received a fair trial. Therefore, it cannot be said that the trial court erred in denying defendant's motion for mistrial as to this comment.

In the second instance in which defendant objected and moved for a mistrial, the prosecutor was arguing in rebuttal about defense counsel questioning the evidence, or lack thereof, and said:

> MR. GUILLORY:
> That's why there's no crime lab report. That's why there's no photos.
> Only Mr. Williams knows why there was no money or what he did with the gun.
>
> MR. WAINWRIGHT:
> Excuse me, Your Honor.
>
> THE COURT:
> Yes, sir.
>
> MR. WAINWRIGHT;
> As to the comment at this point in rebuttal closing argument –
>
> THE COURT:
> Yes, sir.
>
> MR. WAINWRIGHT:
> - That only my client –
>
> THE COURT:
> I heard the comment, sir.
>
> MR. WAINWRIGHT:
> - Knows what he did with the weapon.
>
> THE COURT:
> Yes, sir.
>
> MR. WAINWRIGHT:
> I move for a mistrial.
>
> THE COURT:
> I would deny that request based on the jurisprudence interpreting the articles of our Code.
> I will note an objection for the Defense.

Shortly before the prosecutor made the comment at issue he had talked about the gun and the money taken in the robbery, he had stated: "You are going to commit a robbery and then just keep the gun, money, and everything on you?"

In quoting the comment complained of, defendant states that "[t]he prosecutor drew the juries [sic] attention to Mr. Williams not having taken the witness stand."

Although defendant did not specify a ground for his objection and motion for mistrial in this instance, because of the nature of the comment, it is obvious that the defense objection was that the prosecutor directly or indirectly referred to defendant's failure to testify.

La. C.Cr.P. art. 770(3) states that upon motion of a defendant a mistrial "shall be ordered" when a remark of comment made within the hearing of the jury by a prosecutor in argument "refers directly or indirectly to" the failure of the defendant to testify in his own behalf.

In order to support the granting of a mistrial under La. C.Cr.P. art. 770(3), it must be obvious that an alleged indirect reference was intended to focus the jury's attention on the defendant's failure to testify in his own defense. State v. Mitchell, 2000-1399, p. 5 (La. 2/21/01), 779 So. 2d 698, 701. See also State v. Johnson, 426 So. 2d 95, 100 (La. 1983) ("This court has held that to constitute reversible error under C.Cr.P. 770(3), 'the inference must be plain that the remark was intended to bring to the jury's attention the failure of the defendant to testify.' ").

In Mitchell, supra, during rebuttal argument in defendant's trial for second degree murder and attempted second degree murder, the prosecutor stated: "Where's the weapon? One person knows where the weapon is. One person." Mitchell, 2000-1399, p. 6, 779 So. 2d at 702. Defense counsel failed to object to

this comment at trial, but raised the issue in a motion for new trial after the defendant's conviction. The trial court granted that motion. On application for supervisory writs, the Louisiana Supreme Court reversed, finding that the statement was neither a direct reference nor an intended indirect reference to the defendant's failure to testify in his defense, and that the trial judge erred when he granted what the Supreme Court referred to as a "mistrial." A witness had testified at trial that the defendant had informed him that he had thrown the weapon used in the shootings out of a vehicle window while traveling along a highway. The court noted that, at the hearing on the defendant's motion for new trial, the prosecutor had argued that his remark was not impermissible because it was not a reference to the defendant's failure to testify in his defense, but instead was an argument excusing the State's failure to place a gun in evidence. The court stated, as to the prosecutor's reason for making the statement:

> That belief on his part was not unrealistic. The United States Supreme Court recognized this very problem in Old Chief v. United States, 519 U.S. 172, 188, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), when it stated:
>
> > [B]eyond the power of conventional evidence to support allegations and give life to the moral underpinnings of allegations of law's claims, there lies the need for evidence in all its particularity to satisfy the juror's expectations about what proper proof should be. Some such demands they bring with them to the court house, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about.
>
> Taken in this context, the words "Where's the weapon? One person knows where the weapon is. One person." do not necessarily focus upon the defendant's failure to take the stand. Nor do they support the likelihood that the prosecutor intended to do so. The comment comes across as an explanation for the State's inability to introduce the murder weapon because the defendant threw the weapon away while he was traveling from Breaux Bridge to Lafayette.

Mitchell, 2000-1399 at p. 6, 779 So. 2d at 702.

In the instant case, the gun used in the armed robberies was never recovered, nor was the money taken from the victims. Defense counsel made much of this during his cross examination of Det. Mary Colon, who investigated the robberies. It is not obvious that the prosecutor's comment that "[o]nly Mr. Williams knows why there was no money or what he did with the gun" was intended as an indirect reference to defendant's failure to testify in his defense, as contemplated by La. C.Cr.P. art. 770(3). Moments earlier in his rebuttal the prosecutor had referred to the absence of the gun and money. As in Mitchell, supra, the comment likely was an explanation for the State's inability to account for the gun used in the robbery or the money taken from victims at gunpoint. Considering the totality of the circumstances, it cannot be said that it was obvious that the comment was intended to focus the jury's attention on the defendant's failure to testify in own defense. Thus, it cannot be said the trial court erred in denying defendant's motion for mistrial as to this comment by the prosecutor.

There is no merit to either of the trial court's denials of defendant's motions for mistrial.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 6

In this assignment of error defendant argues that the trial court erred in denying his motion for post-verdict judgment of acquittal.

A motion for post-verdict judgment of acquittal shall be granted only if the court finds that the evidence, viewed in a light most favorable to the State, does not reasonably permit a finding of guilty. La. C.Cr.P. art. 821(B). A motion for post-verdict judgment of acquittal raises the question of the sufficiency of the evidence. See State v. Hampton, 98-0331, p. 12 (La. 4/23/99), 750 So. 2d 867, 880 ("The

question of the sufficiency is properly raised by a motion for post-verdict judgment of acquittal."); State v. Vanburen, 2008-0824, p. 6 (La. App. 4 Cir. 12/30/08), 3 So. 3d 552, 556 ("A motion for post-verdict judgment of acquittal raises the question of sufficiency of the evidence.").

In the instant case, defendant specifically argues that the evidence was insufficient to support the jury's implicit finding that he was properly identified and that his alibi defense was adequately controverted by the State. Thus, the issue is whether the evidence was sufficient to establish that defendant was the individual who robbed the two victims.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La. 1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.
>
> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such

> that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-228.

In State v. Davis, 2002-1043, pp. 3-4 (La. 6/27/03), 848 So. 2d 557, 559, the Louisiana Supreme Court reiterated that:

> [T]he task of an appellate court reviewing the sufficiency of the evidence is not to second-guess the credibility choices of the trier of fact "beyond ... sufficiency evaluations under the Jackson [v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)] standard of review." A victim's or eyewitness's testimony alone is therefore usually sufficient to support a verdict. (Citations omitted).

In the instant case, in addressing defendant's prior assignment of error that the trial court erred in denying his motion to suppress the identification, it was determined that the victims' identification of defendant hours after the robberies did not present a substantial likelihood of misidentification. In addition, each victim positively identified defendant in court as the individual who robbed them.

It is true that the victims did not notice certain things about defendant during the robbery—that he had a gold tooth, embroidery on his pants, and a red stipe running all the way down the sleeves of his jacket to the cuffs, although victim Paul Currer noticed red stripes on the top running down the sleeves. And it is true that victim Andy Francis apparently reported to the 911 operator that the robber was light complected, when in fact Francis conceded at trial that defendant was dark complected.

Defendant's alibi witnesses presented evidence that, if true, a rational trier of fact might find difficult to reconcile with defendant having committed the robberies. Nevertheless, viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the State's witnesses more credible than those of the defense and found that defendant was the person who robbed the victims at gunpoint.

There is no merit to this assignment of error.

PRO SE PLEADINGS

Defendant filed three pleadings in this court, all relating to what he styled as motions to remand. The first, filed in this court on January 6, 2010, was entitled "Previously Filed Motion to Remand Supplemental Exhibits 'I,' 'J,' 'K,' 'L,' 'M' and 'N'." The second, filed in this court on January 20, 2010, was entitled "Motion for Rehearing and/or Request for Reconsideration of the Previously denied Motion to Remand and/or Request for Review of this Particular Pleadings [sic], Before a Three Judge Panel." The third pleading, filed in this court on May 7, 2010, was entitled "Previously filed Motion to Remand 2nd Supplemental Exhibits 'O, P, Q, R and S'."

As to these three motions, filed in this court on January 6, 2010, January 20, 2010, and May 7, 2010, it is hereby ordered that appellant's motions are DENIED, reserving to defendant the right to file an application for post-conviction relief within the time limitations set forth in La. C.Cr.P. art. 930.8, following the finality of his appeal.

For the foregoing reasons, the defendant's conviction is affirmed. It is ordered that defendant's sentence is vacated and that the matter is remanded to the trial court for resentencing. It is further ordered that defendant's three motions

filed in this court be denied, reserving to defendant the right to file an application for post-conviction relief within the time limitations set forth in La. C.Cr.P. art. 930.8, following the finality of his appeal.

CONVICTION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING; MOTIONS DENIED.