NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1000

STATE OF LOUISIANA

VERSUS

LESTER BELL

DATE OF JUDGMENT: FEB 15 2013

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
NUMBER 27624, PARISH OF ASCENSION
STATE OF LOUISIANA

HONORABLE RALPH TUREAU, JUDGE

* * * * * *

Donald D. Candell Gonzales, Louisiana	Counsel for Plaintiff-Appellee State of Louisiana
Ricky L. Babin, District Attorney Donaldsonville, Louisiana	Counsel for Plaintiff-Appellee State of Louisiana
Frank Sloan Mandeville, Louisiana	Counsel for Defendant-Appellant Lester Bell

* * * * * *

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Disposition: CONVICTIONS AFFIRMED. SENTENCES ON COUNTS FIVE AND SIX AFFIRMED. SENTENCES ON COUNTS ONE THROUGH FOUR VACATED AND REMANDED.

KUHN, J.

Defendant, Lester Bell, was charged by grand jury indictment with second degree kidnapping on counts one through four (as amended) and armed robbery on counts five and six, violations of La. R.S. 14:44.1 and La. R.S. 14:64.[1] Defendant pled not guilty on each count. After a trial by jury, he was found guilty as charged on counts one through four and six and guilty of the responsive offense of attempted armed robbery on count five. See La. R.S. 14:27. As to each conviction on counts one through four, the trial court sentenced the defendant to forty years imprisonment at hard labor, to be served concurrently. On count five, the trial court sentenced defendant to forty-five years imprisonment at hard labor to be served consecutive to the sentences imposed on counts one through four. Finally, on count six the trial court sentenced defendant to ninety-nine years imprisonment at hard labor to be served consecutive to the other sentences. Defendant now appeals, assigning error to the denial of his motion for mistrial and the jury's access to written evidence during deliberations. For the following reasons, we affirm all the convictions as well as the sentences imposed on counts five and six. The sentences imposed on counts one through four are, however, vacated and remanded.

STATEMENT OF FACTS

On May 2, 2009, sometime after 9:00 p.m., two armed African-American males (one later identified as defendant) entered Kendall Converse's rental home located at 804 Bayou Road in Donaldsonville.[2] At the time, Converse's friends,

[1]Defendant was originally charged with aggravated kidnapping on counts one through four. However, the State amended the indictment the day before jury selection began and defendant was re-arraigned and pled not guilty to the amended charges. Defendant was charged and tried along with Michael Comery. In an unpublished order, this court remanded Comery's appeal due to the trial court's failure to rule on his *pro se* motion for new trial. ***State v. Comery***, 2012-0999 (La. App. 1st Cir. 10/11/12) (unpublished).

[2] According to police testimony, one of the perpetrators was still at large at the time of the trial.

Brian Carr, Tedronne Breston, and Nathanial Eseff, were helping him move to another residence. They were taking a break to watch a basketball game when the assailants knocked on the door, forced entry with their handguns drawn, and ordered the men to get down on the floor. When Converse stood up, both of the gunmen struck him in the head with their weapons, forced him back down to the floor, and demanded money. The gunmen took cash and threatened to kill the victims as they demanded more money.

While defendant held the other victims at gunpoint, the other gunman led Converse out of the home alone. Subsequently, all of the victims were forced, at gunpoint, to get into Converse's truck. The gunmen instructed Converse to drive and to follow a red or maroon Toyota, which was driven by a third perpetrator, who was later identified as codefendant Comery.[3] Converse followed Comery to Converse's new residence located at 217 Madewood Drive. Defendant sat in the front seat with his gun pointed at Converse while the other gunman sat in the back of the vehicle with the other victims. When the gunmen entered the home with Converse and his friends, Converse attempted to calm his girlfriend and children who were home at the time and immediately activated the silent home alarm. Converse then gave the gunmen a bag containing approximately five thousand dollars and his payment stub. The perpetrators took the money and fled from the scene.

At approximately 9:40 p.m., Sergeant Jeff Griffin of the Ascension Parish Sheriff's Department responded to a BOLO (a be-on-the-lookout dispatch), spotted a vehicle that fit the given description near I-10 at LA Highway 73 near Baton Rouge travelling westbound, and alerted dispatch. Louisiana State Trooper Jeremy Ballard also responded to the BOLO. For several miles, the police pursued the

[3] Converse and Eseff testified that they were familiar with Comery because they had seen him in the area before the incident.

vehicle at high speed with their sirens and lights activated. The vehicle exited at College Drive in Baton Rouge, and several individuals, including the driver, jumped out of the vehicle behind Ruby Tuesday's Restaurant and fled on foot. Sergeant Griffin observed items that fell out of the vehicle when one of the passengers exited the vehicle, including Converse's payment stub that was subsequently recovered. The police pursued the individuals on foot and apprehended defendant and Comery.

ASSIGNMENT OF ERROR NUMBER ONE

Defendant contends that the State intentionally elicited testimony from Sergeant Teddy Gonzales of the Ascension Parish Sheriff's Office regarding defendant's postarrest and ***Miranda*** silence in violation of the Due Process Clause of the Fourteenth Amendment. Thus, he claims that the trial court erred in denying his motion for mistrial on this basis.

The following colloquy at issue took place during the State's direct examination of Sergeant Gonzales:

> Q. Okay. So what was your next step as far as your role in this investigation?
>
> A. I then met with Mr. Bell. Mr. Bell was dressed in a blue, in color, jumpsuit. I noticed that he was sweating profusely, and he was advised of his rights, but he wished not to make any statements at the time.
>
> Q. You said he didn't want to make any?
>
> A. That is correct.

Defense counsel then objected to the witness's reference to defendant's invocation of his right to remain silent and asked the trial judge to note his objection for the record. After he indicated that the contemporaneous objection would be a part of the record, the trial judge asked defense counsel if he wished any further relief, pointing out that an admonishment would bring further attention to the jury. Defense counsel specifically stated that the note of the objection for the record was

sufficient. Thereafter, the State diverted the line of questioning. During a subsequent break, the defense moved for a mistrial on that basis, which was denied.

Under the authority of La. C.Cr.P. art. 771, where the prosecutor or a witness makes a reference to a defendant's post-arrest silence, the trial court is required, upon the request of the defendant or the State, to promptly admonish the jury. In such cases where the court is satisfied that an admonition is not sufficient to assure the defendant a fair trial, upon motion of the defendant, the court may grant a mistrial. ***State v. Kersey***, 406 So.2d 555, 560 (La. 1981). 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 a showing of an abuse of that discretion. ***State v. Berry***, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

In ***Doyle v. Ohio***, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976), the United States Supreme Court held that the use, for impeachment purposes, of the defendant's silence at the time of arrest and after receiving the ***Miranda*** warnings, violates the Due Process Clause of the Fourteenth Amendment. Accord ***Portuondo v. Agard***, 529 U.S. 61, 74-75, 120 S.Ct. 1119, 1128, 146 L.Ed.2d 47 (2000). However, not every mention of the defendant's postarrest silence is prohibited by ***Doyle***. As emphasized by the Louisiana Supreme Court in ***State v. George***, 95-0110 (La. 10/16/95), 661 So.2d 975, 980, ***Doyle*** condemns only the use **for impeachment purposes** of the defendant's postarrest silence.

A brief reference to postarrest silence does not mandate a mistrial or reversal where the trial as a whole was fairly conducted, the proof of guilt is strong, and the State made no use of the silence for impeachment. See ***State v. Smith***, 336 So.2d

867, 868-70 (La. 1976); accord ***State v. Stelly***, 93-1090 (La. App. 1st Cir. 4/8/94), 635 So.2d 725, 728-29, writ denied, 94-1211 (La. 9/23/94), 642 So.2d 1309. Further, the State is allowed to reference the defendant's postarrest silence when the line of questioning is an attempt to summarize the extent of the police investigation and is not designed to exploit the defendant's failure to claim his innocence after his arrest in an effort to impeach his testimony or attack his defense. See ***George***, 661 So.2d at 979-80.

In this case, the reference to the defendant's postarrest silence was brief, and the trial as a whole was conducted fairly. The initial reference by Sergeant Gonzales was an unsolicited response to the State's question regarding the investigation. Further, it does not appear that the State pursued the line of questioning for the purpose of calling the jury's attention to the defendant's postarrest silence or having the jury make an inappropriate inference. See ***Stelly***, 635 So.2d at 728. Moreover, defendant did not testify at the trial and thus, the testimony in question certainly was not used for impeachment purposes. Accordingly, defendant's postarrest silence was not used against him within the meaning of ***Doyle***. One of the victims, Breston, who had poor vision according to his trial testimony, was unable to make a positive identification. However, defendant, who was unmasked at the time of the offenses, was positively identified by photographic lineup prior to the trial and again during the trial by the rest of the victims, Converse, Carr, and Eseff. Despite this brief reference to defendant's postarrest silence, we find that he did not suffer such substantial prejudice that he was deprived of any reasonable expectation of a fair trial. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for mistrial. Assignment of error number one is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

Defendant contends that the trial court erred in granting the jury's request to have access to the Quick Call Report included in State exhibit S-29. Noting that the call log was directly related to factual issues in the case and that both the defense and the State referred to the call log in their closing arguments, defendant asserts the jurors read the call log instead of relying on memory. Thus, defendant claims that the trial court committed prejudicial error by sending this evidence to the jury during deliberations.

In accordance with La. C.Cr.P. art. 793(A), a juror must rely upon his memory in reaching a verdict and shall not be permitted to refer to notes or to have access to any written evidence. While testimony shall not be repeated to the jury, upon the request of a juror and in the discretion of the court, the jury may take with it or have sent to it any object or document received in evidence when a physical examination thereof is required to enable the jury to arrive at a verdict. The general rule as expressed by Article 793 is that the jury is not to inspect written evidence except for the sole purpose of a physical examination of the document itself to determine an issue that does not require the examination of the verbal contents of the document. ***State v. Perkins***, 423 So.2d 1103, 1109-10 (La. 1982).

Black's Law Dictionary defines "testimony" as follows, "Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." Black's Law Dictionary 1613 (9th ed. 2009). The prohibition against repeating testimony to the jury is reflected in jurisprudence applicable in this state since the earliest times and was originally codified as Article 395 of the Louisiana Code of Criminal Procedure of 1928. The policy choice represented by Article 793 is to require jurors to rely on their own memory as to verbal testimony, without notes and without reference to written evidence, such as to depositions or transcribed testimony. The general reason for the prohibition is a fear that the

jurors might give undue weight to the limited portion of the verbal testimony brought into the room with them. However, such prohibition is contrary to the growing trend to permit discretion in the trial court, in the absence of a statutory prohibition, to accede to jury requests to see exhibits and writings (except depositions). ***State v. Freetime***, 303 So.2d 487, 488-89 (La. 1974).

Moreover, a violation of Article 793 does not mandate an automatic reversal of a defendant's conviction. Rather, such a violation constitutes trial error that is subject to a harmless error analysis. See ***State v. Zeigler***, 40,673 (La. App. 2d Cir. 1/25/06), 920 So.2d 949, 956, writ denied, 2006-1263 (La. 2/1/08), 976 So.2d 708; ***State v. Johnson***, 97-1519 (La. App. 4th Cir. 1/27/99), 726 So.2d 1126, 1134, writ denied, 99-0646 (La. 8/25/99), 747 So.2d 56.

Herein, the defense attorney noted that two different reports were admitted in S-29: a quick call report from Baton Rouge and an Ascension Parish incident report. In initially objecting, defense counsel noted that the reports were full of codes and ambiguous references. The trial judge concluded that based on the wording of the jury's request, it could be fulfilled by a review of the quick call report. The trial judge specifically stated, "Yes, I understand. Since they specifically said quick call report, we'll send them the quick call report. If they want the report, they can request the other report." Defense counsel then stated, "Okay." Before sending the exhibit to the jury the trial court stated, "Okay. Since they're requesting, 'Time got call from alarm company,' and it's on the Ascension incident report and it's part of the same exhibit, State's Exhibit Twenty-nine, [does] everybody agree that that information is on this report." Defense counsel agreed, and the trial court allowed the jury to review the exhibit. As contended by

the State on appeal, the defense counsel arguably abandoned his initial objection and acquiesced in the jury's review of S-29.[4]

Further, a call log, which in this case apparently contained the time the police were contacted by the alarm company monitoring Converse's residence on Madewood Drive, is neither written evidence nor testimony under the plain meaning of that word or the language of Article 793. See ***State v. Brooks***, 2001-0785 (La. 1/14/03), 838 So.2d 725, 727-28 (*per curiam*) (permitting the jury to view videotapes of the drug transactions during deliberations was not "testimony" in violation of the prohibition against repeating testimony to the jury under Article 793, but rather formed part of the *res gestae* of the offense); see also ***State v. Pooler***, 96-1794 (La. App. 1st Cir. 5/9/97), 696 So.2d 22, 52-53, writ denied, 97-1470 (La. 11/14/97), 703 So.2d 1288 (documentary evidence in form of a photograph of DNA test results and DNA results themselves in the form of numbers and letters was evidence requiring physical examination to enable the jury in a murder prosecution to arrive at a verdict, and thus, was properly given to jury during its deliberations); and ***State v. Lewis***, 611 So.2d 186, 188 (La. App. 5th Cir. 1992) (fingerprints and a bill of information containing an item number matching the number on the arrest register containing fingerprints were properly viewed by the jury). Subject to the explicit restrictions imposed by Article 793, and by the jurisprudential rule precluding the use of a defendant's confession in any form in the course of jury deliberations, a trial judge has sound discretion in permitting the jury's review of properly-admitted evidentiary exhibits during its deliberations. ***Brooks***, 838 So.2d at 728. Finally as previously noted, three of the victims positively identified defendant by photographic lineup prior to the trial and again during the trial. Considering these circumstances, the convictions surely were not

[4] The parties may agree to waive the statutory prohibitions contained in Article 793. However, such an agreement must be in clear, express language and must be reflected in the record. See ***State v. Adams***, 550 So.2d 595, 599 (La. 1989).

attributable to any trial error that may have occurred as the result of a violation of Article 793. See ***Sullivan v. Louisiana***, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). The alleged error, if any, was harmless beyond a reasonable doubt. See La. C.Cr.P. art. 921. Based on the foregoing conclusions, we find no merit in the second assignment of error.

SENTENCING ERROR

We have conducted our routine review of the record for errors discoverable by a mere inspection of the pleadings and proceedings pursuant to La. C.Cr.P. art. 920(2). In this case, the sentencing minutes and transcript reflect that the trial court did not impose restrictions on defendant's parole eligibility as required on all counts by La. R.S. 14:44.1(C) and La. R.S. 14:64(B). Under the self-activating provisions of La. R.S. 15:301.1(A), if the statutory period of parole ineligibility is specifically mandated, and does not involve any discretion, there is no need to remand the matter for resentencing. ***State v. Williams***, 2000-1725 (La. 11/28/01), 800 So.2d 790, 799. Accordingly, the sentences imposed on counts five and six will automatically be served without the benefit of parole in their entirety. However, under the sentencing provisions for second degree kidnapping, the trial judge may order all or a portion, but at least two years, of the sentence to be served without benefit of parole. Under ***State v. Price***, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (*en banc*), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277, while an illegally lenient sentence is presumably not "inherently prejudicial" to the defendant, this court nevertheless has the option to vacate the sentence and remand for resentencing. Because a determination of the maximum number of years to be served without parole eligibility involves sentencing discretion, correcting the error by this court is not a viable option under ***Price***. Thus, we remand the matter to the trial court for resentencing. Accordingly, the

sentences imposed on counts one through four are hereby vacated, and the matter is remanded to the trial court for resentencing on counts one through four.

DECREE

For these reasons, we affirm all of the convictions and the sentences imposed for counts five and six. The sentences imposed against defendant, Lester Bell, on counts one through four are vacated, and the matter remanded for further proceedings consistent with this opinion.

CONVICTIONS AFFIRMED. SENTENCES ON COUNTS FIVE AND SIX AFFIRMED. SENTENCES ON COUNTS ONE THROUGH FOUR VACATED AND REMANDED.