NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JGW

NUMBER 2012 KA 2045

STATE OF LOUISIANA

VERSUS

JASON MIZELL

Judgment Rendered: DEC 27 2013

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Appealed from the
22nd Judicial District Court
In and for the Parish of Washington, Louisiana
Trial Court Number 107,063

Honorable August Hand, Judge

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

Whipple, C.J., concurs for reasons assigned by J. Crain

Crain, J. concurs and assigns reasons

WELCH, J.

The defendant, Jason B. Mizell, was charged by grand jury indictment with one count of aggravated rape, a violation of La. R.S. 14:42, and pled not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict. He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. He now appeals, contending the trial court erred in refusing to grant a mistrial after the State referenced the defendant's failure to testify. For the following reasons, we affirm the conviction and sentence.

FACTS

The victim, J.S.,[1] testified at trial. His date of birth was January 2, 1998. He is bipolar and during the time period in question, he was taking the prescription medication Risperdal. The defendant was a friend of the victim's family and the victim had known the defendant for his entire life. In October of 2009, when the victim was eleven years old, he spent the night at the defendant's home. The victim watched television with the defendant, and thereafter, the defendant gave the victim alcohol and marijuana. The victim smoked the marijuana, drank the alcohol, and fell asleep. He testified that when he woke up, his pants had been pulled down, and the defendant was masturbating the victim's penis with the defendant's hand. The victim jumped up and was "really scared." The defendant told the victim to calm down, and the victim went and slept on the couch. The victim did not demand to be taken home immediately because the incident happened after midnight, and he did not want his parents to find out about his drug use.

The victim stated that he did not want to go back to the defendant's house, but did so approximately two weeks later to avoid making his parents suspicious. On this second occasion, the victim smoked marijuana and drank alcohol with the

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[1] The victim is referenced herein only by his initials. See La. R.S. 46:1844(W).

defendant. He then fell asleep in the defendant's room while watching a movie. The victim testified that when he woke up, his pants were completely off, and the defendant had his mouth on the victim's penis. The victim pushed the defendant away from him and cried. It was after midnight, the victim was scared, and he did not know what to tell his parents.

Subsequently, the victim stayed at the defendant's house on a third occasion while the victim was still eleven years old. The victim again smoked marijuana and drank alcohol with the defendant. He used the defendant's computer and then fell asleep in the defendant's bed. The victim testified that when he woke up, the defendant was pulling the victim's pants down and putting his mouth on the victim's penis. The victim kicked the defendant and demanded that the defendant take him home, but the defendant refused to do so. The next day, the victim and the defendant went to a fair, where the victim met his family.

The victim also gave a recorded statement concerning the incidents. In the statement, he gave a similar account of the defendant touching the victim's penis with the defendant's hand and mouth on three occasions.

On cross-examination, the victim confirmed that "nothing bad happened" when he spent the night at the defendant's home prior to October of 2009. The victim acknowledged that he gave his recorded statement within a week after disclosing the alleged incidents to his mother. In response to defense questioning, the victim conceded that Chief Culpepper, not his mother, drove him to the Child Advocacy Center (CAC) to give the recorded statement. The defense asked the victim if he and Chief Culpepper talked about what the victim was going to say in his recorded statement, and the victim answered, "No, sir. Not really." The defense asked if, in the victim's recorded statement, he had stated he had punched the defendant during the first alleged incident. The victim replied, "Sir, to be honest, I'm not sure what I said in those interviews. That that (sic) was nearly

three years ago. I'm not completely sure exactly what I said. But it's something along those lines." The defense asked the victim if he was completely sure of his testimony in court, and the victim replied, "Oh, yes. One hundred percent." The defense stated, "You remember that a hundred percent. But you don't recall what you told [the CAC interviewer]?" The victim replied, "No. I recall what I told her. I don't know word for word." The victim answered affirmatively when the defense asked if he recalled telling the interviewer that he had punched the defendant. He answered negatively when asked if "[he] prevented [the defendant] from doing anything to [the victim]." The defense stated, "Okay. So you don't remember telling [the interviewer] that you prevented him from doing something?" The victim replied, "I never prevented him from touching me sir."

MOTION FOR MISTRIAL

In his sole assignment of error, the defendant argues the trial court erred in denying the motion for mistrial after the prosecutor, during closing argument, referenced the defendant's failure to testify.

Louisiana Code of Criminal Procedure article 770 provides that "[u]pon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the ... district attorney ... during the trial or in argument, refers directly or indirectly to ... [t]he failure of the defendant to testify in his own defense." La. C.Cr.P. art. 770(3). An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial. La. C.Cr.P. art. 770.

Article 770(3) prohibits both direct and indirect references to the defendant's failure to testify. Even without these statutory prohibitions, the United States

Supreme Court has held that a prosecutor is not free to comment upon a defendant's failure to take the stand, since such a comment violates the self-incrimination clause of the Fifth Amendment made applicable to the states through the Fourteenth Amendment. **State v. Moser**, 588 So.2d 1243, 1247 (La. App. 1st Cir. 1991), writ denied, 594 So.2d 1314 (La. 1992) (citing **Griffin v. California**, 380 U.S. 609, 612-13, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965)).

When the prosecutor makes a direct reference to the defendant's failure to take the stand, a mistrial should be declared. In the case of such a direct reference, a reviewing court will not attempt to determine the effect that the remark had on the jury. **Moser**, 588 So.2d at 1247. Where the reference to the defendant's failure to testify is not direct, the reviewing court will inquire into the remark's intended effect upon the jury in order to distinguish indirect references to the defendant's failure to testify (which are impermissible) from general statements that the prosecution's case is unrebutted (which are permissible). *Id.*

In ascertaining the intention of a prosecutor's reference to the unrebutted nature of the state's case, the jurisprudence does not envision the impossible task of reading what was actually in the prosecutor's mind at the time the reference was made. In cases where the prosecutor simply emphasized that the State's evidence was unrebutted, and there were witnesses other than the defendant who could have testified on behalf of the defense but did not do so, the Louisiana Supreme Court has concluded that the prosecutor's argument does not constitute an indirect reference to the defendant's failure to testify. On the other hand, where the defendant is the only witness who could have rebutted the State's evidence, a reference to the testimony as uncontroverted or unrebutted focuses the jury's attention on the defendant's failure to testify and mandates a mistrial. **Moser**, 588 So.2d at 1247 (referencing **State v. Johnson**, 541 So.2d 818, 822 (La. 1989)). In order to support the granting of a mistrial, the inference must be plain that the remark was intended to focus the jury's

attention on the defendant's failure to testify. **State v. Mitchell**, 2000-1399 (La. 2/21/01), 779 So.2d 698, 701.

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 a mistrial will not be disturbed on appeal without 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 the instant case, during closing, the State argued:

> Well, there's no evidence here, and [the victim] said it didn't happen, of him being forced to perform oral sex on [the defendant]. But there's uncontroverted testimony that the defendant performed oral sexual intercourse on [the victim]. Twice. During the month of October. Once he said clearly and unequivocally was the Friday before the Fair started. The second time, he said clearly and unequivocally it was the Tuesday night before the Fair.
>
> You heard him say his mouth was on, his mouth touched my private, or my junk. You heard him say that on the CAC on ... October 28, 2009. I know in cross-examination, you heard [defense counsel] trying to trip up [the victim], trying to trip up a 14-year-old [boy] taking the stand, who was telling a bunch of strangers about tell (sic) the most horrific experience in his life. Do you remember saying this or not saying this? No. I told them. I told Ms. JoBeth that. You know there's a reason that I didn't play that for him? There's a reason that I didn't want him to see that.
>
> Is (sic) because when we talked before he hit the witness stand, he recited everything to me like it was yesterday. He didn't need to see it. You have him saying the same thing twice over two and a half years apart. And like he said from the witness stand, you know what? Some things, you just don't forget. You just don't forget.
>
> So we know that it's uncontroverted that the defendant put his mouth...

The defense asked to approach the bench and moved for a mistrial, arguing the State had twice "referred to uncontroverted evidence," and was putting in the jury's minds that the defendant did not testify. The State responded that by

"uncontroverted" it was referring to the victim's statement at the Child Advocacy Center and his statement on the witness stand. The trial court denied the motion for mistrial and instructed the State to move on. The defense objected to the court's ruling.

The trial court did not abuse its discretion in denying the motion for mistrial. The challenged closing argument reviewed in context indicates that rather than alluding to the defendant's failure to testify, the State was pointing out that the victim's testimony at trial was consistent with other evidence concerning the offense, *i.e.*, the victim's recorded statement. The State argued the victim alleged "the same thing twice over two and a half years apart." See **State v. Martin**, 475 So.2d 101, 101-02 (La. App. 2nd Cir. 1985).

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. C.Cr.P. art. 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. C.Cr.P. art. 920(2).

The trial court did not wait twenty-four hours after denying the motions for a new trial and for a postverdict judgment of acquittal before imposing sentence. See La. Code Crim. P. art. 873; **State v. Wilson**, 526 So.2d 348, 350 (La. App. 4th Cir. 1988), writ denied, 541 So.2d 851 (La. 1989) (stating that La. C.Cr.P. art. 873 refers to both motions for a new trial and in arrest of judgment when it requires the twenty-four hour delay; therefore, the trial court's failure to delay after denying a motion for postverdict judgment of acquittal should be analogously treated). In this case, the issue was not assigned as error, the sentence was not challenged, and there has been no claim of actual prejudice resulting from the court's failure to

delay sentencing. Any error which may have occurred is not grounds for reversal. See **State v. Augustine**, 555 So.2d 1331, 1333-34 (La. 1990); **State v. Claxton**, 603 So.2d 247, 250 (La. App. 1st Cir. 1992).

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.

STATE OF LOUISIANA

VERSUS

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CRAIN, J., concurs.

The State's comment during closing argument that the victim's testimony describing the sexual assault was "uncontroverted" improperly focused the jury's attention on the defendant's failure to testify because the defendant was the only witness who could have rebutted this evidence. *See State v. Magee*, 11-0574 (La. 9/28/12), 103 So. 3d 285, 335, *cert. denied*, 12-9070, 2013 WL 821547 (2013); *State v. Johnson*, 541 So. 2d 818, 822 (La. 1989); *State v. Moser*, 588 So. 2d 1243, 1247 (La. App. 1 Cir. 1991), *writ denied*, 594 So. 2d 1314 (La. 1992).

However, an improper comment on a defendant's failure to testify is a trial error subject to harmless-error analysis, not a structural defect in the proceedings. *Magee*, 103 So. 3d at 335. Moreover, the mandatory mistrial provisions of Louisiana Code of Criminal Procedure article 770, which encompass a prosecutor's direct or indirect comment on the defendant's failure to testify, are directives to the district court and do not preclude an appellate court from conducting a harmless-error analysis. *State v. Johnson,* 94–1379 (La.11/27/95), 664 So.2d 94, 101. An error is harmless if the guilty verdict was surely unattributable to the error. *State v. Johnson*, 94-1379 (La. 11/27/95), 664 So. 2d 94, 100. Unless an appellate court is thoroughly convinced that the remarks influenced the jury and contributed to the verdict, it should not reverse a conviction due to improper remarks during a closing argument. *State v. Shannon*, 10-580 (La. App. 5 Cir. 2/15/11), 61 So. 3d 706, 724-25, *writ denied*, 2011-0559 (La. 9/30/11), 71 So. 3d 283.

There is ample evidence in the record to support the guilty verdict. The State presented the testimony of the victim, who described the sexual encounters with the defendant in impressive detail and in a manner consistent with a recorded statement provided by the victim to the Children's Advocacy Center only days after the last sexual assault. The State also presented testimony from two prior victims of the defendant who testified to sexual abuse under very similar circumstances. Like the victim in this case, those individuals, as minors, were invited into the defendant's home and provided alcohol or marijuana. Once under the influence of the alcohol or marijuana, the victims were sexually molested by the defendant. This evidence indicates the defendant's lustful disposition toward children and is highly probative to prove his propensity to commit like crimes. *See* La. Code of Evid. Art. 412.2.A; *State v. Buckenberger*, 07-1422 (La. App. 1 Cir. 2/8/08), 984 So. 2d 751, 757, *writ denied*, 08-0877 (La. 11/21/08), 996 So. 2d 1104. In light of the compelling evidence presented by the State, I would find that the guilty verdict was surely unattributable to the brief, indirect reference in closing arguments to the "uncontroverted" nature of the evidence. Therefore, I concur that the conviction and sentence should be affirmed.