NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 KA 1195

STATE OF LOUISIANA

VERSUS

WALTER JEROME FORT

Judgment Rendered:

MAR 09 2015

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On appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 05-12-0947, Section I

Honorable Anthony J. Marabella, Jr., Judge Presiding

* * * * * *

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* * * * * *

BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ

GUIDRY, J.

The defendant, Walter Jerome Fort, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1 (count 1), and illegal use of weapons, a violation of La. R.S. 14:94B (count 2).[1] He entered a plea of not guilty and, following a jury trial, was found guilty as charged. He filed a "Motion for Post-Verdict Judgment of Acquittal or New Trial," which was denied. The defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. He now appeals, asserting one counseled and one *pro se* assignment of error. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

On March 3, 2012, between 2:00 and 3:00 a.m., Baton Rouge Police Department Officer Willie Collins was dispatched in reference to a stalled red Ford Mustang in the far right, southbound lane of Interstate 110 between the Mohican and Chippewa exits. Officer Collins parked his unit and approached the Mustang. He heard music playing from the vehicle, but noticed no one was sitting in the driver's seat. The window of the passenger side door was on the ground. A black man, later identified as the victim, Silas Gibbs, was slumped over in the front passenger seat with blood coming out the side of his face. Officer Collins immediately called for emergency medical services and contacted detectives with the Baton Rouge Police Department.

Investigations revealed that Donald Aucoin, Gerald Wilson, and the defendant were in the Mustang with the victim prior to the shooting. Both Aucoin and Wilson called 911, reported the shooting, and gave statements. The defendant fled to Texas, where he was located and arrested on March 5, 2012.

[1] Count 2 was subsequently dismissed.

At trial, Wilson testified that on March 2, 2012, after he got off of work, he went to the house that was next door to his neighbor, Michael Duncan's, house where he met the victim and the defendant. Wilson, the victim, and Duncan went to purchase a daiquiri and food. When they returned, Wilson, the victim, and the defendant went to look for drugs in the victim's vehicle. While out looking for drugs, they picked up Aucoin. The victim's vehicle was low on gas, so the men switched to Wilson's girlfriend's Mustang. According to Wilson, the defendant originally planned to sit in the front seat, but then told the victim that he could sit in the front. The victim sat in the front passenger seat, and the defendant sat directly behind him; Wilson drove the vehicle, and Aucoin sat directly behind him.

Once on the interstate, the four men headed toward south Baton Rouge. Wilson testified that he was racing another vehicle. He heard gunshots, looked over, and saw that the passenger side window was shattered. The victim was slumped over. Wilson hit the brakes and looked at the defendant, who had a gun in his hand and a look on his face that scared Wilson. Wilson turned around and grabbed for the gun. The defendant told him to drive and that he was going to take the clip out, but Wilson began to wrestle the defendant for the gun. The gun fired while the two were struggling, and Wilson bit the defendant's hand to make him release the gun. Wilson then took it, exited the vehicle, threw the gun off the interstate, and ran down the interstate ramp to a Burger King where he called 911. According to Wilson, no one was arguing prior to him hearing the shots, and the defendant and the victim were referring to each other as "big brother" and "little brother" that night.

Aucoin testified that he, the victim, the defendant, and Wilson were going downtown on the night of the shooting to visit some clubs and the casino. They originally were in the victim's car, but decided to switch to the Mustang before

heading downtown. The defendant told them that he would give them $20.00 or $30.00 each to use at the casino or to buy drinks. On their way downtown, they stopped at a Texaco station to buy alcohol, but it was too late to make such a purchase. According to Aucoin, while the four men were on the interstate, they were smoking, listening to music, and laughing. Wilson, who was driving, was racing another vehicle. No one was arguing, and Aucoin did not know anything was wrong until the defendant shot the victim. Aucoin grabbed the defendant and Wilson brought the Mustang to a stop. Wilson turned around and said, "What you doing, bro? You tripping. Like, you shot this dude in my [girl's] car. Like, bro, you're tripping." The defendant told Wilson to drive the car, but Wilson told him, "No, bro, you ... tripping." He saw Wilson wrestle the defendant for the gun, bite the defendant, jump out of the car, and run down the interstate ramp. The defendant jumped from the backseat into the front and attempted to drive off. Aucoin slid out of the car and ran behind Wilson down the ramp. He ran to a relative's house and called his mother, who drove him to his grandfather's house where he called the police.

John Cook testified that he heard a tap on his door around 2:30 or 3:00 a.m. on March 3, 2012, and found the defendant wearing only boxers. The defendant told him he had to "knock a n----r down" and that he "had to do it, he was trying to get me, I had to get him." According to Cook's testimony, the defendant asked Cook to call the defendant's mother and for some peroxide to use to remove the blood on him, but Cook refused. Cook instead gave the defendant clothes.

The defendant testified at trial. According to the defendant, he met the victim during his freshman year in college, and they were roommates. He and the victim had known each other for about four years. The defendant claimed that he loaned the victim money to purchase a gun on the day of the incident. He told the

victim that he had just gotten his grant refund from school totaling approximately $800.00, so the victim was aware that he had cash. According to the defendant, before the four men went to the Texaco station, he put his gun underneath the front passenger seat. He paid for the gas and, when he came out of the store, he thought that they were heading to the casino. Instead, they began riding "in circles" in unfamiliar neighborhoods. When he asked where they were going, Wilson told him to "be cool." The defendant asked to be dropped off at a friend's house, but Wilson refused. The defendant claimed that when he looked underneath the seat, he noticed that his gun was not there.

The defendant testified that the men drove onto the interstate, and he said a prayer. According to the defendant, as soon as he raised his head from praying, Aucoin pointed the gun at him and demanded the defendant's iPod Touch, which he believed Aucoin thought was an iPhone. The defendant claimed that after he complied, Aucoin told him to empty his pockets and "strip." The defendant testified that the victim said, "Walt, just give him the money . . . don't make me use this" and held up the gun he had purchased earlier that day. The defendant acted like he was going to pull his pants down, but instead grabbed for the gun from Aucoin. As they were wrestling, shots were fired. The defendant claimed that those were the shots that hit the victim. However, the defendant also testified that he intended to shoot the victim. He testified, "[a]t the time I was defending my life." On cross-examination, the defendant admitted that the victim was shot in the back of his head and was not looking at him when he was shot, but claimed that the victim had a gun in his lap. According to the defendant, he ran to Cook's house because Cook was the only person he knew in the area, and he fled to Houston after the fact because he was scared that the police would not believe his story.

The State called Raven Lewis as a rebuttal witness. She testified that about one week prior to the victim's death, she met the defendant when the victim introduced them at her house. She heard a loud conversation between the defendant and the victim that night, and she spoke with the victim afterward. According to Lewis, the victim was upset after speaking with the defendant and said that he felt threatened.

The autopsy performed on the victim revealed that the cause of death was multiple gunshot wounds to the head. The victim sustained five gunshot wounds, and four projectiles were recovered from his body in his right cheek, brain, skull, and neck. All four projectiles recovered from the victim's body were tested and determined to have been fired from the defendant's firearm, which was located underneath the interstate. Five cartridges found in the Mustang were submitted for testing and determined to have been fired from the defendant's firearm. The DNA on the firearm was tested and found to contain a mixture from two contributors, one major and one minor. The victim could not be excluded as a major contributor, and the defendant could not be excluded as a minor contributor.

OTHER CRIMES EVIDENCE

In his sole counseled assignment of error, the defendant argues that the district court erred in denying his motions for mistrial based on the erroneous introduction of evidence of other crimes. Specifically, the defendant contends that the photographic lineups shown to Aucoin, Wilson, and Cook prior to the defendant's arrest, wherein he is wearing "orange prison garb" made it clear to the jury that he had been previously arrested. Thus, the defendant argues that the lineups constituted evidence of another crime.

Wilson testified that a detective showed him a photographic lineup, and he identified the defendant on the same day as the incident, March 3, 2012. The State

asked Wilson whether he recognized Exhibit 106. Wilson indicated that it was the form he filled out and the photographic lineup that he was shown. The State then introduced Exhibit 106, including the photographic lineup and lineup statement sheet, into evidence. Defense counsel responded, "No objection, Your Honor." The State asked Wilson to read the photographic lineup statement and asked whether the lineup in Exhibit 106 was the one that he was shown. Wilson testified that it was. The State indicated that it was going to publish the document and then asked more questions about the lineup statement. It was not until this point that defense counsel asked to approach and stated that he had "a real problem with [the prosecutor] showing the lineup that took place before [the defendant was] arrested when he's in [prison] garb." He moved for a mistrial, arguing that if anyone knew that it was parish prison garb, he or she would know that the defendant had been arrested in the past. The State responded that all six individuals in the photographic lineup were wearing prison orange. In response, defense counsel stated, "The issue isn't whether it's prejudice because they're not all the same. The issue is that these people are going to know my client has been arrested for something in the pa -- before he was arrested in this case because that lineup took place before my client was arrested."[2] The State argued that defense counsel's argument presumed the jury knew the color orange meant that the defendant was wearing prison garb. The court denied the motion for mistrial, and defense counsel stated that he did not want an admonition.

Cook also testified that the police showed him a photographic lineup on the day of the incident. The State introduced into evidence Exhibit 107, which included the photographic lineup statement and photographic lineup shown to Cook. Defense counsel objected and moved for mistrial. The court asked, "You

[2] Wilson identified the defendant in the photographic lineup on March 3, 2012, and the defendant was not located and arrested for the instant offense until March 5, 2012.

had these documents before?" Defense counsel responded, "I had, but I never thought that he was going to introduce the --." The court interrupted, stating:

> Let me stop you. He introduced [Exhibit] 106. You didn't object. It came in. And then you objected ... after he showed it to the jury once it came in. I went back and looked on my thing. He offered it. You knew what was in it. You didn't object at the time; and then, when he showed it, is when you objected and moved for a mistrial.

Finding the photographic lineup in Exhibit 107 to be the same as that in Exhibit 106, which was already in evidence, the district court overruled the objection.

As Aucoin testified, the State asked whether he was shown a photographic lineup. Aucoin responded affirmatively, and the State showed him Exhibit 108. Defense counsel made the same objection and motion as that previously made during the testimonies of Wilson and Cook. The court overruled defense counsel's objection. The State then introduced Exhibit 108, which included the photographic lineup statement and lineup shown to Aucoin during his interview on the day of the incident.

The photographic lineups individually shown to Wilson, Cook, and Aucoin are the same. They depict the defendant among five other black males, with each wearing orange. The defendant argues that because he is wearing an orange jumpsuit in the lineups, the State made an indirect reference to a crime in violation of La. C. Cr. P. art. 770, and his motions for mistrial should have been granted.

When the State introduced Exhibit 106 into evidence, defense counsel responded, "No objection, Your Honor." It was not until after the prosecutor stated that he was going to publish the lineup to the jury that defense counsel asked to approach the bench and moved for a mistrial. As pointed out by the district court, the lineup had already been admitted into evidence, without objection, at that point. Pursuant to La. C.E. art. 103A(1), "[e]rror may not be predicated upon a

ruling which admits ... evidence unless a substantial right of the party is affected, and ... a timely objection ... appears of record, stating the specific ground of objection[.]" The purpose of the contemporaneous objection rule is to allow a district court judge the opportunity to rule on the objection and thereby prevent or cure an error. State v. Hilton, 99-1239, p. 12 (La. App. 1st Cir. 3/31/00), 764 So. 2d 1027, 1035, writ denied, 00-0958 (La. 3/9/01), 786 So. 2d 113. Moreover, even if the defendant had entered a timely objection, based on our review of the record, the district court properly denied the defendant's motions for mistrial.

Louisiana Code of Criminal Procedure article 770(2) prohibits direct or indirect reference by a judge, district attorney, or a court official to other crimes by the defendant as to which evidence is not admissible.[3] A mistrial is warranted under Article 770 when certain remarks are considered so prejudicial and potentially damaging to a defendant's rights that even jury admonition could not provide a cure. See State v. Edwards, 97-1797, p. 19 (La. 7/2/99), 750 So. 2d 893, 906, cert. denied, 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed.2d 421 (1999). Potentially damaging remarks include reference to race or religion, when not material or relevant to the case, and direct or indirect reference to another crime committed or alleged to be committed by the defendant, unless that evidence is otherwise admissible. The comment must be within earshot of the jury and must be made by a judge, district attorney, or other court official. La. C. Cr. P. art. 770. Moreover, a comment must not "arguably" point to a prior crime; to trigger mandatory mistrial pursuant to Article 770(2), the remark must "unmistakably" point to evidence of another crime. State v. Babin, 336 So. 2d 780, 781-82 (La.

[3] Louisiana Code of Criminal Procedure article 770 is a rule for trial procedure. Its operation depends upon a motion by the defendant. The defendant may even waive its mandatory mistrial effect by requesting an admonition only. Accordingly, the mandatory language of La. C. Cr. P. art. 921 provides the proper scope for appellate review; i.e., a judgment or ruling *shall* not be reversed due to error unless the error affects substantial rights of the accused. See State v. Johnson, 94-1379, pp. 16-17 (La. 11/27/95), 664 So. 2d 94, 101.

1976) (where reference to a "mug shot" was not an unmistakable reference to a crime committed by the defendant).

In State v. Davis, 407 So. 2d 702, 705-06 (La. 1981), the defendant argued that the introduction of his 1973 "mug shot" was prejudicial because it showed him with a plaque hanging around his neck reading "Department of Louisiana" and a date prior to that of his 1980 arrest for the offense for which he was on trial. The court in Davis noted there was a possibility that the jury could give undue weight to the inference that the defendant had been previously arrested or convicted. The Louisiana Supreme Court held that Article 770(2) did not require a reversal because identification was a highly material issue, and the discrepancy in dates was not spelled out for the jury. Citing State v. Curry, 390 So. 2d 506 (La. 1980), the court stated, "[u]nless the inference is plain that the prosecutor commented on other crimes committed by the defendant, Article 770 is inapplicable." Davis, 407 So. 2d at 705-06.

The fact that the defendant is wearing orange in the lineup does not constitute a comment or remark that "unmistakably" points to evidence of another crime. While the prosecutor was examining Wilson, Aucoin, and Cook, he did not refer to the photograph of the defendant as a "mugshot" or a booking photograph. He also made no reference to any other crime committed by the defendant or the fact that the defendant had previously been arrested for any other offense. The prosecutor simply asked the three witnesses whether they had been shown a photographic lineup and asked them to identify what they had been shown. Therefore, as this case does not involve a "remark or comment" by the prosecutor, we find Article 770(2) inapplicable, as in Davis cited above.

Instead, we find applicable La. C. Cr. P. art. 775, which provides for a mistrial "when prejudicial conduct in ... the courtroom makes it impossible for the

defendant to obtain a fair trial, or when authorized by Article 770 or 771." However, as a general matter, mistrial is a drastic remedy that should only be declared upon a clear showing of prejudice by the defendant; a mere possibility of prejudice is not sufficient to warrant a mistrial. In addition, a district court judge has broad discretion in determining whether conduct is so prejudicial as to deprive the defendant of a fair trial. State v. Leonard, 05-1382, p. 11 (La. 6/16/06), 932 So. 2d 660, 667. The introduction into evidence of these lineup photographs does not constitute the type of reference to a specific other crime that would deprive the defendant of any reasonable expectation of a fair trial. Further, as noted above, defense counsel stated that he did not want an admonition. Therefore, the district court did not err in denying the motions for mistrial. Accordingly, this assignment of error is without merit.

RETURN OF INDICTMENT IN OPEN COURT

In his sole *pro se* assignment of error, the defendant argues that there was a violation of La. C. Cr. P. art. 383 because his indictment was not returned in open court. That article provides:

> An indictment is a written accusation of crime made by a grand jury. It must be concurred in by not less than nine of the grand jurors, indorsed "a true bill," and the indorsement must be signed by the foreman. Indictments shall be returned into the district court in open court; but when an indictment has been returned for an offense which is within the trial jurisdiction of another court in the parish, the indictment may be transferred to that court.

The record contains an indictment in proper form that was signed by the foreman of the grand jury. However, the court minutes do not go back to the date of the indictment. Therefore, the minute entries do not show whether or not the indictment was returned in open court.

The provisions of La. C. Cr. P. art. 535A state that a motion to quash may be filed of right at any time before commencement of the trial when based on certain

grounds listed in that paragraph. Paragraph A also provides that the grounds listed in that paragraph may be urged at a later stage of the proceedings in accordance with other provisions of the Criminal Code. Failure to return the indictment in open court is not a ground listed in Paragraph A. Paragraph B of Article 535 states that a motion to quash on the ground that the time limitation for commencement of trial has expired may be filed at any time before commencement of trial. Paragraph C states that a motion to quash on grounds other than those stated in Paragraphs A and B shall be filed in accordance with Article 521, and Paragraph D states that the grounds for a motion to quash under Paragraphs B and C are waived unless a motion to quash is filed "in conformity with those provisions."

According to La. C. Cr. P. art. 521A, "[p]retrial motions shall be made or filed within fifteen days after arraignment, unless a different time is provided by law or fixed by the court at arraignment upon a showing of good cause why fifteen days is inadequate." Because the ground asserted by the defendant is not listed in Paragraph A or B of Article 535, it had to be asserted within the time limitations provided for in Article 521, or it was waived. See La. C. Cr. P. art. 535C & D; State v. Sears, 298 So. 2d 814, 822-23 (La. 1974), overruled on other grounds by State v. Lovett, 345 So. 2d 1139 (La. 1977); State v. Mack, 43,206, p. 14 (La. App. 2d Cir. 4/23/08), 981 So. 2d 185, 190-91, writ denied, 08-1222 (La. 2/20/09), 1 So. 3d 491. Because the defendant waited until after trial to allege these grounds, error, if any, was waived. This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.