

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2014 KA 1449

STATE OF LOUISIANA

VERSUS

BENNIE LEE CARTER, JR.

Judgment Rendered: MAR 09 2015

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On Appeal from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
No. 536073

The Honorable Peter J. Garcia, Judge Presiding

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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.

Crain, J. concurs on all assigned reasons.

HOLDRIDGE, J.

The defendant, Bennie L. Carter, Jr., was charged by bill of information with simple burglary, a violation of La. R.S. 14:62. The defendant entered a plea of not guilty. After a trial by jury on August 6, 2013, he was found guilty as charged by a unanimous jury. On August 30, 2013, the defendant filed motions for new trial and post-verdict judgment of acquittal. Prior to sentencing, the State filed a habitual offender bill of information against the defendant, alleging that he was the same person convicted in four previous cases and should be sentenced accordingly as a habitual offender. At the habitual offender hearing on September 19, 2013, the defendant was adjudged a fourth felony habitual offender, and was sentenced to imprisonment at hard labor for twenty years, without benefit of probation, parole, or suspension of sentence. A motion to reconsider sentence was denied by the trial court. The defendant appealed his conviction, assigning error to the trial court's denial of his motion for mistrial. The defendant's motion was based on the State's reference, during its rebuttal closing argument, to defendant having been in jail for the instant offense pending trial.

In a previous appeal, this Court pretermitted discussion of the defendant's argument, noting a sentencing error; specifically, that the trial court failed to rule on the defendant's motions for new trial and post-verdict judgment of acquittal before imposing sentence. Therefore, the defendant's habitual offender sentence was vacated and the matter remanded to the trial court for a hearing and ruling on the defendant's post-trial motions. See State v. Carter, 2013-2114 (La. App. 1st Cir. 05/02/14), 2014 WL 3843882 (unpublished).

On remand, the trial court denied the defendant's motions for new trial and post-verdict judgment of acquittal. Further, using the same predicate offenses as before, the trial court again adjudged the defendant a fourth-felony habitual

offender¹, and sentenced him to twenty years at hard labor, without benefit of probation or suspension of sentence.² In the instant appeal, the defendant again assigns error to the trial court's denial of his motion for mistrial. For the following reasons, we affirm the defendant's conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On or about January 9, 2013, Russell Walker observed footprints in a muddy area of his yard in Abita Springs, Louisiana. In addition to his home, Mr. Walker's property included buses and storage sheds. Mr. Walker testified that he stored race engine parts, aluminum and copper brass radiators, drive shafts, rear ends, race car seats, performance cylinder heads, and other items in a bus. After seeing the footprints on the ground, Mr. Walker noticed a bent screwdriver on the ground near the lock on the back of the bus and suspected that someone had attempted to break-in, though he concluded that there had not been an actual break in at that point. That night, Mr. Walker set up a motion sensor "game camera" to monitor the area.³

Approximately twenty-one hours later, in the late afternoon, Mr. Walker's fiancée noticed that one of the bus windows had been broken and told Mr. Walker,

¹ Predicate #1 was set forth as the defendant's April 16, 2009 guilty plea, under Twenty-Second Judicial District Court Docket #455728, to theft between \$300 and \$500. Predicate #2 was set forth as the defendant's February 24, 2010 guilty plea, under Twenty-Second Judicial District Court Docket #475142, to theft greater than \$500. Predicate #3 was set forth as the defendant's April 4, 2010 guilty plea, under Twenty-Second Judicial District Court Docket #485797 to simple burglary. Predicate #4 was set forth as the defendant's April 5, 2010 guilty plea, under Twenty-Second Judicial District Court Docket #485798, to theft between \$300 and \$500.

² While the minutes indicate the defendant was sentenced without benefit of probation, parole, or suspension of sentence, the transcript and commitment order both indicate the defendant was only denied probation and suspension of sentence. It is well settled that in the event of a discrepancy between the minutes and the transcript, the transcript prevails. See State v. Lynch, 441 So.2d 732, 734 (La.1983).

³ Mr. Walker testified that the camera had video capability and produced color daytime photographs and black and white nighttime photographs. The State entered into evidence a dark, black and white photograph captured by the camera at the time of the offense.

who then contacted the police. Mr. Walker noted that the window appeared to have been broken from the inside because most of the glass was on the ground outside of the bus. He further noted that the driver's-side sliding window was open though he had kept it closed, and a pipe that did not belong to him was leaning against the bus. Several radiators had been stolen, which Mr. Walker estimated had a combined value of approximately three to four thousand dollars. After reviewing photographs from his game camera, Mr. Walker concluded that the perpetrators removed the radiators from the bus, stacked them over his barbed-wire fence, and loaded them into a truck. Mr. Walker recognized the truck and one of the perpetrators and periodically saw him in the same vehicle in the following months, but he did not know him by name. In May 2013, Mr. Walker showed one of the photographs to his friends, who recognized and knew the defendant by name. Mr. Walker then contacted the police and gave them the defendant's name.

On May 24, 2013, the defendant was taken into custody, and after being advised of his **Miranda**⁴ rights, he signed a waiver of rights form and gave a recorded police interview. During the interview, which was conducted by Detective Steve Lucia of the St. Tammany Parish Sheriff's Office, the defendant was shown the photographic evidence obtained from Mr. Walker's game camera, confirmed that he remembered going to the residence, positively identified himself and the vehicle, and admitted to taking the radiators. The defendant would not identify the other photographed perpetrator. Further, transaction tickets obtained by the police revealed that on January 10, 2013, the defendant and his father sold several copper brass and aluminum radiators to P&W Industries in Mandeville. After viewing photographs of the items sold by the defendant, Mr. Walker testified that some of them appeared to be similar to the ones he owned.

⁴ **Miranda v. Arizona**, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

DENIAL OF MOTION FOR MISTRIAL

In his sole assignment of error, the defendant notes that during its rebuttal argument, the State told the jury that he had been in jail for the instant offense pending trial. The defendant further notes that he moved for a mistrial in this regard, and that the parties agreed to postpone a ruling until after the court completed the jury instructions. The defendant argues that the trial court erred in concluding that his objection was not contemporaneous, contending that the objection should have been considered timely. The defendant notes that the trial court also considered the fact that the jury already knew about his arrest and police interview. The defendant avers the jury could have thought that he was released after giving the interview if the State had not informed them otherwise. Further, the defendant claims the trial court erred in considering the State's lack of intent to ire the jury or to prejudice them against the defendant. The defendant specifically argues that the State's intent is irrelevant since the remark infringed upon his presumption of innocence and denied him due process of law. Finally, the defendant avers that a mistrial was warranted since an admonition would have only exacerbated the problem by calling further attention to the defendant's incarceration.

During closing arguments, the defense attorney made reference to a continuance being warranted in cases where a main witness is unavailable. The defense attorney further noted that the investigating detective (Detective Lucia) was not available for trial,⁵ as elicited during the testimony of Sergeant Dale Galloway, who observed Detective Lucia's interview of the defendant's, although he was not the interviewer or investigating officer in this case. The defense attorney discussed the inability to question Detective Lucia regarding the content

⁵ At the time of trial, Detective Lucia was overseas, serving in the United States Armed Forces.

of his report or the procedure of his investigation. The defense attorney also noted that while the instant offense occurred in January 2013, the defendant was not taken into custody until May 23, 2013, and Detective Lucia was not present to directly explain the gap in the investigation. In response, during its rebuttal closing argument, the State's attorney argued:

Getting a continuance can involve many things. Detective Lucia won't be back for a year. Bennie Carter has been in jail, according to the defense, since May 23rd. Is it fair to keep him in jail another year without trial?

It was a decision I made because the [sic] Detective Galloway supervised Detective Lucia, and as you saw in that picture, the main reason I wanted to show it to you is you saw Detective Lucia come in with water for Bennie Carter. He was there. Is it fair to make Bennie Carter wait another year when Lucia would add nothing but hearsay?

During the jury instructions, and after the judge instructed the jurors on the elements of the offense and responsive offense, the defense attorney interrupted and was given permission to approach the bench. At that point, the defense attorney stated, "[i]t just dawned on me during Nick's rebuttal he mentioned that Bennie was going to be in jail, another jail, and he's been in jail since May 23rd." The defense attorney agreed to allow the trial court to finish the jury instructions before further considering and ruling on the issue.

After the jury was retired, the defense moved for a mistrial based on the State insinuating during its rebuttal closing argument that the defendant had been in jail for a year. The defense attorney argued that the defendant was prejudiced by the fact that the jury was made aware of his incarceration on this case, and declined the trial court's offer to admonish the jury. In denying the motion for mistrial, the trial court noted that the defense attorney's objection was not contemporaneous.

The defense attorney did not contemporaneously object to the prosecutor's allegedly prejudicial comments during the State's closing argument, but rather waited until the trial court was instructing the jury to lodge his objection. "A defendant's failure to object contemporaneously to improper argument by the prosecutor waives any claim on appeal based on the argument." See La. Code Crim. P. art. 841; **State v. Johnson**, 2000-0680 (La. App. 1st Cir. 12/22/00), 775 So.2d 670, 680, writ denied, 2002-1368 (La. 5/30/03), 845 So.2d 1066. Irregularities or errors cannot be availed of on appeal if no objection is made at the time of the occurrence. **State v. Walker**, 94-0587 (La. App. 1st Cir. 4/7/95), 654 So.2d 451, 453, writs denied, 95-1124 & 95-1125 (La. 9/22/95), 660 So.2d 470. "The grounds for objection must be sufficiently brought to the court's attention to allow it the opportunity to make the proper ruling and prevent or cure any error." **State v. Trahan**, 93-1116 (La. App. 1st Cir. 5/20/94), 637 So.2d 694, 704. The contemporaneous objection rule also applies to motions for mistrial. **State v. Madrid**, 12-410 (La. App. 5th Cir. 12/11/12), 104 So.3d 777, 783. Therefore, although we think the State's reference to the defendant's incarceration may have been inappropriate, the defendant failed to preserve this issue for review by failing to contemporaneously object.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

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 **CRAIN, J., concurring in the result.**

Because the trial court ruled on the motion, I would consider the defendant's argument that the trial court erred in denying his motion for mistrial and, finding no merit, affirm the defendant's conviction, habitual offender adjudication, and sentence.

The prosecutor's statement did not trigger the requirements of a mandatory mistrial under Louisiana Code of Criminal Procedure article 770. According to Louisiana Code of Criminal Procedure article 771, the trial court had the discretion to grant a mistrial if the remark was one that was irrelevant or immaterial and might create prejudice against the defendant in the mind of the jury, and if the trial court is satisfied that an admonition is not sufficient to assure the defendant of a fair trial. The trial court offered to admonish the jury, but that offer was declined. The prosecutor made the statement during his rebuttal argument. The defendant did not object at the end of summation, but waited until the trial court had nearly finished instructing the jury before bringing the statement to the trial court's attention as an afterthought. Considering the circumstances, the defendant's motion for mistrial was untimely. *Compare State v. Brown*, 96-1002 (La. App. 5 Cir. 4/9/97), 694 So. 2d 435, 438, *writ denied*, 97-1310 (La. 10/31/97), 703 So. 2d 19.

Further, defense counsel, not the prosecutor, was the first to refer to the defendant's incarceration, at least by inference, commenting that the defendant was "taken into custody" on May 23, 2013, while arguing to the jury that a continuance

was warranted in the case. The prosecutor had the right to answer that argument and I do not find that his remarks were so prejudicial as to deny the defendant a fair trial. *See* La. Code Crim. Pro. art. 774; *State v. Smith*, 418 So. 2d 515, 522 (La. 1982).

I find that the trial court did not abuse its discretion in denying the defendant's motion for mistrial. *See State v. Berry*, 95-1610 (La. App. 1 Cir. 11/8/96), 684 So. 2d 439, 449, *writ denied*, 97-0278 (La. 10/10/97), 703 So. 2d 603 (recognizing that a mistrial is a drastic remedy and that a trial court's denial of a motion for mistrial will not be disturbed in the absence of an abuse of discretion). The motion for mistrial was untimely, the statement was made to rebut the arguments raised by the defense and the inferences that the jury could have drawn from those arguments, and the defendant failed to show prejudice in light of the overwhelming evidence of his guilt. For these reasons, I concur.