

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2016 KA 0607**

**STATE OF LOUISIANA**

**VERSUS**

**NICHOLAS LEE STEWART**

**Judgment Rendered: OCT 31 2016**

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On Appeal from the Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
No. 03-13-0969

Honorable Beau Higginbotham, Judge Presiding

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by  
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Nicholas Lee Stewart

\* \* \* \* \*

**BEFORE: WHIPPLE, C.J., GUIDRY, AND McCLENDON, JJ.**

*Whipple, I concur in the result.*



**McCLENDON, J.**

Defendant, Nicholas Lee Stewart, was charged by bill of information with possession of a firearm by a convicted felon, a violation of LSA-R.S. 14:95.1(A). He pled not guilty. Following a jury trial, defendant was found guilty as charged. Thereafter, the trial court sentenced defendant to twelve years at hard labor, without benefit of parole, probation, or suspension of sentence. Defendant now appeals, alleging a single assignment of error. For the following reasons, we affirm the conviction and sentence.

**FACTS**

Around 2:30 p.m. on February 2, 2013, Baton Rouge Police Officer Joseph Keller attempted to stop the driver of a black SUV for a seatbelt violation. After Officer Keller activated his emergency lights, the driver turned from Evangeline Street onto West Brookstown Drive and initially appeared to stop the vehicle. After stopping, the vehicle then jerked forward, and the driver bailed out and began to flee the area. As the driver fled, Officer Keller noticed that he was holding a black pistol with an extended magazine. Officer Keller chased the driver for several blocks before eventually losing sight of him.

After he lost contact with the driver, Officer Keller returned to the scene of the traffic stop, where another officer had secured the vehicle. Officer Keller identified the registered owner (not defendant) of the vehicle from its license plate. He also recovered a "prison ID" with defendant's name and picture, from which he recognized defendant as the driver of the vehicle. Officer Keller then relocated to meet other officers at the address listed for the vehicle's registered owner. There, out of several detained subjects, Officer Keller identified defendant as the driver of the vehicle and as the person who had fled from the stop with a handgun. Officer Keller noted that defendant was not wearing the same clothing from the time of the stop, but he was breathing heavily, had cuts on his hand, and was sweating. Despite attempting to retrace defendant's path and a search of the room in which defendant was found, Officer Keller never recovered the weapon defendant possessed as he fled.

At trial, the state introduced evidence to show that defendant had previously been convicted of possession of a schedule IV controlled dangerous substance (alprazolam). Defendant did not testify at trial.

### **MOTION FOR MISTRIAL**

In his sole assignment of error, defendant argues that the trial court erred in denying his motion for a mistrial. He contends that Officer Keller's testimony regarding a "prison ID" was improper other crimes evidence that prejudiced his ability to receive a fair trial.

Louisiana Code of Evidence article 404(B) provides that evidence of other crimes, acts, or wrongs is generally not admissible. Louisiana Code of Criminal Procedure article 770(2) provides that a mistrial shall be granted upon motion of the defendant when a remark or comment is made within the hearing of the jury by the judge, district attorney, or a court official, during trial or in argument, and that remark refers to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible.<sup>1</sup> As a general rule, a state witness is not a "court official" within the meaning of LSA-C.Cr.P. art. 770. See State v. Perry, 420 So.2d 139, 146 (La. 1982), cert. denied sub nom., McCray v. New York, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983). However, an impermissible reference to another crime deliberately elicited by the prosecutor is imputable to the state and would mandate a mistrial. See State v. Boudreaux, 503 So.2d 27, 31 (La.App. 1 Cir. 1986).

In the instant case, the issue of a mistrial arose during Officer Keller's testimony regarding his actions after he returned to the scene of the initial stop. The following exchange occurred:

[The State]: What did you do once you got to that vehicle?

[Officer Keller]: I contacted the other officer that was there, who secured the vehicle until I could get back, and we were able to identify the location of the registered owner of the vehicle, and found a prison ID in the vehicle. From the photo on the prison ID, I was able to –

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<sup>1</sup> 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 LSA-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 (La. 11/27/95), 664 So.2d 94, 101.

The Court: Wait. Stop right there. Approach.

(Reporter's note: Whereupon, a bench conference was held.)

The Court: All right. We're not going to refer to a prison ID. If it's – if it's the defendant's –

[The State]: And I was going to get him to slow it down and tell him it's the –

The Court: – I don't care. We're not going to prejudice this jury. He's already – we already know that he's got a felony conviction.

[Defense Counsel]: Thank you for that, Judge.

The Court: But we're not going to prejudice the jury by having a victim ID – or a prison ID that he's going to refer to. So, we're just going to leave it at that. You're not going to ask who's [sic] ID it is and you're just going to move on.

[The State]: – Okay.

The Court: Okay?

(Reporter's note: Whereupon, bench conference concluded.)

[The State]: Were you able to find the location of the defendant?

[Officer Keller]: Yes, sir.

[The State]: And were you able to identify the defendant?

[Officer Keller]: Yes, sir.

[The State]: Where did you identify him?

[Officer Keller]: From a prison ID in the vehicle.

The Court: All right. Approach again.

At that time, the trial court excused the jury and discussed Officer Keller's testimony in open court. The trial court spoke directly to Officer Keller and instructed him not to mention a prison ID again. It appears that Officer Keller had been excluded from the previous bench conference and had not been so instructed at that time.

Defense counsel also moved for a mandatory mistrial under Article 770 on the ground that a state witness had impermissibly referred to inadmissible other crimes evidence. The state opposed this motion, arguing that it had already established defendant's status as a convicted felon, making any reference to a prison ID non-prejudicial. The trial court denied defendant's motion for a mistrial. The trial court noted that it was the one, in both instances, to cut off Officer Keller's testimony. The

trial court stated that while the implication might have been that the prison ID belonged to defendant, there was no completed testimony to that fact. He also informed the parties that any further reference to a prison ID would result in a mistrial. Lastly, when the jury returned, the trial court gave the following admonition:

Okay. You may be seated. Okay. Ladies and gentlemen, before we had just taken a small break, there was a mention of a prison ID. You are not to consider that as evidence and you are not to consider that as any relation to Mr. Stewart. Okay? All right. Mr. Volo.

On cross-examination, defense counsel asked Officer Keller why he did not attempt to lift fingerprints from the vehicle. Without objection, Officer Keller stated that he did not fingerprint the vehicle because he had already located "that ID" in the vehicle. On redirect examination, the state asked Officer Keller to describe the ID. Again without objection, Officer Keller described that the ID was located in the front, driver area of the vehicle, and it contained defendant's name and picture.<sup>2</sup>

Mistrial is a drastic remedy that is only authorized where substantial prejudice will otherwise result to the accused. A trial court ruling denying mistrial will not be disturbed absent an abuse of discretion. **State v. Smith**, 418 So.2d 515, 522-23 (La. 1982).

In the instant case, the trial court did not err or abuse its discretion in denying defendant's motion for a mistrial. First, there is no evidence that the state deliberately elicited Officer Keller's response to the "prison ID." Officer Keller's first reference to the "prison ID" came as a result of the state's relatively open-ended question regarding his actions upon returning to the vehicle. At that time, the trial court paused the proceedings and held a bench conference from which Officer Keller appears to have been excluded. Therefore, Officer Keller was presumably unaware of the trial court's initial instruction regarding any further references to the "prison ID." Thereafter, the state asked questions that appear to have been calculated to get Officer Keller to describe his in-person identification of defendant. Having not been present for the initial bench conference, Officer Keller appears to have misunderstood the state's line of questioning, and he responded again with a reference to the "prison ID." Considering

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<sup>2</sup> None of the parties referred specifically to a "prison ID" in either instance.

the record as a whole, we find that the state's questions cannot be fairly considered as attempts to deliberately elicit testimony regarding a "prison ID." 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. Edwards**, 97-1797 (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). Here, we cannot say that the references to a "prison ID" are unmistakable references to another crime.

Rather than the mandatory provision of Article 770, the applicable provision in this case is LSA-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." In pertinent part, Article 771(2) authorizes a mistrial when a remark or comment is made during the trial by a witness, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant in the mind of the jury, and the court is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

After hearing arguments from the state and the defense, the trial court concluded that an admonition was sufficient to cure Officer Keller's two references to a "prison ID." This admonition clearly instructed the jurors that they were not to consider the mention of a "prison ID" as evidence or as having any relation to defendant. Officer Keller's two references to the "prison ID" were immediately curtailed by the court's own motion, and defendant has made no showing that he was unable to receive a fair trial as a result of them. Furthermore, the jurors had already been informed of defendant's status as a felon, making it difficult to assume that a reference to a "prison ID" somehow added any additional prejudice. Finally, Officer Keller twice more referred to the ID – albeit without any reference to "prison" – without any objection from the defense. Considering the record as a whole, we find that the trial court did not err or abuse its discretion in finding that an admonition was the appropriate manner of proceeding.

This assignment of error is without merit.

## PATENT ERROR

Initially, we note that our review for error is pursuant to LSA-C.Cr.P. art. 920(2), 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." In imposing the sentence for possession of a firearm by a convicted felon, the trial court failed to impose the mandatory fine of not less than one thousand dollars nor more than five thousand dollars. See LSA-R.S. 14:95.1(B). Although the failure to impose the fine is error under LSA-C.Cr.P. art. 920(2), it certainly is not inherently prejudicial to the defendant. Because the trial court's failure to impose the fine was not raised by the state either in the trial court or on appeal, we are not required to take any action. Further, considering the above and in an effort to conserve judicial resources, we decline to correct the illegally lenient sentence imposed on count three. See State v. Price, 05-2514 (La.App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

## CONCLUSION

For the foregoing reasons, we affirm the defendant's conviction and sentence.

**CONVICTION AND SENTENCE AFFIRMED.**