NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-1529**
VERSUS	*	**COURT OF APPEAL**
RODNEY C. BARLOW	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 401-779, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

Court composed of Chief Judge William H. Byrnes, III,
Judge James F. McKay, III, and Judge Dennis R. Bagneris, Sr.

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CONVICTION AND SENTENCE AFFIRMED

STATEMENT OF THE CASE

By bill of information dated September 24, 1998, defendant was charged with being a convicted felon in possession of a firearm; and, he pleaded not guilty. The trial court denied defendant's motion to suppress the evidence; and, on August 9, 1999, he was tried by a twelve-member jury that found him guilty of attempted possession of a firearm by a convicted felon. On February 25, 2000, the trial court sentenced defendant to six years at hard labor. The trial court also denied defendant's motion for new trial and motion for reconsideration of sentence. Defendant waived all delays at sentencing.

STATEMENT OF THE FACTS

Agent Michael Eberhardt of the Bureau of Alcohol, Tobacco and Firearms testified that on September 9, 1998, between 9:00 and 9:30 p.m., he and Officer Raymond Veit of the NOPD were on patrol when they saw a blue Hyundai run a stop sign at St. Ann and Broad Avenue. They pursued the vehicle until it came to a stop at Iberville and Dorgenois Sts.. Eberhardt stated that he saw two guns thrown out of the car's passenger side window.

He then saw the driver exit the car, and Eberhardt chased after him while Veit found the passenger lying down on the front seat of the car. Veit testified that as the driver exited the car, he saw the passenger throw the guns out of the window. Veit ordered the passenger, later identified as defendant, out of the car. Veit also retrieved the guns thrown from the car. Both guns were loaded, and one of them was cocked. No fingerprints were taken from either gun. Eberhardt did not catch the driver of the car.

Lawrence Jones, who had an automobile detailing shop at St. Ann and White Streets, testified that he had known defendant his entire life and that on the night in question, he had asked someone named Melvin, who had two other people in the car, to give defendant a ride. He further testified that defendant did not know Melvin. Jones stated that Melvin picked up defendant at around 6:00 p.m., and that he saw an unmarked police car behind Melvin's car. On cross-examination, Jones stated that Joe Williams was the driver of the car but he could not remember if Melvin was in the back seat. He admitted that he did not see anything else.

Willard Williams testified that as he walked down Dorgenois, he saw the police arrest defendant. He stated that he saw a blue truck turn the corner and then he saw a police car behind it. He stated that someone got out of the truck, threw something, and ran and that one of the police officers

ran after this man halfway up the block. The other police officer pulled defendant, whom he referred to as "Rock," out of the truck.

Vincent Holland testified that as he and his girlfriend walked to a bar to get crawfish, he saw a car stop at the corner of Iberville and Dorgenois Sts. He stated that a man jumped out of the car, threw something, and then ran. Holland further stated that a police car came up; the officers got out their car, ran past the first car, and then returned to their car. He testified that the officers were cursing and that he saw another person in the first car. He also testified that he saw the officers searching for something on the ground and that they did not find anything. He stated that a second group of officers arrived and that they found guns. Holland admitted that he could not tell what it was that the first man threw as he got out of the car.

Defendant submitted the preliminary examination testimony of Patrice Bryant, which was read into the record. Ms. Bryant testified that she was with defendant on the night of September 9 at 2757 St. Ann St. and that she saw him get a ride with a man she did not know. She stated that she did not see any bulges in defendant's clothing. She further stated that she saw the police car shortly after defendant got into the car.

ERRORS PATENT

A review of the record shows no errors patent.

ASSIGNMENT OF ERROR NO. 1

In his sole assignment of error, defendant complains that the trial court erred in overruling his objections and denying his motion for mistrial due to prejudicial comments made by the State during closing argument.

La. C.Cr.P. art. 774 provides:

> The argument shall be confined to the evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw from, and to the law applicable to the case.
> The argument shall not appeal to prejudice.
> The state's rebuttal shall be confined to answering the argument of the defendant.

In State v. Langley, 95-1489, p. 7 (La. 4/14/98), 711 So. 2d 651, 659, the Supreme Court stated:

> In any event, prosecutors are allowed broad latitude in choosing closing argument tactics. See, e.g. State v. Martin, 539 So.2d 1235, 1240 (La. 1989). Although under La. C.Cr.P. art. 774 closing argument must be "confined to the record evidence and the inferences which can reasonably drawn there from," both sides may still draw their own conclusions from the evidence and convey such view to the jury. State v. Moore, 432 So. 2d 209, 221 (La. 1983), cert. denied 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983). "Before allegedly prejudicial argument requires reversal, the court must be thoroughly convinced that the jury was influenced by the remarks and that such contributed to the verdict." State v. Taylor, 93-2201, p. 21 (La. 2/28/96), 669 So. 2d 364, 375;

> State v. Jarman, 445 So. 2d 1184, 1188 (La. 1984). We also ask whether the remarks injected "passion, prejudice or any arbitrary factor" into the jury's recommendation. Moore, 432 So. 2d at 220.

Defendant complains of the following comment by the prosecutor regarding Patrice Bryant: "Patrice Bryant. She's not here. She's strictly just not here. Maybe it was too much for her to lie the first go round." Defendant objected to this comment and moved for a mistrial, which were denied by the trial court on the basis that the prosecutor was free to argue that she lied just as defendant was free to argue that the police lied. After defendant argued that the prosecutor had no evidence that Ms. Bryant did not show up because she had lied in the past, the trial court sustained the objection. Defendant did not reassert his motion for a mistrial after the trial court sustained his objection.

Defendant argues that the State appealed to the potential prejudice that the jurors might have for a witness they did not see and that as a result of these inflammatory remarks, Ms. Bryant's testimony was disregarded by the jurors. It does not appear that defendant was prejudiced by the prosecutor's comments regarding Ms. Bryant. Assuming that the jury disregarded her testimony because the prosecutor characterized it as not believable, her testimony was, at best, marginally exculpatory. She was not present when the officers saw the guns thrown from the car window and defendant was

arrested. Her testimony simply showed that defendant accepted a ride in the Hyundai. Therefore, the trial court did not err in denying the mistrial as to the prosecutor's comments.

Defendant also complains about the prosecutor's referring to Willard Williams as a convicted felon three different times during closing argument. The trial court sustained defendant's objection the first time the prosecutor referred to Williams as a convicted felon, but it denied his motion for a mistrial. During rebuttal argument, the prosecutor summarized Williams' testimony and stated that Williams had a cocaine conviction; and, the trial court sustained defendant's objection. The third time the prosecutor referred to Williams, as being a convicted felon was when he stated that two of the three defense witnesses had prior convictions. The trial court again sustained defendant's objection. It should be noted that defendant did not reassert the motion for mistrial after the trial court sustained his objections.

Defendant argues that these comments appealed to the prejudice that a prior felony conviction holds in society and irreparably damaged the ability of the jury to consider Williams' testimony fairly. It does not appear that the trial court erred in denying defendant's motion for a mistrial because the court noted that it had admonished the jury not to hold it against Williams. Furthermore, Williams' credibility was more seriously undermined by the

fact that he was the only witness who stated that defendant was in a truck, not a car as the other witnesses stated, than by the State's characterizing him as a convicted felon. This assignment is without merit.

Defendant further complains that the prosecutor "personally assaulted" defense counsel by calling him a "salesman." He also complains that the prosecutor commented on what defendant may have been thinking when the police stopped him. Another complained-of comment concerned a reference to Agent Eberhardt's training. Defendant also complains about the prosecutor's telling the jurors that if his case was not proven when he sat down at the end of the State's case and if the jurors still had any doubt, it was cleared up by the defense's case. Defendant further complains that the prosecutor prejudiced him when the prosecutor stated that the officers stopped defendant from committing some unspecified future crime. A review of the transcript shows no objection to any of these comments; hence, appellate review is precluded. La. C.Cr.P. art. 841.

Defendant also complains about the prosecutor's statement about the testing of the guns for fingerprints. Defendant objected to this comment as being beyond the facts in the record, and the trial court sustained the objection. There was no motion for a mistrial. Where there is no motion for a mistrial or an admonishment after the trial court sustains an objection to a

remark made by the prosecutor, defendant has no basis for claiming that the remark was prejudicial. State v. McGee, 98-2116, 98-2124 (La. App. 4 Cir. 2/23/00), 757 So. 2d 50.

Accordingly, this assignment of error is without merit.

CONCLUSION

Accordingly, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED