STATE OF LOUISIANA	*	**NO. 2000-KA-1755**
VERSUS	*	**COURT OF APPEAL**
ROBERT BUCKINGHAM AND LEONARD MICHELL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 396-040, SECTION "H"
Honorable Camille Buras, Judge

* * * * * *

Charles R. Jones
Judge

* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones, and
Judge Dennis R. Bagneris, Sr.)

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AFFIRMED

Robert Buckingham and Leonard Michell were charged on March 3, 1998, with one count each of armed robbery, a violation of La. R.S. 14:84, and one count each of second degree kidnapping, a violation of La. R.S. 14:44.1. Leonard Michell was also charged with being a felon in possession of a firearm, a violation of La. R.S. 14:95.1. At his arraignment on March 16, 1998, Buckingham pled not guilty. On November 24, 1998, a twelve-member jury found Buckingham and Michell guilty as charged in the armed robbery and second-degree kidnapping charges. On January 26, 1999, the court sentenced both to seventy-five years imprisonment on the armed robbery charges and to forty years imprisonment on the second degree kidnapping charges. All sentences were ordered served without benefit of parole, probation or suspension of sentence, with credit for time served, and the sentences were to run concurrently. Prior to sentencing, Michell withdrew his not guilty plea to being a felon in possession of a firearm, pled guilty, and was sentenced to ten years imprisonment, without benefit of parole, probation or suspension of sentence, with credit for time served; his

sentence is to run concurrently with the other sentences. The State filed a multiple bill of information on April 23, 1999, and Buckingham pled guilty to the multiple bill. The court vacated his original armed robbery sentence and re-sentenced him to seventy-five years in prison without benefit of probation, parole, or suspension of sentence. A multiple bill of information was also filed as to Michell on June 1, 1999. The court adjudged Michell a second felony offender, vacated his original armed robbery sentence, and re-sentenced him to seventy-five years imprisonment without benefit of probation, parole, or suspension of sentence. This timely appeal follows.

STATEMENT OF FACTS

At approximately 10:00 p.m. on January 18, 1998, as Chris Weindel exited his car to enter Parlay's Bar, he was robbed and abducted by Buckingham and Michell. Michell drove Weindel's car while Buckingham sat in the back seat with Weindel, holding a gun to Weindel's head. Buckingham searched Weindel, taking his cell phone, wallet, ATM card and thirty dollars. Michell drove the car to an ATM machine where Buckingham used Weindel's ATM card to access additional cash. They drove Weindel to an uptown New Orleans area where Buckingham purchased drugs. Buckingham and Michell smoked the cocaine in the car, and then decided to go to the Westbank to purchase heroin. At that point, Weindel convinced

them to release him. As Weindel got out of the car, Buckingham and Michell threatened to kill him if he went to the police. After walking for about thirty minutes, Weindel found a phone, and called a friend to pick him up. He and his friend drove to the police station, where Weindel reported the incident.

Sergeant Randy Chestnut was patrolling the St. Thomas Housing Development when he heard the radio dispatch of the description of Weindel's vehicle. Sergeant Chestnut spotted a car fitting the description, and followed it. After a high-speed chase on the Westbank Expressway, Buckingham and Michell were apprehended when they wrecked Weindel's vehicle. The police found Weindel's wallet, cell phone, money clip and ATM card in the vehicle with Buckingham and Michell.

Chris Weindel identified Buckingham and Michell as his assailants the night of the incident during a show-up identification and four days later during a photographic lineup. At trial, Weindel identified them again and the items taken from him on the night of the incident.

ERRORS PATENT

A review for errors patent on the face of the record reveals one as to Leonard Michell. Neither the docket master nor the minute entries indicate that he was ever arraigned or entered an initial plea.

La.C.Cr.P. art. 831 provides, in part, that a defendant must be present at arraignment and when a plea is given. La.C.Cr.P. art. 832(A) provides a waiver of this requirement when a defendant is temporarily voluntarily absent. The article further provides that, "the defendant may always object to his absence at the arraignment or plea to the merits." La.C.Cr.P. art. 555 states:

> Any irregularity in the arraignment, including a failure to read the indictment, is waived if the defendant pleads to the indictment without objecting thereto. A failure to arraign the defendant or the fact that he did not plead is waived if the defendant enters upon the trial without objecting thereto, and it shall be considered as if he had pleaded not guilty.

Michell has shown no prejudice resulting from the error. He did not object to the omission at his arraignment nor; does he now object on appeal. Since Michell's plea of not guilty can be assumed, the failure of the record to show that he was arraigned on the charges in this case is harmless error. *State v. Perez*, 98-1407 (La. App. 4 Cir. 11/3/99), 745 So.2d 166, *writ den.*1999-3372 (La. 9/22/00), 768 So.2d 32.

BUCKINGHAM ASSIGNMENT OF ERROR NUMBER 1

In his first assignment, Buckingham assigns error to the district court's failure to order a mistrial based upon the State's alleged reference to

inadmissible other crimes evidence in closing rebuttal argument.

A mistrial is warranted under La. C.Cr.P. art. 770 when certain remarks are considered so prejudicial and potentially damaging to a defendant's rights that even a jury admonition cannot provide a cure. *State v. Johnson,* 94-1379 (La.11/27/95), 664 So.2d 94. Potentially damaging remarks include direct or indirect references to another crime committed or alleged to another crime committed or alleged to
have been committed by the defendant, unless that evidence is otherwise admissible. La.C.Cr.P. art. 770(2).

Buckingham alleges that the Prosecutor made damaging remarks in his closing arguments such that he warrants a new trial. The scope of closing arguments "shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, 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." La.C.Cr.P. art. 774. However, a prosecutor retains "considerable latitude" when making closing arguments. *State v. Taylor*, 93-2201 (La.2/28/96), 669 So.2d 364, 374, *cert. denied*, *Taylor v. Louisiana*, 519 U.S. 860, 117 S.Ct. 162, 136 L.Ed.2d 106 (1996). Further, the trial judge has broad discretion in controlling the scope of closing

arguments. *State v. Casey,* 99-0023, (La.1/26/00), 775 So.2d 1022, *cert.den,. Casey v. Louisiana,* 121 S.Ct. 104, 148 L.Ed.2d 62 (2000). Even if the prosecutor exceeds the bounds of proper argument, the court will not reverse a conviction unless "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. *Id*.; *State v. Ricard,* 98-2278, 99-0424 (La.App. 4 Cir. 1/19/00), 751 So.2d 393, 395, writ denied, 2000-0855 (La. 12/8/00), 775 So.2d 1078.

In this case, the record indicates that counsel moved for a mistrial at the close of trial. Those portions of the State's closing arguments which Buckingham contends were inflammatory references to his criminal record are:

> And the law is written that the Judge is the one that is concerned with sentencing. And that is because the Judge knows a lot more about these cases then y'all are allowed to hear.
>
> * * *
>
> Y'all decided facts. The Judge gets to take everything into consideration. They learn about the defendant's background, they learn about all of their history, what kind of person they are. This is stuff you can't know as a juror. And you're not supposed to know.
>
> * * *
>
> We trust you not to be worried about something like sentences which is (sic) up to somebody who

> knows a little bit more about his background.
>
> * * *
>
> Why else do you want to cut them a break? Because **they** have been convicted before of another felony? (**emphasis added**).

In the first three excerpts, the prosecutor pointed out that the judge, not the jury, determines a defendant's sentence and that the sentence is based upon multiple considerations. There is no implication that the defendant had prior conviction(s). As for the fourth excerpt, the prosecutor was responding in part to defense counsel's plea for leniency for his client. It is clear error even in a veiled reference to both defendants having committed prior crimes when Buckingham's prior crimes had not been admitted in trial. This comment made by the Prosecutor was clearly prejudicial, and we condemn such remarks. However, the error was harmless. The evidence of the defendant's guilt was substantial. The victim identified Buckingham within hours of the incident during a show up identification, as well as in a photographic lineup a few days after the robbery. The police confiscated the victim's wallet, cell phone and ATM card from the backseat of the victim's car when they apprehended the defendants. In light of the overwhelming evidence, it is improbable the prosecution's remark solely influenced the jury's verdict.

BUCKINGHAM ASSIGNMENT OF ERROR NUMBER 2

MICHELL ASSIGNMENT OF ERROR NUMBER 1

In another assignment of error, both defendants contend their seventy-five year sentences, as second offenders are unconstitutionally excessive.

Article 1, Section 20 of the Louisiana Constitution of 1974 provides that "No law shall subject any person ... to cruel, excessive or unusual punishment." A sentence within the statutory limit is constitutionally excessive if it is "grossly out of proportion to the severity of the crime" or is "nothing more than the purposeless imposition of pain and suffering." *State v. Caston*, 477 So.2d 868 (La.App. 4 Cir.1985). Generally, a reviewing court must determine whether the trial judge adequately complied with the sentencing guidelines set forth in La. C.Cr.P. art. 894.1 and whether the sentence is warranted in light of the particular circumstances of the case. *State v. Soco*, 441 So.2d 719 (La.1983); *State v. Quebedeaux*, 424 So.2d 1009 (La.1982).

If adequate compliance with Article 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of his case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. *State v. Bonicard*, 98-0665, (La.App. 4 Cir. 8/4/99), 752 So.2d 184, 185, *writ denied*, 99-2632 (La.3/17/00), 756 So.2d

324.

In sentencing Buckingham, the trial judge noted:

> At this time the Court is going to vacate the sentence previously imposed in this case and at that date I had gone through my reasons and my consideration of the sentencing guidelines in this case --that I have considered them when I originally gave you your sentence.
>
> And again, I note for the record that this case was close to an aggravated kidnapping. What you did could have gotten you a life offense. You were charged with armed robbery and second degree kidnapping.
>
> I find that in light of the facts of this case and what the victim went through on that night, my sentence will be 75 years in the Department of Corrections without benefits of probation, parole or suspension of sentence.

At the original sentencing hearing, the district court reviewed Buckingham's pre-sentence investigation report, noting that he has a lengthy arrest record, serious substance abuse problems, and was on probation for a 1997 simple burglary conviction at the time he committed the present offenses.

As for Michell, after adjudicating him a second offender, the district court said:

> At this time, as the Court articulated at the sentencing on January 26th of 1999, the court ordered a pre-sentence investigation in this case which detailed the past criminal history, social history, family history and the victim's input into the offenses charged against Mr. Michell.

* * *

> The Court would note again that it has considered the sentencing guidelines as this Court articulated in January of 1999, and after considering those factors, as well as the contents of the pre-sentence investigation, and in light of the past criminal history, it's at this time the sentence of this Court that Mr. Michell be sentenced in Count One to 75 years in the Department of Corrections at Hard labor, that sentence being without the benefit of probation, parole or suspension of sentence, and that sentence to run concurrent with the other two counts in this case, Count Two and Three, Second Degree Kidnapping and Felon with a Firearm, giving Mr. Michell credit for all time served.

As with Buckingham, the district court reviewed Michell's pre-sentence investigation report at the original sentencing hearing. The report documents Michell's lengthy juvenile arrest record dating back to 1991. His convictions include theft in 1991 and 1992; burglary of an inhabited dwelling in 1994 and simple burglary in 1996.

The district court articulated reasons for sentencing pursuant to La. C.Cr.P. art. 894.1. As second offenders, the defendants faced a sentencing range of forty-nine to one hundred ninety-eight years. The record supports the seventy-five year sentences imposed by the district court. Further, given Michell's prior criminal history, the sentence imposed was not excessive. This assignment is without merit.

DECREE

For the foregoing reasons, we affirm Buckingham's and Michell's convictions and sentences.

AFFIRMED