STATE OF LOUISIANA	*	**NO. 2000-KA-1939**
VERSUS	*	**COURT OF APPEAL**
RODGER L. KELLY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 365-561, SECTION "B"
Honorable Patrick G. Quinlan, Judge

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Judge Steven R. Plotkin
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(Court composed of Judge Steven R. Plotkin, Judge Michael E. Kirby, Judge Max N. Tobias, Jr.)

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AFFIRMED

The legal issues in this appeal are whether the trial court should have granted a motion to suppress and did the State make excessive, inflammatory and prejudicial remarks during closing arguments. We find no error and affirm the conviction and sentence.

PROCEDURAL HISTORY

By bill of information defendant, Rodger L. Kelly a/k/a Roger Kelly ("Kelly), was charged with possession of cocaine with the intent to distribute to which he pleaded not guilty. Defendant was tried by a twelve-member jury that found him guilty as charged. Defendant admitted to the allegations of the multiple bill filed by the State and the trial court sentenced defendant, as a second offender, to fifteen years at hard labor. The trial court granted defendant's motion for post-conviction relief and granted him an out-of-time appeal.

STATEMENT OF THE FACTS

Officer Joseph Williams testified that on August 25, 1993, at around

4:30 p.m., he and his partner, Joseph Thomas, received information from an "established" reliable confidential informant that a man he observed wearing a "Bugs Bunny" T-shirt and gray and white striped shorts was selling cocaine in the 3700 block of North Dorgenois Street. The informant advised that the man "had small bags of crack cocaine in a white plastic bottle which he kept in his pocket." Williams had intended to conduct surveillance of the area but decided not to because the car he was in was identifiable as a police vehicle and there were a lot of pedestrians in the area who would have noticed the police officers. When Officers Williams and Thomas drove into the driveway separating the 3700 and 3800 blocks of North Dorgenois, Williams saw defendant, who fit the description given by the informant, and two other persons. Defendant and the other two men appeared to have recognized Williams and they ran from the scene. Kelly ran in one direction, while the other two men ran in another. The officers accelerated the police car and pursued defendant through a courtyard to North Dorgenois, then to Independence Street, to Florida Avenue, and back to the courtyard where he originally had been. Defendant tried to jump into the open window of a first floor apartment, but Williams jumped out of the police car and grabbed defendant. Williams patted down defendant's outer clothing and felt a plastic bottle in his front left pocket. Williams testified

that the informant stated that the person fitting defendant's description had crack cocaine in a pill bottle. Williams opened the bottle and found thirty-five pieces of crack cocaine. He also found $115.00 in cash in defendant's pocket. Williams stated that he had previously arrested defendant for possession of cocaine.

Defendant was on probation for a conviction for possession of cocaine. Kelly testified that on August 25, 1993, his mother and Johnnie Stewart dropped him off on Alvar Street where he went to the home of a mechanic for whom he once worked. Jimmie Nell Kelly, defendant's mother, stated that they left after 12:00 and dropped off defendant at Alvar and Florida so that he could buy a tire for his car. Kelly said that he had $45.00 to buy a timing chain for his car; and when the mechanic asked defendant to come back later, defendant decided to go to his girlfriend's house. Defendant stated that he ran into a friend who asked him to install a car stereo and gave defendant $100.00. Defendant then went to his girlfriend's house and gave her $10.00. He left his girlfriend's to go back to the mechanic's and saw some more of his friends. He gave $5.00 to one of his friends to buy him a sandwich. Kelly was sitting in the Dorgenois driveway and talking to several friends when one of them saw the police car. Defendant said that because he was on probation and could not be caught by

the police while with his friends, he ran from the scene. Defendant testified that when he ran from the officers, the other people with him threw guns and drugs to the ground. The police caught Kelly, took $115.00 from his pocket, and put him in the police car. The officers drove around to the building where they had caught him, and Williams got out of the car to look around in the abandoned building. Williams asked two women if they had seen anybody throw anything to the ground; Williams went into the hallway. Then, Williams returned to the police car, told his partner that he had something, and started counting out "rocks." The officers kept asking Kelly about people who sold drugs and asking him to be a confidential informant.

ERRORS PATENT

A review of the record shows no errors patent.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, Kelly complains that the trial court erred in denying his motion to suppress the evidence. Defendant argues that the officers did not have probable cause to arrest him because they failed to corroborate the information received from a paid confidential informant. Kelly further argues that the officers did not have reasonable suspicion for an investigative stop and that the search of the pill bottle exceeded the permissible scope of the search.

In State v. Benjamin, 97-3065, p. 2-3 (La. 12/1/98), 722 So. 2d 988, 989, the Louisiana Supreme Court stated:

> Both the United States and Louisiana Constitutions protect against unreasonable searches and seizures. The justification for a seizure, or "stop," must be objectively reasonable under the "concrete factual circumstances of individual cases." Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, (1968). In art. 215.1 of the Code of Criminal Procedure, the Louisiana legislature described the circumstances under which a police officer may stop a person as when "he reasonably suspects [the person] is committing, has committed, or is about to commit an offense." LA.CODE CRIM. PROC. art. 215.1. If evidence was derived from an unreasonable search or seizure, the proper remedy is exclusion of the evidence from trial. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); State v. Tucker, 626 So.2d 707 (La.1993).
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> This Court has previously ruled that flight from police officers, alone, will not provide justification for a stop. State v. Belton, 441 So.2d 1195 (La.1983). This activity, however, is highly suspicious and, therefore, may be one of the factors leading to a finding of reasonable cause. Belton, 441 So.2d at 1198. Police to do not have to observe what they know to be criminal behavior before investigating. The requirement is that the officer have a reasonable suspicion of criminal activity. [Footnote omitted.]

Here, defendant ran from the police officers immediately upon seeing the police car. The officers knew defendant from having previously arrested him and they had received a tip from a reliable confidential informant that a person fitting defendant's description was selling cocaine. Under Benjamin,

it appears that the officers had reasonable suspicion to stop defendant.

In State v. Sheehan, 97-2386 (La. App. 4 Cir. 12/9/98), 740 So. 2d 127, writ granted and reversed 99-0725 (La. 7/2/99), 767 So. 2d 1, an officer responded to a call from the ATF Crime Hotline. Without giving a description of the men, the caller said that a group of men standing on the corner of Barracks and Treme Streets was selling narcotics. When the officer drove to the intersection, he observed several people sitting on a step in the 1200 block of Treme Street and one man standing in front of them. The man standing noticed the police car and ran down Treme Street. The officer and his partner stopped to conduct an interview with the men. One of the officers asked them to put their hands on the wall so that he could perform a pat down. The partner removed a partially opened pack of cigarettes from Sheehan's shirt pocket. In the cigarette package, the agent saw crumpled cellophane in which he found a white, rock-like substance. The officer acknowledged that Sheehan did not attempt to run, and he was not observed in any illegal activity. The trial court found probable cause and denied Sheenan's motion to suppress. This Court affirmed the decision of the trial court. The Supreme Court reversed, finding that even assuming that the police had reasonable suspicion to conduct an investigatory stop and that the close association of weapons and narcotics trafficking gave the officers

an articulable basis to conduct a self-protective frisk for weapons, the seizure and search of the cigarette pack from the defendant's shirt pocket exceeded the permissible scope of the patdown frisk sanctioned by Terry. This activity amounted to the sort of search that Terry expressly refused to authorize.

Even under the "plain feel" seizure of contraband exception to the warrant requirement, the contraband must be "immediately apparent" upon mere touching. Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993); State v. Denis; State v. Lavigne, 95-0204 (La. App. 4 Cir. 5/22/96), 675 So. 2d 771; State v. Parker, 622 So. 2d 791 (La. App. 4 Cir. 1993).

In State v. Brown, 98-2615, 99-1097 (La. App. 4 Cir. 7/12/00), 773 So. 2d 742, a sheriff's deputy and another officer in a separate unit were on patrol when they saw the defendant and two other men walking. As the officers got closer, they realized that the men were walking in the middle of the road and not along the side; and, the officers also recognized the men as known drug offenders. The defendant ran into an area known for drug trafficking when he saw the police officers, and the officers gave chase. The officers eventually caught the defendant and patted him down. The deputy found a large bulge in defendant's left front pants pocket, and he asked the

defendant what it was. The defendant refused to answer, and he pulled away when the deputy asked him to remove it. The deputy then removed the object to see if it was a gun; but, it turned out to be a paper bag that contained crack cocaine. The defendant was then placed under arrest. The trial court denied the defendant's motion to suppress the evidence; but, this court reversed that ruling. Although the officers had reasonable suspicion to stop the defendant, the search of the contents of his pocket exceeded the permissible scope of the search. There was no testimony that the bag appeared to contain a weapon or that it contained contraband.

In the present case, neither officer testified that defendant was patted down because they feared that he was armed with a dangerous weapon. However, unlike the above-cited cases, the officers had received a tip from a reliable confidential informant that defendant kept his contraband in a pill bottle. When Officer Williams felt the bottle as he patted down defendant's outer clothing, he then corroborated the tip and had probable cause to seize and open the bottle. When he saw the contraband inside the bottle, he then had probable cause to arrest defendant. Therefore, the trial court did not err in denying the motion to suppress the evidence.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, Kelly complains that the trial court

erred in denying his numerous objections to the inflammatory and prejudicial comments made by the prosecutor during closing argument.

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

> The argument 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.

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

> 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 therefrom," 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.
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> The Louisiana Supreme Court has developed a standard for

reviewing improper closing statements. The Court stated in State v. Howard, 98-0064 (La. 04/23/99), 751 So.2d 783, 811-12:

> In any event, Louisiana jurisprudence on prosecutorial misconduct allows prosecutors wide latitude in choosing closing argument tactics. See, e.g., State v. Martin, 539 So.2d 1235, 1240 (La.1989) (closing arguments referring to "smoke screen" tactics and defense "commie pinkos" held inarticulate but not improper); State v. Copeland, 530 So.2d 526, 545 (La.1988) (prosecutor's waving a gruesome photo at jury and urging jury to look at it if they become "weak kneed" during deliberations held not improper). In addition, La.C.Cr.P. art. 774 confines the scope of argument to "evidence admitted, to the lack of evidence, to conclusion of fact that the state or defendant may draw therefrom, and to the law applicable to the case." The trial judge has wide discretion in controlling the scope of closing argument. State v. Prestridge, 399 So.2d 564, 580 (La.1981). Even if the prosecutor exceeds these bounds, the Court will not reverse a conviction if not "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. See Martin, 645 So.2d at 200; State v. Jarman, 445 So.2d 1184, 1188 (La.1984); [98-0064 La. 27] State v. Dupre, 408 So.2d 1229, 1234 (La.1982).

In evaluating whether or not a closing argument was improper "the court must be thoroughly convinced that the argument influenced the jury and contributed to the verdict before reversing a conviction based on misconduct during the closing arguments." State v. Casey, 99-0023, p. 12 (La. 1/26/00), 775 So.2d 1022, 1036.

Defendant complains about a number of comments made by the prosecutor during both closing and rebuttal arguments. Defendant's first

overruled objection came when the prosecutor stated that drug cases are not victimless crimes, but before the prosecutor could state who the "victims" were, defense counsel objected to the general characterization of all drug cases. The prosecutor did not finish the comment. Although the court overruled the objection, the statement was not impermissible.

Defendant's next overruled objection dealt with the prosecutor stating that Kelly was trying to deny that he was lying and that the police officers should be on trial because they were bad police officers. The trial court did not err in overruling this objection because a review of the cross-examination of the officers shows that defense counsel challenged the officers' testimony in almost every instance. This was a credibility issue for the jury to decide.

Defendant objected when the prosecutor pointed out that defendant had testified that his prior conviction was for possession of cocaine when it was actually for possession of cocaine with the intent to distribute. The prosecutor then tried to distinguish the two offenses but failed to complete her argument; thus, the overruling of this objection was not erroneous.

Defendant further complains about another comment by the prosecutor regarding possession with intent to distribute as opposed to possession. This comment was in response to a statement by defense

counsel during voir dire. The trial judge stated that the jury had to rely on its memory regarding these comments. The trial court did not err in overruling this objection.

Kelly also complains about the prosecutor's referring to children being present in the area where defendant was arrested even though there was no evidence that any children were in that location. Although defendant is correct that there was no evidence about the presence of children, this comment was not so prejudicial as to warrant reversible error.

Defendant complains that the prosecutor stated that although defendant did not lie to the police, he lied on the witness stand. The prosecutor also stated that if the jurors were going to believe what somebody said because they were told it more times, she would change the way she tried cases to have witnesses repeat their stories numerous times. The prosecutor later referred to defendant's testimony that he could not get away from other felons but also that he had moved; and, the prosecutor characterized this testimony as inconsistent. All of these statements relate to credibility of defendant. Comments on credibility are within the permissible scope of closing argument. State v. Ricks, 93-1611 (La. App. 4 Cir. 5/26/94), 637 So. 2d 1239.

Kelly objects to comments concerning guns since he was not found in

possession of a weapon. The prosecutor commented that defendant needed a gun if he was a drug dealer. As no gun was found in defendant's possession, he was not prejudiced by these comments.

Kelly objected to comments concerning the basis for defendant's arrest and why he fled the scene. The prosecutor referred to defendant's testimony that he ran away because he knew he was violating his probation by talking to felons, and she stated that Kelly could not get arrested for that. This was an incorrect statement meant to attack defendant's credibility as to the real reason he fled from the police.

The prosecutor further stated that the only thing that counted was that defendant had thirty-five rocks of crack cocaine on him and that was why he was arrested and on trial. Defendant objected on the grounds that this was a determination for the jury. The objection was overruled. As the district attorney was referring to the evidence in the record, the amount of cocaine to prove the reason for his arrest and prosecution, this is a fair and reasonable comment by a prosecutor.

The prosecutor referred to statements made, apparently by defense counsel, about other people possessing kilos of cocaine who were not stopped by the police; and, she then stated that a kilo was about two and one-half pounds. Defendant objected on the basis that the comment was

beyond the scope of closing argument and had not been testified to. The trial judge overruled the objection by stating that the prosecutor had the right to rebut what defense counsel had said. Defendant also complains about a comment regarding the size of crack cocaine, but the comment was not completed. The judge again overruled the objection by stating that the prosecutor had the right to rebut what defense counsel had said. This same basis was used to overrule an objection to a comment about children not being able to go out to play at 4:30 p.m. because of all the drug dealers. These rulings were not erroneous. All were made in response to earlier comments of defense counsel or were reasonable summations.

Defendant also complains about the prosecutor's stating why defendant may have been out of breath when the police officers caught him. The prosecutor stated that she would have been out of breath because she was out of shape, but did not smoke and did not smoke crack cocaine. The reference to smoking crack cocaine was arguably improper, but it was not so inflammatory as to warrant reversal. The prosecutor also stated that athletes would also have been out of breath, and defense counsel objected because there was no evidence of this.

Other comments referred to defendant's being in the age bracket to be unemployed and that Officer Thomas was once that age and he was not

unemployed. The reference to Officer Thomas goes beyond the evidence introduced at trial but this was harmless error. The prosecutor again referred to people who were unemployed looking for work and educating themselves and who were not standing around with thirty-five rocks of crack cocaine unless the work they wanted was that of a drug dealer. The comment was reasonable based upon the evidence.

Defendant also complains that the trial judge should not have overruled his objections to comments regarding his being on probation for a previous conviction for possession of cocaine with intent to distribute and how all defendant had to do was abide by the conditions of his probation. The jury was aware that defendant was on probation for the cocaine conviction; thus, this argument was within the scope of the evidence.

The final complained-of comments deal with defendant's having been given a break nine months before on his previous conviction and being caught doing the same thing. Defense counsel objected that this was a determination for the jury. The trial court did not err in overruling this objection since the argument referred to facts in evidence. The final complained-of remark concerns the prosecutor's stating that when the sentence was over, defendant will not do it (commit the same offense) again and that he would help other people "like that lady's husband." Defendant

objected on the grounds that the comment was beyond the scope of the evidence. It is not clear to whom the prosecutor was referring with this comment; and, although it was beyond the scope of the evidence, it is not so prejudicial as to warrant reversal of defendant's conviction.

Although some of the prosecutor's closing statements are marginal, we cannot say, beyond a reasonable doubt, that the arguments influenced the jury and contributed to the verdict. The errors that may have occurred herein, were harmless, in light of the overwhelming evidence against this defendant.

The conviction and sentence are affirmed.

AFFIRMED