NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-2148**
VERSUS	*	**COURT OF APPEAL**
AUTHER WILLIAMS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 396-904, SECTION "E"
HONORABLE CALVIN JOHNSON, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray, and Judge Max N. Tobias, Jr.)

HONORABLE HARRY F. CONNICK
DISTRICT ATTORNEY OF ORLEANS PARISH
LESLIE PARKER TULLIER
ASSISTANT DISTRICT ATTORNEY OF ORLEANS PARISH
619 SOUTH WHITE STREET
NEW ORLEANS, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

LAURA PAVY
LOUISIANA APPELLATE PROJECT
P.O. BOX 750602

NEW ORLEANS, LA 70175-0602
COUNSEL FOR DEFENDANT/APPELLANT

CONVICTION AND SENTENCE AFFIRMED.

On 7 April 1998, the defendant, Auther Williams ("Williams"), was charged by bill of information with one count of armed robbery, a violation of La. R.S. 14:64. Williams pled not guilty at his arraignment on 9 April 1998. He filed discovery and suppression motions on 24 April 1998 and the trial court conducted a preliminary and a suppression hearing on 7 August 1998. The trial court found probable cause and denied the defendant's motion to suppress the identification. After a jury trial on 24 May 1999, the defendant was found guilty as charged. On 8 June 1999, the trial court sentenced him to serve fifty years at hard labor without benefit of probation, parole, or suspension of sentence. On the same day, the State filed a multiple bill of information to which the defendant entered a plea of not guilty. He filed a motion to reconsider sentence and a motion to quash the multiple bill of information on 9 June 1999. A multiple bill hearing was held on 21 September 1999, at which Williams was adjudicated a third felony offender. On 24 September 1999, the trial court vacated the defendant's prior sentence and resentenced him to life imprisonment at hard

labor without benefit of probation, parole, or suspension of sentence. The trial court granted Williams' motion for appeal.

STATEMENT OF FACTS

Officer George Jackson responded to a call of a stolen vehicle at approximately 4:15 p.m. on 14 February 1998. When he arrived on the scene, he met with the victim in front of the victim's residence in the 7800 block of Lacombe Street. The victim, John Taylor, Jr., informed Officer Jackson that he had been washing his truck in his front yard when two men approached him. One of the men walked up to him and asked for a light for a cigarette. The victim told the man that he did not have a lighter. The second man told the first man to give him the cigarette. At this point, the first man pulled out a gun and handed it to the second man. The second man then yanked the victim out of his truck and stuck the gun in his side. The first man told the second man to shoot the victim. The two men then jumped into the victim's truck and drove off, heading north on Lacombe Street. Officer Jackson canvassed the area, but was unable to locate the subjects. He returned to the police station and put out a bulletin with descriptions of the truck and the two subjects.

Officer Rhonda Leach was on routine patrol with her partner on the evening of 14 February 1998. While driving on Old Gentilly Road, she

observed a truck with its lights on stopped in the middle of the street. The officer blinked her vehicle's lights indicating to the driver of the other vehicle to either move or pull to the side of the street. At that point, one of the passengers jumped out of the truck and ran into the bushes. Officer Leach's partner exited the vehicle and approached the truck. The driver of the truck put the vehicle in reverse and sped off at a high speed. The officers pursued. They observed that the license plate of the truck was one of the license numbers read during roll call as being recently stolen. They apprehended the subject who ran into the bushes. Officer Leach notified her ranking officer of the pursuit. The driver of the truck drove the vehicle into a ditch and then started to run towards the woods. The officers then began a foot pursuit of the subject. The subject was apprehended and taken to the Seventh District Police Station. Officer Leach identified Williams as the subject she and her partner apprehended. Officer Leach testified a bag containing a gun was found in the truck.

Officer Tracy Fulton assisted in the pursuit and apprehension of Williams. When he fled on foot, the officer established a perimeter in order to stop the fleeing subject. The officer apprehended the defendant behind a dumpster.

At approximately 4:30 p.m. on 14 February 1998, Margaret Taylor

was getting ready for her son's birthday party when she heard a noise that sounded like a truck going fast down the street. She walked to the front of the house and heard someone banging on the door. When she opened the door, she saw her husband, who was upset and excited. She inquired why her husband was upset and then called 911. Mrs. Taylor identified her voice on a 911 audiotape played for the jury.

John Taylor, Jr. testified that on the afternoon of 14 February 1998, he was washing his truck in his front yard, when, at approximately 4:05 p.m., a black male approached him and asked for a light for a cigarette. Taylor told the man that he did not have a lighter. The man then walked to the rear of the truck and told a second black male that Taylor did not have a lighter. The first man told the second man to give him the cigarette. At that time, the second man gave the first man a semi-automatic pistol. The first man grabbed Taylor and shoved the gun into his chest. The gun was a blue steel semi-automatic pistol. The first man grabbed Taylor's pocket, which was empty. The second man told the first man to shoot Taylor. Taylor backed away from the vehicle. The two men jumped into Taylor's truck and took off. Taylor then went into his house, told his wife what happened, and called 911. Taylor testified that he recovered his truck the next day. A police officer called after midnight on 15 February 1998, and told him that

they had found his truck. Taylor identified his truck and noted that the vehicle had been damaged. He identified Williams as the person who pointed the gun at him and took his truck.

Detective Byron Adams participated in the pursuit and apprehension of Williams. Detective Adams testified that the defendant was taken to the Seventh District Police Station after his apprehension and arrest, where he was photographed for a photographic lineup. The victim identified the defendant in a photographic lineup as the person who stole his truck. The officer found the defendant's wallet and a gun on the front seat of the truck.

Officer Angel Williams, a crime lab technician, took photographs and collected evidence from the scene on 15 February 1998. She took photographs of the vehicle and attempted to locate fingerprints on it. However, she could not find any fingerprints on the vehicle. The officer also found a weapon, a Larson pistol, on the scene.

ERRORS PATENT

A review of the record for errors patent reveals none.

COUNSEL'S ASSIGNMENT OF ERROR

On appeal, the defendant's appellate counsel argues that Williams' adjudication as a multiple offender should be vacated as the record did not contain the documents used to prove his prior felonies at the multiple bill

hearing. However, the record was supplemented with the documents and is now complete. The appellate record includes a transcript of the multiple bill hearing and the documents produced by the State to prove the defendant's status as a third felony offender. Thus, this assignment of error is moot.

PRO SE ASSIGNMENT OF ERROR NO. 1

In his first pro se assignment, Williams argues that the trial court abused its discretion when it allowed the district attorney to give a definition of reasonable doubt. The statement of which the defendant complains occurred during voir dire.

> BY MISS BARTHOLOMEW:
> Reasonable doubt. Some people use examples as to what it is. Some people use examples as to what it is not. It is not whether the police officer, for example, wrote 4:58 or 4:59 on is (sic) report. It is not what color socks the victim was wearing that day; were they white or were they black. It is something more than that that you can put your finger on.
>
> BY MR.CREECH:
> Your Honor, I'm going to object to that.
>
> BY THE COURT:
> I'm sorry.
>
> BY MR.CREECH:
> I'm going to object to that statement by the district attorney. Reasonable doubt can be, essentially, anything that the jury latches onto. The district attorney's trying to give examples of what is not reasonable doubt. You can't do that, Your Honor. Reasonable doubt can be in anyone's head can have a reasonable doubt.

BY THE COURT:

> Well, Mr. Creech, I will allow her to give some examples of the same. And, in essence, I will overrule your objection. However, you can also give you (sic) examples. Jurors, I caution you that the only definition of reasonable doubt that I am going to give is that a reasonable doubt is a doubt based upon reason and common sense. That's my definition. That's the one I'm going to give at the close of this trial. But now she can give you an example. Mr. Creech, you can, also.

La. C.Cr.P. article 786 provides, in pertinent part, that "[t]he court, the state, and the defendant shall have the right to examine prospective jurors. The scope of the examination shall be within the discretion of the court." Voir dire examination of prospective jurors is designed to determine the qualifications of prospective jurors by testing their competency and impartiality and discovering bases for challenges for cause and to secure information for an intelligent exercise of peremptory challenges. State v. Straughter, 406 So.2d 221 (La. 1981); State v. Bertrand, 381 So.2d 489 (La. 1980). Further, the scope of voir dire examination is within the scope of the trial court's sound discretion, and its ruling will not be disturbed in the absence of a clear abuse of discretion. State v. Williams, 615 So.2d 1009 (La. App. 1 Cir. 1993). In State v. Pedroso, 557 So.2d 455 (La. App. 5 Cir. 1990), the Fifth Circuit found the trial court did not abuse its discretion when it allowed the prosecutor to use hypothetical questions to explain the concepts of murder and manslaughter.

Further, a prosecutor's misstatements of law during voir dire

examination, or in opening and closing remarks, do not require reversal of a defendant's conviction if the court properly charges the jury at the close of the case. State v. Cavazos, 610 So.2d 127 (La. 1992). In the present case, the defendant objected to the prosecutor's use of examples to define reasonable doubt. The court overruled the objection and stated that it would allow both the State and the defendant to use examples. The court then advised the jury that it would instruct the jury at the end of the case, but went forward with an instruction on reasonable doubt as a comment to the objection. The trial court did not abuse its discretion when it overruled the defendant's objection.

This assignment is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 2

The defendant further contends that the trial court erred when it denied his motion for mistrial after a potential juror made inflammatory remarks during voir dire. A review of the trial transcript reveals that Mr. Edmond Kihnel, a potential juror, was challenged for cause by the State in response to his answers to the questions posed during voir dire. Defense counsel informed the trial court that it wished to question the juror before the trial court ruled on the challenge for cause. The juror was called into the trial court's chambers and was questioned by defense counsel and the trial

court.

BY THE COURT:
There were some questions outside that the prosecutor was asking you and you had no comment. Can you tell me why you can't comment on them?

BY MR. KIHNEL:
Your Honor, I called the New Orleans Police Department up because of a situation at my house where I was robbed at my house. The police came out. They didn't report it. The officer wasn't wearing a name tag. And he ticked me off.

BY THE COURT:
I hear you.

BY MR. KIHNEL:
All right. If you want to play games, you can go on the football field and play games.

BY THE COURT:
I hear you.

BY MR. KIHNEL:
There's more to it than that.

BY THE COURT:
I understand. You've said enough for our purposes. Mr. Creech.

BY MR. KIHNEL:
I want to be excused from the trial.

BY THE COURT:
I understand. Do you have any questions.

BY MR. CREECH:
No, sir.

MR. KIHNEL STEPPED BACK OUTSIDE.

BY MR. CREECH:
Your Honor, I'm going to object to the challenge for cause. It's very clear the man is angry. But he said he didn't want to be on this jury. I don't think just because he doesn't want to be a juror is a reason to let him off. A lot of people don't want to be a juror.

BY THE COURT:
Well because of his whole demeanor and his attitude, I'm going to excuse him from the panel. I may get up the nerve to talk to him some more about it. But I'm going to excuse him. I note an objection on behalf of the defendant. I grant the challenge for cause. Anymore challenges by the state?

BY MS. BARTHOLOMEW:
No, judge.

BY THE COURT:
Mr. Williams, I excused Mr. Williams based on the fact that he told me at the side that his son was not only murdered, but was murdered in a car jacking. And he was just – he didn't think he could sit through an armed robbery where it was an alleged car jacking.

BY MR. CREECH:
Your Honor, when you called him to the bench and he informed you of that, I noted at the time to preserve my objection that I move to discharge the entire panel, as being prejudiced by his comments.

BY MS. BARTHOLOMEW:
I was informed that he went to the bench before going into details. I couldn't hear anything the man was –

BY THE COURT:
And then he started to whimper. That's what I actually heard he said. What I heard was his tears was basically what I heard.

BY MR. CREECH:
I want to move for a distrial (sic).

> BY THE COURT:
> I note an objection on behalf of the defendant, based on the cause challenge being granted and also to the Court's denial of the mistrial. I deny the same.

While Williams argues that defense counsel moved for a mistrial on the basis of Mr. Kihnel's statements, it is apparent, upon reading the transcript, that the mistrial was sought as a result of the alleged statements and/or action of another potential juror. The record indicates that the defense sought a mistrial as a result of a potential juror crying in front of the other members of the jury venire. The gentleman's son had been murdered during a car-jacking. It appears that the juror's comments and actions occurred while he was involved in a sidebar discussion with the trial judge. The record does not reflect that the juror made any prejudicial comments in front of the other members of the jury venire. Thus, the trial court did not err when it denied the defendant's motion for a mistrial. Because the defense did not request a mistrial based upon Mr.Kihnel's statements, the court could not grant a mistrial on that basis. See La. C.Cr. P. art. 775. In addition, the defendant cannot now raise a mistrial claim as to Mr. Kihnel's statements because counsel did not move for a mistrial in connection with those statements. See La. C.Cr.P. art. 841.

This assignment is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 3

Williams suggests that prosecutorial misconduct occurred when the district attorney shifted the burden of proof to the defense. The defendant contends that the prosecutor's statements during closing argument placed the burden of proof on the defendant.

During the closing argument, the prosecutor stated:

> Mr. Creech is going to get up. I want him to explain to you how he had the occasion to be so sure of his identification. I want him to explain to you how that man is driving that man's truck. I want him to explain to you how that man was seen trying to get rid of his hooded sweat shirt that he use (sic) in an armed robbery and a car jacking earlier that day. And I want you to have him explain to you how the defendant's wallet came into the car, owned by Mr. Williams. I submit to you, ladies and gentlemen, the only verdict here is guilty as charged. Thank you, very much.

Immediately thereafter, defense counsel approached the bench and requested a mistrial. A brief bench conference was held after the state's closing argument. The trial court then gave the jury the following instruction:

> BY THE COURT:
> Jurors, I need to caution you about something. That is, that the defendant had no burden of proof. He does not have a burden of proof. And therefore, Mr. Creech does not have to prove or, for that matter, even explain things. You can continue, Mr. Creech.

Closing arguments should "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." La. C.Cr.P. art. 774. Although a remark may go beyond the scope set forth in the above article, it is considered to be harmless error unless the court is convinced that the remark influenced the jury so that it contributed to the verdict. State v. Sanders, 93-0001 (La.11/30/94), 648 So.2d 1272; State v. Allen, 94-1895 (La.App. 4 Cir. 9/15/95), 661 So.2d 1078.

In the present case, one could argue that the prosecutor was attempting to place a burden of proof on the defendant. The defendant objected and requested a mistrial. While the trial court did not grant the mistrial, it did admonish the jury and provide the jury with the correct statement of law. The admonition provided by the trial court was sufficient to cure the error committed by the prosecutor. Further, the prosecutor's remarks were harmless error. The evidence presented by the State was overwhelmingly sufficient to prove that the defendant was the person who stole the victim's truck. The victim positively identified Williams as the person who shoved a gun into his chest and stole his truck. The prosecutor's statements during closing argument did not improperly contribute to the jury's verdict.

This assignment is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 4

The defendant further argues that the trial court erred when it denied his motion for mistrial on the basis that Detective Adams was in the courtroom while another person was testifying. Apparently, Detective Adams was in the courtroom during the testimony of Officer Rhonda Leach. Officer Leach and Detective Adams testified at the preliminary hearing on the weapons charge. The preliminary hearing on the weapons charge was conducted immediately prior to trial on the armed robbery charge. As this appeal concerns only the armed robbery conviction, the issue is not properly before this court for review as it concerns testimony which applied only to the weapons charge.

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 5

Williams contends that the trial court erroneously allowed his clothing and gun into evidence although the State failed to establish a chain of custody.

A lack of positive identification or defect in the chain of custody goes to the weight of the evidence rather than its admissibility. State v. Sam, 412 So.2d 1082 (La. 1982); State v. Merrill, 94-0716 (La. App. 4 Cir. 1/31/95), 650 So.2d 793. In order to introduce demonstrative evidence at trial, the law

requires that the object be identified. This identification may be visual (i.e., by testimony at the trial that the object exhibited is the one related to the case) or it may be by chain of custody (i.e., by establishing the custody of the object from the time it was seized to the time it was offered in evidence). State v. Sweeney, 443 So.2d 522, 528 (La. 1983). For admission of demonstrative evidence, it suffices that it is more probable than not that the object is connected to the case. State v. Frey, 568 So.2d 576,578 (La. App. 4 Cir. 1990).

In the case at bar, the victim testified that Williams was wearing a gray sweatshirt at the time of the robbery and described the defendant's weapon as a blue steel semi-automatic pistol. Mr. Taylor identified the sweatshirt and gun at trial as the clothing worn and the weapon used by the defendant at the time of the robbery. Officer Williams of the Crime Lab testified that she took possession of the clothing and weapon and placed these items in the property room. Officer Jackson stated that he took a statement from Mr. Taylor immediately after the robbery. Mr. Taylor described the suspect as wearing a gray sweatshirt and blue pants and carrying a blue steel semi-automatic pistol. Officer Leach testified that she assisted in the defendant's apprehension and arrest. At trial, she identified the gray sweatshirt that the defendant was wearing that night and the

Lawson .380 caliber pistol found in the victim's truck. Officer Adams also identified the Lawson .380 caliber pistol as the weapon that was recovered from the victim's truck. The testimony produced by the State was sufficient to prove that these items are more probably than not related to the present case. The victim identified the clothing and the weapon. The officers testified that the defendant was wearing the sweatshirt when he was apprehended. The weapon was found in the victim's truck along with the defendant's wallet. The trial court did not err when it overruled the defendant's objection and allowed the clothing and weapon to be admitted into evidence.

This assignment is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 6

In his last assignment of error, the defendant contends that the trial court erred in denying his motion to suppress the identification. He contends that the procedures used were suggestive.

When reviewing an out-of-court identification procedure for its constitutionality and its admissibility in court, an appellate court must first make a determination of whether the police used an impermissibly suggestive procedure in obtaining the out-of-court identification. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243 (1977); State v. Prudholm, 446 So.

2d 729 (La. 1984); State v. Hankton, 96-1538 (La. App. 4 Cir. 9/16/98), 719 So. 2d 546. If the court finds in the affirmative, the court must then decide, under all of the circumstances, if the suggestive procedure gave rise to a substantial likelihood of misidentification. Id. In Manson v. Brathwaite, the Supreme Court set forth a five-factor test to determine whether the identification was reliable: (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the assailant; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation. See also Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972).

A photographic lineup may be unduly suggestive if the pictures display the defendant so singularly that the attention of the witness is focused on the defendant. State v. McPherson, 630 So. 2d 935 (La. App. 4 Cir. 1993). Strict identity of physical characteristics is not required; all that is necessary is a sufficient resemblance to reasonably test identification. State v. Savoy, 501 So. 2d 819 (La. App. 4 Cir. 1986).

A review of the testimony and the photographs used in the photographic lineup reveals that the defendant's argument is without merit. Mr. Taylor testified that he was not forced or threatened into making an

identification. He stated that the officers provided him with six photographs to review. He looked over the photographs and identified the defendant as the person who robbed him. Mr. Taylor was positive of his identification. He stated that he was very observant of the defendant during the commission of the robbery. The incident occurred during broad daylight hours. Mr. Taylor provided the police with an accurate description of the perpetrator. The identification occurred within two days of the robbery. Therefore, Mr. Taylor's memory was very fresh. Further, the photographs do not single the defendant out as the possible suspect. In fact, all six men in the photographs bear a resemblance to one another. Thus, the trial court did not err when it denied the defendant's motion to suppress the identification.

This assignment is without merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.