

STATE OF LOUISIANA

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NO. 2000-KA-2703

VERSUS

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COURT OF APPEAL

**GREGORY M. REESE, A/K/A
GEORGE HARDIN**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 401-985, SECTION "H"
Honorable Camille Buras, Judge

JOAN BERNARD ARMSTRONG

JUDGE

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

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AFFIRMED.
STATEMENT OF CASE

On October 5, 1998, the defendant Gregory M. Reese, AKA George Hardin, was charged by bill of information with armed robbery. At his arraignment the defendant entered a plea of not guilty. On November 18, 1999, a twelve-member jury found the defendant guilty as charged. Following a multiple bill hearing, the court found the defendant to be a quadruple offender. After waiving delays, the defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation or the suspension of sentence. Counsel for the defendant filed a motion to reconsider the sentence, which was denied. On appeal, the defendant raises two assignments of error.

STATEMENT OF THE FACTS

The victim, Karen Wood, testified that on July 23, 1998, at approximately 5:20 pm she was unloading groceries from her car parked in the entrance of the garage next door to her apartment located at 926 Chartres in the French Quarter. On the day of the 23rd it had been raining so the

victim was placing her groceries on the bottom step to prevent them from getting wet. When she had placed the last bag on the step, a guy came up behind her, put a gun in her face, and said “I’m going to shoot your f---ing head off if you make a sound.” The victim had left her purse in her car, and she had no money with her. However, she was wearing an engagement ring that the robber demanded from her. She testified that he ripped it off her finger causing her injury. She stated that as the gunman turned to leave she also turned and he told her he was going to shoot her anyway. But, he did not and he left her standing there. As he fled the scene, the victim stated, she ran out behind him yelling and pointing that he had just robbed her.

As the gunman was leaving the scene, he was almost hit by a van exiting the garage next door. A couple walking down the street noticed this, and when the victim appeared yelling she was robbed, the man of the couple began to chase the gunman.

Michael Wagner, a Wayne County Assistant Prosecuting Attorney in Detroit, Michigan, and the man who chased the gunman, testified that he was in New Orleans attending a conference of prosecuting attorneys from July 19th through the 25th in 1998. On July 23, 1998, he and Ruth Carter, another Wayne County Assistant Prosecutor, were walking down Chartres Street in the French Quarter when they noticed a man jump as he passed a

parking garage as if he had been struck by the vehicle exiting the garage. He stated that as the man passed him, he saw the victim, pointing in the direction of the man, saying he robbed her. Mr. Wagner stated he immediately turned and ran in the direction of the man who was almost hit by the car. He pursued the man around the corner, and as he turned it he saw him stopped in the middle of the street. The man was pointing and gesturing, saying he ran that way and acting as if he was looking for someone else. However, Mr. Wagner had not said anything to indicate he was looking for someone, so they stood there for a moment staring at each other. Mr. Wagner stated he then asked the man what he did to that lady, and the man looked at him and began pulling something from his waistband. Mr. Wagner could not see exactly what it was, but he took a step back and put up his hands. The man then said "You want to play?" looking at Mr. Wagner for another moment before he turned and ran. Mr. Wagner further testified that he began to chase the man again, but this time he left some distance between himself and the man in the event he actually had a gun. Mr. Wagner lost sight of the man when he turned a corner into a courtyard. He waited a few minutes to see if the man would come out, but when he did not Mr. Wagner returned to Chartres Street. By that time a small crowd had gathered. Ms. Carter, the victim, the couple from the van and Mr. Wagner

were all standing and talking when Mr. Wagner saw the man he had been chasing passing by again. Ms. Carter and the victim also saw him and they all almost simultaneously indicated it was him. Mr. Wagner chased the man again, but he was unable to catch him because the man ran into the French Market getting lost in the crowd. Mr. Wagner returned to Chartres once again, and the police had arrived. He told them what happened and gave them a description of the man he had been chasing.

Mr. Wagner testified that some time after he returned to Detroit he received instructions and a photographic line-up by mail from the New Orleans Police Department. He was instructed to view the photos, and if he recognized anyone he was to sign and date that photo. He was also instructed to date and initial the other photos to indicate he had viewed them. Mr. Wagner testified that he recognized, in one of the photos, the man he had been chasing. He then walked down the hall to the office of Ms. Carter and laid the photos on her desk, asking her to view them. Upon viewing the photos, Ms. Carter identified the same person Mr. Wagner picked out of the line-up.

Ruth Carter, a Wayne County Assistant Prosecuting Attorney in Detroit, Michigan, testified she also attended the conference in New Orleans and that she was familiar with the city because she had attended Dillard

University. She stated she recalled seeing a vehicle almost hit a man and that she and Mr. Wagner were trying to see if the man was okay when he sort of skipped walked away. She testified that the victim approached them, and she was hoarse and shaken, saying she had just been robbed. Then she held out her hand showing them her ring finger that was swollen, bruised, scraped and bloody. Ms. Carter stated she and Mr. Wagner looked at each other and determined that the man who passed them must have been the robber. She further testified that Mr. Wagner began chasing the man and she ran after Mr. Wagner telling him to drop the bags he held in his hands. When Ms. Carter reached the corner she stopped to pick up the bags dropped by Mr. Wagner, but he continued around the corner. She remained on the corner, but began yelling to Mr. Wagner "That's the guy." Ms. Carter said she then saw Mr. Wagner raise his hands and take a step back, and she concluded that the man must have had a weapon. Ms. Carter was not certain what Mr. Wagner did next because she turned her attention back to the victim, who was crying and upset. She stated that Mr. Wagner returned to the group. They were talking when they saw the man again, and Mr. Wagner tried to catch him. The police then arrived on the scene, and Ms. Carter stated she told them what she saw giving them a description of the suspect. However, the police did not get her name or any personal information from

her, and the police department never contacted her.

She recalled it was some time after she returned to Detroit, possibly the following spring, when Mr. Wagner entered her office and sat some photos on her desk asking her to view them. After looking at the photos she identified the man they saw in New Orleans.

Warren Keller, a New Orleans Police Officer assigned to the Tactical Division, testified he conducted a follow-up investigation in the armed robbery that occurred at 926 Chartres Street. Once the investigation produced a suspect, he then prepared a photographic line-up at the New Orleans Police Department Record and Identification Division. The line-up consisted of a picture of the defendant along with five fill-in subjects for a total of six pictures. After completing the line-up he gave it to Officer Mike Eskine who then took it to the victim, to view. Officer Keller stated he also prepared and mailed a photo line-up to Mr. Wagner in Detroit. He further testified that after he received a positive identification from the victim and Mr. Wagner he “rebooked the defendant at Central Lockup.”

Tess Lassai testified that on July 23, 1998, the defendant, who she knew as Mike, was at the grocery store where she was employed at the time. She testified that she worked Monday through Saturday from 4:00 pm to 9:00 pm. She stated that she recalled the day because it was her cousin’s

birthday and she spent the day with her at the store. She also stated that her cousin asked the defendant to buy her a beer for her birthday. She was not certain, but Ms. Lassai believed the defendant was wearing a work uniform of some kind on that day. Ms. Lassai testified that a couple of weeks after July 23rd the defendant's mother contacted her to ask her about him being in the store.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant complains that the statements of a prospective juror and the testimony of the investigating officer, both concerning a prior arrest of the defendant, impermissibly tainted the jury and deprived him of a fair trial. The defendant also complains that the investigating officers' testimony contained inadmissible hearsay testimony of out of court positive photo identifications by two witnesses who did not testify.

La.C.Cr.P. art. 770, in pertinent part, provides:

Upon motion of a defendant, a mistrial shall be ordered when a

remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:

...

(2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible.

...

An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial.

La.C.Cr.P. art. 771, in pertinent part, provides:

In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during trial, or in argument within the hearing of the jury when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:

...

(2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.

In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

The Louisiana Supreme Court, in State v. Hayes, 414 So.2d 717 (La. 1982), citing State v. Carter, 412 So.2d 540 (La. 1982), stated that “a policeman is not a ‘court official’ and therefore even if the policeman makes

a reference to another crime, mistrial under La.C.Cr P. art. 770 is not required.” Instead, the proper remedy would be the application of art. 771, and upon request of the defendant an admonition to the jury to disregard the remark be given.

In the instant case, the judge offered to admonish the jury with regard to the remark made by Mr. Anderson, the prospective juror, that he recognized the defendant from OPP. The judge stated that, assuming the rest of the jurors knew what OPP meant, that it is common knowledge that the defendant was probably arrested and booked through the Orleans Parish Prison, but an admonishment might further highlight the comment. Also, she pointed out that there was no time reference made by Mr. Anderson, so the jurors were not left with any inference that it was a prior case, and as soon as Mr. Anderson made the comment she stopped all questioning of the jurors immediately. The option of granting a mistrial under Art. 771 is discretionary, and it does not appear that the court abused its discretion in not granting it.

The defendant also complains about the comments of Officer Keller regarding Mr. Reese and another “incident” and that he “rebooked” him. This court stated in State v. Lewis, 95-0769 (La. App. 4 Cir. 1/10/97), 687 So.2d 1056, citing State v. Hayes, 414 So.2d 717 (La. 1982), an

admonishment under art. 771 is not necessary unless the remark constitutes an unambiguous reference to another crime. It does not appear that the remarks clearly referred to another crime committed by the defendant.

The defendant also complains that the testimony of Officer Keller contained inadmissible hearsay of positive photo identifications by two witnesses who did not testify. Hearsay is testimony in court of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. La.C.E. art. 801(c) Officer Keller testified as to his role in the follow-up investigation of the robbery at 926 Chartres, and the steps he took to arrive at the defendant as a suspect in the crime. He stated that after the victim, Mr. Wagner, and two other witnesses identified the defendant, he arrested the defendant. However, if Officer Keller's reference to the photo identifications was hearsay the Louisiana Supreme Court in State v. Hayes, *id*, where the testimony of a witness was found to be hearsay, concluded that "[it is virtually certain that the substantial rights of the accused were not adversely affected in light of the evidence of the defendant's guilt the state otherwise presented." The state's case consisted of the testimony and positive out of court and in court identifications of the defendant by the victim, Mr. Wagner, who had

opportunity to stand face to face with the defendant, and Ms. Carter.

Therefore, if the admission of testimony was error, it was harmless. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, the defendant complains the trial court erred by finding him to be a fourth offender. Specifically, he contends the state did not initially produce the minute entry in case 317-334, which was produced by the end of the hearing; and the state produced only a minute entry and plea form in 365-623, and the minute entry did not list the Boykin rights or state the court advised him of the rights.

In Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969), the United States Supreme Court emphasized three federal constitutional rights which are waived by a guilty plea: the privilege against self-incrimination; the right to trial by jury; and the right to confront one's accusers. The purpose of the Boykin rule is to ensure that the defendant had adequate information to plead guilty intelligently and voluntarily.

In State v. Alexander, 98-1377, pp. 5-6 (La. App. 4 Cir. 2/16/00), 753 So.2d 933, 937, this court set forth the standard of proof in multiple bill hearings:

LSA-R.S. 15:529.1 D(1)(b) states that the district attorney has the burden of proving beyond a reasonable doubt any issue of fact and that the presumption of regularity of

judgment shall be sufficient to meet the original burden of proof. In State v. Shelton, 621 So.2d 769, 779-780 (La.1993), the Supreme Court stated:

If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. If the State introduces anything less than the "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three Boykin rights. (footnotes omitted).

In State ex rel. LeBlanc v. Henderson, 261 La. 315, 259 So.2d 557 (La. 1972), the court held that a determination of voluntariness of a guilty plea is not limited by Boykin to the verbatim entry made at the time of the plea but rather is determined from the entire record, which can include evidence

taken at a reconstruction of the plea proceedings at a hearing when the plea is later attacked. In State v. Bland, 419 So.2d 1227, 1232 (La. 1982), Louisiana Supreme Court stated the state may affirmatively prove that the defendant was fully Boykinized by either the transcript of the plea of guilty or by the minute entry. “Most importantly, for our purposes, we have also held the state has met its burden of proving a prior guilty plea in a habitual offender hearing where it submitted a very general minute entry, and a well executed plea of guilty form.” State v. Tucker, 405 So.2d 506, 509 (La. 1981). In the instant case as in Tucker , the minute entry does not specifically mention the Boykin rights, but it is accompanied by a well executed plea of guilty form. The form spells out the rights being waived, and is signed by the defendant, his counsel and the judge. Therefore, this assignment of error is without merit.

For the foregoing reasons, the defendant’s conviction and sentence are affirmed

AFFIRMED.