NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-2280**
VERSUS	*	**COURT OF APPEAL**
KEVIN OLIVER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 423-360, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Dennis R. Bagneris Sr., and Judge Michael E. Kirby)

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CONVICTION AND SENTENCE AFFIRMED

STATEMENT OF CASE

On July 24, 2001, the State charged Kevin Oliver with crime against nature, a violation of La. R.S. 14:89. The defendant pled not guilty at his arraignment on July 26, 2001. The trial court heard motions, and found probable cause following a preliminary hearing on August 13, 2001. On January 23, 2002, the jury found Oliver guilty as charged. The trial court sentenced Oliver on June 4, 2002, to five years at hard labor, with credit for time served, sentence to run concurrently with any other sentence. That same day, the State multiple billed Oliver, and the trial court denied his motion to reconsider sentence but granted his motion for appeal.

On October 18, 2002, the trial court adjudged Oliver a fourth felony offender, vacated his original sentence, and sentenced him to twenty years at hard labor with credit for time served, sentence to run concurrently with any other sentence. Also on that day, the trial court denied Oliver's motion to reconsider sentence.

STATEMENT OF FACT

Detective Marcellus White testified that on the night of June 27, 2001, he was wearing civilian clothing, and driving an unmarked police vehicle through the French Quarter on undercover assignment with the NOPD Vice Squad. White noticed the defendant standing at the intersection of St. Louis and Dauphine Streets. The two made eye contact, and the defendant motioned for White to turn around and stop, which White did. The defendant opened the car door, and sat in the front seat with White. As White drove, the defendant told White that he was from Trinidad, and in town for the Essence Festival. He then asked White if he could help him out "with a little something" until his credit card balance came back the next day. When White asked the defendant what the $20.00 was for, the defendant replied "anything in particular" that White might like, mentioning, "people like to beat each other, suck each other or basically look at a sexy body." White explained to the trial court that from his experience with the vice crimes unit, the defendant meant masturbation, fellatio or just viewing a person's body. White told the defendant to choose one. The defendant told White "since we were in the car he was going to suck me off" and asked White to find a location. At that point White gave the pre-arranged signal to other vice squad officers acting as the take down team. Officer Chin Nguyen stopped White's vehicle, and arrested the defendant.

Officer Chin Nguyen confirmed that he was part of the take down team the night of the defendant's arrest. Nguyen testified that when the cover unit saw White's signal, the cover unit altered Nguyen, who activated his vehicle's lights and sirens as though pulling White's car over for a traffic stop. Nguyen ordered both men out of the car. White conferred with Nguyen as to the charges against the defendant. Nguyen arrested the defendant, and read him his rights.

The defendant testified that on the night he was arrested, he had just come from an Essence Festival production meeting at a Canal Street hotel. Detective White approached him for directions to the House of Blues. The defendant offered to show White the way, and got into White's vehicle. The defendant denied any talk of solicitation for sex or exchange of money between him and White. He further denied telling White that he was from Trinidad or that he needed money because of his credit card balance. He admitted two convictions for burglary and one for forgery. Further, he stated that he typically got into strangers' cars when they asked for directions, never fearing for his safety because "I walk in the good graces of God."

ERRORS PATENT

A review for errors patent on the face of record reveals none.

ASSIGNMENT OF ERROR NUMBER 1

In the first of two assignments of error, the defendant argues that the Trial Court erred in denying his motion for mistrial based upon the prosecutor's reference to the defendant's prior convictions.

The objectionable reference occurred during closing argument:

> Well, the bottom line is this is a hustle. You get into somebody's car and say, "Give me some money. Give me some money for an act." Okay?
>
> Now, Mr. Oliver has several prior convictions for breaking into people's houses. What happens when people break into people's houses? They find stuff. They sell it for money.
>
> He's got a conviction for forgery. Again, cheating people out of some money. The crime here, ladies and gentlemen, is when you enter somebody's car and you say, "I will suck you off or let you beat me off. I will suck you off for twenty dollars." That is a crime. Okay?

The defendant complains that the prosecutor made the remarks solely to inflame the jury by suggesting that the defendant exhibited a pattern of behavior motivated purely by monetary gain. The defendant maintains the prosecutor's comments violated La. C.E. art. 609.1, which generally restricts reference to prior convictions to such details as the name of the offense, the date of conviction, and the sentence imposed.

The transcript of closing arguments indicates that defense counsel failed to lodge a contemporaneous objection to the prosecutor's arguing the possible inferences to be drawn from the defendant's prior convictions. The record indicates that the prosecutor completed the first closing argument, the

defense made its closing argument, and the prosecution then made its rebuttal, without objection from the defense. Defense counsel voiced his objection to the prosecutor's remarks via motion for mistrial after the jury began deliberating.

A defendant cannot avail himself of an alleged error unless he made a contemporaneous objection at the time of the error, stating the specific ground of the objection, and he is limited on appeal to that ground articulated at trial. La.C.Cr.P. art. 841(A); *State v. Jones*, 2001-0630 (La. App. 4 Cir. 3/20/02), 814 So.2d 623, *writ den.* 2002-1111 (La. 11/15/02). Nevertheless, even if an objection had been made, and the issue preserved for appellate review, there was no error.

Mistrial is a drastic remedy, which should be declared when unnecessary prejudice results to the defendant. *State v. Robertson,* 2002-0156 (La. App. 4 Cir. 2/12/03), ___So.2d ___, 2003 WL 365302. The Trial Court has discretion to determine whether a fair trial is impossible, or whether an admonition is adequate to assure a fair trial when the alleged misconduct does not fit into the provisions for mandatory mistrial, and the ruling will not be disturbed on review absent an abuse of discretion. *Id.*

Prosecutors have wide latitude in choosing closing argument tactics. *State v. Casey*, 99-0023, p. 17 (La.1/26/00), 775 So.2d 1022, 1036, citing

State v. Martin, 539 So.2d 1235, 1240 (La.1989) (closing argument references to "smoke screen" tactics and "commie pinkos" were deemed inarticulate but not improper). Further, the trial judge has broad discretion in controlling the scope of closing arguments. *Id*. Even if the prosecutor exceeds the bounds of proper argument, a reviewing Court will not reverse a conviction unless "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. *State v. Ricard,* 98-2278, p. 4 (La. App. 4 Cir. 1/19/00), 751 So.2d 393, 397. Even where the prosecutor's statements are improper, credit should be accorded to the good sense and fair-mindedness of the jurors who have heard the evidence. *Ricard, supra.*

None of the objectionable remarks prejudiced the defendant so as to deprive him of a fair trial. The prosecutor’s inference that burglars take things that they later convert into money is nothing more than a permissible comment on facts adduced at trial. Moreover, the defendant testified, and confirmed his convictions for burglary and forgery. Because the defendant’s prior convictions were properly before the jury, the prosecutor’s reference to them in closing remarks was merely cumulative. Given the defendant's admission, and the evidence of his guilt, there is no indication that the jury was inflamed by the prosecutor’s remarks or that the remarks played a part in the defendant’s conviction.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

By this assignment, the defendant complains the trial Court erred in denying his motion for a *Daubert* hearing where identification for purposes of the multiple bill rested solely on fingerprint analysis.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) established guidelines for the admissibility of expert testimony. The Louisiana Supreme Court adopted the *Daubert* test in *State v. Foret*, 628 So.2d 1116 (La.1993) and applied it to La. C.E. art. 702.

Daubert fashioned a standard that requires the trial Court to act in a "gatekeeping" function to ensure that all scientific testimony or evidence admitted is not only relevant, but also reliable. *State v. Quatrevingt*, 93-1644, p. 10 (La.2/28/96), 670 So.2d 197, 204, *cert. denied*, 519 U.S. 927, 117 S.Ct. 294, 136 L.Ed.2d 213 (1996); *Doerr v. Mobil Oil Corp. And Chalmette Refining, L.L.C.*, 2001- 0775, p. 3 (La.App. 4 Cir. 2/27/02), 811 So.2d 1135, *writs den.*2002-0920 and 2002-938 (La. 5/13/02), 817 So.2d 105, 106. Expert testimony should be admitted whenever the trial Court, balancing the probative value against its prejudicial effect, finds that the evidence is reliable and will aid in a decision. *Id.* The four factors in the

Daubert standard are guidelines to be used by the trial Court in its determination of reliability of scientific evidence. In order to be admitted, evidence must rise to a threshold of reliability. *Id.*

At the multiple bill hearing in this case, the State offered a stipulation that its witness, Officer Isidro Magana, was "an expert in the taking, examination, comparison and analyzation [sic] of fingerprints." Because the defense refused to stipulate, the State established that Magana had completed two courses at LSU in taking and examining fingerprints, had been trained on the job by NOPD veterans, and had spent his entire work day for the past two years practicing the field in which he had been trained. Further, Magana had been qualified as a fingerprint expert in section "H" of the Criminal District Court as well as "almost every Court" in Orleans Parish.

The defense cross-examined Magana on whether his work on this case had been checked by a peer or co-worker, and whether he was present when the Sheriff's department took an arrestee's fingerprints. When Magana responded negatively to those questions, the defense stated, "[w]e also would raise the *Daubert* and [*Kumho*] Tire issue as well to be considered in his qualifications or abilities to be qualified as a fingerprint examiner."

Based upon the predicate established by the State, the Trial Court

accepted Magana as an expert in fingerprint analysis, and denied the defense motion for a *Daubert* hearing.

The defendant contends the Court cut short his cross-examination of Magana and that he should have been allowed to conduct a *Daubert* hearing because, without the fingerprint testimony, the defendant's sentence would not have been increased from five to twenty years.

In point of fact, the Trial Court directed defense counsel to question Magana on his qualifications as an expert, not the chain of custody of the fingerprints defense counsel had been pursuing. Instead of following the Court's directive, and questioning Magana about his expertise, counsel requested a *Daubert* hearing. The record indicates that defense counsel in fact had the opportunity he now complains of being denied.

Jurisprudence has established that fingerprints are an acceptable means of identification in habitual offender hearings. *State v. Lindsey*, 99-3256 (La.10/17/00), 770 So.2d 339 *cert. denied*, 532 U.S. 1010, 121 S.Ct. 1739, 149 L.Ed.2d 663 (2001). Past experience and training have been held to qualify a witness as an expert in fingerprint analysis. *State v. Madison*, 345 So.2d 485 (La.1977). Magana's testimony showed familiarity and knowledge of the comparison of different fingerprints to determine whether they were made by the same person.

In *State v. Brauner,* 99-1954 (La. App. 4 Cir. 2/21/01), 782 So.2d 52, *writ den.* 2001-1260 (La.3/22/02), 811 So.2d 920, this Court held that trial judges have great latitude in deciding whether a prospective expert has the competence, background, and experience to qualify as an expert. The Court further stated that the Trial Courts are vested with great discretion in determining the competency of an expert witness, and the rulings on the qualification of a witness, as an expert will not be disturbed unless there was an abuse of discretion. In this case, the defendant has not shown that the Trial Court abused its discretion by allowing Magana to testify as an expert, or that he was not qualified to do so under *Daubert.* This assignment is without merit.

CONCLUSION

For the above reasons we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED