NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-2446**
VERSUS	*	**COURT OF APPEAL**
ALBERT WILLIAMS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 428-710, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Max N. Tobias Jr., Judge David S. Gorbaty)

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AFFIRMED

On March 13, 2002, the defendant was charged by bill of information with violation of La. R.S. 40:966(A), possession of heroin with intent to distribute arising out of a traffic stop on January 16, 2002. On March 21, 2002, the defendant was arraigned, and he pled not guilty. On April 4, 2002, the defendant was tried by a jury on the charge of possession of heroin with intent to distribute. The jury returned a responsive verdict of guilty of attempted possession of heroin. La. R.S. 40:966(C) and 14:27. On July 16, 2002, the trial court sentenced the defendant to five years at hard labor, to be served pursuant to La. R.S. 15:574.5, the About Face Program. The trial court also ordered the defendant to complete his GED and substance abuse training.

Subsequently, the state filed a multiple bill, charging the defendant with being a second felony offender. On August 19, 2002, the defendant pled guilty to the multiple bill. The trial court vacated the previous sentence and sentenced the defendant pursuant to La. R.S. 15:529.1 to five years at hard labor, to be served pursuant to La. R.S. 15:574.5, the About Face Program. The trial court further ordered the defendant to complete his GED and substance abuse training. Defendant subsequently filed this appeal.

FACTS

Officer Carlos Peralta testified at the defendant's trial that on January 16, 2002, he and his partner, Officer Arthur Cleveland, came into contact with the defendant. The officers were responding to an unrelated call when they observed a green Jeep Cherokee on Bienville Street in New Orleans traveling at a high rate of speed, making lane changes without signaling, and making a left hand turn from the right lane. After observing that the vehicle had a "smashed out" driver's side vent window, the officers decided to conduct a traffic stop. After a struggle, the defendant attempted to flee on foot, and he kept his right hand in his pants pocket. Officer Peralta restrained the defendant and found one plastic bag containing marijuana and another plastic bag containing twenty-nine tinfoil packets of heroin in the defendant's pocket.

On direct examination, the state asked Officer Peralta why he charged the defendant with possession of heroin with intent to distribute, and he began to answer based on his "experience in narcotics". The defendant objected that Officer Peralta was commenting on the ultimate issue before the jury. The court ruled that Officer Peralta would be allowed to testify as to why he charged the defendant as he did but that he would not be allowed to testify based upon his experience as a police officer as to any other case.

When the state repeated the question, Officer Peralta again began to testify based on his past experience, and the court reminded him that he could not testify by relating "what happened in the past". Officer Peralta then testified as follows:

THE WITNESS: When packets of heroin are transported or carried in say, more than five individual aluminum packets such as this, the person is usually selling.

MR. MEYER [defense counsel] : See, Judge –

THE WITNESS That enormous amount of –

MR. MEYER I object and ask for a mistrial again.

THE COURT All right, I'll deny –

MR. MEYER He's now giving an opinion now that he thinks he's been selling. Why do we have this jury for? We might as well let him decide the case.

THE COURT The jury will decide the case. I will overrule your objection. . . .

Thus, the trial court denied the defendant's motion for mistrial but admonished the jury that it remained the finder of fact.

On cross-examination, Officer Peralta testified that no money was found on the defendant or in the vehicle. Officer Peralta also testified that no scales or baggies were found in the vehicle. Defense counsel then questioned Officer Peralta regarding whether it is departmental policy or his personal criteria to charge someone found with five or more tinfoil packets of heroin with possession with intent to distribute. Officer Peralta replied that the scenario described by defense counsel was neither departmental policy nor his personal criteria. On redirect, Officer Peralta testified as follows:

Q [A.D.A.]: Officer, there is no magic number of foils that would make you charge the defendant with simple possession versus P-wit?

A [Officer Peralta]: No.

Q: And you made the decision based in this case on the twenty-nine individually wrapped foils of heroin in his possession, is that correct?

A: Yes, ma'am.

Officer Cleveland also testified, and he corroborated the testimony of

Officer Peralta. In particular, the state again asked "what did you charge the defendant with?" Officer Cleveland responded: "Given the amount of heroin we had, we charged him with possession with intent to distribute." Defense counsel did not object or cross-examine Officer Cleveland.

The defendant testified against the advice of his counsel. He denied any involvement with the stolen vehicle or the drugs, and he testified that the officers framed him for the crime. The defendant claimed he was walking down the street when he witnessed the speeding green vehicle followed by the officers in their patrol car. The defendant testified that the driver of the green vehicle fled on foot, and when the officers asked him which way the driver ran, the defendant answered that he did not know. The defendant alleged that the officers physically abused him in an attempt to elicit an answer from him. When he continued to answer that he did not know which way the driver ran, the officers arrested him for possession of the stolen vehicle and possession of heroin and marijuana, which the defendant claimed the officers found in the stolen vehicle.

ERRORS PATENT/ASSIGNMENT OF ERROR NUMBER 2

A review of the record for errors patent reveals none.

ASSIGNMENT OF ERROR NUMBER 1

The defendant argues that the trial court erred in denying the

defendant's motion for mistrial after Officer Peralta testified in opinion form that the defendant was selling heroin. The defendant points out that Officer Peralta was not qualified as an expert in narcotics distribution. Had he been qualified as such an expert, perhaps it would have been proper for him to testify that heroin for retail distribution is typically packaged in tinfoil packets like those recovered in the instant case. Nevertheless, the defendant argues that Officer Peralta's testimony went beyond permissible limits, as even expert witnesses are prohibited from testifying as to a defendant's guilt. The defendant concludes that the trial court should have granted his motion for mistrial pursuant to La. C.Cr.P. art. 771.

The state argues that while expert testimony can be used to prove intent to distribute, the state may also prove its case through other means. For example, intent to distribute can be inferred from the amount of narcotics possessed, and an arresting officer's testimony regarding the facts and circumstances of the particular arrest is also useful. The state argues that the arresting officer's testimony should be given much deference:

> Deference should be given to the experience of the policemen who were present at the time of the incident; in reviewing the totality of circumstances, the officer's past experience, training and common sense may be considered in determining if his inferences from the facts at hand were reasonable. *State v. Short*, 96-1069 (La.App. 4 Cir. 5/7/97), 694 So.2d 549.

State v. Ash, 1997-2061, p. 7 (La.App. 4 Cir. 2/10/99), 729 So.2d 664, 669.

In the instant case, the state characterizes Officer Peralta's testimony as follows: that the individually wrapped packages of heroin led him to suspect the defendant of selling or intending to distribute heroin. Officer Peralta, according to the state, did not make a factual conclusion regarding the defendant's guilt and was merely discussing his experience in law enforcement as applied to the particular facts of the defendant's arrest. Such testimony, the state argues, is not impermissible. Furthermore, if Officer Peralta's testimony was inappropriate, the defendant did not suffer any prejudice, as the jury found the state did not meet its burden when it returned the responsive verdict of guilty of attempted possession of heroin. Therefore, any error would be harmless.

At issue is Officer Peralta's comment that "[w]hen packets of heroin are transported or carried in say, more than five individual aluminum packets such as this, the person is usually selling." The trial court denied the defendant's motion for mistrial but admonished the jury that "[t]he jury will decide the case."

La. C.Cr.P. art. 770 mandates a mistrial only if the impermissible comment is made by the judge, district attorney or court official. A policeman is not a "court official" for purposes of La. C.Cr.P. art. 770. *State v. Walker*, 593 So.2d 818, 819 (La.App. 4 Cir. 1992), *citing State v. Harper*,

430 So.2d 627 (La.1983). As Officer Peralta is not a court official and his comment was not within the scope of La. C.Cr.P. art. 770, the comment in question should be evaluated to determine whether it was "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 …[w]hen the remark or comment is made by a witness … regardless of whether the remark or comment is within the scope of Article 770." La. C.Cr.P. art. 771.

When a witness makes an irrelevant remark that might prejudice the defendant, La.C.Cr.P. art. 771 gives a trial court the option either to admonish the jury or, if an admonition does not appear sufficient, to declare a mistrial. *State v. Ducre,* 2001-2778 p. 1 (La. 9/13/02), 827 So.2d at 1120. In *Ducre,* the Louisiana Supreme Court stated:

> Mistrial is a drastic remedy which should be declared only upon a clear showing of prejudice by the defendant; a mere possibility of prejudice is not sufficient. *State v. Smith,* 430 So.2d 31, 44 (La.1983); *State v. Wilkerson,* 403 So.2d 652, 659 (La.1981). In addition, a trial judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial. *State v. Sanders,* 93-0001, pp. 20-21 (La.11/30/94), 648 So.2d 1272, 1288-89; *State v. Wingo,* 457 So.2d 1159, 1166 (La.1984).

Ducre, 2001-2778, p. 1, 827 So.2d at 1120. In *Ducre,* a police officer testifying as an expert witness commented that the defendant was found with a "distribution amount" of cocaine, and the trial court admonished the jury

instead of granting the defendant's motion for mistrial. *Ducre*, 2001-2778, p. 2, 827 So.2d 1120, 1120. The Louisiana Supreme Court in *Ducre* held that the trial court did not abuse its discretion:

> In the present case, the district court did not abuse its discretion in admonishing the jury rather than granting a mistrial when a police officer indicated that the cocaine in defendant's possession was a "distribution amount." Although the court of appeal rested its decision on jurisprudence in this Court precluding expert testimony tantamount to an opinion that the defendant is guilty of the crime charged, *State v. White,* 450 So.2d 648, 650-51 (La.1984); *State v. Montana,* 421 So.2d 895, 900 (La.1982); *State v. Wheeler,* 416 So.2d 78, 81 (La.1982), in those cases the trial courts overruled defense objections to the contested expert testimony, and thus the respective juries were allowed to consider what should have been inadmissible evidence. *White,* 450 So.2d at 649; *Wheeler*, 416 So.2d at 79; *Montana,* 421 So.2d at 900. In the present case, the trial court sustained the defense objection and admonished the jury that it, not the expert witness, remained the ultimate finder of fact.

Ducre, 2001-2778, p. 2, 827 So.2d 1120, 1120-1121.

In *State v. Johnson,* 2000-0056 (La.App. 4 Cir. 11/29/00), 780 So.2d 403, this court reviewed a range of cases dealing with allegedly improper comments by officers testifying both as experts and non-experts and whether the comments necessitated the granting of a mistrial:

> During his testimony, Officer O'Neal reviewed the evidence retrieved, including the quantity of cocaine found on the defendants, and the scales, baggies and glass tubes. The officer testified that the items were consistent with distribution. The defendant argues that this testimony constituted giving an opinion on an ultimate issue of guilt, the intent to distribute, in violation of the holdings in *State v. Montana,* 421 So.2d 895

(La.1982); *State v. Wheeler,* 416 So.2d 78 (La.1982); *State v. White,* 450 So.2d 648 (La.1984), *State v. Evans,* 593 So.2d 900 (La.App. 4 Cir.1992), *writ denied* 598 So.2d 371 (La.1992), and *State v. Dabney,* 452 So.2d 775 (La.App. 4 Cir.1984).

* * *

In *Wheeler,* the defendant was charged with possession of marijuana with the intent to distribute. The prosecutor asked the police officer-expert a hypothetical question in which the details exactly mirrored the facts of the case. The expert was then asked, in his expert opinion "... what is the likelihood of this [hypothetical] individual being involved in the distribution of marijuana" to which he replied "[i]n my opinion the person would be involved in the distribution of marijuana ..." *Wheeler, supra* at 79. On appeal, the Louisiana Supreme Court found that the trial court had erred when it overruled the defendant's objection to the hypothetical question because the testimony "was tantamount to an opinion that the defendant was guilty of the crime charged, an indirect abstract inference as to the ultimate issue in the case." *Wheeler, supra* at 81.

In *State v. Montana,* the court held that where an expert gives his opinion as to the ultimate issue of the defendant's guilt, i.e. whether the defendant intended to distribute drugs, he has improperly usurped the function of the jury. The court in *Montana* found reversible error where a police officer, qualified as an expert in the packaging and distribution of illegal drugs, was given a factual situation similar to the circumstances surrounding the defendant's arrest, and the officer gave his opinion that "they [the defendants] had it for sale." *Montana,* supra at 900.

Likewise in *State v. White,* the State posed a hypothetical factual situation virtually identical to the actual evidence produced at defendant's trial. The officer testified that in his opinion, "a person standing on the street corner with a matchbox containing say twenty-seven tin foils containing heroin, would be there for the purpose of selling or distributing." Once again, the court found reversible error concluding that the officer was usurping

> the jury's function as finder of fact.
> In *State v. Evans*, this court reversed the defendant's conviction because the State failed to establish a proper foundation qualifying the officer to testify as an expert in the field of narcotics, where the basis of the officer's expertise, such as amount of time he had been with the police force or with the narcotics division, was not disclosed. Moreover, this court indicated that the officer's testimony that "the quantity is possession with intent to distribute", was in effect an opinion as to the defendant's guilt.
> In *State v. Dabney*, the defendant's conviction was reversed because the expert gave an opinion as to whether a person in possession of an exact number of "sets of Ts and Blues" (i.e. the same number of sets as was taken from the defendant) was possessing them for personal use. This Court found that the expert, who had already testified to the packaging and marketing of "Ts and blues" on a wholesale level, had given the equivalent of a direct statement that the defendant possessed the drugs with the intent to distribute.
> * * *
> Unlike the testifying experts in *Montana, Wheeler, White, Evans* and *Dabney*, Officer O'Neal did not give the jury an opinion as to the defendant's guilt or innocence, only that the paraphernalia confiscated in the case was consistent with paraphernalia used in narcotics distribution.

State v. Johnson, 2000-0056, p. 25-28 (La.App. 4 Cir. 11/29/00), 780 So.2d 403, 416-417.

Recently, this court reviewed *Johnson* and the line of cases cited therein to determine that an officer's testimony was not impermissible opinion testimony:

> The jurisprudence Mr. Major collects in his brief in support of this final argument is identical to that set forth in *State v.*

> *Johnson,* 2000-0056 (La.App. 4 Cir. 11/29/00), 780 So.2d 403, *writ denied,* 2000-3547 (La.11/9/01), 801 So.2d 358. Although that line of jurisprudence stands for the proposition that an officer's testimony on the ultimate issue of guilt is improper, the detectives' testimony in this case, as in *Johnson, supra,* "did not give the jury an opinion as to the defendant's guilt or innocence, only that the paraphernalia confiscated in the case was consistent with paraphernalia used in narcotics distribution." 2000-0056 at p. 28, 780 So.2d at 417.

State v. Major, 2002-0133, p. 15 (La.App. 4 Cir. 10/2/02), 829 So.2d 625, 636.

Officer Peralta was not qualified as an expert witness, and no testimony was elicited regarding his qualifications. The cases, as indicated by this court's discussion in *Johnson*, discuss allegedly impermissible opinion testimony regarding guilt in the context of both expert and non-expert witnesses. The state asked Officer Peralta why he charged the defendant with possession with intent to distribute, and Officer Peralta replied, in essence, that the amount of heroin found in the defendant's possession was a distribution amount. Officer Peralta's answer is not distinguishable from the comment by the testifying officer in *Ducre*, which the Louisiana Supreme Court agreed was an opinion as to guilt. The defendant is, therefore, correct that Officer Peralta's comment was an inappropriate comment on the ultimate issue of guilt. The defendant, however, fails to recognize that although the trial court denied the motion for

mistrial, the trial court admonished the jury that it remained the finder of fact. Thus, the instant case, like *Ducre*, is distinguishable from cases in which no admonishment was given to the jury and the jury was allowed to consider as evidence inappropriate opinion testimony as to guilt.

Furthermore, the defendant was not prejudiced by Officer Peralta's comment. The defendant was charged with possession of heroin with intent to distribute, but he was found guilty of attempted possession of heroin. It is clear, therefore, that Officer's Peralta's comment that someone with the amount of heroin found on the defendant would be selling did not persuade the jury that the defendant was selling heroin.

CONCLUSION

The comment by Officer Peralta was an inappropriate comment on the ultimate issue of guilt. Such a comment is not within the scope of La. C.Cr.P. art. 770, and a mistrial is not, therefore, mandatory. Under La. C.Cr.P. art. 771, the comment is irrelevant and immaterial, but the trial court did not abuse its discretion by admonishing the jury that it was the finder of fact and denying the motion for mistrial. The defendant suffered no prejudice as a result of the irrelevant and immaterial remark, as he was charged with possession of heroin with intent to distribute but was found guilty of simple possession of heroin. Accordingly, for the foregoing

reasons, the defendant’s conviction and sentence are affirmed.

AFFIRMED