NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 KA 1754

STATE OF LOUISIANA

VERSUS

GARY J. PEREZ

Judgment Rendered: February 12, 2010

* * * * * * * *

Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 400883

The Honorable William J. Burris, Judge Presiding

* * * * * * * *

Walter P. Reed
District Attorney
Kathryn Landry
Assistant District Attorney
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Jane L. Beebe
New Orleans, Louisiana

Counsel for Defendant/Appellant
Gary J. Perez

* * * * * * * *

BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

GAIDRY, J.

The defendant, Gary J. Perez, was charged by bill of information with armed robbery, a violation of La. R.S. 14:64. Defendant entered a plea of not guilty. After a trial by jury, defendant was found guilty of the responsive offense of first degree robbery, a violation of La. R.S. 14:64.1. Defendant was adjudicated a third felony habitual offender.[1] The trial court imposed a sentence of 70 years imprisonment at hard labor. Defendant now appeals, challenging the constitutionality of the sentence and the propriety of the state's closing argument. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On or about May 25, 2005, at approximately 11:30 p.m. defendant robbed a Shell gas station convenience store near Slidell, Louisiana, while armed with a stun gun. Defendant brandished the weapon and demanded that the clerk, Jenna Tong, give him money. After Tong opened the cash register, defendant reached in and took money before fleeing the premises.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, defendant contends that the trial court imposed the sentence without considering mitigating circumstances. Defendant emphasizes that no one was hurt during the course of the crime and that he cooperated with the police. He also notes that the weapon used

[1] Defendant's predicate convictions consist of two February 25, 1997 guilty pleas to unauthorized entry of an inhabited dwelling (violations of La. R.S. 14:62.3) under docket numbers 183623 and 188773 in St. Bernard Parish and a May 6, 1999 guilty plea to possession of cocaine (a violation of La. R.S. 40:967) under docket number 397506 in Orleans Parish. In the reasons for the adjudication, the trial court found defendant to be a fourth felony habitual offender punishable under La. R.S. 15:529.1(A)(1)(c)(i). However, according to the minutes and sentencing transcript, defendant was adjudicated a third felony habitual offender and sentenced as such. The distinction is of no material consequence as to the legality of the sentence or the merits of this appeal.

was only a one-battery stun gun, that he showed remorse for his crime, that he grew up in a troubled home, and that he suffered from substance abuse.

A review of the record indicates that defense counsel did not file or make a motion to reconsider sentence. Under La. C.Cr.P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. Defendant is therefore procedurally barred from having this assignment of error reviewed. *State v. Duncan*, 94-1563, p. 2 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam). *See also State v. Felder*, 00-2887, p. 10 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, *writ denied*, 01-3027 (La. 10/25/02), 827 So.2d 1173.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, defendant contends that the state overstepped permissible bounds during closing argument. Defendant asserts that the state violated La. C.Cr.P. arts. 771 and 774, and that the state's inflammatory remarks should have resulted in a mistrial. Defendant maintains that the stun gun was not actually used on the victim and that the victim was not even sure if she saw one. Defendant further contends that the state's remark was prejudicial and prevented him from obtaining a fair trial.

Defendant specifically challenges the following statement: "You have been exposed to news stories that . . . people who have been exposed to stun guns were killed." Defendant cites *State v. Bradley*, 516 So.2d 1337, 1339 (La. App. 4th Cir. 1987), in which the Fourth Circuit, citing *State v. McClinton*, 399 So.2d 178, 182 (La. 1981), noted that an argument that attempts to have the jurors think of themselves as crime victims is prejudicial.

Louisiana Code of Criminal Procedure article 771 provides, in pertinent part:

> 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 the 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:
>
> (1) When the remark or comment is made by the judge, the district attorney, or a court official, and the remark is not 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.

Opening and closing arguments in criminal cases shall be limited to the evidence admitted, the lack of evidence, conclusions of fact that may be drawn therefrom, and the law applicable to the case. La. C.Cr.P. art. 774. However, a prosecutor is afforded considerable latitude in making closing arguments. *State v. Sanders*, 93-0001, p. 16 (La. 11/30/94), 648 So.2d 1272, 1285, *cert. denied*, 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996).

Louisiana Code of Criminal Procedure article 775 provides that a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial. A mistrial under the provisions of article 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness or of the prosecutor make it impossible for the defendant to obtain a fair trial. *See State v. Miles*, 98-2396, p. 4 (La. App. 1st Cir. 6/25/99), 739 So.2d 901, 904, *writ denied*, 99-2249 (La. 1/28/00), 753 So.2d 231. However, a mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any

reasonable expectation of a fair trial. Determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal without abuse of that discretion. *State v. Berry*, 95-1610, p. 7 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, *writ denied*, 97-0278 (La. 10/10/97), 703 So.2d 603.

In this case, the remark at issue was brief and general. After the remark at issue, defendant objected and the trial court sustained the objection. Defendant did not request an admonition or move for a mistrial.

If an objection is sustained, the defendant cannot on appeal complain of the alleged error unless at trial he requested and was denied either an admonition to disregard or a mistrial. *State v. Michel*, 422 So.2d 1115, 1121 (La. 1982); *State v. Maillian*, 464 So.2d 1071, 1076 (La. App. 1st Cir.), *writ denied*, 469 So.2d 982 (La. 1985). The motion for mistrial is a necessity. The absence of a timely motion for mistrial constitutes a waiver of the alleged error. *State v. Craddock*, 435 So.2d 1110, 1123 (La. App. 1st Cir. 1983).

Moreover, improper closing argument constitutes reversible error when it is firmly convincing that the jury was influenced by the remarks and that they contributed to the verdict. *State v. Sanders*, 93-0001 at pp. 16-17, 648 So.2d at 1285-86. Even if we assume the impropriety of the statement at issue, we are not convinced that it influenced the jury and contributed to the verdict. This assignment of error is without merit.

REVIEW FOR ERROR

Defendant asks that we examine the record for error under La. C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under La. C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of

the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. *See State v. Price*, 05-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), *writ denied*, 07-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.