NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0400

STATE OF LOUISIANA

VERSUS

GREGORY R. ADRAGNA

Judgment Rendered: September 14, 2007

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 398256, Div. "D"

Honorable Peter J. Garcia, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

The defendant, Gregory R. Adragna, was charged by bill of information with obstruction of justice, a violation of LSA-R.S. 14:130.1.[1] He entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. Upon the denial of the defendant's motion in arrest of judgment, motion for a new trial, and motion for judgment of acquittal, the defendant waived sentencing delays and the trial court imposed a sentence of four years imprisonment at hard labor. The trial court suspended the sentence and placed the defendant on four years probation with conditions (including the payment of a $1,500.00 fine, court costs, and a monthly probation supervision fee).

The defendant now appeals raising the following assignments of error:

> 1. The trial court erred by denying defendant's various [m]otions for [m]istrial because comments made by the prosecutor during closing statements and by a witness during his testimony were highly prejudicial toward defendant Gregory Adragna.
>
> 2. The evidence presented at trial was insufficient to find defendant guilty of obstruction of justice beyond a reasonable doubt in light of the evidence demonstrating defendant's high level of intoxication.
>
> 3. The sentence imposed upon defendant Gregory Adragna was excessive in light of the evidence presented at trial.
>
> 4. The trial court erred in denying defendant's post-trial motions, namely: Motion for Judgment of Acquittal, Motion in Arrest of Judgment, and Motion for New Trial.

Based on the following reasons, we affirm the conviction and sentence.

FACTS

On May 15, 2005, Trooper Melerine of the Louisiana State Police Troop L arrested the defendant for driving while intoxicated (DWI). The

[1] Originally, the defendant was also charged with aggravated battery. The trial court granted the defendant's motion to sever.

defendant was taken to the St. Tammany Parish Sheriff's Office for the completion of paperwork and a breath test. When Trooper Melerine turned his back to the defendant and walked out of the room, Trooper Melerine heard the movement of the chains to which the defendant was handcuffed. When Trooper Melerine walked back toward the defendant, the defendant was standing over the Intoxilyzer machine and DWI logbook. Trooper Melerine looked in the garbage can and saw torn pieces of paper and observed more pieces of paper on top of the machine. The torn pieces of paper were later identified as paperwork from the DWI logbook. The last entry on the paperwork was Gregory Adragna, the defendant.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant avers that the trial court erred in denying his various motions for mistrial. First, the defendant argues that Trooper Melerine made an immaterial, irrelevant, and highly prejudicial reference to other charges pending against the defendant (including illegal carrying of a gun). The defendant argues that he did not receive a fair trial as a result of the reference. Second, the defendant argues that the State made an indirect reference to the defendant's failure to testify in his own defense. Finally, the defendant argues that the prosecutor improperly described the societal costs of not finding the defendant guilty by referring to other individuals who might not have been brought to justice for their respective DWI offenses due to the defendant's destruction of a page from the Intoxilyzer logbook. The defendant argues that the comment unduly prejudiced him and prevented him from receiving a fair trial.

Mistrial is a drastic remedy and warranted only when substantial prejudice will otherwise result to the accused to deprive him of a fair trial. **State v. Booker**, 2002-1269, pp. 17-18 (La. App. 1 Cir. 2/14/03), 839 So.2d

455, 467, writ denied, 2003-1145 (La. 10/31/03), 857 So.2d 476. A trial court's ruling denying a mistrial will not be disturbed absent an abuse of discretion. **State v. Givens**, 99-3518, p. 12 (La. 1/17/01), 776 So.2d 443, 454. The trial court may grant a mistrial for certain inappropriate remarks that come within LSA-C.Cr.P. art. 770, which provides in pertinent part:

> 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:
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> * * *
>
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
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> (3) The failure of the defendant to testify in his own defense; or
>
> * * *
>
> 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.

Otherwise, an admonition to the jury may suffice, as provided in LSA-C.Cr.P. art. 771:

> 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; or
>
> (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.

Other Crimes Evidence

Except under certain statutory or jurisprudential exceptions, evidence of other crimes or bad acts committed by the defendant is inadmissible at trial. LSA-C.E. art. 404(B)(1); **State v. Jackson**, 625 So.2d 146, 148 (La. 1993). The erroneous admission of "other crimes" evidence is subject to harmless-error analysis. **State v. Morgan**, 99-1895, p. 5 (La. 6/29/01), 791 So.2d 100, 104 (per curiam). The test for determining harmless error is whether the verdict actually rendered in the case was surely attributable to the error. **Morgan**, 99-1895 at p. 6, 791 So.2d at 104. See also **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

On this issue, the defendant references the following colloquy between the prosecutor and Trooper Melerine:

> Q. At any point in time, did you leave the room where this machine and this log [book were] located to continue to do paperwork?
>
> A. Where this is at is a little room, and it's just a machine, the subject, and me. It's got a doorway. I'm finished with him. I'm telling the sheriff's office. They're pending other charges on him. I go straight to the sheriff's office and say, look, I'm finished with my DWI and the improper lane usage and the illegal carrying of a gun.

At this point, the defense attorney objected and moved for a mistrial. After a recess, the trial court denied the defense motion for mistrial. The trial court concluded that the "slight reference" in question was unsolicited and would not prevent the defendant from having a fair trial. The trial court offered to admonish the jury and the defendant declined. We find that the trial court did not abuse its discretion in denying the defendant's motion for mistrial.

The defense counsel did not want an admonition and the trial court was not mandated to grant a mistrial since the remark was not made or solicited by the judge, district attorney, or a court official. Any error regarding the reference to pending charges was harmless in view of the evidence of the defendant's guilt, i.e., the verdict was surely unattributable to the reference.[2] Thus, the defendant did not suffer any prejudicial effect by the reference.

The Failure of the Defendant To Testify In His Own Defense

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. LSA-C.Cr.P. art. 774. A prosecutor should refrain from argument that tends to divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury's verdict. **State v. Messer**, 408 So.2d 1354, 1356 (La. 1982). The argument shall not appeal to prejudice. The State's rebuttal shall be confined to answering the argument of the defendant. LSA-C.Cr.P. art. 774. However, 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, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000).

A conviction will not be reversed because of an improper closing argument unless the reviewing court is thoroughly convinced that the remarks influenced the jury and contributed to the verdict. **State v. Bates**, 495 So.2d 1262, 1273 (La. 1986), cert. denied, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 826 (1987). Much credit should be accorded to the good

[2] The sufficiency of the evidence will be fully discussed in addressing the defendant's second assignment of error.

sense and fair-mindedness of jurors who have seen the evidence, heard the argument, and have been instructed repeatedly by the trial judge that arguments of counsel are not evidence. **State v. Dilosa**, 2001-0024, p. 22 (La. App. 1 Cir. 5/9/03), 849 So.2d 657, 674, writ denied, 2003-1601 (La. 12/12/03), 860 So.2d 1153.

The defendant points to the following portion of the State's rebuttal argument:

> What evidence did you hear that he's a schoolteacher? What I say and what Marion says is not evidence. The evidence comes from the witness stand.

At the outset, we note that the defendant did not object to this portion of the State's rebuttal or move for a mistrial in this regard. A defendant's failure to object contemporaneously to improper argument by the prosecutor waives any claim on appeal based on the argument. **State v. Williams**, 96-1023, p. 13 (La. 1/21/98), 708 So.2d 703, 715, cert. denied, 525 U.S. 838, 119 S.Ct. 99, 142 L.Ed.2d 79 (1998); **State v. Johnson**, 2000-0680, pp. 14-15 (La. App. 1 Cir. 12/22/00), 775 So.2d 670, 680, writ denied, 2002-1368 (La. 5/30/03), 845 So.2d 1066. See LSA-C.Cr.P. art. 841. Accordingly, defendant is procedurally barred from having this claim reviewed.

Nonetheless, we note that this argument lacks merit. Prosecutors are allowed to comment on the lack of evidence. In this instance, the prosecutor was merely answering the defense argument during closing by making reference to the lack of evidence to support defense counsel's claim that the defendant was a schoolteacher. Specifically, defense counsel in his closing argument, stated in part as follows: "It's obnoxious to think that they would take this kind of crime and try to destroy a man with a felony conviction who is a schoolteacher just because some trooper got mad[.]" The above-

noted reference made by the prosecutor does not constitute a comment on the defendant's failure to testify.

Consequences or Societal Costs of a Not Guilty Verdict

A prosecutor's predictions as to the consequences of a not guilty verdict, or the societal costs of such a result, are clearly improper and should be avoided. **State v. Barrow**, 410 So.2d 1070, 1075 (La.), cert. denied, 459 U.S. 852, 103 S.Ct. 115, 74 L.Ed.2d 101 (1982); **State v. Crocker**, 551 So.2d 707, 714 (La. App. 1 Cir. 1989). See also LSA-C.Cr.P. art. 774. Herein, the defendant argues that the State improperly described the societal costs of not finding the defendant guilty by referring to other individuals (presumably listed on the same log document destroyed by the defendant) who might not have been brought to justice for their respective DWI offenses. The defendant notes the following portion of the State's rebuttal:

> Any of these individuals above could possibly, if the evidence is not there, could possibly get off on a technicality for a DWI which could what? Not get them the treatment -- ... Any of those people could not be brought to justice for the DWI that they might have committed and could not get the treatment that they might have needed and what could happen next? Does it have to be me driving the road, you driving the road to meet them head on after they don't get the treatment they need?

The defense counsel objected in the midst of the above comments and moved for a mistrial. The trial court overruled the objection and denied the motion for mistrial.

During closing argument, defense counsel repeatedly minimized the importance of the instant case. For example, defense counsel stated in part, "Why are we doing this? ... There hasn't been any harm done." Defense counsel further stated, "[Y]ou'd think that the D.A.'s office would have better cases to try ... . But instead, they're trying the tearing up of a 15 [cent] sheet that has not hindered justice in any way whatsoever. ... This is

nothing. On a scale from one to a hundred, this is a .5." He added, "Something is wrong with a system with a particular case where they take this little thing, this little deal." Finally, in concluding, defense counsel stated, "This does not deserve, does not deserve a felony conviction. What happened does not deserve a felony on this man's record or anybody's record[.]"

We find that the above-noted statements by the prosecutor were an attempt to answer the defendant's arguments in closing by emphasizing the seriousness of the instant offense. The challenged statements did not predict the consequences of a not guilty verdict. Rather, the statements focused on potential consequences of the defendant's criminal conduct, notwithstanding a subsequent guilty or not guilty verdict. Compare **State v. Hayes**, 364 So.2d 923, 925-26 (La. 1978) (cited by the defendant in his brief to this court), wherein the prosecutor in closing argument attempted to turn the verdict into a diatribe on heroin and heroin dealers and predicted dire consequences for the society as a whole if the defendant therein were set free. The Supreme Court found that the comments were improper but did not constitute reversible error (the Court noted the defendant's failure to contemporaneously object and the conviction therein was reversed on other grounds). Also compare **Barrow**, supra (also cited by the defendant in his brief to this court), wherein the prosecutor's statement in closing argument that the next time the defendant decided to commit a crime he might bring in a gun and shoot the victim was found improper but, in the face of overwhelming evidence of guilt, was ruled harmless.

In the instant case, when giving opening remarks and charging the jury, the trial court informed the jurors that the opening statements and closing arguments of counsel are not evidence. The trial court also

instructed the jurors that the burden is on the State to prove each element of the offense charged beyond a reasonable doubt, and that they were to determine the facts only from the evidence presented. Finally, the trial court instructed the jurors that they are not to be influenced by sympathy, passion, prejudice, or public opinion. See **State v. Bell**, 477 So.2d 759, 768 (La. App. 1 Cir. 1985), writ denied, 481 So.2d 629 (La. 1986). Considering the above instructions to the jurors and the evidence presented in this case, we conclude that the prosecutor's remarks, although improper, did not influence the jury or contribute to the guilty verdict and that the trial court's failure to sustain the objection was harmless error. For the above reasons, this assignment of error is meritless.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant argues that the verdict was not supported by sufficient evidence. The defendant specifically argues that the State failed to prove beyond a reasonable doubt, in merely presenting the testimony of Trooper Melerine, the requisite specific intent where intoxication could have precluded this element. The defendant further argues that a reasonable doubt exists as to whether the defendant intended to distort the results of a pending criminal investigation in removing the log sheet. The defendant hypothesizes that he only had the intent to exhibit anger and frustration. The defendant notes that the evidence of the result of the Intoxilyzer test was in numerous other locations.[3]

[3] Louisiana Administrative Code Title 55, Part I Chapter 5. (Breath and Blood Alcohol Analysis Methods and Techniques) Subchapter A. (Analysis of Breath) Section 511. (Recording Analysis and Recertification Date), in pertinent part, states: "After each breath analysis, the results shall be recorded in the blood/breath alcohol testing log book, a copy of which is to be sent to the applied technology unit at the end of each month and a copy to be retained at the testing agency." (repromulgated by the Department of Public Safety August 1991). Under La. R.S. 32:663, a chemical analyses would not be valid if Section 511 is not complied with. Thus, in a case where the validity of a chemical analysis is challenged, the log book may be relevant evidence of such validity.

In reviewing the sufficiency of the evidence to support a conviction, an appellate court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that the State proved the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492, p. 5 (La. App. 1 Cir. 2/14/03), 845 So.2d 416, 420.

A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Smith**, 600 So.2d 1319, 1324 (La. 1992). In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. **State v. Thomas**, 2005-2210, p. 8 (La. App. 1 Cir. 6/9/06), 938 So.2d 168, 174, writ denied, 2006-2403 (La. 4/27/07), 955 So.2d 683. As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1 Cir. 1984). Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **Richardson**, 459 So.2d at 38. When a case involves circumstantial evidence and the trier of fact reasonably rejects a hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

Specific intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences of his act. LSA-R.S. 14:10(1). Thus, specific intent need not be proven as a fact and may be inferred from the circumstances present and the actions of the defendant. **State v. Fisher**, 628 So.2d 1136, 1141 (La. App. 1 Cir. 1993), writs denied, 94-0226, 94-0321 (La. 5/20/94), 637 So.2d 474, 476. Specific intent can be formed in an instant. **State v. Cousan**, 94-2503, p. 13 (La. 11/25/96), 684 So.2d 382, 390. Voluntary intoxication is a defense only if the circumstances indicate that it has precluded the presence of a specific criminal intent required in a particular crime. LSA-R.S. 14:15(2); **State v. Guidry**, 476 So.2d 500, 503 (La. App. 1 Cir. 1985), writ denied, 480 So.2d 739 (La. 1986). The defendant has the burden of proving the existence of that condition at the time of the offense. When defenses, which actually defeat an essential element of an offense, such as intoxication, are raised by the evidence, the State must overcome the defense by evidence which proves beyond a reasonable doubt that the mental element was present despite the alleged intoxication. **Guidry**, 476 So.2d at 503.

Obstruction of justice is defined by LSA-R.S. 14:130.1, which provides, in pertinent part, as follows:

> A. The crime of obstruction of justice is any of the following when committed with the knowledge that such act has, reasonably may, or will affect an actual or potential present, past, or future criminal proceeding as hereinafter described:
>
> (1) Tampering with evidence with the specific intent of distorting the results of any criminal investigation or proceeding which may reasonably prove relevant to a criminal investigation or proceeding. Tampering with evidence shall include the intentional alteration, movement, removal, or addition of any object or substance either:

> (a) At the location of any incident which the perpetrator knows or has good reason to believe will be the subject of any investigation by state, local, or United States law enforcement officers; or
>
> (b) At the location of storage, transfer, or place of review of any such evidence.

The Sheriff's Office maintains a log to record information for each person who submits to, or refuses to submit to, a breath test. The log, in part, contains the individuals' names, the time, the test results, charges, and whether or not the individual was involved in an automobile accident. One log sheet contains entries for several different individuals. After conducting the defendant's breath test, Trooper Melerine completed the log information for the defendant and exited the room. Trooper Melerine reentered the room when he heard the defendant's chains moving. According to Trooper Melerine's testimony, the defendant made the following statements when questioned regarding his actions, "I'm sorry, I'm sorry, I'm stupid, I'm stupid." After observing the pieces of the document in the garbage can, Trooper Melerine asked the defendant, "[W]hy are you doing that[?]" According to Trooper Melerine, the defendant responded, "I thought if I get rid of that you wouldn't have me for DWI." The State introduced the ripped pieces of the original and carbon copy of the log sheet that includes the defendant's information along with several others and the subsequent separate log sheet.

During cross-examination, Trooper Melerine confirmed that the information on the log sheet would also be contained in a ticket and a police report. The defendant's blood-alcohol level was .228, significantly higher than the legal limit for DWI of .08. LSA-R.S. 14:98A(1)(b). During redirect examination, Trooper Melerine confirmed that the evidence at issue was valuable to protect the integrity and honesty of police reports.

Deputy Jeffery Mayo conducted the follow-up investigation of the defendant for the instant offense. Deputy Mayo advised the defendant of his **Miranda**[4] rights at 3:24 a.m. on May 16, 2005. The defendant signed to indicate that he understood his rights but did not sign the waiver of rights portion of the form. According to Deputy Mayo, the defendant, nonetheless, stated that he was "pissed off" and apologized for his actions. Deputy Mayo concluded that the defendant was aware of what he did and acknowledged that he was wrong.

During cross-examination, Deputy Mayo also confirmed that the information on the log sheet was routinely recorded in other places and that the defendant was "still somewhat intoxicated" when Deputy Mayo had contact with him. On redirect examination, Deputy Mayo stated that he had previously observed paperwork wherein defense attorneys subpoenaed the DWI logbook as part of the record for a DWI case.

We find that the evidence presented by the State proves beyond a reasonable doubt that the mental element was present despite the defendant's intoxication. According to both State witnesses, the defendant was apologetic and seemed to understand his actions and the reason therefor. It is uncontested that the defendant was being investigated for DWI. It is apparent that the defendant had the knowledge that his actions reasonably may have affected a potential criminal proceeding for DWI. The evidence at issue contained the defendant's breath test results and would clearly be relevant to a DWI investigation or proceeding. The defendant tampered with the evidence by ripping it into pieces. We find that the instant circumstances do not establish that the defendant's intoxication precluded the presence of the specific criminal intent required in obstruction of justice.

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[4] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

It is evident that the defendant intended to distort the results of the DWI investigation and impair the integrity of the evidence at issue or prevent its use in a future DWI proceeding. Further, we do not find the jury's rejection of the hypothesis of innocence presented by the defense unreasonable. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the State successfully proved the elements of the offense beyond a reasonable doubt. Moreover, the jury reasonably rejected the hypothesis of innocence presented by the defense. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

In the third assignment of error, the defendant argues that the sentence imposed by the trial court was constitutionally excessive. The defendant's trial counsel did not object to the sentence at the time of sentencing. A thorough review of the record indicates the absence of either a written or oral motion to reconsider sentence. The failure to file or make a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. LSA-C.Cr.P. art. 881.1(E); **State v. Duncan**, 94-1563, p. 2 (La. App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam). Accordingly, the defendant is procedurally barred from having the instant assignment of error reviewed.

ASSIGNMENT OF ERROR NUMBER FOUR

In the fourth and final assignment of error, the defendant argues that the trial court erred in denying his motion for judgment of acquittal, motion in arrest of judgment, and motion for new trial. The defendant does not raise any additional arguments in this assignment but simply states that the law and evidence entitled him to the granting of the above-named motions for the reasons cited in the arguments for the previous assignments of error. As

we have already found the prior arguments raised by the defendant meritless for the reasons stated in addressing the other assignments of error, we also find that this assignment of error lacks merit.

CONVICTION AND SENTENCE AFFIRMED.