NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1457

STATE OF LOUISIANA

VERSUS

JONATHAN A. GERALD

Judgment Rendered: May 3, 2012.

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On Appeal from the
22nd Judicial District Court,
in and for the Parish of Washington
State of Louisiana
District Court No. 07 CR6 96491

The Honorable Raymond S. Childress, Judge Presiding

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* * * * *

BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

CARTER, C.J.

The defendant, Jonathan A. Gerald, was charged by bill of information with molestation of a juvenile, a violation of Louisiana Revised Statutes section 14:81.2. The defendant pled not guilty and, following a jury trial, was found guilty as charged. He was sentenced to eight years imprisonment at hard labor. The trial court suspended five years of the eight-year sentence and ordered that the defendant, after his release, be placed on five years of supervised probation. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

In 2004, the defendant, who had just finished high school, lived with his aunt and uncle for the summer in Washington Parish so that he could work construction with his uncle. Ten-year-old K.T. was the defendant's first cousin.[1] K.T. had her own bedroom, but most often slept on the couch in the living room. K.T. testified at trial that every day, while living in the same house with her, the defendant would approach K.T. while she was sleeping and touch her vagina for about fifteen minutes. According to K.T., the defendant molested her early in the morning before anyone else was awake. When the defendant would touch her, K.T. pretended to be asleep because she was afraid that if he knew she was awake he would try to do something more. To prevent the defendant from touching her, K.T. started wearing two pairs of pants and would wrap herself up in blankets. She did not confront the defendant or tell her parents because she was afraid and

[1] K.T. turned eleven while the defendant was still living with her family.

embarrassed. Eventually, K.T. told a close friend about what the defendant had done. K.T.'s friend told K.T. to tell her (K.T.'s) mother, which she did.

The defendant testified at trial. He stated he spent the summer with K.T.'s family in 2004 to work, but he denied that he ever touched K.T.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the trial court erred in denying his motion for mistrial. Specifically, the defendant contends that other-crimes evidence ruled inadmissible at a pretrial *Prieur*[2] hearing was nevertheless allowed before the jury.

The State filed notice of intent to introduce evidence of other crimes pursuant to Louisiana Code of Evidence article 404B(1). At a *Prieur* hearing one day prior to trial, K.T. testified that the defendant was her older cousin who was about seven years older than K.T. One summer weekend, K.T. and her brother slept over at the defendant's house when K.T. was five or six years old. K.T. was alone in the defendant's bed taking a nap around noon when she was awakened by the defendant's touching her vagina. K.T. pretended to be asleep because she was scared. K.T. did not tell anyone about the incident until about five years later. During those five years, the defendant did not touch K.T.

In ruling this incident inadmissible, the trial court stated:

> I have reviewed several cases regarding the matter on the Prieur Hearing. And my concern, as I expressed previously, is still my concern.
>
> I don't think, if this had been reported and adjudicated, I don't think it would be admissible.
>
> And so, I'm not going to allow any discussion about this alleged prior act that occurred when the victim was 5.

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2 *State v. Prieur*, 277 So. 2d 126 (La. 1973).

It was learned at the trial of the matter that K.T. had a condition known as selective mutism, wherein she had difficulty speaking aloud to most people, including the defendant. Her condition improved as she got older. She was able, however, in many instances, to communicate through writing. As part of the ongoing investigation of the charge against the defendant, K.T. was interviewed by Jobeth Rickels at the Children's Advocacy Center (CAC). The recorded CAC interview was played for the jury at trial. K.T. did not speak to Rickels, but communicated to her by writing down answers to some questions she was asked. Toward the end of the interview, Rickels asked K.T. if there was anything else that she could think of that would be important for her (Rickels) to know that K.T. could write down for her. K.T. wrote something down. Rickels asked, "Now, when you say it's been about five years now, that's how long he's been doing this?" K.T. nodded. Then to confirm, Rickels said, "So the last time was like this past September or August, and then it's been going on for like about five years." K.T. nodded.

Defense counsel moved for a mistrial based on the *Prieur* ruling of the previous day. He noted that K.T. was asked about how long this had been going on and she said five years. According to defense counsel, that was "information that should not have been left on the tape[,] and it should not have been presented to the Jury. And obviously, it's highly prejudicial." The prosecutor responded that there had been no specifics and no references to the incident that was specifically excluded by the court.

In denying the motion for a mistrial, the trial court stated:

> Well, I would think, at this point, that the mention of this on this tape, and needless to say, this is, as Ms. Rickels

indicated, this is not the classic CAC tape when there's not any verbal responses from the alleged victim.

As she was writing this, and I was not in a position to see the tape, I don't know how clear it was as to what she was writing, showing up on the actual video itself, and I can take a look at that later on.

I think we can cure this by simply not giving this to the Jury and let them rely upon their recollection as it pertains to what they heard on this tape.

We're not going to send this back or publish this to the Jury, which has been tendered as State's Exhibit 2.

Certainly, with the live testimony of the victim in Court, if any reference is to be made relative to anything that occurred five years prior to that, I would certainly re-entertain your motion for a mistrial.

But I am going to deny your motion on the [sic] based upon what we have, thus far. And we will proceed with the trial.

. . .

All right. We can go back on the record. And just so the record is clear, during the break, I reviewed the videotape. And certainly, I don't think, from what I could see of it, that the writing that the child did during the course of the videotape was something that was going to be easily seen by the Jury sitting over there, as they were.

But I realize that Ms. Rickles [sic] was repeating, at times, what she was writing. But in the context of everything that was being said, I just -- I'm going to stick with my ruling.

I'm not going to grant the mistrial. And certainly, I'm not going to admonish the Jury not to take that into consideration because that would probably cause them to really then wonder when did anybody say five years, okay?

We find no reason to disturb the ruling of the trial court. Under Louisiana Code of Criminal Procedure article 770(2), 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 trial or argument refers directly or indirectly to another crime committed or alleged to have been

committed by the defendant as to which evidence is not admissible. As a general rule, Article 770 does not apply to testimony by a state witness, since a witness is not considered a "court official." *State v. Boudreaux*, 503 So. 2d 27, 31 (La. App. 1st Cir. 1986). However, an impermissible reference to another crime deliberately elicited by the prosecutor is imputable to the State and would mandate a mistrial. *See Boudreaux*, 503 So. 2d at 31. Article 770 is inapplicable in this case because the alleged prejudicial comments were not made by the judge, district attorney, or court official, but rather during a previously recorded interview by Jobeth Rickels, a witness at trial; nor was an impermissible reference to another crime deliberately elicited by the prosecutor.

The controlling provision is Louisiana Code of Criminal Procedure article 771, which 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 . . . 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.

Here, the defendant objected to a remark or remarks and moved for a mistrial, rather than an admonition. Because Rickels's remarks, as noted, fell within the scope of Article 771, the granting of a mistrial was within the broad discretion of the trial court. *State v. Johnson*, 06-1235 (La. App. 1

Cir. 12/28/06), 951 So. 2d 294, 300. Louisiana Code of Criminal Procedure article 775 provides in part that "[u]pon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771." As a general matter, mistrial is a drastic remedy that should only be declared upon a clear showing of prejudice by the defendant. *State v. Ducre*, 01-2778 (La. 9/13/02), 827 So. 2d 1120, 1120 (per curiam). In addition, a trial judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial. *Ducre*, 827 So. 2d at 1120. A reviewing court in Louisiana should not reverse a defendant's conviction and sentence unless the error has affected the substantial rights of the accused. *See* La. Code Crim. Proc. Ann. art. 921.

There is no showing of clear prejudice to the defendant since Rickels's two remarks were vague and too generalized to have made any substantial impact in the mind of the jury. Rickels only obliquely referred to an extended period of molestation by the defendant and made no direct reference to the incident at the defendant's house five years earlier when K.T. was napping in the defendant's bed. Moreover, Rickels's comments were not in response to any questions the prosecutor may have asked. Unsolicited and unresponsive testimony is not chargeable against the State to provide a ground for mandatory reversal of a conviction. *See State v. Thompson*, 597 So. 2d 43, 46 (La. App. 1st Cir.), *writ denied*, 600 So. 2d 661 (La. 1992). Furthermore, we cannot find, nor does the defendant claim, that the State deliberately neglected to excise the ostensibly offending

portion of the tape so as to prejudice the rights of the defendant. There is no indication that the defendant was unable to obtain a fair trial because of these statements. A mistrial was not mandated under Articles770 or 771, and we find no abuse of discretion in the trial court's denial of the motion for mistrial.[3]

The assignment of error is without merit.

REVIEW FOR ERROR

The defendant asks this court to examine the record for error under Louisiana Code of Criminal Procedure article 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under Article 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 (La. App. 1 Cir. 12/28/06), 952 So. 2d 112, 123-24 (en banc), *writ denied*, 07-0130 (La. 2/22/08), 976 So. 2d 1277.

CONCLUSION

For the forgoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.

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[3] Evidence of the defendant's prior act likely would have been allowed at trial under Louisiana Code of Evidence article 412.2 to show the defendant's lustful disposition toward young females. *See State v. Buckenberger*, 07-1422 (La. App. 1 Cir. 2/8/08), 984 So. 2d 751, 757, *writ denied*, 08-0877 (La. 11/21/08), 996 So. 2d 1104. Further, a pretrial *Prieur* hearing is not required for the admissibility of other crimes evidence of sexual assault pursuant to Article 412.2. *See State v. Williams*, 02-1030 (La. 10/15/02), 830 So. 2d 984, 984-85.