

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0658

STATE OF LOUISIANA

VERSUS

TIMOTHY WAYNE MURRAY

Judgment Rendered: December 21, 2011

**Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 432816-1**

Honorable William J. Crain, Judge Presiding

**Walter P. Reed
Covington, LA**

**Counsel for Appellee,
State of Louisiana**

**Kathryn W. Landry
Baton Rouge, LA**

**Frank Sloan
Mandeville, LA**

**Counsel for Defendant/Appellant,
Timothy Wayne Murray**

BEFORE: WHIPPLE, KUHN AND GUIDRY, JJ.

Timothy, Jr. concurs

WHIPPLE, J.

The defendant, Timothy Wayne Murray, was charged by grand jury indictment with first degree murder, in violation of LSA-R.S. 14:30.¹ The defendant pled not guilty. After a trial by jury, the defendant was found guilty as charged. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, alleging prosecutorial misconduct and challenging the trial court's evidentiary rulings and the denial of his motions for mistrial. For the following reasons, we affirm the defendant's conviction and the sentence.

STATEMENT OF FACTS

The defendant brought his tree-cutting business from North Carolina to Louisiana after Hurricane Katrina. He and approximately seven other tree-cutting co-workers rented a home in Slidell from Carl Glass (the victim), a retired tree cutter. Eventually, the defendant met Jody Swafford at the point of a drug transaction. Specifically, the defendant purchased cocaine from Swafford, who was selling and using cocaine at the time. Around the date of the offense, the defendant and other tree cutters were staying at a campground in Pearl River. The night before the offense, the group had consumed alcohol and cocaine. On April 8, 2006, the day of the offense, Swafford planned to purchase more cocaine for the group's use, and the defendant rode with him to the victim's home. Swafford later claimed that when he and the defendant went to the victim's home, they planned to rob him, but had no plans to kill him.

Once they arrived, around 5:00 p.m., they knocked on the side door of the residence. The victim, who was home alone at the time, told them to come in. The victim remained seated using his computer. After they entered the victim's

¹The State did not seek the death penalty.

residence, the defendant signaled Swafford to move forward with the preplanned attack. Swafford grabbed the victim from behind and tried to choke him, but was unsuccessful as the victim was big and strong. Swafford and the victim fell to the floor. The defendant started beating the victim in the face and kicking him while Swafford had him in a "choke hold." Swafford was unsure how many times the defendant hit the victim, but confirmed that it could have been as many as twenty blows. Swafford testified that he got hit by the victim's head in the process, blackening his eye. As the defendant continued to beat the victim, Swafford went to the victim's bedroom and retrieved his wallet.

According to Swafford, they stole approximately \$950.00 in cash from the victim and later divided it. The defendant exited the home first. Before leaving the home, Swafford pulled the victim's body into the hallway. The victim was in a fetal position when Swafford left. The defendant got back to the car first. Swafford discarded his blood-covered shirt near a shed behind the victim's home before he entered the vehicle, still covered with the victim's blood, and the defendant drove away from the scene. The defendant drove to a nearby lake, and he and Swafford jumped into the lake to wash off the victim's blood.

According to the defendant's version of the facts, they went to the victim's residence looking for an acquaintance. While they were there, a heated argument between the defendant and the victim ensued when the victim accused the defendant of stealing a motorcycle from one of his roommates. According to the defendant, the victim jumped up and slapped him. The defendant also claimed he only punched the victim three or four times in the face with both fists, knocking the victim's eyeglasses from his face. When asked for the exact number of blows he inflicted, the defendant stated, "Three or four, I don't remember exactly how many it was, it happened so fast." Defendant claimed that the victim's nose was bleeding as a result, but he was standing when the defendant exited the home. The

defendant expected Swafford to exit right behind him. Since Swafford was delayed defendant walked back toward the house. At that point, the defendant saw Swafford walking from behind the shed with blood all over him. As they left the scene, the defendant assumed that Swafford had been injured by the victim.

Dr. Michael DeFatta performed an autopsy on the victim on April 10, 2006. The victim suffered multiple areas of bruising and lacerations of the face and forehead, forearms, wrists, knees, and calf. The victim further suffered a significant amount of head and brain hemorrhage, and also had hemorrhage and bruising of neck muscles, consistent with the fact that he was strangled, causing asphyxia. Dr. DeFatta concluded that the main cause of the victim's death was the asphyxia due to strangulation, but that the blunt force trauma to the head was contributory.

ASSIGNMENTS OF ERROR

In the first assignment of error, the defendant argues that the prosecutor premeditatedly, unethically, and unfairly prejudiced the jury against him by asking assertive questions about his prior convictions and alleged propensity for violence, and by pretending to introduce a nonexistent inadmissible transcript of a potential witness. The defendant argues that the assertive questions were impermissibly used to attack his character and credibility. The defendant further argues that any probative value of the evidence regarding his prior conviction and propensity for violence was substantially outweighed by the danger that the evidence would unfairly prejudice him. In his second assignment of error, the defendant contends that the trial court erred and/or abused its discretion and unjustly failed to control the proceedings and permitted the prosecutor to repeatedly, unethically, and unfairly prejudice the jury by refusing to order a mistrial despite the cumulative prejudicial effects of the prosecutor's misconduct. In assignment of error number three, the defendant contends that the trial court's evidentiary rulings regarding the

above issues were in error and/or an abuse of discretion. Finally, in the fourth assignment of error, the defendant contends that the errors complained of were not harmless. In this regard, the defendant notes that the verdict was based on a credibility determination and contends that the physical evidence in this case was not a controlling factor.

The defendant contends that during his trial testimony on direct examination, he admitted to his 2006 conviction of attempted second degree sexual offense in North Carolina, and, thus, did not do anything to trigger cross-examination on the underlying facts of the conviction. The defendant further contends that while the prosecutor knew that this evidence was inadmissible and highly prejudicial, on three separate occasions the prosecution brought to the attention of the jury that the victim of the defendant's prior conviction was thirteen years old at the time of the offense. The defendant also contends, in assignment of error number three, that the prosecutor improperly questioned him regarding the details of his Louisiana conviction for escape. The defendant contends that since the offense took place in St. Tammany Parish, the jury was led to believe that he was a threat to escape and commit crimes in the same parish in which they all lived.

The defendant contends that he did not claim or offer testimony that he was a non-violent person nor did he offer evidence of a pertinent character trait. Thus, the defendant contends, the defense did not open the door to the prosecutor's assertive questions designed to portray him as a person to be feared and as having a reputation for being violent.

Furthermore, the defendant notes that the prosecutor pretended to possess a

transcript of the testimony of a witness from Swafford's trial,² at which the defendant was not a party, so that the jury would be prejudiced against the defendant by assuming that the defense objected to its admissibility because such evidence would have been in favor of the State. The defendant notes that the trial court sustained the defense's objection, but failed to inform the jury that the transcript did not exist.

The trial court shall 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:

* * *

(2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;

* * *

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 set forth 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 Swafford was also charged with first degree murder and, following a separate jury trial, was found guilty as charged. Swafford was also sentenced to life imprisonment. On appeal, Swafford's conviction and sentence were affirmed by this court. See State v. Swafford, 2010 KA 1791 (La. App. 1st Cir. 5/6/11)(unpublished).

(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.

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 (La. App. 1st 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 (La. 1/17/01), 776 So. 2d 443, 454.

During direct examination of Swafford, the prosecutor asked the following question, "Are you afraid of Murray?" When Swafford responded affirmatively, as a follow-up the prosecutor asked, "how is Murray regarded in the prison system?" At that point, the defense attorney lodged an objection, which was sustained by the trial court. As the prosecutor made another attempt to elicit testimony regarding Swafford's fear of the defendant's friends, the defense attorney again objected, and the trial court again sustained the objection. After the prosecutor's second attempt to elicit testimony regarding Swafford's fear of Murray's friends, the defense moved for a mistrial. The trial court denied the motion for mistrial, but warned the prosecutor that the witness could only testify that he is fearful, but could not state any details as to what may have been said in prison.

Prior to resting, the prosecutor noted that the State's intended final witness, Julie Webber (an acquaintance of the defendant), was unavailable and he wanted her testimony from the other trial read to the jury in this case. The defense attorneys asked for a recess to read the transcript and noted that they might lodge an objection. The trial court informed the members of the jury that there would be

a fifteen-minute recess, and the jury exited the courtroom. At that point the prosecutor withdrew the request, noting that he understood that the defense would be objecting. The defense noted that the recess was granted to allow them an opportunity to make an evaluation and added that the evidence would be inadmissible. The defense also moved for a mistrial. The defense argued that the prosecutor knew that he did not actually have a copy of the testimony and knew that such evidence would be inadmissible at any rate.

The trial court ruled that a mandatory mistrial was not warranted under Article 770 and, after a recess, denied the motion on a discretionary basis. The defense requested an admonition, and the trial court gave the defense a preview of the admonition, to which an objection was not lodged. As indicated, the trial judge admonished the jury to not consider the State's offer or request to present testimony of an absent witness as evidence in any way and to disregard it in its entirety. The defense thanked the judge for the admonition and again did not lodge any objections in that regard.

Prior to calling the defendant to the stand, the defense contended that under LSA-C.E. art. 609.1, impeachment by evidence of prior convictions would only allow the name and date of the offense and the sentence to be disclosed. The State argued that the article was more permissive under certain circumstances. The trial court took note of the balancing test under subsection (C)(3) of Article 609.1 and delayed any ruling. During direct examination, the defendant was questioned about his other offenses and admitted to a guilty plea to the crime of attempted second degree sexual offense in North Carolina for which he was sentenced to seven and one-half to nine and one-half years imprisonment. With regard to the instant offense however, the defendant told the police that he did not commit this offense. After being brought back to Louisiana, the defendant escaped from jail.

Thereafter, he pled guilty to escape, aggravated burglary, and possessing contraband while in jail.

On cross-examination, as the prosecutor began to inquire about the sexual assault offense, the defense attorney asked to approach the bench and reiterated the limits of Article 609.1 outside of the hearing of the jury. The prosecutor stated that he was only going to inquire as to the date of the offense. After eliciting the date of the offense, the prosecutor asked, "Do you know a Haley Nelson -- ... a 13-year old girl? How do you know her?" At that point, the defense attorney again asked to approach the bench, and the trial court sustained the objection, noting that the probative value of evidence regarding the victim and the victim's age in the sexual assault offense was outweighed by the prejudicial effects. The prosecutor subsequently asked, "So when you wanted to get back to North Carolina, at the end of April of '06, did you know there was a warrant for your arrest out for that sexual assault of Haley?" Just before the defense attorney asked to approach the bench and moved for a mistrial, the defendant responded, "No, sir, not at the time, I didn't."

The trial court threatened to hold the prosecutor in contempt, but denied the motion for mistrial. After hearing argument on both sides, the trial court took a recess and, upon return, noted its review of the applicable law and jurisprudence and heard further argument on both sides. The trial court noted that the defendant testified to a version of the facts in this case that contrasted with the facts as presented by the State, placing his credibility and capacity for violence at issue. The trial court concluded that under LSA-C.E. art. 609.1(C)(3), the probative value of the details of the prior offense outweighed any prejudicial effect. The trial court later limited the ruling, explaining that the prosecutor could only present the date of the conviction, the sentence on the conviction, the elements of the prior offense to which the defendant pled guilty (attempted second degree sexual offense), and

the fact that the defendant knew the victim in that case. The prosecutor limited the cross-examination on that offense as instructed.

The prosecutor then began to question the defendant regarding the escape offense, and the defense's objection thereto was overruled. The prosecution specifically asked, "You and three other people cut the bars of the parish prison to escape. Is that correct?" The defendant testified that he did not personally do the cutting, but did escape after others did so.

As to the defendant's aggravated burglary offense, the State asked, "After you escaped, you broke into somebody's house near Folsom, correct?" The prosecutor inquired as to the dates of the prior offenses and the sentences. As to the instant offense, the defendant confirmed that he was 26 or 27 years old at the time, while the victim was 57 years old. The defendant also confirmed that he hit the victim hard enough to almost knock him out. Further, the defendant also admitted that he and Swafford got in a lake and washed away blood.

The prosecutor then asked the defendant to admit to other convictions, including breaking and entering, violating a domestic protective order, and DWI, all of which the defendant admitted. The prosecutor also asked defendant to admit to convictions for first degree burglary and second degree sexual battery, but the defendant denied being convicted of those crimes. The prosecutor further had the defendant read a portion of a letter that he wrote to Julie Webber, on May 1, 2006.

In pertinent part, the defendant complied, reading the following:

I hope that the rape [s---] don't make you feel any different either, because it's not true. I was dating this girl named Sissy and she was in love with me and I wasn't in love with her but I acted like I was to use her. And she found out what the deal was and is trying to set me up with this 14-year-old girl that lives with her.

The defense objected, and the trial court noted that it had instructed the prosecutor not to introduce the age of the victim, but that the prosecutor wanted to find a way to do so despite the court's ruling. After taking a recess and listening to arguments

on both sides, the trial court further warned the prosecutor, but ultimately concluded that the reference was brief and did not warrant a mistrial.

Louisiana Code of Evidence article 404 generally disallows the admission of evidence of a person's character or a trait of his character for the purpose of proving he acted in conformity therewith on a particular occasion. Louisiana Code of Evidence article 609.1, except under limited circumstances, precludes introduction of the details surrounding a prior conviction, though the fact of the conviction and sentence are otherwise admissible for the purpose of assessing the witness's credibility.

Louisiana Code of Evidence article 609.1, in pertinent part, provides:

A. General criminal rule. In a criminal case, every witness by testifying subjects himself to examination relative to his criminal convictions, subject to limitations set forth below.

B. Convictions. Generally, only offenses for which the witness has been convicted are admissible upon the issue of his credibility, and no inquiry is permitted into matters for which there has only been an arrest, the issuance of an arrest warrant, an indictment, a prosecution, or an acquittal.

C. Details of convictions. Ordinarily, only the fact of a conviction, the name of the offense, the date thereof, and the sentence imposed is admissible. However, details of the offense may become admissible to show the true nature of the offense:

...

(3) When the probative value thereof outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Louisiana Code of Evidence article 609.1(C)(3) allows cross-examination into the details of a prior conviction only where the issue of the witness's credibility is raised and the details of the prior conviction are probative in impeaching his testimony and not outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See State v. Leonard, 2005-1382 (La. 6/16/06), 932 So. 2d 660, 667.

“Assertive questions are those which place before the jury the details concerning the other crime.” State v. Hatch, 305 So. 2d 497, 503 (La. 1974), cert. denied, 423 U.S. 842, 96 S. Ct. 76, 46 L. Ed. 2d 63 (1975). The prosecutor's assertive questions referring to evidence that was previously ruled inadmissible by the trial court fell within the scope of LSA-C.Cr.P. art. 771(1), rather than LSA-C.Cr.P. art. 770(2). In this case, Article 771(1) is the controlling rule because the facts of the prior convictions and the sentences were otherwise admissible under Article 609.1, albeit for the limited purpose of attacking the defendant's credibility. The defendant admitted to the convictions in his direct testimony. Thus, the prosecutor's assertive questions were not a remark or comment that referred directly or indirectly to “[a]nother crime committed or alleged to have been committed by the defendant as to which evidence is not admissible.” LSA-C.Cr.P. art. 770(2). Accordingly, the prosecutor's assertive questions were outside the scope of Article 770. Nonetheless, the assertive questions constitute a remark or comment made by the prosecutor during trial within the hearing of the jury that was “irrelevant or immaterial and of such a nature that it might create prejudice against the defendant ... in the mind of the jury.” LSA-C.Cr.P. art. 771.

Louisiana Code of Evidence article 609.1 only permits introduction of the details of a conviction for impeachment purposes under limited circumstances. Herein, the defendant admitted the convictions and did not testify to exculpatory facts or circumstances. On review, we are not convinced that the probative value of the evidence with respect to the defendant's credibility outweighed the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Louisiana Code of Criminal Procedure article 771 provides that “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 the questions under Article 609.1 and moved for a mistrial, rather than an

admonition, under either Article 770 or 771. Because the prosecutor's assertive questions fell within the scope of Article 771, the granting of a mistrial was within the broad discretion of the trial court. 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. In addition, a trial judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial. Leonard, 932 So. 2d at 667.

The Rules of Professional Conduct also apply to the prosecutor's actions. Prosecutors are not to engage in deliberate misconduct with the expectation that such misconduct will later be deemed harmless error. Nonetheless, the purpose of appellate review is not to punish a misbehaving prosecutor, but to correct errors that have contributed to the jury's verdict. Therefore, considering that the State impermissibly delved into the details of the defendant's convictions, a harmless error analysis is an appropriate part of the appellate review process in this case.

The history of Louisiana's harmless error rule makes clear that there has been one common directive: appellate courts should not reverse convictions for errors unless the accused's substantial rights have been violated. State v. Johnson, 94-1379 (La. 11/27/95), 664 So. 2d 94, 100. This comports with the general theory that “appeals in criminal cases are not granted merely to test the correctness of the trial judge's ruling, but only to rectify any injury caused thereby.” State v. Saia, 212 La. 868, 876, 33 So. 2d 665, 668 (1947); LSA-C.Cr.P. art. 921 (“A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the

accused.”). The court on appeal must determine whether the jury's verdict in the present case was surely unattributable to the State's violation of LSA-C.E. art. 609.1, and whether this error was harmless beyond a reasonable doubt. Leonard, 932 So. 2d at 668. The test for determining whether an error is harmless is whether the verdict actually rendered in this case “was surely unattributable to the error.” Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993); State v. Miles, 98-2396 (La. App. 1st Cir. 6/25/99), 739 So. 2d 901, 904, writ denied, 99-2249 (La. 1/28/00), 753 So. 2d 231.

In this case, the defendant's own testimony was sufficient to support a finding of guilt by the jury. Based on the record before us, which contains overwhelming evidence of the defendant's guilt, even considering the prosecutor's clear disregard of the trial court's ruling, the guilty verdict actually rendered in this trial was surely unattributable to any error. Thus, a mistrial was not mandated by LSA-C.Cr.P. art. 770 or LSA-C.Cr.P. art. 771. Accordingly, we find no error in the trial court's denial of the defendant's motions for a mistrial.

Further, regarding the prosecutor's questioning of Swafford about his fear of the defendant and/or his friends, the trial court sustained the timely defense objections. Thus, there was no testimony admitted on the issue. Finally, after the denial of the motion for mistrial based on the State's offer to introduce testimony of the absent witness, but prior to the admonishment, the trial court informed the defendant that it would admonish the jury to disregard the remarks at issue. The defendant did not object to the trial court's decision to merely admonish the jury and did not enter an objection following the admonishment. The failure to raise a contemporaneous objection to a ruling of the court constitutes a waiver of that objection. LSA-C.Cr.P. art. 841. Moreover, the record before us does not indicate that the defendant was unable to obtain a fair trial.

The assignments of error lack merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.