

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 2209

STATE OF LOUISIANA

VERSUS

WILLIAM DAVID LAUGA



Judgment Rendered: June 10, 2011

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 476,106

Honorable William J. Crain, Judge

Walter P. Reed, District Attorney
Covington, LA
and
Kathryn W. Landry
Baton Rouge, LA

Attorneys for
State – Appellee

Lieu T. Vo Clark
Mandeville, LA

Attorney for
Defendant – Appellant
William David Lauga

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

The defendant, William David Lauga, was charged by bill of information with armed robbery, a violation of La. R.S. 14:64. He pled not guilty. Following a trial by jury, the defendant was convicted as charged. The defendant moved for post-verdict judgment of acquittal and for a new trial. The trial court denied both motions. The defendant was sentenced to imprisonment for sixty-five years at hard labor, without the benefit of probation, parole, or suspension of sentence. The defendant moved for reconsideration of the sentence. The trial court denied the motion. The defendant now appeals, raising the following assignments of error by counseled and pro se briefs:

Counseled:

1. The trial court erred in denying the defendant's motion for a mistrial after the state questioned the defendant as to a juvenile adjudication.
2. The trial court erred in denying the defendant's motion for reconsideration of sentence.
3. The sentence is unconstitutionally excessive.

Pro se:

1. The trial court erred in allowing evidence of prior criminal acts through the 404(B) motion.

We affirm the defendant's conviction, vacate the sentence, and remand the matter to the district court for resentencing.

FACTS

On January 25, 2009, Joseph Brooks was working as a bartender at Tooloula's in St. Tammany Parish. At approximately 1:30 a.m., as Brooks was cleaning and preparing for closing, a male patron entered. The patron, who was clad in a navy blue jacket with a name tag and a U.S. Marshal patch on the sleeve, sat at the bar and engaged in conversation with Brooks. According to

Brooks, the man stated he was a U.S. Marshal with the New Orleans Division and indicated he was investigating an armed robbery. He provided a description of the alleged suspect. Brooks advised that he had not seen anyone matching the description and proceeded to discuss a recent patron whom he considered suspicious.

After conversing with Brooks for a while, the man left the bar area and went to the restroom. Brooks continued cleaning. The man later exited the restroom and returned to the bar area. He and Brooks engaged in further conversation. At some point, the man told Brooks he needed to retrieve some paperwork from his vehicle. When he returned, he and Brooks continued to talk about the suspicious patron. Approximately ten minutes later, the man pulled out a gun and held it to Brooks's neck. Brooks pushed the perpetrator away from him and ran out the front door. Outside, the perpetrator threatened to "blow [Brooks's] f-ing head off," grabbed Brooks by his shirt, and threw him onto the ground. He then pointed the gun at Brooks and instructed him to get up and "don't [do] nothing [sic] stupid." Brooks stood up and ran away. The perpetrator chased Brooks, threatening to shoot him and demanding money.

Eventually, the perpetrator discontinued the pursuit and returned to the bar. Once Brooks realized that he was no longer being chased, he used his cellular phone to contact the police. Brooks watched as the perpetrator exited the bar and ran north through the parking lot into an apartment complex. Meanwhile, Deputy Sean Beavers of the St. Tammany Parish Sheriff's Office arrived at the scene. Brooks returned to the bar, advised Deputy Beavers of what occurred, and provided a physical description of the perpetrator. Brooks also observed that the money that had been in his tip jar (three \$1 bills and a few quarters) was gone.

On February 16, 2009, Brooks identified the defendant, from a six-person

photographic lineup, as the individual who pretended to be a U.S. Marshal and eventually robbed him at gunpoint on the night in question. Brooks also identified the defendant as the perpetrator of the robbery in open court during the trial. Brooks testified that he got a good look at the defendant, whom he believed to be a marshal, for approximately twenty-five minutes. Brooks emphasized that there was no doubt in his mind that the defendant was the person who had robbed him.

At the defendant's trial, Elissa Lee testified regarding an evening she and her friend, Amanda Smith, spent in the company of the defendant and an individual named "Jeremy" at Mudbugs in Slidell. Ms. Lee testified that, at some point during the encounter, which lasted approximately three hours, the defendant pulled out a badge and stated that he was a U.S. Marshal. The defendant told the women they were under arrest and requested that Ms. Lee and Ms. Smith leave with Jeremy and him. The women refused. However, they continued to "hang out" with the men inside of Mudbugs. According to Ms. Lee, the defendant was wearing a "law enforcement hat." Approximately two weeks later, Ms. Lee later identified the defendant from a photo line-up as the purported U.S. Marshal she conversed with at Mudbugs. Ms. Lee also identified the defendant in open court at the trial.

The State also presented evidence of an unrelated robbery in Orleans Parish wherein the defendant was identified as the perpetrator. The defendant was never convicted of the Orleans Parish robbery.

The defendant testified on his own behalf at the trial. He denied committing the armed robbery at issue and presented a defense of misidentification. The defendant claimed he was asleep at a friend's house when the offense occurred. Regarding Ms. Lee's testimony, the defendant admitted that he met Ms. Lee and Ms. Smith at Mudbugs approximately five

days after the date of the robbery in this case. However, he denied ever showing the ladies a badge or claiming to be a U.S. Marshal.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and “error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.” La. C.Cr.P. art. 920(2).

The record reflects that, after being convicted, the defendant filed a motion for post-verdict judgment of acquittal and a motion for a new trial. On August 16, 2010, the trial court denied both motions and immediately imposed sentence. The trial court did not wait twenty-four hours after denying the motions. See La. C.Cr.P. art. 873. Nothing in the record indicates the defendant waived the delay.

It is well settled that prejudice will not be found if the defendant has not challenged the sentence imposed and the twenty-four hour delay violation is merely noted on review for error under La. C.Cr.P. art. 920(2). See State v. Ducre, 604 So.2d 702, 709 (La. App. 1st Cir. 1992). In State v. Augustine, 555 So.2d 1331, 1333-35 (La. 1990), the Louisiana Supreme Court held that a trial court’s failure to observe the twenty-four hour delay is not harmless error if the defendant challenges the sentence on appeal. In this case, the defendant has not assigned as error the trial court’s failure to observe the twenty-four hour delay. However, the defendant, through two counseled assignments of error, has contested the sentence imposed. Accordingly, we vacate the sentence imposed and remand the matter to the district court for resentencing. We pretermitt discussion of counseled assignments of error 2 and 3, which relate to the sentence.

**COUNSELED ASSIGNMENTS OF ERROR
DENIAL OF MOTION FOR A MISTRIAL**

In this assignment of error, the defendant contends the trial court erred in denying his motion for a mistrial after the State questioned him regarding a juvenile adjudication. The defendant argues a mistrial should have been granted under La. C.Cr.P. art. 771 because an admonition could not remedy the prejudice caused by the improper questioning.

The exchange at issue occurred during the State's cross-examination of the defendant:

Q. Have you ever been in any trouble before?

A. Arrest-wise or ever convicted?

Q. In St. Bernard?

[BY DEFENSE COUNSEL]:
Object to that as irrelevant.

BY THE COURT:
Sustained.

EXAMINATION BY [THE STATE]:

Q. You ever had a conviction in St. Bernard as a juvenile?

A. No, sir, do not.

Q. You were never adjudicated a juvenile delinquent?

A. No, sir, I was not.

Q. For armed robbery, you were never adjudicated –

[BY DEFENSE COUNSEL]:
I object. As a juvenile, it is irrelevant.

[BY THE DEFENDANT]:
Excuse me, Your Honor. May I?

[BY THE COURT]:
Sustained. You all approach.

During the bench conference, the trial court explained that the defendant's objection was sustained because under La. C.E. art. 609.1(F),

evidence of juvenile adjudications of delinquency is not admissible to attack credibility. Counsel for the defendant then moved for a mistrial and argued that the prosecutor's reference to a juvenile adjudication was irrevocably prejudicial and a mistrial was mandatory. The State responded that a mistrial was not warranted since the defendant denied the existence of the juvenile adjudication.

Following the Louisiana Supreme Court's decision in **State v. Roberts**, 331 So.2d 11, 13 (La. 1976), reversed on other grounds, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977), the trial court ruled that a mistrial is mandatory (under La. C.Cr.P. art. 770) only when there is an improper reference to a crime, not a juvenile adjudication. Thus, the court noted that the instant matter is governed by the discretionary mistrial provision of La. C.Cr.P. art. 771.¹ The trial court refused to grant a mistrial and reasoned:

I'm looking specifically at the conversation, questions from yesterday. There is a reference to a conviction as a juvenile. Mr. Lauga on the stand denied that twice. There was never any mention made of what that crime was or may have been.

So there's nothing in the jury's mind, if anything, about this. Other than that he denied that he was ever adjudicated a delinquent or convicted as a juvenile of any crime. And that's the way it stands with the jury. There's no reference to the type of crime or anything.

Under La. C.E. art. 609.1(F), the attempt by the prosecutor in this case to impeach the defendant's credibility by questioning him as to a prior juvenile adjudication was clearly improper. However, as the trial court correctly noted, the improper reference to a juvenile adjudication of delinquency falls within the purview La. C.Cr.P. art. 771, not article 770. See Roberts, 331 So.2d at 13.

Louisiana Code of Criminal Procedure article 771 provides, in pertinent

¹ On appeal, the defendant does not challenge the trial court's ruling regarding the inapplicability of article 770. Instead, he argues only the trial court abused its discretion in failing to grant a mistrial under article 771.

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.

Under La. C.Cr.P. art. 771, the granting of a motion for mistrial is discretionary rather than mandatory and is appropriate only when an admonishment cannot cure the error. See State v. Goods, 403 So.2d 1205, 1207 (La. 1981). Moreover, mistrial is a drastic remedy that is authorized only where substantial prejudice will otherwise result to the accused. **State v. Anderson**, 2000-1737, p. 19 (La. App. 1st Cir. 3/28/01), 784 So.2d 666, 682, writ denied, 2001-1558 (La. 4/19/02), 813 So.2d 421. 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.

In the instant case, the trial court sustained the defendant's objection to the State's question regarding the juvenile delinquency adjudication. The trial court denied the defendant's motion for a mistrial, but offered to provide an admonishment to the jury. The defendant declined the admonition, reasoning that it would only serve to draw additional attention to the improper inquiry. Later, during the closing instructions, the trial court instructed the jury on the limited use of other crimes evidence.

Based upon our review of the record in this case, we find no error in the

trial court's refusal to grant a mistrial. Initially, we note that the trial court's claim that the nature of the alleged juvenile adjudication was never disclosed is incorrect. The record reflects that the prosecutor specifically inquired whether the defendant had been adjudicated delinquent based upon the offense of armed robbery. Nevertheless, the defendant denied any such adjudication and there was no further questioning on the matter. While it is clear that the inquiry at issue could have given rise to an inference adverse to the defendant, the jury could also infer that the defendant was candid when he denied the existence of said delinquency adjudication since there was no further mention of the issue. Therefore, we find no error or abuse of discretion in the trial court's finding that an admonition, and not a mistrial, was proper. We are not convinced that the defendant was unable to obtain a fair trial because of the inquiry.

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR OTHER CRIMES EVIDENCE

In his pro se assignment of error, the defendant contends the trial court erred and/or abused its discretion in permitting the State to introduce evidence of another armed robbery offense wherein the defendant was charged, but never convicted. The defendant asserts the evidence of this unrelated offense was not relevant and was used only to depict him as a person of poor character.

It is well settled that courts may not admit evidence of other crimes to show the defendant as a man of bad character who has acted in conformity with his bad character. La. C.E. art. 404(B)(1); see State v. Williams, 96-1023, p. 30 (La. 1/21/98), 708 So.2d 703, 725, cert. denied, 525 U.S. 838, 119 S.Ct. 99, 142 L.Ed.2d 79 (1998); State v. Prieur, 277 So.2d 126, 128 (La.

1973). Evidence of other crimes, wrongs or acts committed by the defendant is generally inadmissible because of the “substantial risk of grave prejudice to a defendant.” **Prieur**, 277 So.2d at 128. However, the State may introduce evidence of other crimes, wrongs or acts if it establishes an independent and relevant reason such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. La. C.E. art. 404(B)(1). The Louisiana Supreme Court has also held other crimes evidence admissible as proof of other crimes exhibiting almost identical modus operandi or system, committed in close proximity in time and place. The other crimes evidence must tend to prove a material fact genuinely at issue, and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. **State v. Millien**, 2002-1006, p. 10 (La. App. 1st Cir. 2/14/03), 845 So.2d 506, 513-14. The State bears the burden of proving that the defendant committed the other crimes, wrongs or acts. **State v. Galliano**, 2002-2849, p. 2 (La. 1/10/03), 839 So.2d 932, 933 (per curiam).²

If the prosecution is using other crimes evidence to show “identity,” the law requires that facts of cases be so peculiarly distinctive that one must logically say they are works of the same person, but if the State wishes to use such evidence to show defendant’s “intent,” the standard is lower, and the State must only show that crimes are similar. **State v. Langley**, 95-2029, p. 4

² Under **Prieur**, the State had to prove by clear and convincing evidence that the defendant committed the other crimes. **Prieur**, 277 So.2d at 129. However, 1994 La. Acts 3d Ex.Sess., No. 51 added La. C.E. art. 1104, which provides that the burden of proof in pretrial **Prieur** hearings, “shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404.” The burden of proof required by Federal Rules of Evidence Article IV, Rule 404, is satisfied upon a showing of sufficient evidence to support a finding by the jury that the defendant committed the other crime, wrong, or act. The Louisiana Supreme Court has yet to address the issue of the burden of proof required for the admission of other crimes evidence in light of the repeal of La. C.E. art. 1103 and the addition of La. C.E. art. 1104. However, numerous Louisiana appellate courts, including this court, have held that burden of proof to now be less than “clear and convincing.” **Millien**, 2002-1006 at p. 11, 845 So.2d at 514. In this appeal, the defendant does not argue that the State failed to meet its burden of proving that he committed the other crime.

(La. App. 4th Cir. 9/4/96), 680 So.2d 717, 721, writ denied, 96-2357 (La. 2/7/97), 688 So.2d 498. "System evidence" has relevance independent of defendant's criminal propensity and is admissible if it meets other requirements for the admission of other crimes evidence, where defendant's identity as the perpetrator of the charged offense will be genuinely at issue at trial. **State v. Ester**, 436 So.2d 543, 546 (La. 1983). Where testimony shows that factual circumstances of prior acts and the crime charged are virtually identical, evidence of other crimes is corroborative of the victim's testimony and establishes a system or plan. **State v. Lewis**, 95-0769, p. 5 (La. App. 4th Cir. 1/10/97), 687 So.2d 1056, 1059, writ denied, 97-0328 (La. 6/30/97), 696 So.2d 1004.

In **State v. Bell**, 99-3278, pp. 4-8 (La. 12/8/00), 776 So.2d 418, 421-423, the supreme court found that while there were some similarities between the two crimes, the prior crime was not "so distinctively similar to the charged crime (especially in time, place and manner of commission) that one may reasonably infer that the same person was the perpetrator." Bell was charged with armed robbery, and the State sought to introduce evidence of another robbery. The supreme court found that there were many differences between the two robberies, including the race of the perpetrators and the type of weapons used, and that the identity exception to inadmissibility must be limited to cases in which the crimes are genuinely distinctive. The crimes involved robberies of bars at night and occurred within two months of one another in Ascension Parish. The perpetrators in both cases were described as wearing dark hooded sweatshirts or starter jackets. During both robberies, the perpetrators disengaged the telephone at the scene. The only evidence directly connecting the defendant to the crime was the testimony of two co-perpetrators who were charged with participation in the robbery, but had not

yet been tried. The supreme court found that the sufficiency of the evidence presented by the co-perpetrators easily would be upheld, if the prosecutor had not introduced inadmissible evidence for the purpose of influencing the jury's determination of the defendant's guilt and then emphasized in argument the role of that evidence in the guilt determination. The court found that it could not conclude with any confidence that the jury's guilty verdict was surely unattributable to the erroneous admission of evidence of a prior armed robbery committed by the defendant, especially since the prosecutor exploited the inadmissible evidence in rebuttal closing argument. The supreme court found that this court concluded correctly that the other crimes evidence was erroneously admitted. A harmless error analysis was conducted, the conviction was reversed, and the case was remanded for a new trial.³ **Bell**, 99-3278 at pp. 4-8, 776 So.2d at 421-423.

Ultimately, questions regarding the admissibility of evidence are within the discretion of the trial court and should not be disturbed absent a clear abuse of that discretion. See State v. Schleve, 99-3019, p. 15 (La. App. 1st Cir. 12/20/00), 775 So.2d 1187, 1199, writs denied, 2001-0210 (La. 12/14/01), 803 So.2d 983 & 2001-0115 (La. 12/14/01), 804 So.2d 647, cert. denied, 537 U.S. 854, 123 S.Ct. 211, 154 L.Ed.2d 88 (2002).

Prior to trial, the State gave notice of its intent to introduce evidence of an unrelated armed robbery that occurred in Orleans Parish on June 2, 2008. At the hearing on the motion, the State argued that the evidence of this armed

³ The Louisiana Supreme Court concluded that erroneous admission of other crimes evidence is subject to harmless error analysis under the standard set forth in **Chapman v. California**, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The **Chapman** standard was later refined in **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). The United States Supreme Court stated that the inquiry was not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. The **Bell** court found that when the trial court erroneously allows inadmissible evidence, the prosecutor has a very heavy burden to demonstrate in the appellate court that the error was harmless beyond a reasonable doubt. **Bell**, 99-3278 at p. 5, 776 So.2d at 422.

robbery was admissible under the provisions of La. C.E. art. 404(B)(1) as proof of identity. The trial court agreed to allow the State to introduce evidence of the other robbery at the defendant's trial. On appeal, the defendant does not argue that the State failed to meet its burden of proving that he committed the Orleans Parish armed robbery offense. Instead, he argues the offenses are not so similar as to make the evidence of the other offense admissible.

In allowing evidence of the Orleans Parish robbery, the trial court noted that because the accuracy of the victim's identification of the defendant as the robber was placed into question by the defense, the other crimes evidence would be relevant to establish that issue. The court noted:

What I have in this case are two armed robberies. The armed robbery that was involved in the subject case involves a perpetrator who was, who according to testimony, was identified by the victim out of a six pack line-up.

The perpetrator in this case committed the armed robbery with a gun, pistol, held to the victim's neck. The perpetrator in this case also represented himself to be a U.S. Marshal prior to the commission of the armed robbery, who was looking for an armed robber.

In the evidence that I have been presented on the New Orleans crime, the defendant, Mr. Lauga, was also identified from a six pack line-up as the perpetrator of that crime. It, too, was an armed robbery committed with a gun.

According to the video that was reviewed by the detective involved, investigating the New Orleans crime, the defendant wore a hat that had SWAT, S-W-A-T, a law enforcement form.

The thing that is, the two things that are most similar about this case is that both of them were committed with a weapon. And in both cases, this defendant was identified from a six pack line-up as being the perpetrator of the crimes.

Ms. Gilbert testified that the reason that she didn't go forward and was unwilling to cooperate in New Orleans was her fear. And that at this time, her conscience has dictated that she come forward. She also identified the defendant here in the courtroom as the perpetrator of that crime.

The trial court weighed the prejudicial nature of the other crimes evidence against its probative value and concluded that the evidence met the balancing test of La. C.E. art. 403.

At trial of this matter, Rebecca Gilbert testified, on June 2, 2008, she was working as a cashier at Paradise Casino in Orleans Parish. At sometime between 1:30 to 2:30 a.m., the defendant entered the casino, held a gun to the head of the security guard, and threatened to kill him. The defendant then escorted the guard over to the cashier station at gunpoint and demanded that Ms. Gilbert give him money. Ms. Gilbert filled a bag the defendant handed her with approximately \$15,000.00 in cash. The defendant instructed Ms. Gilbert and the security guard to lie down on the floor. Once they complied, the defendant fled.

Ms. Gilbert testified the defendant was wearing a black cap, black clothing and black face paint. Ms. Gilbert identified the defendant in a pretrial photographic line-up as the robber. However, Ms. Gilbert explained she later refused to cooperate with the investigation of the case because she feared for her life. The charge against the defendant for the Orleans Parish robbery was not pursued by the district attorney.⁴ Ms. Gilbert identified the defendant in open court at the instant trial as the individual who robbed her. She explained that although she still feared for her life, she was willing to testify at the instant trial because she felt that her failure to cooperate with the Orleans Parish robbery investigation resulted in someone else being “victimized.”

Detective Gregory Powell, of the New Orleans Police Department, testified that he reviewed the video surveillance footage from Paradise Casino in connection with his investigation of the June 2, 2008 armed robbery in

⁴ The security guard was never able to positively identify the perpetrator.

Orleans Parish. According to Detective Powell, the defendant was observed wearing a hat with the letters "SWAT" on it, a large black coat, and some blue or purple gloves on his hands. The surveillance footage also showed the defendant leaving the casino in a white Ford Expedition.

Detective Powell later determined that the defendant owns a white Ford Expedition. Detective Powell compiled a photographic line-up and presented it to Ms. Gilbert for identification. Ms. Gilbert positively identified the defendant as the person who committed the robbery.

Based on our review of the record, we agree with the trial court's ruling that the other crimes evidence was substantially relevant to show identity. The defendant disputed his identity as the perpetrator in the instant offense. Thus, the State had to establish that element at trial. Analyzing the offenses, we note that the defendant committed both robberies at approximately the same time, during early morning hours. In both instances, the defendant was clad in clothing that suggested that he was affiliated with law enforcement. In both offenses, the defendant held a victim at gunpoint and threatened to shoot if the victim did not cooperate. The defendant wore gloves in both robberies. The defendant was identified from a photographic line-up as the perpetrator of both robberies. We find that the *modus operandi* in both robberies was so distinctively similar that one may reasonably infer that they were the work of one person.

In finding this evidence relevant and admissible, we have no difficulty concluding that it was more probative than prejudicial and outweighed any dangers set forth in La. C.E. art. 403. Furthermore, the trial court gave the jury a limiting instruction that the other crimes evidence was received for the limited purpose of proving an issue for which other crimes evidence may be admitted, but not to prove the bad character of the defendant. The trial court

further instructed the jury that the defendant's guilt or innocence relative to the instant offense may not be determined merely because the defendant may have committed another offense. Thus, the trial judge lessened any prejudicial effect and guarded against jury misuse of the evidence by giving cautionary instructions during the trial, and again with his final jury charges. In light of the foregoing, the trial court properly found the other crimes evidence admissible for the limited purpose under La. C.E. art. 404(B).

Moreover, even if we were to find the other crimes evidence was inadmissible, it would not result in the reversal of the defendant's conviction. It is well settled that 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 unattributable to the error. **Morgan**, 99-1895 at p. 6, 791 So.2d at 104.

After reviewing the record in its entirety, we find the defendant's conviction was surely unattributable to the admission of the other crimes evidence. The defendant was positively identified by the victim in this case, who had ample opportunity to view his face. The victim's trial testimony established he was absolutely positive in his identification of the defendant as the individual who feigned the role of a U.S. Marshal and robbed him at gunpoint. The victim explained that he and the defendant conversed for an extended period of time in the well-lit establishment. The defendant did not conceal his face or otherwise attempt to mask his identity while talking with the victim for almost thirty minutes. Considering the foregoing, we find that the jury's verdict in this case was based on the victim's positive identification of the defendant as the robber shortly after the offense occurred, and again in open court at the trial. Ms. Lee's testimony that the defendant once told her

that he was a U.S. Marshal also served to corroborate the victim's account of the events and his identification of the defendant as the robber.

This assignment of error lacks merit.

CONCLUSION

For the foregoing reasons, we affirm the conviction, vacate the sentence, and remand for resentencing.

**CONVICTION AFFIRMED; SENTENCE VACATED;
REMANDED FOR RESENTENCING.**