NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 0461

STATE OF LOUISIANA

VERSUS

DESMOND HENDERSON

Judgment Rendered: September 10, 2010

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Trial Court Number 802,060

Honorable M. Douglas Hughes, Judge

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

WELCH, J.

The defendant, Desmond Henderson, was charged by bill of information with aggravated burglary, a violation of La. R.S. 14:60.[1] The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The defendant was sentenced to ten years imprisonment at hard labor. The defendant now appeals, assigning error as to the sufficiency of the evidence and the trial court's denial of his motion for mistrial. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On or about December 1, 2007, David Toler, the assistant general manager of Aaron's Sales and Lease Store in Hammond, Louisiana, arrived at work at approximately 7:15 a.m. After he exited his truck and began walking towards the store entrance, Toler observed an approaching individual. Toler noted that the individual was an African-American male wearing baggy pants and a hooded sweatshirt, despite the warm weather. Toler proceeded to unlock the store door. Just after he opened the door and turned back, the man ran towards him. As Toler attempted to close the door, the man placed his foot in the doorway and pointed a gun at Toler's face and a physical altercation ensued. Toler and the individual stumbled out of the store as they fought. The physical struggle ended when the assailant ran towards the parking area of a neighboring store and Toler ran towards his truck. Toler observed the assailant enter the passenger side of a four-door, gold vehicle he believed to be a Cadillac stopped in the parking lot with the engine running. The vehicle was driven from the scene. Toler drove his truck to a co-worker's home, across the street from the store, contacted the police, and returned to the scene.

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[1] The defendant was originally charged with armed robbery, and the State later amended the bill of information.

Sergeant Thomas R. Miller of the Hammond Police Department responded to a dispatch regarding the incident, secured the scene, and interviewed Toler. Detective Mark Jones was assigned to the investigation of the case. Toler provided a description of the assailant and the getaway vehicle. On December 6, 2007, in a photographic lineup, Toler identified the defendant as the assailant.

ASSIGNMENT OF ERROR NUMBER ONE

While the defendant does not dispute that someone approached Toler with a handgun and threatened his life if he did not give him money from inside the store, he disputes the identification of him as the armed assailant. Noting that the surveillance video was erased several days after the incident, the defendant contends that Toler, in vital part, based his identification on the contents of the video. The defendant argues that the jury should not have found him guilty without viewing the video and contends that there was evidence to show that Toler pinpointed the defendant simply because he remembered him from his former employment at another Aaron's store. The defendant specifically contends that Toler may have remembered his face from a prior meeting at one of the stores. The defendant concludes that the State failed to negate any reasonable probability of misidentification.

The standard of review for sufficiency of the evidence to support a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime and defendant's identity as the perpetrator of that crime beyond a reasonable doubt. See La. C.Cr.P. art. 821; **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Johnson**, 461 So.2d 673, 674 (La. App. 1st Cir. 1984). When analyzing circumstantial evidence, La. 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. 1st Cir. 2/14/03), 845 So.2d 416, 420. 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. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

Aggravated burglary is, in pertinent part, the unauthorized entering of any structure where a person is present, with the intent to commit a felony or any theft therein, if the offender is armed with a dangerous weapon or commits a battery upon any person while in such place, or in entering or leaving such place. La. R.S. 14:60. A dangerous weapon is defined as an instrument "which, in the manner used, is calculated or likely to produce death or great bodily harm." La. R.S. 14:2(3). Louisiana Revised Statutes 14:33 defines a battery, in pertinent part, as the intentional use of force or violence upon the person of another. When the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. **State v. Holts**, 525 So.2d 1241, 1244 (La. App. 1st Cir. 1988). Positive identification by only one witness may be sufficient to support the defendant's conviction. **State v. Andrews**, 94-0842, p. 7 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 453. As noted, the defendant does not contest the elements of aggravated burglary, only his identity as the perpetrator.

The incident in question occurred on Saturday, the first of the month. Toler noted that it was a busy weekend for the store, as people received their paychecks the previous day and rental payments were due at that time. He further noted that between $25,000.00 and $30,000.00 was in the store at the time. In accordance with policy, the store did not make night deposits; funds were deposited on Saturday mornings. As assistant manager, Toler had access to the store's safe and

was responsible for the accounts receivable. Toler arrived early to open the store for other employees scheduled to arrive at 7:30 a.m. He indicated that all of the stores had the same procedure.

Toler stated that he was suspicious of the male individual at first sight because of his attire, the fact that it was early in the morning before the store's opening, and it was unusual for someone to be walking in that area at that time. The assailant knelt down just before approaching Toler. Toler "paid attention" to the assailant from the moment he knelt down to the point he abruptly approached. He momentarily lost sight of the assailant as he unlocked the door, but the assailant approached Toler just as he turned back after opening the door. Toler testified that he looked at the assailant's face as the assailant entered the building. The assailant was approximately one or two feet away from him when he pulled a gun from his sweatshirt, pointed it at Toler's face, and mentioned money. At that point he was still wearing a hood on his head but it slightly slid away from his forehead. In an attempt to avoid being shot, Toler began swinging at the assailant when he saw the gun. He specifically stated that he swung towards the individual's face. In the midst of the struggle, Toler was able to get another look at the assailant's face after they stumbled outside of the store and the assailant raised the gun again and pointed it at Toler's face. The entire incident took place within three minutes or less.

After the incident, Toler watched the surveillance video. Toler testified that although the video captured the altercation, it "would have been tough" to see his or the perpetrator's face on the video. The video was recorded in black and white. Toler notified the police of the recording's existence. Toler stated that the video, described as a security "stealth video," was not on a removable cassette or disk and was subsequently automatically erased or recorded over. Toler and the regional vice-president did not know how to download or retrieve the recording from the

hard drive. Toler watched the video a few other times that day with other Aaron's employees before it was erased. He testified, "you really couldn't tell anything. I mean, it happened, the altercation happened so fast. So, I mean, me seeing it five times or seeing it fifty, wouldn't have made any difference." Toler stated that he did not rely on the video in identifying the assailant.

Toler also testified that he did not know the assailant in any way prior to the incident in question. Toler confirmed his photographic lineup selection and identified the defendant as the assailant in court. Toler testified that he was immediately able to pick the assailant from the photographic lineup, mainly focusing on the individual's eyes. Toler also remembered the rest of the individual's face. After the incident, Toler learned that the defendant was a previous general manager for an Aaron's store located in New Orleans. Toler did not recall any contact with the defendant in that capacity and was unaware of the time period of the defendant's employment. Toler confirmed that he had no doubts as to the defendant's identity as the perpetrator. During cross-examination, Toler admitted that he was frightened during the incident and his adrenaline was elevated. He also stated that he attended corporate regional meetings several times monthly that included the New Orleans store. The general managers did not attend those meetings. Toler began working for Aaron's in November of 2006. Toler admitted that he and the defendant crossing paths was not out of the realm of possibility, although he did not recall such an occurrence.

Based on our review of the evidence, a rational trier of fact could have concluded that the State negated any reasonable probability of misidentification. Toler was suspicious of and observed the assailant before the altercation took place. He was able to get a good look at the assailant's face when he was accosted at gunpoint. His identification was made with certainty and specificity. The other essential elements of the offense are not in dispute. Any rational trier of fact,

viewing the evidence in the light most favorable to the State, could have found proof beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, of the essential elements of aggravated burglary and the defendant's identity as the perpetrator of that offense. Thus, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant argues that the trial court erred in denying his motion for mistrial based on the State's rebuttal closing argument in the presence of the jury that the defendant should have presented evidence to establish his innocence. The defendant specifically argues that he was entitled to a mistrial pursuant to La. C.Cr.P. art. 775(3). The defendant further contends that the State's remarks violated his constitutional right to remain silent and undermined the basic principle that the defendant is not obligated to put on a defense or even to testify. The defendant contends that the damage was already done before the trial court sustained the defense objection and that the admonishment was insufficient to correct the wrong. The defendant contends that he was denied a fair trial and that it is incumbent upon this court to reverse the trial court's ruling and order that he be given a new trial.

Closing arguments in criminal cases shall be limited to the evidence admitted, the lack of evidence, conclusions of fact that may be drawn therefrom, and the law applicable to the case. La. C.Cr.P. art. 774. 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. La. 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 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. 1st Cir. 5/9/03), 849 So.2d 657, 674, writ denied, 2003-1601 (La. 12/12/03), 860 So.2d 1153.

In accordance with La. C.Cr.P. art. 775(3), a mistrial may be ordered when there is "a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law." Article 775 further states that the defendant's motion for a mistrial shall be ordered, "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." Louisiana Code of Criminal Procedure article 770(3) provides that a mistrial shall be granted upon motion of the defendant when a remark or comment is made within the hearing of the jury by the judge, district attorney, or a court official during trial or in argument and that remark refers directly or indirectly to the failure of the defendant to testify in his own defense. Louisiana Code of Criminal Procedure article 771 sets forth permissive grounds for requesting an admonition or a mistrial when a prejudicial remark is made on grounds that do not require automatic mistrial under Article 770. 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. 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, p. 12 (La. 1/17/01), 776 So.2d 443, 454.

Prior to the defense objection and motion for mistrial, the following statements were made during the prosecution's rebuttal closing argument:

> Again, there has not been one scintilla of evidence presented, that is contrary in any way, shape or form to what Mr. Toler told you, not one bit of evidence.
>
> And if any of you have any doubt whatsoever, in just a little bit when you deliberate, I ask that you ask yourself this one question, and that question being: If I was the Defendant and I was being wrongfully accused, okay, I wasn't there, I didn't do it, I wasn't even the driver in the car, what would I do?

At this point, the defense counsel objected, stating "He doesn't have to put on a defense." The trial court overruled the objection, agreeing with the State's assertion that it was not alleging that the defendant had to put on a defense but simply instructing the jurors to ask themselves what they would do. The prosecution continued as follows,

> My question is: What would you do, in that situation? Me? I would find an aunt, a momma, a sister, a girlfriend, a wife, somebody who could say, I was somewhere else.
>
> You've not heard any evidence –

At this point, the trial court sustained the defense's renewed objection and removed the jurors. The defense counsel, in part, stated "He's telling us that we have to, the jury that we have to, that we did not put on a defense, that we did not contradict it, that we did not put on evidence. Your Honor, we don't have an obligation to put on evidence." After hearing opposing arguments, the trial court concluded that the State was "getting dangerously close to informing the jury that they should have put on a defense." The trial court struck the line of argument "out of an abundance

of caution." The defense moved for a mistrial and the trial court denied the motion, but stated that it would admonish the jury. The trial court, in part, instructed the jury not to ponder the line of questioning and argument proposed by the State. After the admonishment, the State concluded its rebuttal closing argument without further objection.

In **State v. Falkins**, 2004-250 (La. App. 5th Cir. 7/27/04), 880 So.2d 903, writs denied, 2004-2220 (La. 1/14/05), 889 So.2d 266, 2004-2171 (La. 5/20/05), 902 So.2d 1045, the evidence showed that Floyd Falkins (defendant therein) and Larry Simms (not a party to the appeal) entered a Hibernia National Bank and robbed four tellers while armed with guns. The State also introduced evidence to show that, after the robbery, Falkins and Simms got into a vehicle being driven by Dwayne Simms (defendant therein) and they fled the scene. Among the State's witnesses were bank tellers and Jean D. Pierre, a witness who testified that she was in a Rite Aid parking lot when she observed two men coming from Hibernia toward the Rite Aid parking lot. Pierre observed the individuals as they got into a vehicle in the parking lot behind Rite Aid. During the cross-examination of Pierre, the defense counsel suggested that Dwayne Simms was parked in front of a doctor's office and had been inside of that office. During rebuttal argument, the prosecutor in part stated, "if it had been there for him to go in the doctor's office, why didn't you hear somebody from the doctor's office come here and say, oh, yeah, Mr. Simms had a doctor's visit that day?" **Falkins**, 2004-250 at p. 18, 880 So.2d at 915. In objecting and moving for a mistrial, the defense counsel stated, "I did not put on a case, there were no witnesses to put on, and for counsel to suggest I should have called the doctor or anybody else is improper," adding, "there's no burden on the defendant to call witnesses." **Falkins**, 2004-250 at pp. 18-19, 880 So.2d at 915. The trial court denied the motion but instructed the jury that the defendants are not required by law to call any witnesses or produce any evidence.

The Fifth Circuit Court of Appeal found that the statements were not sufficient to influence the jury's verdicts and did not warrant a mistrial. **Falkins**, 2004-250 at p. 21, 880 So.2d at 917.

Similarly, herein, we reject the defendant's argument on appeal that a mistrial was warranted by La. C.Cr.P. art. 775. The comments in question did not constitute a legal defect in the proceedings or make it impossible for the defendant to obtain a fair trial. During closing argument, the defense counsel thoroughly questioned the witness's ability to positively identify the defendant as the assailant. During its rebuttal argument, the State made reference to the lack of contradictory evidence or testimony by potential witnesses who could have testified, on behalf of the defense, that the defendant was somewhere else at the time of the offense. Considering that the State did not expressly or specifically refer to the failure of the defendant to testify in his own defense, the comments were not of the type that would require a mistrial under La. C.Cr.P. art. 770. Moreover, we are not convinced that the remarks in question influenced the jury and contributed to the verdict. Thus, we do not find that the State's remarks caused the defendant substantial prejudice. In addition to the admonishment, the trial court, in part, instructed the jury that the defendant is presumed to be innocent, is not required to prove that he is innocent, and further instructed the jury regarding the State's burden of proof. The trial court also informed the jury that opening statements and closing arguments made by the attorneys are not evidence. Considering the entirety of the record, we do not find that the trial court abused its discretion in denying a mistrial based on these comments by the State. Accordingly, we find that this assignment of error lacks merit.

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under La. C.Cr.P. art. 920(2). This court routinely reviews the record for such errors,

whether such a request is made by a defendant. Under La. C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.