NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1021

STATE OF LOUISIANA

VERSUS

KERRY LOUIS DOUCETTE

Judgment rendered: DEC 2 2 2010

****

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
No. 455734 "I"
The Honorable Reginald T. Badeaux, III, Judge Presiding

****

Walter P. Reed
District Attorney
Covington, Louisiana

Kathryn W. Landry
Attorney for the State
Baton Rouge, Louisiana

Counsel for the Appellee
State of Louisiana

Mary E. Roper
Baton Rouge, Louisiana

Counsel for Appellant
Kerry Louis Doucette

BEFORE: KUHN, PETTIGREW AND KLINE, JJ.[1]

[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

KLINE, J.

The defendant, Kerry Louis Doucette, was charged by bill of information with possession of a firearm by a convicted felon (count one), a violation of La. R.S. 14:95.1, and possession of marijuana, second offense (count two), a violation of La. R.S. 40:966(E)(2). He pled not guilty to both counts. Following a trial by jury, the defendant was convicted as charged. The trial court sentenced the defendant to imprisonment at hard labor for ten years, without the benefit of probation, parole, or suspension of sentence on count one. The defendant now appeals, urging the following assignments of error:

1. The trial court erred when it allowed the jury to examine the minutes of the defendant's first marijuana conviction in their deliberations as to whether he was guilty of second offense possession of marijuana.

2. The trial court abused its discretion in refusing to grant a mistrial when the District Attorney brought out facts about the rifle in defendant's possession having been reported as stolen in a burglary, since the defendant had not been charged in connection with the burglary or with being in possession of stolen property, and the facts [of] how the defendant came into possession of the firearm were not relevant to a determination of whether he was a convicted felon in possession of a firearm.

For the following reasons, we affirm the conviction and sentence on count one and dismiss the appeal as to count two. We remand for imposition of sentence on count two.

FACTS

On August 12, 2008, at approximately 12:49 a.m., Deputy John Evans, of the St. Tammany Parish Sheriff's Office, was traveling southbound on Military Road in Slidell, Louisiana, when he observed a vehicle traveling northbound at a very slow rate of speed with sparks of fire coming from one of the tires. Deputy Evans engaged the emergency lights and siren on his marked police vehicle and effectuated a traffic stop. The vehicle immediately pulled over.

At Deputy Evans's direction, the driver, later identified as the defendant, exited the vehicle. Deputy Evans advised the defendant of the reason for the stop and asked what was wrong with his vehicle. The defendant responded that he was trying to make it home. Deputy Evans asked the defendant to produce his driver's license, vehicle registration and insurance. Deputy Evans also asked if the defendant had any outstanding warrants. The defendant advised that he possibly had an outstanding warrant. Upon confirming that an active warrant for the defendant's arrest existed, Deputy Evans read the defendant his **Miranda** rights and placed him under arrest. During a safety pat down of the defendant's person, Deputy Evans observed a small plastic bag containing what appeared to be marijuana protruding from the opened zipper of the defendant's pants.[2] Deputy Evans seized the marijuana and asked if there were any other drugs or weapons on the defendant's person or inside the vehicle. The defendant admitted that there was a gun in the trunk of the vehicle. Deputy Evans recovered a Marlin lever action rifle (with a scope on it) from the trunk. Deputy Evans asked the defendant why he possessed the rifle and the defendant stated that he had borrowed it from a friend. He explained that his grandmother had recently died and he "wanted to go blow off some steam."

DENIAL OF MOTION FOR A MISTRIAL

In his second assignment of error, the defendant argues the trial court abused its discretion in refusing to grant a mistrial after the state, in its opening statement, mentioned information regarding the fact that the rifle found in the defendant's possession had been reported stolen in a burglary. The defendant argues that since he had not been charged in connection with the burglary or with being in possession of stolen property, the facts regarding the burglary were irrelevant and highly prejudicial.

[2] At the trial, the parties stipulated that the green leafy material found inside the plastic bag was marijuana.

During the opening statement, after explaining the events leading up to the defendant's arrest, the prosecutor stated:

> You are also going to hear testimony from Detective Steve Lucian. Detective Lucian worked in the Property Crimes area, and had a recent couple of burglaries in the area. And Detective Evans and a couple of road deputies were aware of it. [One] of the weapons was a large rifle with a scope on it, and it was a Marlin. So they started talking. You are going to find out because of that, Deputy Evans turned over the gun he retrieved to Detective Lucian. It was still all in the Sheriff's Office for further investigation on it.
>
> You are going to hear from Detective Lucian who took over at that point, that he took the gun, the information on it, and the gun itself did match the information. He contacted what is the reporting person that had been the victim of a burglary, and showed him the gun, went over the gun with him, and you are going to find out the gun was, identified to have been his and to have been reported stolen. You are going to find out that based on that confirmation, Detective Lucian didn't make any assumptions, he decided he needed to go talk to Mr. Doucette.
>
> You are going to find out at that time Mr. Doucette was still in custody. They went to the jail, read him his rights. Told what he was now looking at that the gun was stolen. And you are going to hear he did an audio statement with Mr. Doucette, who did waive his rights, and gave him information about the nature of the gun, where he had gotten it, as much as he was willing to tell the officers.
>
> You are going to find out he told the officers that the gun was given to him by a friend. He was able to give a street name. And that the officers did their own investigation, and find out a residence. They went in the residence, and you are going to find out they did also recover some other stolen property that didn't have anything [to] do about this case. Now you are going to find out that Mr. Doucette's statement to them was that he knew it wasn't his friend. He didn't ask any questions, but he did not believe it to be stolen from his statement. And officers went on about the investigation and find the gun was returned to the owner for a brief period of time. We also got it back so you could have it here today and see it for trial.

At the conclusion of the prosecutor's opening statement, defense counsel moved for a mistrial. He argued that the prosecutor's references to the burglary and stolen goods (criminal offenses for which the defendant was not being prosecuted) were irrelevant. The trial court denied the mistrial motion and advised that the jury would be admonished as to the limited use of other crimes evidence in the jury instructions.

Except under certain statutory or jurisprudential exceptions, evidence of other crimes or bad acts committed by the defendant is inadmissible at trial. La. Code Evid. art. 404B(1); **State v. Jackson**, 625 So.2d 146, 148-49 (La. 1993). Louisiana Code of Criminal Procedure article 770 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.

Mistrial is a drastic remedy that should be declared only when unnecessary prejudice results to the accused. **State v. Smith**, 430 So.2d 31, 44 (La. 1983). In addition, a trial judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial. See **State v. Sanders**, 93-0001, p. 21 (La. 11/30/94), 648 So.2d 1272, 1288-89, cert. denied, sub nom., **Sanders v. Louisiana**, 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996).

In **State v. Edwards**, 97-1797, p. 20 (La. 7/2/99), 750 So.2d 893, 906, cert. denied, sub nom. **Edwards v. Louisiana**, 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed.2d 421 (1999), the Louisiana Supreme Court held:

> [A] comment must not "arguably" point to a prior crime; to trigger mandatory mistrial pursuant to Article 770(2), the remark must "unmistakably" point to evidence of another crime. **State v. Babin**, 336 So.2d 780 (La. 1976) (where reference to a "mug shot" was not unmistakable reference to a crime committed by defendant); **State v. Harris**, 258 La. 720, 247 So.2d 847 (1971) (where no crime was evidenced by a police officer's reference to obtaining defendant's photograph from the Bureau of Investigation). In addition, the imputation must "unambiguously" point to defendant. **State v.**

Edwards, 406 So.2d 1331, 1349 (La. 1981), cert. denied sub nom. Edwards v. La., 456 U.S. 945, 102 S.Ct. 2011, 72 L.Ed.2d 467 (1982). The defendant has the burden of proving that a mistrial is warranted.

In the instant case, the comments as to the stolen nature of the rifle did not divulge any facts that would constitute evidence that the defendant had actually committed another crime. The comments were made while relating the sequence of events and were relevant to establish the chain of custody for the evidence in the case. Furthermore, while the comments may have pointed to evidence of other crimes, they did not unambiguously point to the defendant as having been involved in those crimes.

Moreover, even if we conclude that the prosecutor's comments regarding the rifle having been reported stolen in a burglary constituted the introduction of impermissible other crimes evidence, the analysis would not end with such a finding. It is well settled that the erroneous admission of other crimes evidence is subject to harmless error review. See **State v. Johnson**, 94-1379, p. 15 (La. 11/27/95), 664 So.2d 94, 101. Here, wherein the defendant, a convicted felon, was found in constructive possession of the rifle, a fact he did not dispute, we find that the guilty verdict was surely unattributable to any evidence of a burglary or possession of stolen goods. See **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). Therefore, even if we were to conclude that there was error by the trial court in allowing the jury to hear information regarding other crimes, any such error was clearly harmless and does not necessitate reversal of the defendant's conviction. See La. Code Crim. P. art. 921.

Insofar as the defendant asserts the trial court should have "at the least" provided a limiting instruction to the jury, we note, the record in this case reveals that the trial court did, in fact, admonish the jury on the limited use of the evidence at issue. During the testimony of Detective Steven Lucia (the detective responsible

for investigating the burglary during which the rifle was stolen), counsel for the defendant objected to any references to the burglary and stolen property. The court overruled the objection and asked if counsel would like to have the jury admonished at that time. When counsel responded affirmatively, the court instructed the jury:

> All right. I am going to admonish the jurors not to attach too much importance to any mention of other crimes. You know, they're inextricably intertwined here and the State is trying to show their chain of custody of the evidence. So you only consider it for that limited purpose.

Although it was not included in the final instructions to the jury, the limiting instruction was given when the defense requested it during the testimony of the witness.

Considering the above, we find no error or abuse of discretion in the trial court's denial of the defendant's motion for a mistrial. As previously noted, mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial.

This assignment of error lacks merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. Code Crim. 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. Code Crim. P. art. 920(2). During our review in this case, several sentencing errors were discovered.

First, the trial court failed to impose the mandatory fine of not less than one thousand dollars nor more than five thousand dollars on count one. See La. R.S. 14:95.1(B). Although the failure to impose the fine is error under La. Code Crim.

P. art. 920(2), it certainly is not inherently prejudicial to the defendant. Because the trial court's failure to impose the fine was not raised by the State in either the trial court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. See **State v. Price**, 2005-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

We also discovered a sentencing error that requires us to remand this matter for further proceedings before we can consider the defendant's appeal as to count two. Although the February 11, 2010, minute entry reflects that the trial court imposed a sentence on the possession of marijuana, second offense, conviction, the sentencing transcript for that date indicates otherwise. At the time of sentencing, the trial court imposed the sentence only on the firearm conviction. The transcript is devoid of any reference to a sentence for the possession of marijuana conviction. It is well settled that in the event of a discrepancy between the minutes and the transcript, the transcript prevails. See **State v. Lynch**, 441 So.2d 732, 734 (La. 1983). Furthermore, it is worth noting that the minute entry that reflects a sentence for the possession of marijuana conviction states that the sentence was imposed following a guilty plea. However, the record before us clearly indicates that the defendant was tried by a jury and convicted on that offense. The minute entry is obviously in error.

Pursuant to Louisiana Constitution article V, § 10(A), as amended, this court has appellate jurisdiction of criminal matters. It is well settled that a defendant can appeal from a final judgment of conviction only where sentence has been imposed. La. Code Crim. P. art. 912(C)(1); **State v. Chapman**, 471 So.2d 716 (La. 1985) (per curiam). In the absence of a valid sentence on the possession of marijuana, second offense, conviction, the defendant's appeal of that conviction is not properly before this court. As such, we pretermit consideration of the defendant's first

assignment of error, as it relates to that conviction. We remand the matter to the trial court for sentencing on count two. After sentencing, the defendant may perfect a new appeal as to that conviction.

DECREE

For the foregoing reasons, we affirm the defendant's conviction and sentence on count one. We dismiss the appeal as to count two, and remand for imposition of sentence on that count.

CONVICTION AND SENTENCE ON COUNT ONE AFFIRMED; APPEAL DISMISSED ON COUNT TWO; REMANDED FOR IMPOSITION OF SENTENCE ON COUNT TWO