NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1521

STATE OF LOUISIANA

VERSUS

SHAWN HILLS

Judgment Rendered: March 25, 2011.

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On Appeal from the
23RD Judicial District Court,
In and for the Parish of Ascension,
State of Louisiana
Trial Court No. 24750

The Honorable Alvin Turner, Judge Presiding

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

FGW Welch J. concurs without reasons.

CARTER, C. J.

Defendant, Shawn Hills, was charged by bill of information with being a convicted felon in possession of a firearm (count 1), a violation of La. Rev. Stat. Ann. § 14:95.1. Subsequently, the bill of information was amended to add the additional charge of possession of cocaine (count 2), a violation of La. Rev. Stat. Ann. § 40:967C. Defendant pled not guilty and, following a trial by jury, was found guilty on count 1 of the responsive offense of attempted possession of a firearm by a convicted felon, a violation of La. Rev. Stat. Ann. §§ 14:27 and 14:95.1, and not guilty on the charge of possession of cocaine. The trial court sentenced defendant to five years at hard labor, without benefit of parole, probation, or suspension of sentence, and ordered defendant to pay a fine of $1,000.00. Defendant has now appealed, arguing in two assignments of error that: (1) the trial court erred in denying his three motions for mistrial based on references by state witnesses to other crimes he allegedly committed; and (2) the trial court erred in failing to admonish the jury to disregard the references to other crimes. For the following reasons, we affirm the conviction and sentence.

FACTS AND PROCEDURAL HISTORY

On December 7, 2008, Detective Teddy Gonzales of the Ascension Parish Sheriff's Office (APSO) received information from an informant, Timothy Lee, regarding possible illegal drug activity by defendant. Lee was with defendant at the time and gave Gonzales a description of both defendant and the tan Lexus he was driving. He also told Gonzales the location he and defendant were going to next. At trial, Lee explained that he made the call to the APSO because he had been at a drug house in Baton Rouge with defendant the prior evening and became upset when defendant refused to give him another "hit" because he was out of money.

As a result of the information received, Gonzales and Lieutenant Aaron Hebert proceeded to the location indicated and found the vehicle described by Lee being driven by defendant. Upon conducting a computer check of the license plate number, it was discovered that the number and vehicle description did not match. On that basis, the officers intended to make a traffic stop, but before they did so, the vehicle pulled into the parking lot of the Oak Grove Exxon.

Lee got out of the vehicle and went into the store. As Gonzales approached the vehicle, he noticed it had an expired inspection sticker. He advised defendant, who was still seated in the vehicle, that the reason for the stop was the expired inspection sticker and the fact that the license plate on the Lexus did not match the vehicle description associated with that plate number. When he asked defendant for his name, defendant gave a false name. However, Gonzales obtained defendant's real name from Lee. Defendant claimed he lied about his name because he believed there were outstanding warrants for his arrest in Baton Rouge. He also advised Gonzales that there was no insurance on the vehicle, which belonged to his girlfriend. Gonzales informed him that the vehicle would have to be towed in that case. Defendant was advised of his rights, which he indicated he understood.

When Gonzales asked if there were any weapons in the vehicle, defendant did not respond. However, when Lieutenant Aaron Hebert thereafter inquired about a weapon, defendant told him there was a gun underneath the front floor mat on the driver's side. Hebert moved the floor mat back but failed to see the weapon. He again asked defendant where the weapon was, to which defendant once more responded that the gun was under the floor mat. When Hebert rolled the mat back further, he discovered and seized the gun. Defendant stated that the gun belonged to his girlfriend.

The officers conducted a criminal background check on defendant, which revealed that he had a prior felony conviction. Accordingly, he was arrested for being a felon in possession of a firearm, as well as for the traffic violations cited. When a small bag of crack cocaine was found on the rear floorboard, behind the driver's seat, during an inventory search of the vehicle, defendant was additionally charged with possession of cocaine.

At trial, defendant's girlfriend, Leandra Stephens, testified that the gun found in the car belonged to her and was registered in her name. She further stated that she had left it in her car and had forgotten that it was there when she allowed defendant to borrow the car a few days later.

DISCUSSION

Other Crimes Testimony

In his first assignment of error, defendant argues the trial court erred in denying the three motions for mistrial he made on the grounds of inadmissible testimony regarding other crimes given by state witnesses in response to questioning by the prosecutor. Specifically, defendant complains he was prejudiced by the fact that on three occasions, with three separate state witnesses, the jury heard unsubstantiated allegations of drug dealing by him. He argues a mistrial was mandated under La. Code Crim. Proc. Ann. art. 770, since the testimony was intentionally elicited by the prosecutor in violation of the rules of evidence. Defendant contends that, if not for the prosecutor's actions in assassinating his character by using state witnesses to imply he was a lifelong drug dealer, he would have been acquitted of the firearm charge.

The first instance defendant complains of occurred during the testimony of the informant, Lee. The following exchange took place while the prosecutor was questioning Lee about his activities on the evening preceding defendant's arrest:

Q: Okay; what were you'll [sic] doing?

A: I was at the drug house.

Q: Okay; and what were you all doing at the drug house?

A: I was getting high.

Q: Okay; with what kind of drug?

A: Crack.

Q: And was the defendant there?

A: Yes, sir.

Q: Doing drugs?

A: No, sir.

Q: Okay; he was just there?

A: He sells drugs.

At this point, defense counsel moved for a mistrial on the grounds that the witness alleged that defendant was selling drugs, a reference to other crimes, since defendant was not on trial on such a charge. The prosecutor responded that it was a matter of the weight of the evidence, and defense counsel would have an opportunity to cross-examine the witness. The trial court denied the motion for mistrial, noting defendant's objection.

Thereafter, Lee proceeded to give testimony indicating that he and defendant went to Ascension Parish on the day defendant was arrested for the purpose of selling drugs, because defendant needed money. He testified that the plan was for him to help defendant get customers, in return for which defendant would "take care" of him. Further, Lee indicated that he had bought drugs from defendant the night before. Defense counsel raised no objection to any of this testimony.

The second challenged instance occurred when the prosecutor asked Detective Gonzales what defendant said in a spontaneous utterance he made upon

arriving at jail. Gonzales responded that: "It was to the effect of, up until his first drug arrest he had not sold any drugs until just last week." Once again, defense counsel moved for a mistrial based on the reference to defendant selling drugs the prior week, arguing it was highly prejudicial to defendant, since he was on trial for possession of drugs. He maintained a mistrial was appropriate because the prosecutor led the witness in the direction of the testimony given. The prosecutor indicated the purpose of the testimony was to confirm that defendant had possession of drugs. While the trial court agreed with defense counsel that the objected to testimony was not relevant to this case, it denied the motion for mistrial. However, the court advised the prosecutor that he needed to instruct his witnesses not to go into other crimes evidence.

The final motion for mistrial occurred as the prosecutor was questioning Barbara Mason, a criminal records analyst with the Louisiana State Police, who was accepted by the trial court as an expert in the field of fingerprint comparison. Her testimony was intended to establish defendant's prior conviction, which was an essential element of the firearm charge against him.

To establish that defendant was the same person convicted for the predicate offense of possession of cocaine, Mason took a sample of defendant's fingerprints in court, out of the jury's presence. Once the jury returned to the courtroom, the prosecutor questioned her about whether she had a reference set of prints with which to compare defendant's fingerprints. When she replied that she did, the prosecutor asked her what those prints represented. She replied that the referenced prints were from "an arrest for possession of cocaine with intent to distribute."

Defense counsel immediately moved for a mistrial based on the reference to the arrest for distribution of cocaine, noting that it was the third reference made by a state witness to other crimes. The prosecutor responded that his intent had been

to introduce evidence of the conviction for possession of cocaine, which was the conviction that ultimately resulted from the arrest referred to by Mason. The trial court once again denied the motion for mistrial, after again advising the prosecutor that he needed to instruct his witnesses.

On appeal, defendant concedes that Lee's testimony regarding defendant's sale of drugs to him arguably was admissible as *res gestae* evidence. However, he contends that Lee's specific statement that defendant "sells drugs" was inadmissible character evidence. Defendant also argues the prosecutor intentionally elicited the reference to prior drug dealing in questioning Gonzales about the statement defendant made, since the prosecutor clearly was aware of the contents of the statement and knew what Gonzales would say. Further, he notes that Mason made her reference to defendant's arrest on another charge in direct response to a question from the prosecutor, who should have instructed her not to refer to other crimes.

Defendant argues that, based on the prosecutor's opening and closing arguments, as well as the references to other crimes elicited from three state witnesses, it is obvious the prosecutor intentionally ignored the rules of criminal procedure and evidence in order to portray defendant as a "gun [toting] drug dealer." Thus, he asserts that the impermissible references to other crimes are imputable to the prosecutor and mandated a mistrial under La. Code Crim. Proc. Ann. art. 770. Defendant further contends an admonition was insufficient to avoid a mistrial. In fact, defendant never requested an admonition, nor was one given by the trial court.

Article 770(2) 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 to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible. For purposes of Article 770, a law enforcement officer is not considered a "court official." *State v. Pooler*, 96-1794 (La. App. 1st Cir. 5/9/97); 696 So. 2d 22, 48, *writ denied*, 97-1470 (La. 11/14/97), 703 So. 2d. 1288; *State v. Brown*, 95-0755 (La. App. 1st Cir. 6/28/96); 677 So. 2d 1057, 1068.

However, since defendant is objecting in this case to testimony given by state witnesses, rather than to remarks or comments made by a judge, district attorney, or court official, the provisions of La. Code Crim. Proc. Ann. arts. 771 and 775 are applicable. *See Pooler*, 696 So. 2d at 48. Article 771(2) sets forth permissive grounds for requesting an admonition or a mistrial when a prejudicial remark is made by a witness or person other than a judge, district attorney, or court official. A mistrial should be granted under Article 771 only where the prejudicial remarks of the witness make it impossible for the defendant to obtain a fair trial. *Pooler*, 696 So. 2d at 45. Additionally, Article 775 sets forth additional permissive grounds for mistrial, including situations where "prejudicial conduct in or outside the courtroom makes it impossible for the defendant obtain a fair trial."

The jurisprudence has held that an impermissible reference to another crime deliberately elicited of a witness by the prosecutor would be imputable to the state and would mandate a mistrial. *State v. Madison*, 345 So. 2d 485, 494 (La. 1977); *Pooler*, 696 So. 2d at 45. However, unsolicited and unresponsive testimony is not chargeable against the state to provide a ground for mandatory reversal of a conviction. *Pooler*, 696 So. 2d at 45. Furthermore, a statement is not chargeable to the state solely because it was in direct response to questioning by the prosecutor. *Id.* Although a prosecutor might have more artfully formulated the question that provoked a witness's response, where the remark was not deliberately

obtained by the prosecutor to prejudice the rights of defendant, it is not the basis for a mistrial. *Id.*

Mistrial is a drastic remedy that is only authorized where substantial prejudice will otherwise result to the accused. *Id.* Further, a trial court ruling denying a motion for mistrial will not be disturbed absent an abuse of discretion. *State v. Givens,* 99-3518 (La. 1/17/01); 776 So. 2d 443, 454.

Finally, a determination that other crimes evidence was improperly admitted at trial does not end a reviewing court's inquiry. In *State v. Johnson,* 94-1379 (La. 11/27/95); 664 So. 2d 94, 101, the Supreme Court explained that the mandatory language of La. Code Crim. Proc. Ann. art. 921 provides the proper scope for appellate review of the erroneous admission of other crimes evidence. *Johnson,* 664 So. 2d at 101. Article 921, a judgment or ruling shall not be reversed due to error, unless the error affects substantial rights of the accused. *Johnson,* 664 So. 2d at 101. Thus, the Supreme Court held that the erroneous admission of other crimes evidence is a trial error subject to harmless-error analysis on appeal. *Johnson,* 664 So. 2d at 101-02.

Generally, evidence of crimes other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. *State v. Millien,* 02-1006 (La. App. 1 Cir. 2/14/03); 845 So. 2d 506, 513. To admit "other crimes" evidence, the state must establish that there is an independent and relevant reason for doing so, such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act. *See* La. Code Evid. Ann. art 404B(1). Evidence of other crimes, however, is not admissible simply to prove the bad character of the accused. La. Code Evid. Ann. art. 404B(1). Furthermore, 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. *Millien*, 845 So. 2d at 513-14. Under Article 404B(1), the state is required, upon request of the defendant, to provide reasonable notice before trial of any evidence of other crimes, wrongs, or acts it intends to introduce at trial for any of the purposes enumerated therein. Additionally, in order for the evidence to be admitted, the state has to prove the defendant committed the other crime.[1] *See Millien*, 845 So. 2d at 514.

In the present case, the state does not assert that the challenged testimony was admissible for any of the purposes enumerated in Article 404B(1). Rather, the state argues the testimony was relevant and admissible for the purpose of proving defendant's possession of the seized cocaine (an essential element of the charged offense of possession of cocaine), since he would have had to be in possession of cocaine in order to sell it. However, the trial court specifically found that Detective Gonzales' testimony relaying what defendant said about selling drugs in the past was irrelevant to the present case. We agree. Moreover, we find this testimony, as well as Mason's reference to defendant's prior arrest for possession

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[1] The procedure to be followed when the state intends to offer evidence of other criminal offenses formerly was governed by *State v. Prieur*, 277 So. 2d 126 (La. 1973). Prior to its repeal by 1995 La. Acts 1300, La. Code Evid. Ann. art. 1103 provided that the notice requirements and clear and convincing evidence standard of *Prieur* and its progeny were not overruled by the subsequent adoption of the Louisiana Code of Evidence. Under *Prieur*, the state was required to give a defendant notice, both that evidence of other crimes would be offered against him, and of which exception to the general exclusionary rule the state intended to rely upon. *Prieur*, 277 So. 2d at 130. Additionally, 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., 51, added La. Code Evid. Ann. 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 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. *See Huddleston v. U.S.*, 485 U.S. 681, 685 (1988). Although 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 Article 1103 and the addition of Article 1104, numerous appellate courts, including this Court, have held that burden of proof to now be less than "clear and convincing" evidence. *Millien*, 845 So. 2d at 514.

of cocaine with intent to distribute, to be of little probative value in proving that he was in possession of cocaine on the date of his arrest.

Additionally, although defendant requested notice of other crimes evidence the state intended to introduce, the state failed to give defendant pretrial notice that it intended to introduce any specific other crimes evidence. The only notice the state gave to defendant was a general notice that it intended to use any and all statements or confessions made by him. Further, no pretrial *Prieur* hearing was held in this case. Under the totality of the circumstances, it does not appear that the challenged testimony of Gonzales and Mason referring to other crimes was properly admissible.

However, with respect to the statement of the informant, Lee, that defendant sold drugs, we do not believe this testimony was an unambiguous reference to other crimes. This testimony came as the prosecutor was questioning Lee about the events leading up to defendant's arrest, beginning with their presence at a crack house the preceding evening. The jury could have concluded that Lee was referring only to defendant selling drugs that evening, rather than on other occasions. Therefore, the testimony was admissible under Article 404B(1) as evidence relating to conduct constituting an integral part of the act or transaction at issue. We further note that, after defense counsel's motion for mistrial was denied, the prosecutor questioned Lee as to the plan he and defendant formulated to sell drugs in Ascension Parish. Defendant raised no objection to this testimony. Accordingly, Lee's statement that defendant "sells drugs" essentially was cumulative of other testimony, admitted without objection, indicating that defendant was selling or planning to sell drugs shortly before his arrest.

Furthermore, even if this testimony, in addition to the references made by Gonzales and Mason, was improperly admitted other crimes evidence, such a

conclusion does not end our analysis. *Johnson*, 664 So. 2d at 101-02. The determination of whether prejudice has resulted so as to require a mistrial lies within the sound discretion of the trial court. *See State v. Banks*, 96-2227 (La. 4/18/97); 692 So. 2d 1051, 1053 (per curiam). Defendant contends it is clear that the prosecutor intentionally elicited the other crimes evidence in each of the three instances. However, a review of the record reveals that, while the trial court may have displayed some frustration at the prosecutor's failure to properly instruct his witnesses, the court gave no indication of reaching a conclusion that the prosecution acted intentionally. Further, the trial court obviously concluded in each instance that any prejudice resulting from the admission of the other crimes evidence was not of such a prejudicial nature as to require a mistrial.

We find no abuse of discretion in the trial court's determination. Even if the other crimes evidence was erroneously admitted, the admission of that evidence was harmless error. The test for determining whether an error is harmless is whether the verdict actually rendered in this case was surely unattributable to the error. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). The pertinent inquiry is 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. *Sullivan,* 508 U.S. at 275; *Johnson*, 664 So. 2d at 100.

Given that defendant was charged with being a felon in possession of a firearm, the jury already knew that he had a prior felony conviction. Thus, the instant case does not present a situation where the erroneous admission of other crimes evidence made the jury aware for the first time that the defendant had a criminal history. Additionally, despite the fact that all of the objected to testimony dealt with allegations of defendant selling drugs, the jury nevertheless acquitted

defendant of the drug charge on which he was being tried. If, as defendant alleges, the jury was influenced by the other crimes evidence to believe he was a drug dealer, it surely would not have acquitted him of this drug possession charge.

Finally, the jury heard evidence in this case establishing that, just prior to his arrest, defendant was driving a car with a gun under the floor mat at his feet. The testimony of Gonzales and Hebert further established that defendant was fully aware of the presence of the gun. Upon being asked whether there was a weapon in the car, defendant told Hebert exactly where to find the gun. When Hebert initially failed to see it, defendant displayed no uncertainty as to its location, reiterating that it was under the floor mat. Regardless of whether defendant's girlfriend owned the gun and originally placed it under the floor mat, defendant drove the car around with knowledge of the gun's presence and without making any attempt to divest himself of it. Further, the state presented evidence that defendant had a 2005 conviction for possession of cocaine, which is one of the predicate crimes enumerated in La. Rev. Stat. Ann. § 14:95.1.[2] Thus, the state's evidence clearly established beyond a reasonable doubt all of the essential elements of both the charged offense and the responsive offense of attempted possession of a firearm, including defendant's constructive possession of the gun and his intent to possess it. *See State v. Dabney*, 02-0934 (La. 4/9/03); 842 So. 2d 326, 330 (per curiam); *State v. Tatum*, 27,301 (La. App. 2d Cir. 9/27/95); 661 So. 2d 657, 660-61.

The charged offense of being a felon in possession of a firearm is a general intent crime, whereas the attempt to commit that offense is a specific attempt

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[2] Louisiana Revised Statutes Annotated § 14:95.1A prohibits persons convicted of certain categories of felonies from possessing a firearm or carrying a concealed weapon. One of the enumerated categories is any violation of the Uniform Controlled Dangerous Substances Law that is a felony. Possession of cocaine is a felony violation of the Uniform Controlled Dangerous Substances Law. See La. Rev. Stat. Ann. § 40:967C.

crime. *See* La. Rev. Stat. Ann. § 14:95.1A; La. Rev. Stat. Ann. § 14:27A; *Tatum*, 661 So. 2d at 660. We conclude the evidence herein established defendant's guilty knowledge and specific intent to possess the gun seized by the police. *See Tatum*, 661 So. 2d at 660-61. However, even if the evidence was insufficient to support the conviction for attempted possession of a firearm by a felon, because it failed to establish specific intent, defendant's conviction would not be subject to reversal on this basis. The jurisprudence provides that, if a jury is instructed on a responsive verdict, without objection by the defendant, then the reviewing court may affirm the conviction if the evidence would have supported a conviction of the greater offense, whether or not the evidence supports the conviction of the legislatively responsive offense returned by the jury. *State v. Harris*, 02-1589 (La. 5/20/03); 846 So. 2d 709, 712-13, 715; *State ex rel. Elaire v. Blackburn*, 424 So. 2d 246, 251 (La. 1982), *cert. denied*, 461 U.S. 959 (1983). In this case, the evidence clearly proved that defendant had general intent to possess the gun, since he drove the vehicle with full awareness of its presence at his feet, without making any attempt to divest himself of it. *See State v. Frank*, 549 So. 2d 401, 405 (La. App. 3d Cir. 1989); *State v. Bailey*, 511 So. 2d 1248, 1250 (La. App. 2d Cir. 1987), *writ denied*, 519 So. 2d 132 (La. 1988). Therefore, the evidence was sufficient to support a conviction for the charged offense.

For the above reasons, we are convinced the guilty verdict rendered in this case was surely unattributable to the fact that the jury was exposed to evidence of defendant's prior arrest for possession of cocaine with intent to distribute, as well as testimony that he previously had sold drugs. Any error in the jury hearing such testimony was harmless beyond a reasonable doubt. *See* La. Code Crim. Proc. Ann. art. 921.

This assignment of error lacks merit.

Trial Court's Failure to Admonish Jury

In his second assignment of error, defendant argues he was deprived of his due process right to a fair trial when the trial court failed to admonish the jury to disregard the inadmissible other crimes evidence.

We find no error in the trial court not admonishing the jury to disregard the challenged testimony. Although defense counsel objected and moved for a mistrial in each instance, he failed to ask the trial court to admonish the jury to disregard the said testimony. The decision whether or not to request an admonishment involves trial strategy that lies solely within the discretion of defense counsel. Furthermore, La. Code Crim. Proc. Ann. art. 771 mandates a request for an admonishment. *Pooler*, 696 So. 2d at 48; *State v. Jack*, 554 So. 2d 1292, 1296 (La. App. 1st Cir. 1989), *writ denied*, 560 So. 2d 20 (La. 1990). Accordingly, given that defendant did not request an admonition, the trial court's failure to instruct the jury to disregard the testimony referring to other crimes was not reversible error. *See Pooler*, 696 So. 2d at 48.

This assignment of error is without merit.

DECREE

For the reasons above, the ruling of the district court affirming the conviction and sentence is affirmed.

AFFIRMED.