NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 2229

STATE OF LOUISIANA

VERSUS

JAMES EARL WHITE, JR.

Judgment rendered: May 4, 2007

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On Appeal from the 22nd Judicial District Court
Parish of Washington, State of Louisiana
Docket Number 04 CR5 90267; Division: Criminal
The Honorable Elaine W. DiMiceli, Judge Presiding

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James Earl White, Jr.

In Proper Person

BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

Hughes, J., concurs.

DOWNING, J.

The defendant, James Earl White, Jr., was charged by bill of information with possession with intent to distribute a Schedule II controlled dangerous substance (cocaine) in violation of La. R.S. 40:967A(1). The defendant entered a plea of not guilty. Following a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for new trial. The State filed a habitual offender bill of information. The defendant remained silent as to the allegations of the habitual offender bill of information. Prior to the hearing on the habitual offender bill of information, the trial court sentenced the defendant to ten years imprisonment at hard labor and ordered two years of said sentence be served without the benefit of probation, parole, or suspension of sentence.

Upon a hearing on the habitual offender bill of information, the defendant was adjudicated a third felony habitual offender. The trial court vacated the original sentence, and the defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant now appeals, raising the following assignments of error:

1. The trial court erred in failing to grant the motion for mistrial and/or motion for new trial.

2. The trial court erred in qualifying Lieutenant Lentz as an expert in narcotics distribution.

3. The trial court erred in adjudicating the defendant a multiple offender.

Assignment of error number three also was raised in the defendant's pro-se supplemental brief. The defendant also asks that we examine the record for error under La. Code Crim. P. art. 920(2). For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On or about February 4, 2004, during the early morning hours (around midnight), Detective Scott Crain, Deputy Kenneth Edwards, and Detective Brent Goings (all of the Washington Parish Sheriff's Office Drug Task Force) were patrolling in a predominantly residential area in Bogalusa, Louisiana. Detective Crain and Deputy Edwards were traveling in an unmarked car as Detective Goings patrolled in a separate unmarked car. The officers were wearing uniform shirts visibly marked, "Sheriff Narcotics." As they traveled north on Second Street, Detective Crain and Deputy Edwards observed a group of approximately five male subjects standing in the driveway of an abandoned house near the Second Street and Sixth Street intersection.

After the officers approached and stopped their vehicle, the group dispersed in different directions. The defendant, in particular, turned and began to walk east. Deputy Edwards exited the vehicle, announced himself as a police officer, and advised the defendant to stop, turn around, and walk toward him. The defendant continued to walk away from Deputy Edwards. The defendant ignored further orders to stop and began to run. Detective Crain informed Detective Goings of the pursuit by radio. Detective Crain then exited the vehicle and gave chase.

At the time of the radio communication, Detective Goings was traveling south on Second Street. Detective Goings located Detective Crain as he headed toward Sixth Street. After Detective Goings turned onto Sixth Street, the defendant ran in front of his vehicle and crossed the street. The defendant turned west and ran down the south side of Sixth Street, back towards Second Street. Detective Goings stopped his vehicle and began driving in reverse in pursuit of the defendant. Detective Goings's vehicle was parallel to the defendant as he continued to run toward Second Street. Detective Goings followed the defendant to Second Street, exited his vehicle, and began chasing the defendant on foot.

Detective Goings illuminated the defendant with his flashlight as the defendant ran toward him. Detective Goings observed the defendant as he raised his left hand up and dropped something over a chain-linked fence.

Detective Goings made contact with the defendant and tackled him to the ground. Detective Crain approached, and the officers apprehended the defendant. As Detective Crain detained the defendant, Detective Goings walked to the area where the defendant's discard was observed. Detective Goings retrieved a clear plastic wrapping that contained suspected crack cocaine. During a search incident to the defendant's arrest, the detectives recovered sixty-six small Ziploc bags contained in a larger Ziploc bag and eight hundred thirty-three dollars in U.S. currency. The rock-like substance was ultimately tested by the Louisiana State Police Crime Laboratory and determined to contain 3.69 grams of cocaine.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant argues that the trial court erred in denying his motion for mistrial and/or his motion for new trial.[1] The defendant notes the prosecutor's inclusion in his opening statement of a statement made by the defendant after arrest. The defendant argues that the State violated discovery rules by failing to inform the defendant of the intent to introduce the statement. While noting that the statement quoted by the prosecutor "cuts both ways as far as whether it is exculpatory or inculpatory," the defendant argues that the defense was prejudiced by the undisclosed introduction of the statement. The defendant specifically contends that he was not afforded an opportunity to file a motion to suppress the statement or to prepare a defense based on the statement. The defendant notes that he presented evidence during the trial to show that he cashed his income-tax refund check on the day of the offense, and he argues that the

[1] The defendant's motion for new trial, in pertinent part, includes the following bases: the court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error; and, the ends of justice would be served by the granting of a new trial.

statement quoted by the prosecutor could have been used to develop the formidable argument that he was upset about the forfeiture of his money and knew nothing of the drugs. The defendant argues that granting a mistrial would have afforded the defense an opportunity to hear the statement in its entirety and its context to make a decision as to whether to suppress or buttress the statement. The defendant argues that it was additional error for the trial court to deny his motion for new trial on the same grounds. The defendant concludes that the verdict was clearly attributable to the noted error.[2]

Louisiana Code of Criminal Procedure article 716, in pertinent part, regulates discovery of statements made by defendant as follows:

> B. Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the existence, but not the contents, of any oral confession or statement of any nature, made by the defendant, which the district attorney intends to offer in evidence at the trial, with the information as to when, where and to whom such oral confession or statement was made.
>
> C. Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the substance of any oral statement which the state intends to offer in evidence made by the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be a law enforcement officer.

The notice provisions of articles 716B and C are applicable only where the State intends to introduce the defendant's statement as evidence at trial. Under Article 716B the defendant is not entitled to the contents of the statement, but only to notice of its existence as well as when, where, and to whom it was made.

Discovery rules are intended to eliminate unwarranted prejudice arising from surprise testimony to permit the defense to meet the State's case and to allow proper assessment of the strength of its evidence in preparing a defense. ***State v. Harris***, 00-3459, p. 8 (La. 2/26/02), 812 So.2d 612, 617. In the event of a

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[2] In support of his argument, the defendant cites La. Code Crim. P. arts. 718, 729.5,and 875. We note that Article 718 is inapplicable as it regards documents and tangible objects. We further note that while the defendant cites La. Code Crim. P. art. 875, he clearly meant to cite La. Code Crim. P. art. 775.

discovery violation, the court may order the party to permit the discovery, may grant a continuance, may order a mistrial on motion of the defendant, prohibit the party from introducing into evidence the subject matter not disclosed, or enter such other order, other than dismissal, as may be appropriate. La. Code Crim. P. art. 729.5A. A conviction will not be reversed on the basis of the State's discovery violation unless prejudice is shown. ***Harris***, 00-3459 at p. 8, 812 So.2d at 617.

Louisiana Code of Criminal Procedure art. 766 provides that "[t]he opening statement of the state shall explain the nature of the charge, and set forth, in general terms, the nature of the evidence by which the state expects to prove the charge." La. Code Crim. P. art. 767 provides: "The state shall not, in the opening statement, advert in any way to a confession or inculpatory statement made by the defendant ... ." In accordance with La. Code Crim. P. art. 768, if the State intends to introduce a confession or inculpatory statement in evidence, it shall so advise the defendant in writing prior to beginning the state's opening statement (unless the defendant has been granted pretrial discovery). If it fails to do so, a confession or inculpatory statement shall not be admissible in evidence. The purpose of the scheme of articles 766-768 is to prevent surprise and allow adequate time for preparation of the defense as well as to avoid certain problems that had been attendant to the mentioning of confessions or inculptory statements by the State in its opening statement. ***State v. Parker***, 436 So.2d 495, 499 (La. 1983); ***State v. Russell***, 416 So.2d 1283, 1288 (La. 1982). An inculpatory statement admits a fact, circumstance or involvement which tends to establish guilt or from which guilt may be inferred. ***State v. Brumfield***, 329 So.2d 181, 187 (La. 1976).

Statements made outside the permissible scope of an opening statement may result in a mistrial under La. Code Crim. P. arts. 770 and 771. ***State v. Robinson***, 598 So.2d 407, 412 (La. App. 5 Cir. 1992). Mistrial is a drastic remedy and, except in instances in which mistrial is mandatory, is warranted only when trial

error results in substantial prejudice to defendant, depriving him of a reasonable expectation of a fair trial. ***State v. Smith***, 430 So.2d 31, 44 (La. 1983); ***State v. Fisher***, 95-0430, p. 7 (La. App. 1 Cir. 5/10/96), 673 So.2d 721, 725-726. Determination of the existence of unnecessary prejudice warranting a mistrial is within the sound discretion of the trial judge. ***State v. Manning***, 03-1982, pp. 76-77 (La. 10/19/04), 885 So.2d 1044, 1109, cert. denied, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005).

In the instant case, the statement noted by the defendant is included in the following portion of the prosecutor's opening statement:

> The defendant made a statement. It was interesting what he said and what he did not say. **What he said was he was upset about the forfeiture and made no comments about the ownership or possession of the drugs.** (Emphasis added.)

After the prosecutor's opening statement, the defense attorney objected to this statement, noting that it was not mentioned in discovery. The defense counsel objected to the introduction of any evidence regarding the statement and asked for a mistrial. The prosecutor noted that on the first day of the trial (at the conclusion of the jury selection), the defense provided him with a document regarding the defendant's income-tax refund. When the prosecutor showed the document to the officers involved in the defendant's arrest, they recalled the statement by the defendant and conveyed it to the prosecutor. The prosecutor viewed it as exculpatory and res gestae. The trial court denied the motion for mistrial. The prosecutor did not further mention or present any evidence regarding said statement.

The comment at issue does not fall within the scope of Article 770 and, therefore, the granting of a mistrial was discretionary. We find no abuse of discretion. The statement was not introduced as evidence, thus the notice provisions of articles 716B and C are inapplicable. During preliminary

instructions and jury instructions before deliberation, the trial judge instructed the jury that opening statements and arguments made by attorneys are not to be considered evidence. The statement noted by the prosecutor during the opening statement apparently is not inculpatory. We find no showing of prejudice; thus, the trial court did not err in denying the motion for mistrial or the subsequent motion for new trial on the same grounds. See La. Code Crim. P. art. 921. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant avers that the trial court erred in accepting Lieutenant Lentz as an expert witness in narcotics distribution. The defendant notes that Lieutenant Lentz had three years experience in the narcotics division at the time of the trial. The defendant argues that Lieutenant Lentz's experience did not reach an adequate level of expertise. The defendant contends that Lieutenant Lentz only became chief of the Washington Parish Sheriff's Office Narcotics Division because the parish is small. The defendant notes that he was interrupted by the trial court in stating his basis for the objection to the qualification. The defendant contends that the basis for the objection was, nonetheless, clear. The defendant contends that although there was no direct testimony as such, the Lieutenant's testimony was used to prove the ultimate conclusion of intent to distribute.

As a general matter, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," a qualified expert may testify in the form of an opinion. La. Code Evid. art. 702. Under La. Code Evid. art. 704, a trial court may admit expert testimony that "embraces an ultimate issue to be decided by the trier of fact[,]" but the expert witness is not permitted to testify to the ultimate issue of a defendant's

guilt. ***State v. Irish***, 00-2086, pp. 5-6 (La. 1/15/02), 807 So.2d 208, 212, *cert denied*, 537 U.S. 846, 123 S.Ct. 185, 154 L.Ed.2d 73 (2002).

At trial, Lieutenant Lentz indicated that on July 24, 2003, he was the director of the Washington Parish Drug Task Force. He had been involved in law enforcement for nineteen years and had been involved in narcotics investigations for three years. He had attended basic narcotics investigation, narcotics identification and presumptive testing, and search and seizure courses. He had also attended numerous seminars sponsored by the Louisiana Sheriff's Association and the Regional Organized Crime Information Center. He was certified in processing clandestine laboratories. At the seminars, and as a result of his experience working with the Drug Task Force, he learned how crack cocaine was manufactured. He participated in "probably over a thousand" narcotics investigations. The trial court accepted Lieutenant Lentz as an expert in narcotics. The defense counsel objected, stating, "I would object to the court's --." At that point, the trial judge interrupted while noting the defendant's objection.

Lieutenant Lentz presented testimony regarding the process of transforming powder cocaine to crack cocaine. He testified that the evidence seized herein was not severed for personal use, as it consisted of several large pieces that could not fit into a crack pipe. Based on his experience, he further noted that crack cocaine users do not usually carry such a large amount of crack cocaine. He further testified that the amount of crack cocaine seized herein, 3.69 grams, is approximately equivalent to an "eight ball" (one-eighth of an ounce with an ounce consisting of 28 grams). The average piece of rock cocaine is approximately one-tenth of a gram. Thus, thirty-five rocks can yield from the evidence seized herein. Each rock can be sold for approximately twenty dollars each, bringing the evidence to a possible street value of approximately $700.00. He further stated that most of the crack cocaine users that he has come into contact with have a

consumption instrument on their person. During cross-examination, Lieutenant Lentz confirmed that he did not know what the defendant's intentions were.

The trial court gave the jury a limiting instruction on expert testimony during jury instructions. The trial court in part, stated as follows:

> If you should decide that the opinion of an expert witness is not based upon sufficient education and experience or if you conclude that the reasons given in support of the opinion are not found or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Based on his knowledge, skill, experience, and training, it is clear that Lieutenant Lentz's knowledge could assist the trier of fact to understand the evidence or to determine a fact in issue. Under the circumstances present herein, we find no abuse of discretion. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER THREE AND PRO-SE SUPPLEMENTAL ASSIGNMENT OF ERROR

In the third assignment of error, the defendant avers that the habitual offender adjudication was flawed since the prior convictions were obtained on the same date. The defendant further contends that the State failed to provide satisfactory proof of the prior convictions. The defendant notes the absence of an adequate plea form, a ***Boykin*** transcript, a detailed minute entry, and fingerprints on the bills of information. The defendant further notes that the parole officer who testified as to the defendant's identity did not have personal knowledge of the charges or their date of occurrence, or of the proceedings or convictions. The defendant concludes that the State failed to comply with the minimum requirements to prove that the defendant was a multiple offender and that the prior convictions were lawfully obtained.[3]

To obtain a habitual offender adjudication, the State is required to establish both the prior felony conviction and that the defendant is the same person

[3] The defendant incorrectly states that the trial court adjudicated him a sixth felony offender. As aforementioned, the record reflects that the trial court adjudicated the defendant a third felony habitual offender. (R.12, 302-303).

convicted of that felony. In attempting to do so, the State may present: (1) testimony from witnesses; (2) expert opinion regarding the fingerprints of the defendant when compared with those in the prior record; (3) photographs in the duly authenticated record; or (4) evidence of identical driver's license number, sex, race, and date of birth. ***State v. Payton***, 00-2899, p. 6 (La. 3/15/02), 810 So.2d 1127, 1130. The testimony of a probation and parole officer may be used to establish the identity of a defendant in a habitual offender proceeding. ***State v. Lawrence***, 40,278, p. 42 (La. App. 2 Cir. 3/15/06), 925 So.2d 727, 755; ***State v. Young***, 27,237, pp. 8-9 (La. App. 2 Cir. 8/23/95), 660 So.2d 548, 553. In ***State v. Shelton***, 621 So.2d 769, 779-780 (La. 1993), the Louisiana Supreme Court discussed the State's burden of proof in a habitual offender proceeding as follows:

> If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self incrimination (sic), and his right to confront his accusers. If the State introduces anything less than a "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three ***Boykin*** rights. (Footnotes omitted).

See ***Boykin v. Alabama***, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969).

Herein, the habitual offender bill of information lists the following predicate convictions: possession of cocaine committed on May 24, 1996 (96 CR3 65247, a violation of La. R. S. 40:967); burglary committed on March 10, 1996 (96 CR

64530, a violation of La. R.S. 14:62); theft committed on January 12, 1996 (96 CR3 64045, a violation of La. R.S. 14:67); distribution of cocaine committed on September 18, 1995 (two counts) (96 CR 63842, a violation of La. R.S. 40:967); and, distribution of cocaine committed on March 29, 1993 (93 CR3 55831, a violation of La. R.S. 40:967). Each conviction was obtained on December 10, 1996, in the 22nd Judicial District Court.

Under ***State ex rel. Mims v. Butler***, 601 So.2d 649 (La. 1992) (on rehearing), prior convictions had to precede the commission of subsequent felonies for sentencing enhancement purposes. ***State v. Johnson***, 03-2993, p. 18 (La. 10/19/04), 884 So.2d 568, 579, however, held that ***Mims*** was incorrectly decided on the basis of an incomplete legislative record and expressly overruled the decision. Thereafter, effective August 15, 2005, La. R.S. 15:529.1B was amended to add: "[m]ultiple convictions obtained on the same day prior to October 19, 2004, shall be counted as one conviction for the purpose of this Section." See 2005 La. Acts No. 218, § 1.

The instant offense was committed on February 2, 2004, prior to the effective date of 2005 La. Acts No. 218, § 1. Additionally, the applicable habitual offender provisions are those in effect on the date the defendant committed the underlying offense. ***State v. Parker***, 03-0924, p. 17 (La. 4/14/04), 871 So.2d 317, 327. Accordingly, the habitual offender law in effect on February 2, 2004, as interpreted by ***Johnson*** rather than ***Mims***, controlled this case. Under the applicable law, there was no bar to the State using the predicate offenses to enhance the instant offense.

Along with the bills of information for each conviction, the State introduced the minute entry for the guilty pleas. During the hearing on the habitual offender bill of information, State witness David Boe (of the Louisiana Department of Probation and Parole) testified that he supervised the defendant's parole for each

predicate conviction. Boe identified the defendant in court as the person that he supervised as to the predicate convictions. Boe stated that the defendant's last parole expired on October 2, 2003. He added, however, that he did not supervise the defendant on the theft predicate conviction and that his parole for that conviction was revoked on May 8, 2000. He stated that the defendant apparently completed his time for that conviction. Boe was not cross-examined.

In ***State v. Westbrook***, 392 So.2d 1043 (La. 1980) (on rehearing), a case where defendant was convicted of a second offense of driving while intoxicated, the defendant complained of an insufficient connexity to prove he was actually the prior offender. In affirming his second offense DWI conviction, the Louisiana Supreme Court held "the driver's license number, sex, race and birth date all identified the prior offender with defendant. The State [therefore] carried its burden of proving that this defendant is the Westbrook previously convicted[.]" ***Westbrook***, 392 So.2d at 1045. See also ***State v. Lee***, 97-1035, pp. 3-5 (La. App. 5 Cir. 2/11/98), 709 So.2d 226, 228-29 (affirming the defendant's adjudication as a habitual offender even though the bill of information for a predicate conviction did not contain the defendant's fingerprints); ***State v. Hawthorne***, 580 So.2d 1131, 1132-33 (La. App. 4 Cir. 1991) (affirming the defendant's second felony habitual offender adjudication because the defendant's fingerprints matched those on an arrest register in the defendant's name for a charge of aggravated rape, and conviction documentation showed the same crime, same defendant, same date of crime, and same victim's name as that found in arrest register).

The documentation for each of the defendant's prior convictions was linked by name, age, date of birth and/or address. The testimony of Boe supported the documentation submitted by the State. The evidence submitted by the State further reflects prior guilty plea convictions that were counseled and intelligent, as the defendant was informed of his ***Boykin*** rights as to each conviction.

We conclude that the State proved beyond a reasonable doubt that the defendant is the same person convicted of the prior felonies. We also conclude that the State met its initial burden of proving the existence of the prior guilty pleas and that the defendant was represented by counsel when they were taken. On this basis, the burden shifted to the defendant to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas. The defendant did not produce any evidence. The trial court, therefore, adjudicated defendant a habitual offender pursuant to La. R.S. 15:529.1A(1)(b)(ii).

Louisiana Revised Statutes 15:529.1A(1)(b)(ii), at the time of the offense, provided:

> If the third felony and the two prior felonies are felonies defined as a crime of violence under R.S. 14:2(13), a sex offense as defined in R.S. 15:540 et seq. when the victim is under the age of eighteen at the time of commission of the offense, or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, or any other crimes punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

The instant offense and the predicate convictions listed above meet the requirements of La. R.S. 15:529.1A(1)(b)(ii). Based on the above determinations, we conclude that the record adequately supports the habitual offender adjudication herein. The final assignment of error lacks merit.

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record for such error, whether this request is made by a defendant. Under Article 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. See ***State v. Allen***, 94-1941, p. 11 (La. App. 1 Cir. 11/9/95), 664 So.2d 1264, 1273.

DECREE

For the foregoing reasons, we affirm the conviction, habitual offender adjudication, and sentence of James Earl White, Jr.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED