NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 2426

STATE OF LOUISIANA

VERSUS

CEDRIC HUTTON

Judgment Rendered: May 2, 2008.

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On Appeal from the
21st Judicial District Court,
in and for the Parish of Tangipahoa
State of Louisiana
District Court No. 500319

The Honorable Ernest G. Drake, Jr., Judge Presiding

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Defendant/Appellant,
In Proper Person

* * * * *

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

CARTER, C.J.

The defendant, Cedric Hutton, was charged by bill of information with armed robbery, a violation of La. R.S. 14:64.[1] The defendant pled not guilty, and following a jury trial, he was found guilty of the responsive offense of first degree robbery, a violation of La. R.S. 14:64.1. The defendant filed a motion for new trial, which was denied. He was sentenced to forty (40) years imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The defendant now appeals, designating two counseled and one pro se assignments of error. We affirm the conviction and sentence.

FACTS

On the night of October 5, 2004, in Hammond, Olivier Zieleniecki and Julien Lousao, along with two other friends, drove to Waffle House after leaving the bar, Mule's. Olivier and Julien were Southeastern Louisiana University students and tennis teammates from France. In the Waffle House parking lot, two girls approached Olivier and Julien and began talking to them. Everyone went inside Waffle House to eat. Olivier's and Julien's friends said they had to leave to get back home, but Olivier and Julien did not yet want to leave. The girls told Olivier and Julien that they would give them a ride home, so Olivier and Julien stayed while their two friends left.

The two girls were Danielle Luneau and Michelle Williams, who lived together and knew the defendant and his friend, Branaken Monroe.

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[1] The defendant was originally charged with four counts of armed robbery. Following severance of the several counts and codefendants, the defendant was tried on a single count of armed robbery, namely count 1, wherein the victim was Olivier Zieleniecki. Two of the codefendants, Danielle Luneau and Michelle Williams, in exchange for plea agreements offered by the State, testified against the defendant at trial.

Unbeknownst to Olivier and Julien, Danielle and Michelle had conspired earlier with the defendant and Monroe to rob Olivier and Julien. The plan was to get Olivier and Julien into Danielle's car and to drive to a remote location where the defendant and Monroe would be waiting to rob them.

The defendant and Monroe were with Danielle and Michelle when they arrived at Waffle House. When Danielle and Michelle went inside, the defendant and Monroe stayed in the car. Danielle and Michelle told Olivier and Julien that they were leaving, but they would return to give them a ride home. Danielle and Michelle left Waffle House to drop off the defendant and Monroe and returned a short while later to pick up Olivier and Julien. Danielle drove with Michelle in the front seat and Olivier and Julien in the back seat. Danielle drove down a dark, narrow street with no lighting. Monroe walked into the street and stopped the car. The defendant and Monroe, who were both armed, approached the car and ordered Olivier and Julien out. Monroe had a rifle on Olivier and forced him on the ground. The defendant had a handgun on Julien and forced him up against a brick wall near the road. Monroe took what was in Olivier's pockets, including his wallet, keys, and cell phone. Julien broke from the defendant and ran away. Julien eventually found his way to his apartment.

Olivier was forced back into Danielle's car. Monroe drove and the defendant sat in the front seat. Danielle and Michelle sat on either side of Olivier in the back seat. The girls pretended to be frightened. One of the perpetrators retrieved a credit card from Olivier's wallet and Monroe drove to an ATM machine at Hancock Bank. Monroe, along with the help of Michelle, used Olivier's credit card to take $400 from the ATM machine,

the maximum amount allowed. Following this, the defendant forced Olivier to give him his watch. The defendant became angry because he thought Olivier was lying about the $400 limit on his credit card. The defendant pointed his gun at Olivier's face and pulled the trigger. The gun did not discharge but only dry-fired. The defendant and Monroe then jumped out of the car and ran off. Danielle, Michelle, and Olivier remained in the car. Danielle drove Olivier to his house, and Danielle and Michelle left. The defendant and Monroe each took some of the $400. Danielle and Michelle did not get any of the money.

Detective George Bergeron with the Hammond Police Department obtained statements from the defendant, Monroe, Danielle, and Michelle. The defendant's statement was recorded on an audio cassette tape, which was introduced into evidence at trial and played for the jury. In his statement, the defendant admitted to his involvement in the robbery of Olivier.

COUNSELED ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the trial court erred in denying his motion for new trial. Specifically, the defendant raises three issues regarding his taped statement and the use of the transcript of his statement at trial.[2]

At the hearing on the motion to suppress the defendant's confession, Detective Bergeron testified that he recorded the defendant's statement on

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[2] The defendant filed a motion for new trial alleging, inter alia, that pursuant to La. Code Crim. P. art. 851(2), the court's ruling on a written motion or an objection made during the proceedings showed prejudicial error. During the sentencing hearing, the defendant orally argued the motion for new trial, raising the issues that are part of this appeal.

an audiotape. The tape was then logged into evidence, and at some point, the tape was transcribed. Detective Bergeron did not know who transcribed the tape. At trial, an audio cassette tape of the defendant's statement to Detective Bergeron was played for the jury. The State provided copies of the transcript of the defendant's statement to the jurors to assist them in following along with the audio recording.

The defendant sought by a motion to suppress and a motion in limine to exclude the transcript of his recorded statement to Detective Bergeron from evidence and from use at trial.[3] The defendant contended that the transcript of his statement was not certified, not notarized, and not sworn to be correct and, therefore, did not comply with the Louisiana Code of Evidence. He further contends in his brief that portions of the audiotape were inaudible and that the person who transcribed the statement "evidently filled in the blanks on his or her own."

Initially, we note that the defendant's argument that the transcript did not comply with the Code of Evidence because of lack of certification or notarization is misplaced. The transcript was not introduced into evidence but was used only to assist the jury in following along with the tape.[4] Since the transcript was not evidence, the rules of evidence regarding authenticity or admissibility are inapplicable. <u>See</u> La. Code Evid. art. 901A.

Regarding the issue of inaudibility, we note that, while defense counsel objected at trial to the admissibility of the audiotape of the defendant's statement on the grounds that it was inaudible "in large part"

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[3] The defendant reurged his objections at trial.

[4] The transcript of the defendant's statement was filed into the record as discovery provided to the defendant by the State.

and was not the best evidence, at a hearing on a pretrial motion, defense counsel found the defendant's statement to be audible. At the hearing, defense counsel informed the trial court, "[T]he tape recording that I was given by the State of Cedric Hutton's purported taped statement relatively clear. [sic] You can understand the words on it. You can hear it okay." In any event, the defendant does not point to any instances of where the tape is inaudible or where words in the transcript were allegedly inserted. Moreover, we have listened to the tape of the defendant's statement and reviewed the transcript of his statement and find the transcript to be a very faithful rendering of what the defendant actually said. If there was a word dropped here or there or words added in the transcription, this in no way affected the substance of the defendant's statement, which was that he participated in the robbery of Olivier.[5] Also, despite the alleged imperfection of the transcript, the tape that was offered and admitted into evidence at trial was the best evidence of the defendant's statement. See **State v. Burdgess**, 434 So.2d 1062, 1066 (La. 1983); **State v. Griffin**, 618 So.2d 680, 695-696 (La. App. 2d Cir.), writ denied, 625 So.2d 1063 (La. 1993). Accordingly, the defendant's contentions regarding the authenticity of the transcript and the inaudible portions of the tape have no merit.

The defendant further contends that the trial court erred in not requiring the court reporter to transcribe the taped recording of his statement

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[5] For example, in his taped statement, the defendant said, "We had met up with some guys on the side of us hollering out the window. . . ." The statement was transcribed as "We had met up with some guys on the side of us who was hollering out the window. . ." In his taped statement, the defendant said, "I had asked 'em do they have any money on them." The statement was transcribed as "I had asked 'em do they got money on them." In his taped statement, the defendant said, "I still ain't pull my pistol on nobody. It was sitting in my lap." The statement was transcribed as, "I still ain't pull my pistol on nobody. It was still sitting in my lap."

played at trial. According to the defendant, this court cannot verify that the tape played for the jury was played in its entirety and, as such, review of the tape is limited.

The record indicates that during and subsequent to the tape being played for the jury, defense counsel raised no objection nor made any comment or reference about the tape not being played in its entirety. See La. Code Crim. P. art. 841A. Nor on appeal can the defendant point to anything in the record that would indicate that his entire statement (except for any reference to other crimes evidence) was not played. Accordingly, this contention is not properly before us for lack of a contemporaneous objection.

Moreover, this contention is baseless. Nothing in the record suggests that the defendant's statement was not played in its entirety for the jury. Detective Bergeron testified at trial that he took the defendant's statement and recorded it on a micro-cassette tape. Detective Bergeron identified the micro-cassette at trial as the one containing the defendant's statement. The micro-cassette was marked as State's Exhibit 22 and submitted into evidence. The State also submitted into evidence a regular sized cassette tape, which was a copy of the micro-cassette tape with other crimes evidence edited out.[6] The defendant's edited statement was played for the jury. There is no indication in the record that only some or portions of the tape were played for the jury. After the tape was played, the prosecutor asked, "Officer Bergeron, is that a fair and adequate -- or accurate would probably be the better word -- depiction of the taped statement that you took from

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[6] Both parties agreed to excise those portions of the defendant's taped statement that referenced other crimes not related to the instant robbery.

Cedric Hutton?" Detective Bergeron responded, "From what I could hear, yes, ma'am."

Finally, the defendant contends that the trial court erred in denying his motion for a mistrial. Specifically, the defendant asserts that the trial court's reference to the court of appeal was a prejudicial comment that presumed the defendant's guilt.[7]

After the trial court informed defense counsel that the court reporter was not going to transcribe the audiotape of the defendant's statement being played for the jury, the following exchange between defense counsel and the trial court took place:

> Mr. Brown [defense counsel]: Your Honor, I need to make an objection to the --
>
> The Court: Make it, counselor. Let's go.
>
> Mr. Brown: I'm doing my best. To the extent that this is being offered as the voice of Mr. Cedric Hutton, it is important that a transcript be made of what the jury is hearing, since they're hearing this tape as a substantive testimony and not the --
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> The Court: The court is [sic] appeal is going to get that tape. They're going to listen to it, counselor. They're going to hear it the first time, not through some -- what she types.
>
> Mr. Brown: Your Honor, I object to the extent that the court has made a reference to the court of appeals [sic], assuming to the jury that my client will be convicted. The court is commenting on the evidence. I move for a mistrial.

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[7] Louisiana Code of Criminal Procedure article 771 states in pertinent part:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:
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> (1) When the remark or comment is made by the judge . . . and the remark is not within the scope of Article 770[.]

The Court: Overruled. Let's go. Sit down.

The nature of an objection is that, if the objection is overruled, the issue is nevertheless preserved for appeal. When the trial court overruled defense counsel's objection to the court reporter not transcribing the defendant's taped statement, defense counsel continued with his objection, stating that "it is important that a transcript be made of what the jury is hearing." Defense counsel's statement was in keeping with the notion of preserving the issue for appeal. The trial court's comment that the court of appeal is going to get the tape did not imply the defendant's guilt. The trial court was simply explaining to defense counsel that, on review, this court will have the best evidence of the defendant's statement, that is, the actual taped recording of his statement, instead of the court reporter's transcription of the taped recording. Accordingly, we do not find that the trial court's explanation to defense counsel of why it was overruling an objection created prejudice against the defendant in the mind of the jury.[8]

This assignment of error is without merit.

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[8] Louisiana Code of Criminal Procedure article 772 states:

> The judge in the presence of the jury shall not comment upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the testimony of any witness, or giving an opinion as to what has been proved, not proved, or refuted.

Although the defendant does not cite Article 772 in his brief, the defendant states in his brief that the trial court's comment "let the jury know that the trial court assumed that they will convict the defendant, which was a comment on the judge's belief in the sufficiency of the evidence as well as an approval nod at the juror's to convict." To the extent that the trial court commented on the evidence in its ruling on defense counsel's objection, it was not improper for the trial court to make statements that were neither unfair nor prejudicial to the defendant that pertained to the facts in the presence of the jury while ruling on the effect of evidence and the validity of the objections thereto. See **State v. Fallon**, 290 So.2d 273, 285 (La. 1974); see also **State v. Bennett**, 2000-0282 (La. App. 1 Cir. 11/8/00), 771 So.2d 296, 298-299, writ denied, 2000-3246 (La. 10/12/01), 799 So.2d 495.

COUNSELED ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that the maximum sentence of forty years is excessive. Specifically, the defendant contends that the trial court failed to consider mitigating circumstances that would serve to reduce the sentence.

A thorough review of the record indicates that defense counsel did not file a written motion to reconsider sentence.[9] Under La. Code Crim. P. arts. 881.1E and 881.2A(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. The defendant, therefore, is procedurally barred from having this assignment of error reviewed. **State v. Duncan**, 94-1563 (La. App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (*en banc per curiam*); see **State v. Felder**, 2000-2887 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

This assignment of error is without merit.

REVIEW FOR ERROR

The defendant asks this court to examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere

[9] At the conclusion of the sentencing by the trial court, defense counsel stated, "Your Honor, before we adjourn for today, I'd like to move for reconsideration of sentence." The trial court denied the motion. The defendant's failure to urge a claim of excessiveness or any other specific ground for reconsideration of sentence by his oral motion precludes our review of his assignment of error. See **State v. Jones**, 97-2521 (La. App. 1 Cir. 9/25/98), 720 So.2d 52, 52-53; **State v. Bickham**, 98-1839 (La. App. 1 Cir. 6/25/99), 739 So.2d 887, 891.

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. Price**, 2005-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112 (*en banc*), writ denied, 2007-0130 (La. 2/22/08), __ So.2d __.

PRO SE ASSIGNMENT OF ERROR

In his pro se assignment of error, the defendant argues that he is entitled to a new trial. Specifically, the defendant contends that a juror's knowing one of the witnesses who testified was very prejudicial and could have swayed the other jurors to believe the witness.

Randy M. Boyette served as a juror in this case. During voir dire, the prosecutor and defense counsel read aloud their witness lists to a panel of potential jurors, which included Boyette. The trial court asked the potential jurors if they knew any of these witnesses or recognized the names. Boyette did not respond or indicate that he knew any of the witnesses.

During trial, after several witnesses had testified, including Danielle Luneau, Boyette informed the bailiff, who informed the trial court, that he recognized Danielle. Out of the presence of the other jurors, the trial court questioned Boyette about how he knew Danielle. Boyette's testimony revealed that, when he was in his forties, Danielle was one of the teenagers he would see in church when babysitting for the children's ministry. Danielle's stepmother was in the ministry. According to Boyette, he "would sit in with the younger ones to kind of babysit and we'd just sing and, you know, do stuff like that." Following Boyette's brief explanation of how he

knew Danielle, the following colloquy between the trial court and Boyette took place:

> The Court: The fact that she's testified and obviously you've heard it and I'm sure paid attent [sic] to it --
>
> Mr. Boyette: (Nods head affirmatively).
>
> The Court: -- and you knew her in church, are you inclined to believe what she says up there more than anybody else that may testify?
>
> Mr. Boyette: No. Not at all. I mean, I mean, I would weigh it just like I would anybody else's, you know. But I didn't want to let that go by.
>
> The Court: And I appreciate it because it's very important. Let me ask you the way you smiled when you said that, I feel I need to ask you: are you going to believe her any less because of your prior knowledge of her?
>
> Mr. Boyette: No, no. I was laughing because I've taught for 12, 14 years and, you know, like when you asked the lawyer asked, you know, kids are kids. And look, I've taught too many of them. I know them well enough to know, you know.
>
> The Court: So whatever she said, you're not going to believe more or disbelieve more --
>
> Mr. Boyette: No.
>
> The Court: -- because you knew her?
>
> Mr. Boyette: No.
>
> Following this exchange, defense counsel questioned Boyette:
>
> Q. Did you ever have any conversations with Danielle Luneau that you remember?
>
> A. You know, other than just to say hey, you know, how are you, you know. It would have been not much more than that, if that.
>
> Q. You would have never counselled [sic] her, to your knowledge, or anything like that?
>
> A. No. No, not -- because I was really hanging out and babysitting the younger ones. And she might have been in

> there every once in awhile, you know, but most of the time, she was still at the youth part.

At this point, defense counsel moved that Boyette be excluded from the jury because of his prior knowledge of and familiarity with Luneau, and his "being in a ministerial capacity with [Luneau]." The trial court denied the motion.

In **State v. Langendorfer**, 389 So.2d 1271, 1275 (La. 1980), during trial a juror realized that she had taught the rape victim in elementary school. The juror did not recognize the victim and remembered her only as a quiet child. **Id.** The Louisiana Supreme Court upheld the trial court's denial of a mistrial because the juror did not intentionally mislead the defendant. The supreme court concluded that "[q]uestioning by the court showed that she could serve without bias as a fair and impartial juror."

Similarly in the instant matter, Boyette did not intentionally mislead the defense, and questioning by the trial court and defense counsel showed that he could serve as a fair and impartial juror. Moreover, notwithstanding the testimony of Luneau, the evidence of the defendant's guilt was overwhelming, including the defendant's taped statement to Detective Bergeron of his involvement in the robbery.

Accordingly, we find no error in the trial court's denial of the defendant's motion to remove Boyette from the jury. As such, the defendant is not entitled to a new trial. The pro se assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.