NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-2014**
VERSUS	*	**COURT OF APPEAL**
WORLEY BROWN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 411-892, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *
(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris, Sr., and Judge David S. Gorbaty)

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CONVICTION AND SENTENCE AFFIRMED

STATEMENT OF THE CASE

Defendant Worley Brown was charged by bill of information on December 18, 1999, with possession of cocaine, a violation of La. R.S. 40:967(C). Defendant pleaded not guilty at his January 13, 2000 arraignment. Defendant was tried by a six-person jury on January 27, 2000, and found guilty as charged. On May 9, 2000, after defense counsel waived defendant's presence for sentencing, the trial court sentenced defendant to five years at hard labor, with credit for time served. The trial court denied defendant's motion to reconsider sentence, and granted his motion for appeal. On October 4, 2000, the trial court adjudicated defendant a third-felony habitual offender, vacated his original sentence, and resentenced him to five years at hard labor, with credit for time served.

The record was lodged with this court on September 14, 2000, and supplemented on November 8, 2000. Defense counsel filed a brief on behalf of defendant on November 28, 2000. Defendant filed a supplemental pro se brief on November 29, 2000.

FACTS

New Orleans Police Officer Brian Firstley testified that he stopped defendant at 10:46 p.m. on December 18, 1999, after observing him

disregard a stop sign at the intersection of North Johnson and Flood Streets. It was discovered that defendant had a suspended driver's license, and he was arrested and issued citations for that offense, disregarding a stop sign, and failure to wear a seat belt.

New Orleans Police Officer Vincent Smith assisted his partner, Officer Firstley, in arresting defendant. He advised defendant of his Miranda rights and searched him incidental to the arrest. Officer Smith discovered thirteen pieces of a white rock-like substance that he believed to be crack cocaine in defendant's right front pants pocket. Officer Smith identified the cocaine.

It was stipulated that if Criminalist Bill Giblin was called as a witness, he would testify that eleven of the thirteen pieces of white rock-like substances tested positive for cocaine, while two tested negative for any controlled dangerous substance.

Defendant testified that he had entered his car after leaving his residence, when police drove up and asked him to step out. The officers searched the car and questioned him. He denied having thirteen rocks of cocaine in his right front pocket or in his car that night. Defendant said he was familiar with the officers, as he had filed a complaint against them for searching his home without a search warrant in March 1999. He said that in

August 1999, they stopped him, claiming he had run a stop sign. They searched his car and arrested him for driving with a suspended driver's license. They also arrested him for possession of a crack pipe that was found on the ground. Defendant said the officers testified against him at trial on the crack pipe charge, but he was found not guilty.

Officer Smith testified that to his knowledge, he had never arrested defendant before the incident in the instant case, nor had any citizen complaints been lodged against him by a resident of defendant's neighborhood. He could not remember whether he had ever testified against defendant at trial. Officer Smith admitted that he had seen defendant in the neighborhood he patrols. He said on cross examination that he could not recall whether he had ever stopped defendant before the incident in the instant case. He conceded that in March 1999, he had been an assisting officer when defendant's residence was searched, but had been stationed at the perimeter of the scene. He said he could not recall whether he saw defendant on that occasion.

ERRORS PATENT
ASSIGNMENT OF ERROR NO. 3

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NO. 1
PRO SE ASSIGNMENT OF ERROR NO. 1(a)

In these assignments of error, defendant claims the prosecution's argument was so misleading and erroneous that it deprived him of his right to a fair trial.

Defendant cites the prosecutor's remark during closing argument:

> BY MS. VAN DAVIS:
> You know, ladies and gentlemen, there's what you call "rules." … And see, there's one rule that I have to follow as a prosecutor. And that one rule is, One, [sic] I can't tell you all the brushes with the law that this gentleman sitting at the defense table --
>
> MR. MEYER:
> Wait, wait --
>
> BY MS. VAN DAVIS:
> -- has had.

Defense counsel objected, and moved for a mistrial, which the trial court denied. The prosecutor continued:

> BY MS. VAN DAVIS:
> You see, Mr. Meyer talked about, you know, I can go to a computer and tell you what's in the computer. Mr. Meyer knows that I can't go to a computer and tell you everything about this man that's in that computer, which is why he's now complaining about, you know, " need a mistrial" or whatever the case may be. Because I can't do that because I'm bound by the law, his constitutional rights, that I can't just go --

Defense counsel objected again, and the trial court overruled his objection.

The prosecutor continued:

> So we can't do that. And another thing that we cannot do is, see, when someone goes to trial and they're found not guilty, I can't come in and tell you about the information of his having been found not guilty. Because you know why they created that rule? Because, you know, someone thought a long time ago that if I told you about all the times that he had had brushes with the law and may have been found not guilty, you know, jurors in the next case may say, " Well, he got away all those other times and he probably was guilty so I'm gonna go ahead and find him guilty in this particular instance." So that's why they have those rules. So see this case from Section "D," as much as I might on my own want to tell you about the things that he's done in his past, I cannot.

Defense counsel objected for the third time, but the trial court overruled the objection, finding that the prosecutor was simply referring to the prior case in Section "D," about which defendant had already testified to as part of his defense. Defense counsel stated that his objection was not to argument about that case, but the vague reference by the prosecutor to "things" defendant had done in his "past" that she cannot bring up.

The scope of closing argument "shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case. The argument shall not appeal to prejudice. The state's rebuttal shall be confined to answering the argument of the defendant." La. C.Cr.P. art. 774.

However, a prosecutor retains "considerable latitude" when making closing arguments. State v. Taylor, 93-2201, p. 19 (La.2/28/96), 669 So.2d 364, 374. Further, the trial judge has broad discretion in controlling the scope of closing arguments. State v. Casey, 99-0023, p. 17 (La. 1/26/00), 775 So.2d 1022, 1036, cert. denied, Casey v. Louisiana, __ U.S. __, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000). Even if the prosecutor exceeds the bounds of proper argument, an appellate court will not reverse a conviction unless "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. Id.; State v. Ricard, 98-2278, p. 4 (La. App. 4 Cir. 1/19/00), 751 So. 2d 393, 397, writ denied, 2000-0855 (La. 12/18/00), 775 So. 2d 1078. Even where the prosecutor's statements are improper, credit should be accorded to the good sense and fairmindedness of the jurors who have heard the evidence. State v. Snyder, 98-1078, p. 18 (La. 4/14/99), 750 So. 2d 832, 846.

While every witness testifying subjects himself to examination relative to his criminal convictions, any evidence of arrests, the issuance of arrest warrants, indictments, prosecutions or acquittals is generally inadmissible. La. C.E. art. 609.1; 404(B). The prosecutor first said that she could not tell the jury about “all the brushes with the law” defendant “has had.” Defense counsel objected to this comment, and moved for a mistrial,

which the trial court denied. This constituted what might "arguably" be considered an ambiguous reference to a crime other than the one at issue in the instant case, defendant's admitted conviction for possession of cocaine, or his arrest for possession of the crack pipe, for which defendant was tried and acquitted.

However, subsequent to and in connection with this line of argument by the prosecutor, and defense counsel's continuing objections to it, the trial court permitted defense counsel to admit into evidence the record from the case in which defendant had been acquitted—the one in which he claimed that Officers Smith and Firstley testified against him. That record showed that neither of those officers had been listed as witnesses or had testified. The trial court admitted that record into evidence without objection, and allowed both sides to present argument regarding it. The prosecutor took full advantage of the opportunity, argued that defendant had lied on the witness stand, and urged the jury to disregard any of his testimony. Defense counsel declined to present any further argument on the issue.

Considering these facts and circumstances, and according credit to the good sense and fairmindedness of the jurors who heard the evidence, it can be said with confidence that the defendant was convicted on the weight of the evidence against him, and not because of the prosecutor's vague

reference to any other crimes for which defendant had been arrested but not convicted. Accordingly, defendant is not entitled to have his conviction reversed on the ground that he was denied his right to a fair trial as a consequence of the prosecutor's comments.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2
PRO SE ASSIGNMENT OF ERROR NO. 1(b)

Defendant next argues that the trial court erred in denying his motion for mistrial under La. C.Cr.P. art. 770, which 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.

To trigger the mandatory mistrial provision of La. C.Cr.P. art. 770(2), the remark must "unmistakably" point to evidence of another crime; a comment "arguably" pointing to a prior crime will not suffice. State v. Edwards, 97-1797, p. 20 (La. 7/2/99), 750 So. 2d 893, 906, cert. denied, Edwards v. Louisiana, 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed.2d 421

(1999). The prosecutor's comment concerning defendant's "brushes with the law" only "arguably," not "unmistakably," pointed to a crime as to which evidence was inadmissible. That comment, and the subsequent ones, could also be viewed as attempts by the prosecutor to explain to the jury why she had said nothing about the prior arrest, trial and acquittal, on the off chance that the jury suspected that the State had been trying to keep information from it. Accordingly, the mandatory mistrial provision is not applicable.

Under La. C.Cr.P. art. 775, a mistrial shall be ordered upon motion of a defendant when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial. "Mistrial is a drastic remedy, and is warranted only when the defendant has suffered substantial prejudice such that he cannot receive a fair trial." State v. Wessinger, 98-1234, p. 24 (La. 5/28/99), 736 So. 2d 162, 183, cert. denied, Wessinger v. Louisiana, 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999). "The determination of whether actual prejudice has occurred, and thus whether a mistrial is warranted, lies within the sound discretion of the trial judge, and this decision will not be overturned on appeal absent an abuse of that discretion." Id. It cannot be said that the trial court abused its discretion in implicitly determining that the comments by the prosecutor did not make it impossible for defendant to obtain a fair trial and, thus, that a mistrial was

not warranted.

There is no merit to this assignment of error.

PRO SE ASSIGNMENTS OF ERROR NO. 1(c) & (d)

In these assignments of error, defendant claims that the trial court erred in permitting the State to malign him for failing to incriminate himself during his testimony, and in permitting the State to turn part of its closing argument into a plebiscite on crime.

Defendant first argues that the prosecutor's argument to the jury violated his Fifth Amendment right against self-incrimination, to the extent that she suggested that defendant had a reason to lie and noted that he failed to admit during direct examination that he was a convicted felon. Defendant concedes that his trial counsel failed to object to this line of argument, thus conceding the general rule that a defendant cannot avail himself of an alleged error unless he made a contemporaneous objection at the time of the error. La. C.Cr.P. art. 841(A); State v. Seals, 95-0305, p. 5 (La. 11/25/96), 684 So. 2d 368, 373. Defendant argues that his trial counsel's failure to object should not preclude him from arguing this alleged error, as had counsel objected it only would have served to call attention to the objectionable comments, thus serving to incriminate him even more in the

eyes of the jury. There is no merit to this argument, as to accept it would be to relieve defense counsel of the need to make any objection in the presence of the jury in order to preserve an issue for appeal. Defense counsel's failure to object precludes review of this alleged error. Moreover, defendant cites no authority for the proposition that the Fifth Amendment operates to preclude the State from noting that a defendant who testified did not admit a prior conviction on direct examination, or that a defendant who testifies has an obvious reason to lie. Defendant also submits that the trial court, of its own accord, should have prevented the State from mentioning those facts in argument. As nothing the State did in this respect was improper, the trial court had no authority or reason to interrupt the prosecutor's argument.

Defendant also argues that the trial court erred in permitting the State to turn its closing argument into a plebiscite on crime, quoting a portion of the prosecutor's closing argument in which she comments on defendant's habit of driving with a suspended driver's license. The record reflects that defense counsel did not object to this line of argument. Accordingly, defendant is precluded from raising this issue on appeal. See discussion supra.

There is no merit to these assignments of error.

PRO SE ASSIGNMENTS OF ERROR NO. 2 & 3

In these assignments of error, defendant claims that the trial court erred in permitting the introduction into evidence of the trial record in case No. 409-647 after both the State and defense had rested, and in permitting the prosecutor to "testify" as to this record.

Defense counsel sought to introduce the record from the prior case, in which defendant had been tried and acquitted on a charge relating to possession of a crack pipe. Defense counsel obviously believed that the certified record would verify defendant's testimony that Officers Smith and Firstley had testified against him in that case. The court and respective counsel examined the record outside the presence of the jury, and it showed that neither officer had testified at the trial, or had been listed as a witness. The trial court then proceeded to admit the record into evidence, without any objection from defense counsel. The trial court further allowed both the State and defense to present additional argument to the jury concerning the record. The State argued, without any objection from defense counsel. Defense counsel chose not to present any further argument.

Accordingly, because defense counsel failed to object in any way either to the introduction of the record or to the State's argument concerning the record, defendant is precluded from raising either of these issues on

appeal.

There is no merit to these assignments of error.

PRO SE ASSIGNMENT OF ERROR NO. 4

In his last assignment of error, defendant argues that his trial counsel was ineffective in several respects.

"As a general rule, claims of ineffective assistance of counsel are more properly raised by application for post conviction relief in the trial court where a full evidentiary hearing may be conducted if warranted." State v. Howard, 98-0064, p. 15 (La. 4/23/99), 751 So. 2d 783, 802, cert. denied, Howard v. Louisiana, 528 U.S. 974, 120 S.Ct. 420, 145 L.Ed.2d 328 (1999). However, where the record is sufficient, the claims may be addressed on appeal. State v. Wessinger, 98-1234, p. 43 (La. 5/28/99), 736 So. 2d 162, 183, cert. denied, Wessinger v. Louisiana, 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999); State v. Bordes, 98-0086, p. 7 (La. App. 4 Cir. 6/16/99), 738 So. 2d 143, 147. Ineffective assistance of counsel claims are reviewed under the two-part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). State v. Brooks, 94-2438, p. 6 (La.10/16/95), 661 So. 2d 1333, 1337 (on rehearing); State v. Robinson, 98-1606, p. 10 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 126. In order to

prevail, the defendant must show both that: (1) counsel's performance was deficient; and (2) he was prejudiced by the deficiency. Brooks, supra; State v. Jackson, 97-2220, p. 8 (La. App. 4 Cir. 5/12/99), 733 So. 2d 736, 741. Counsel's performance is ineffective when it is shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland at 686, 104 S.Ct. at 2064; State v. Ash,97-2061, p. 9 (La. App. 4 Cir. 2/10/99), 729 So. 2d 664, 669. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance the result of the proceeding would have been different; “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 693, 104 S.Ct. at 2068; State v. Guy, 97-1387, p. 7 (La. App. 4 Cir. 5/19/99), 737 So. 2d 231, 236, writ denied, 99-1982 (La. 1/7/00), 752 So. 2d 175.

This court has previously recognized that if an alleged error falls "within the ambit of trial strategy" it does not "establish ineffective assistance of counsel." State v. Bordes, 98-0086, p. 8 (La. App. 4 Cir. 6/16/99), 738 So. 2d 143, 147, quoting State v. Bienemy, 483 So.2d 1105, 1107 (La. App. 4 Cir. 1986). Moreover, as "opinions may differ on the

advisability of a tactic, hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy is successful." Id. quoting State v. Brooks, 505 So.2d 714, 724 (La. 1987).

The root of most aspects of defendant's claim of ineffective assistance of counsel is that defense counsel was inadequately prepared for trial because he did not know for certain whether defendant had filed a complaint against Officers Smith and Firstley in connection with the warrantless search of his residence in March 1999, or whether Officers Smith and Firstly had in fact previously arrested defendant and testified against him. Defense counsel obviously obtained this information from defendant, accepted him at his word, and based a defense on it. Defendant's argument essentially is that his trial counsel was ineffective in believing what he told him. There is no merit to this argument.

Moreover, the case was simple. The only defense available to counsel was an attack on the credibility of the police officers. Had defense counsel investigated defendant's claims, and decided that it was not worth putting defendant on the stand simply to give his version of the events surrounding his arrest in the instant case, then surely defendant would have been convicted on the testimony of the officers. Therefore, defendant has failed

to show that there is a reasonable probability that but for any deficient performance by defense counsel as to the complaint, the prior arrest and acquittal, or the decision to call defendant as a witness, the result of the proceeding would have been different.

Defendant also claims that defense counsel was ineffective in failing to make an attempt to remedy the damage caused by the introduction of the record in the prior case, which conclusively showed that Officers Smith and Firstley had no connection with the case. Defendant claims that counsel could have consulted with him and argued reasons to the jury why defendant could have been mistaken as to the identity of the officers who testified at the prior trial, pointing out, for instance, that defendant was suffering from AIDS-related dementia. As previously discussed, defense counsel chose not to present any further argument to the jury after the introduction of the case record, and in fact urged defendant, out of the presence of the jury, to plead guilty.

Once again, defendant fails to show a reasonable probability that the result of the proceeding would have been different even had defense counsel been able to completely mitigate the impact of the revelation that Officers Smith and Firstley had nothing to do with the prior case.

There is no merit to this assignment of error.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED