NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-1206**
VERSUS	*	**COURT OF APPEAL**
DANNY ROGERS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 426-341, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Chief Judge William H. Byrnes III
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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CONVICTION AND SENTENCE AFFIRMED

STATEMENT OF THE CASE

Defendant Danny Rogers was charged by bill of information on November 26, 2001, with possession of cocaine, a violation of La. R.S. 40:967(C). Defendant pleaded not guilty at his November 29, 2001 arraignment. On December 12, 2001, defendant was tried by a six-person jury and found guilty of attempted possession of cocaine. On March 14, 2002, defendant was sentenced to thirty months at hard labor. The trial court denied defendant's motion to reconsider sentence, and granted defendant's motion for appeal.

FACTS

New Orleans Police Officer James Foucha testified that on November 2, 2001, he and his partner were on "proactive patrol" when they were flagged down by a citizen. Officer Foucha described "proactive patrol" as patrolling in an area of high drug trafficking or high crime generally. Under such circumstances they will do investigatory stops and go into areas of known drug dealing and car break-ins. Based on information given to them by that citizen (which information in the form of hearsay is the subject of the

defendant's only assignment of error as discussed later in this opinion), the officers proceeded to the 3300 block of Second Street. There, the officers observed defendant sitting on some steps. Officer Foucha stated that when defendant made eye contact with the officers he turned his head to the left and spit several objects out of his mouth. The objects were individually wrapped pieces of white, compressed, hard, rock-like substances believed to be crack cocaine. Officer Foucha testified that he never lost sight of them from the time he saw the defendant spit them out to the time that he retrieved them. Officer Foucha mentioned on cross-examination that defendant also had an outstanding arrest warrant at the time he was arrested.

Officer Foucha testified on cross examination that there was one individual sitting on the steps to the left of the defendant and another to his right. One was arrested by other officers who arrived on the scene and the other was released.

The residence where the defendant was sitting was located in the middle of the block. None of the three individuals lived at that address. Defendant did not stand up when the officers approached, nor did he attempt to flee.

Officer Rhett Charles, Officer Foucha's partner on the day in question, was driving the patrol unit when he saw defendant spit toward the

ground several times. He said that as the officers approached the defendant he could see several objects falling out of defendant's mouth. The officers recovered eleven pieces of crack cocaine. Officer Charles testified that: "Never losing sight of what was discarded from his mouth, I took control of the subject." Office Charles said the other individual who was arrested at the scene was arrested on a narcotics violation by Officer Richard LeBlanc and his partner, and booked under an entirely different item number. Defense counsel brought out that defendant's outstanding arrest warrant was for a probation violation.

It was stipulated that the alleged cocaine introduced in evidence was in fact cocaine.

Defendant testified that on the date in question he was living in the 3600 block of Second Street. He conceded that he had been convicted of crimes and had a "pretty serious" record. He confirmed that he had been arrested in that same neighborhood. Defendant described the incident as follows:

> [The police] turned the corner and when they pulled up, they asked did I live there. I said, "No, I'm talking to a friend, visiting a friend." He said, "If you don't stay there, get up and move." So as I was getting up, he called us to the car. They had another dude, the one who was sitting next to me, they had an alley right there. He was fixin' to throw something in the alley and the passenger got out of the car. He grabbed his weapon and he was

> like, If you run, I'm gonna shoot you. So he said, "All y'all get on the car," we got on the car and they went and found something in the alley.

The defendant described what was found in the alley as "something in a plastic bag." When the defendant asked if he saw anything in the bag, he testified: "Crack was in it, a white substance." He said that the officer who had the plastic bag was not one of the two officers who was handling him. On cross-examination he admitted that he knew what crack was and that he did not reside at the residence where the officers came upon him. He said that he was talking to "T" whose last name he did not know, although they had grown up together. He testified that "T" did reside at the residence where he was arrested. They were eating a hamburger together.

Defendant claimed that he was arrested on the outstanding warrant after police checked his name in the computer. He said he did not learn he was being arrested for possession of crack cocaine until he arrived at central lockup. Defendant denied possessing eleven or twelve pieces of crack cocaine in his mouth that day.

Defendant replied in the negative when asked on cross examination whether he previously had any contact with Officers Foucha or Charles. Defendant admitted prior convictions, including one in 2001 for burglary, two for being a convicted felon in possession of firearm, and one for second

degree battery. He was on parole for the burglary conviction at the time he was arrested in the instant case. He denied that he would lie in order to escape conviction in the instant case and a possible life sentence as a habitual offender. He also stated that he pleaded guilty to the burglary charge in 2001 under a plea agreement in which he was not charged as a habitual offender.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant claims that comments by the State during its opening statement, together with the officers' testimony regarding the citizen's tip that led to the stop, warranted a mistrial.

In its opening statement, the State said that:

> BY [THE PROSECUTOR]:
>
> On November 2nd of this year, the police are on patrol and they are flagged down and they learn of possible narcotics in the 3300 block of Second Street. A description is given of the suspect. It is a young black man with braided hair, a white T-shirt, red sweatpants. They send their unit towards that area.
>
> MR MEYER [DEFENSE COUNSEL]:
>
> Excuse me, Judge, I'm going to object. May we approach the bench? This is total hearsay.

Later on direct examination of Officer Foucha, the following occurred:

> Q. Okay. And how did you first become involved in this investigation?
> A. –We were flagged down –
>
> MR. HESSLER [DEFENSE COUNSEL]:
> Objection your honor.
>
> THE WITNESS [OFFICER FOUCHA]:
> -- by a lady in the --
>
> MR. HESSLER:
> Your Honor, objection.
>
> THE COURT:
> All right, as to that, I don't have any problems with his testifying as to that.
>
> MS. BERNARD [THE PROSECUTOR]
> I understand.
>
> THE COURT:
> Go ahead.
>
> BY MS. Bernard:
> Q. What happened next?
> A. We were flagged down by a lady wearing – by a lady in the 3300 block of third Street who advised us that there was a black male –
>
> MR. MEYER:
> Judge –
>
> MR HESSLER;
> Your Honor –
>
> MR. MEYER:
> -- I'm asking that the jury be –

> THE COURT:
> Whoa, whoa –
>
> MR. MEYER:
> --I'm asking that the jury be excused. **I'm asking for a mistrial. --** [Emphasis added.]

After excusing the jury, there was some discussion and the trial judge instructed Officer Foucha as follows concerning the testimony he was to give:

> When you testify, you have the right to say that you were flagged down, you have the right to say what you did as a result of what this lady told you, but you cannot say, you cannot say – you cannot give the specifics. You can't say she said – she said that it was a black male wearing whatever he was wearing and he's got dope or so and so. You can't say that. You can say I was flagged down by a lady, she directed us to the defendant, we went there and then based upon that, went and looked here or there and then saw – tell them – you can tell them what you observed – he spits things out – you can tell them all that, you just can't say that what she was doing as far as his dealing drugs or his – whatever he's doing, you can't say that. That's hearsay, okay?

Following this instruction to Officer Foucha by the trial judge defense counsel stated that: "I probably should have asked for this mistrial during the opening statement . . ."

The trial judge replied:

> I do not think it violates the provisions of hearsay for an officer to take the witness stand and say that he was flagged down by a citizen or an informant,

> that the informant directed him to the defendant. That does not go to the truth of the matter asserted but simply what actions the officer took based upon information he received. Based upon his approaching the defendant, his observations, in my opinion, are then fair game. That is where I hope we're going with this.

Later while still on direct, Officer Foucha testified as to what he and his partner did in response to the information (not described) furnished them by the person who flagged them down:

> We relocated to the 3300 block of Second Street where we observed a black male with a braided hairstyle, white undershirt, and red pants sitting on the steps. When the subject made eye contact with us in a fully marked vehicle, he turned his head to the left and started spitting several objects from his mouth.

La. C.C.P. art. 775 provides that a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial. "Mistrial is an extreme remedy and, except for instances in which the mandatory mistrial provisions of La. C.Cr.P. art. 770 are applicable, should only be used when substantial prejudice to the defendant is shown." State v. Castleberry, 98-1388, p. 22 (La. 4/13/99), 758 So.2d 749, 768. "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." State v. Wessinger, 98-1234, p. 24 (La. 5/28/99), 736 So.2d 162, 183. The Supreme Court in Wessinger went on in the very next sentence of that opinion to describe the discretion of the trial judge in such matters as "vast."

Defendant concedes that neither the State nor any of the witnesses directly referred to defendant as the person identified by the citizen tipster. However, he notes that the State mentioned in its opening statement that the officers learned "of possible narcotics in the 3300 block of Second Street," citing a description of the suspect as a young black man with braided hair, wearing a white T-shirt and red sweatpants. While defense counsel objected, he did not move for a mistrial. Counsel later said he should have, and moved for a mistrial. Defendant complains of Officer Foucha's statement that the officers were "flagged down" and advised that there was a black male, before defense counsel objected and moved for a mistrial.

Although the defendant did not object at the time, the defendant also complains about the officer's statement that defendant was wearing a white undershirt and red pants. Officer Charles stated that he and Officer Foucha turned the corner and saw the subject "we were actually looking for." Although the defendant made no objection to this statement in the trial court, he now complains of it on this appeal.

Defendant's failure to object precludes him from complaining of the testimony by Officer Foucha as to what defendant was wearing. For the same reason, it is too late for the defendant to complain for the first time on appeal about the comment by Officer Charles indicating that they were looking for the defendant. See La. C.Cr.P. art. 841(A) (an irregularity or error cannot be availed of unless it was objected to at the time of occurrence); State v. Brooks, 98-0693, p. 9 (La.App. 4 Cir. 7/21/99), 758 So.2d 814, 819.

Hearsay is a statement, other than one made by the declarant while testifying at the present trial, offered in evidence to prove the truth of the matter asserted. La. C.E. art. 801(C). The prosecutor's comment in the State's opening statement repeated the substance of what the citizen tipster told the officers, and thus constituted hearsay. Officer Charles' comment that the officers were flagged down and advised that there was a black male was hearsay as to what the officers were advised.

Defendant cites State v. Hearold, 603 So.2d 731 (La.1992), quoting at length from that decision, which addressed the issue of hearsay evidence being admitted to explain a police officer's actions. The court first recognized that the fact an officer acted on information obtained from an informant might be relevant to explain his conduct, but cautioned that an

explanation of the officer's actions "should never be an acceptable basis upon which to admit an out-of-court declaration when the so-called 'explanation' involves a direct assertion of criminal activity against the accused." 603 So. 2d at 737. The court stated that absent some unique circumstance in which the explanation of purpose would be probative evidence of a contested fact, the probative value of the mere fact that an out-of-court declaration was made is generally outweighed greatly by the likelihood that the jury will consider the statement for the truth of the matter asserted. Id.

In Hearold, a police officer testified that officers had received information that defendant and another individual "were involved in narcotics dealings." 603 So.2d at 737. That same officer later answered a question by stating, "we had received several reports about him dealing out of that house." 603 So.2d at 738. Another officer, in replying to a question concerning whether the investigation had been a pretext for harassing defendant, stated that officers had "received so many complaints on him concerning his involvement in drug traffic that there was a possibility that he was going to end up in jail." 603 So.2d at 738. The Louisiana Supreme Court found that the court of appeal had relied partially on such hearsay evidence to find sufficient evidence of the intent to distribute element of the

crime for which the defendant was convicted. The Supreme Court found that the reason why the officer began his investigation was totally irrelevant to the issue of the defendant's guilt of any of the essential elements of the crime. Because the court could not say beyond a reasonable doubt that the jury did not rely on the improper hearsay evidence in determining that defendant was guilty of intending to distribute the drug he possessed, it held that the erroneous admission of that hearsay evidence was not harmless beyond a reasonable doubt, and reversed the defendant's conviction and sentence.

Defendant is correct that under the circumstances of this case, with the officers testifying that they were on proactive patrol, evidence that they received information and consequently went to this location was not necessary to explain their actions. It would have been sufficient to say they were on proactive patrol and observed defendant react to seeing them by spitting cocaine out of his mouth.

However, these hearsay statements were harmless, and it cannot be said that they made it impossible for defendant to obtain a fair trial, thus necessitating a mistrial. The jury heard the testimony of the two police officers and the contradictory testimony of defendant as to whether he spit crack cocaine out his mouth. Defendant, a convicted felon who admitted

that he faced a life sentence as a habitual offender if convicted of the offense for which was being tried, conceded that he never had any previous contact with Officers Foucha and Charles. No evidence was presented suggesting that the officers intentionally lied because of some animosity toward defendant. Nor was there any evidence besides defendant's testimony to indicate that the officers were mistaken in what they observed.

The comments did not make it impossible for defendant to obtain a fair trial, and thus a mistrial was not necessary. Further, considering all of the evidence, the guilty verdict rendered in this case was surely unattributable to the hearsay comment by the State in its opening statement and the vague hearsay comment by Officer Foucha. The jury would have been persuaded regardless by the clear, consistent, unbiased testimony of the police officers and the stipulation agreed to by the defense that the substance was indeed crack cocaine. Therefore, any error with regard to the hearsay was harmless. See State v. Snyder, 98-1078, p. 15 (La. 4/14/99), 750 So.2d 832, 845 (to determine whether an error is harmless, the proper question is whether the guilty verdict actually rendered in this trial was surely unattributable to the error).

There is no merit to this assignment of error.

DECREE

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

CONVICTION AND SENTENCE AFFIRMED