NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0506**
VERSUS	*	**COURT OF APPEAL**
DANIEL BOWENS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 366-874, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Chief Judge William H. Byrnes III
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones,
Judge Dennis R. Bagneris Sr.)

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CONVICTION AND SENTENCE AFFIRMED

STATEMENT OF THE CASE

By grand jury indictment dated December 2, 1993, defendant was charged with second degree murder; and, he pleaded not guilty. Defendant was examined both as to his present competency and his competency at the time of the offense; and, on January 13, 1994, the trial court found defendant incompetent to assist his defense counsel. Defendant was still deemed not competent at a second hearing on August 23, 1994. A third hearing was held on October 5 and 19, 1995, at which time defendant was found competent to stand trial. Defendant was tried on November 22, 1995, by a twelve-member jury that found him guilty as charged. Defendant's motion for new trial was denied on December 1; and, after waiving all delays, defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

This court affirmed defendant's conviction and sentence on October 8, 1997. State v. Bowens, 96-1199 (La. App. 4 Cir. 10/8/97), unpub., 701

So.2d 271, writ denied 97-2858 (La. 5/29/98), 719 So.2d 1276. Defendant filed an application for post-conviction relief that was denied by the trial court on February 10, 1999; but, this court granted defendant a new appeal because counsel's errors patent brief did not meet the requirements of State v. Jyles, 96-2669 (La. 12/12/97), 704 So.2d 241. State v. Bowens, supra.

STATEMENT OF THE FACTS

The facts are as set forth in the original opinion:

> On September 18, 1993, at approximately 8:00 p.m., Renaldo Cains was shot seven times in a courtyard in the 1500 block of Bienville Street. Kevin Pollard testified that as he stood in a driveway about fifty feet away, he saw Renaldo Cains in the Bienville Court of the Iberville Housing Project. He testified that there was a party going on in the courtyard and that when he heard gun shots, he ran toward the disc jockey. When he heard more shots, he ran in a different direction and saw Daniel Bowens and Landon "Minnesota" Marshall shooting Mr. Cains. He testified that after he heard the shooting stop, he ran back to Bienville Street and headed to Mr. Cains's girlfriend's house. He was stopped by the police before he got there. Mr. Pollard chose Mr. Bowens's and Mr. Marshall's pictures out of a photographic lineup a few days later.
>
> Anthony Thomas testified that he was in the courtyard talking to a child at the party where the disc jockey was playing music when he heard gun shots. He said that he was fifteen to twenty feet away from where the shots originated and that he saw two people with guns. The two people were

Landon Marshall and Daniel Bowens, with Mr. Bowens standing over and shooting Renaldo Cains, who was on the ground. Mr. Thomas said that Mr. Bowens and Mr. Marshall then ran off together. He stated that after he learned that Mr. Cains had died, he called the police and later picked Mr. Bowens's and Mr. Marshall's pictures out of a photographic lineup.

The autopsy revealed that Mr. Cains had been shot seven times, with all but one shot entering from behind. The pellets and shell casings recovered from the scene were all fired from a common weapon. Officer Leroy Smith testified that one witness, who refused to identify himself, told him that only one person shot Mr. Cains. Detective Marco Demma testified that he was contacted by Anthony Thomas a few days after the shooting and that on September 27 he met with Anthony Thomas and Kevin Pollard to show them the photographic lineup. He also testified that prior to this interview, he obtained the names of Mr. Bowens and Mr. Marshall from Mr. Cains's mother, who had received telephone calls from people afraid to come forward.

Mary Alice Hewitt, Mr. Bowens's mother, testified that on the day of the murder, she was with her son at the hospital because he had been shot in the thigh. She also testified that he was treated and released the same day and that she dropped him off at home. She stated that he was barely able to walk but he was not on crutches. She admitted she was not with him at 8:00 p.m. that night. Nasacci George, Mr. Bowens's sister, also testified that she was with her brother at the hospital and that her brother was limping and dragging his leg. She admitted not seeing her brother later that night. She also testified that her brother was shot in the head on November 2, 1993, and that he was in the hospital until just before Christmas.

> Officer Roland Matthews testified that he investigated the November shooting of Mr. Bowens and that two arrest warrants were issued in that matter, but he denied that one of those suspects was Kevin Pollard.
>
> Mr. Bowens testified that Mr. Cains was the one who shot him on September 18, but admitted that he did not tell the police. He further testified that Kevin Pollard, whose nickname was "Wolf," a man nicknamed "Oreo," and someone named Edward shot him the second time in November. He stated that he was at home when Mr. Cains was shot because he could barely walk. He admitted that he did not tell the police previously that Kevin Pollard was one of the persons who shot him in November.

ERRORS PATENT

A review of the record shows no errors patent.

ASSIGNMENT OF ERROR NO. 1 (BY COUNSEL)

In his first assignment of error, defendant complains that the trial court erred in admitting photographic identification evidence. He argues that evidence that Kevin Pollard and Anthony Thomas identified defendant and Marshall in a photographic lineup was irrelevant because both witnesses testified that they knew defendant and Marshall and had identified them as the shooters prior to the lineup. He also argues that the trial court should not have overruled his objection to hearsay testimony concerning how the police

developed defendant as a suspect from an unidentified source.

A review of the trial transcript shows that defense counsel stated that there was no objection to Detective Marco Demma's testimony that Pollard and Thomas chose defendant's picture from a photographic lineup. However, defendant later objected, asserting that it was not subject to cross-examination, when Demma stated that Pollard and Thomas were able to make an identification. However, at no point did defendant object to testimony regarding the lineup on the basis of relevancy. Since defendant had no objection at trial to this testimony on the grounds of relevancy, appellate review of this particular issue is precluded because defendant is limited to review of the grounds asserted at trial. La. C.Cr.P. art. 841.

What defense counsel did object to (which is the other argument in this assignment of error) was Demma's testimony about the basis for the inclusion of defendant's picture in that lineup. Demma was asked about who he was in contact with prior to the identification by Pollard and Thomas; and over defendant's objection that this question had already been asked and answered, Demma replied that he had been in contact with the victim's mother. Demma was shown the photographic lineup shown to Pollard and Thomas and was asked about the process used to develop a suspect. The trial judge overruled defendant's objection on the basis that it

was not "as to the truth of the matter asserted, but simply what he did in order to get this lineup." The trial judge had earlier cautioned Demma not to testify about what others told him. Demma testified that with the suspect being identified as a suspect, he obtained the suspect's photograph and put it into the lineup.

During cross-examination, the State made a hearsay objection when defense counsel asked Demma whether one of the reports he reviewed indicated that a witness came up at the time of the offense. The trial judge sustained the objection. Later during cross-examination, defense counsel asked how Demma got defendant's name prior to the identification of defendant by Pollard and Thomas; and, Demma replied that he got the name from Renaldo Cains' mother. There was no objection to this testimony. Demma was further asked how the victim's mother got the names, and Demma replied that she had received numerous phone calls from people.

In State v. Hawkins, 96-0766, pp.4-5 (La. 1/14/97), 688 So.2d 473, 477-478, the Supreme Court stated:

> Under La. Code Evid. Art. 801, hearsay is defined as a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted therein. The content of an informant's tip may not be used at trial by a law enforcement officer because the testimony violates the accused's right to confront and cross-examine his accusers. State v. Hearold, 603 So. 2d 731 (La.

1992).

> Under certain circumstances, the testimony of a police officer may encompass information provided by another individual without constituting hearsay if offered to explain the course of police investigation and the steps leading to the defendant's arrest. State v. Smith, 400 So. 2d 587 (La. 1981); State v. Calloway, 324 So. 2d 801 (La. 1976); State v. Monk, 315 So. 2d 727 (La. 1975). However, the fact that an officer acted on information obtained from an informant may be relevant to explain his conduct, but it may not be used as a passkey to bring before the jury the substance of out-of-court information that would otherwise be barred by the hearsay rule. State v. Wille, 559 So. 2d 1321 (La. 1990); Hearold, supra.

In Hawkins, a police detective was asked what was the first big break in the case; and, the detective replied that there was an anonymous call which stated that there were several individuals in the car with the defendant, who was being tried for first degree murder. The Supreme Court held that the first part of the statement about there being several individuals in the car was relevant and was not hearsay because the detective was explaining the course of the police investigation. The court further stated that the part of the statement identifying the defendant as the perpetrator was inadmissible hearsay, but the court found that the error in admitting the hearsay was harmless. In finding the error to be harmless, the court cited testimony elicited from the detective on cross-examination by the defense in

which the detective stated that he did not learn the name of the perpetrator from the anonymous tip but from other named witnesses who testified at trial.

The only hearsay objection made by defendant was correctly overruled by the trial judge. Demma did not directly or indirectly refer during his testimony on direct examination about how he came to include defendant's picture in the photographic lineup to any statement given to him by the victim's mother regarding anonymous phone calls identifying defendant as a suspect. He simply testified on direct about the steps he took in his investigation of the shooting of Renaldo Cains. It was not until his cross-examination by the defense that he referred to the anonymous phone calls received by the victim's mother. Because the actual hearsay was elicited by defendant and not the State and because defendant did not object to Demma's testimony about the hearsay, defendant has no basis for complaining about its being admitted into evidence. La. C.Cr.P. art. 841. Accordingly, this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2 (BY COUNSEL)

In his second assignment of error, defendant complains that the prosecutor improperly attacked the character of defense counsel during closing rebuttal argument. Defendant's complaint concerns the following:

[MR. MARKS]:

And you know, ladies and gentlemen, I don't know if you've got a legal sense of what was going on when Mr. Scaccia repeatedly and underhandedly kept talking about arrests. But I know you got a sense of the outrage that I was displaying –

MR. SCACCIA:
Let me just object to that for the record.

MR. MARKS:
He knows –

THE COURT:
Overruled.

MR. MARKS:
good and well that the only thing you an [sic] impeach somebody about is convictions, not arrest record. How many times did he try to trip them up and say arrest record? Neither of these guys – we got a 21 year old man who works, we got a 30 year old man who spent the majority of his professional working with children, our children. And neither one of them has a conviction. And he knew it, and he repeatedly tried to confuse you on that issue. And shame on him for it…
To tell people like you on a jury who can make a decision to get a guy like that where he belongs, it takes strong brave people. And we had it in Anthony Thomas and we had it with Kevin Pollard, and there wasn't a thing that Mr. Scaccia's slick questions could do to deny it.

MR. SCACCIA:
Objection to "slick."

MR. MARKS:

I object, Judge. He's not slick at all.

MR. SCACCIA:
Well, Your Honor, I think that this district attorney –

THE COURT:
I would overrule your objection.

MR. SCACCIA:
If I was allowed to say what I say about his tactics –

THE COURT:
I would – Whoa –

MR. SCACCIA:
-- the way he attacks me –

THE COURT:
--Whoa, Mr. Scaccia –

MR. SCACCIA:
-- it would be a mountain.

THE COURT:
I'm going to overrule your objection.

MR. SCACCIA:
Thank you.

THE COURT:
And your comments are out of order, Mr. Marks.

MR. MARKS:
It is, Judge, and I apologize.

THE COURT:
Proceed.

(It should be noted that in his brief, counsel erroneously attributes comments made by Mr. Scaccia to Mr. Marks, the prosecutor.)

La. C.Cr.P. art. 774 provides:

> The argument shall be confined to the 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.

In State v. Langley, 95-1489, p. 7 (La. 4/14/98), 711 So.2d 651, 659, the Supreme Court stated:

> In any event, prosecutors are allowed broad latitude in choosing closing argument tactics. See, e.g. State v. Martin, 539 So. 2d 1235, 1240 (La. 1989). Although under La. C.Cr.P. art. 774 closing argument must be "confined to the record evidence and the inferences which can reasonably drawn therefrom," both sides may still draw their own conclusions from the evidence and convey such view to the jury. State v. Moore, 432 So. 2d 209, 221 (La. 1983), cert. denied 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983). "Before allegedly prejudicial argument requires reversal, the court must be thoroughly convinced that the jury was influenced by the remarks and that such contributed to the verdict." State v. Taylor, 93-2201, p. 21 (La. 2/28/96), 669 So. 2d 364, 375; State v. Jarman, 445 So. 2d 1184, 1188 (La. 1984). We also ask whether the remarks injected "passion, prejudice or any arbitrary factor" into the jury's recommendation. Moore, 432 So. 2d at 220.

The prosecutor's referring to defense counsel as "slick" went beyond the issue of guilt or innocence; but, it does not appear that this comment was so prejudicial and inflammatory as to have influenced the jury and contributed to the verdict and which would warrant the reversal of defendant's conviction. This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 1

In his first pro se assignment of error, defendant complains that the standard used by the trial court to determine his competency violated due process. He argues that the trial court applied the wrong standard to determine his competency to stand trial because Cooper v. Oklahoma, 116 S.Ct. 1373 (1996), held that a defendant is not required to prove his incompetency to stand trial by clear and convincing evidence.

Defendant asserted this same assignment of error in his previous appeal, and this court found it to be without merit. Under the "law of the case" doctrine, an appellate court will generally refuse to reconsider its own rulings of law on a subsequent appeal in the same case. State v. Abbott, 92-2731 (La. App. 4 Cir. 2/25/94), 634 So. 2d 911. However, this principle is discretionary, and this court will generally not follow the doctrine if the prior ruling was clearly erroneous and would result in a manifest injustice.

Turner v. Pelican, 94-1926 (La. App. 4 Cir. 9/15/95), 661 So. 2d 1065, writ denied 95-2513 (La. 12/15/95), 664 So. 2d 441. Because the court thoroughly considered the merits of this claim in defendant's prior appeal and he has not raised anything new in the present appeal, adherence to our prior ruling is neither clearly erroneous nor would it result in manifest injustice. This issue need not be reviewed again. For the reasons set forth in this Court's earlier opinion, State v. Bowens, 96-1199, supra, this assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 2

In his second pro se assignment of error, defendant complains that his counsel was ineffective. He asserts that his trial counsel, who was appointed to represent him thirty-two days before trial, should have moved for a continuance and that his trial counsel failed to investigate or present an insanity defense. Additionally, the defendant points to his trial counsel's inaction with regard to defendant's well-documented history of mental problems and counsel's pursuing a defense based on revenge; trial counsel's failure to interview and subpoena defense witnesses; trial counsel's failure to cross-examine Kevin Pollard about the attempted murder charge against him; and, trial counsel's failure to cross-examine Pollard and Anthony

Thomas about any promises for leniency for their testimony against defendant. He also complains that his counsel was ineffective for informing the jury during the opening statement that defendant's codefendant, Landon Marshall, had already been convicted.

Generally, the issue of ineffective assistance of counsel is a matter more properly raised in an application for post-conviction relief to be filed in the trial court where an evidentiary hearing can be held. State v. Prudholm, 446 So. 2d 729 (La. 1984); State v. Sparrow, 612 So.2d 191 (La. App. 4 Cir. 1992). Only when the record contains the necessary evidence to evaluate the merits of the claim can it be addressed on appeal. State v. Seiss, 428 So.2d 444 (La. 1983); State v. Kelly, 92-2446 (La. App. 4 Cir. 7/8/94), 639 So.2d 888, writ denied 94-2087 (La. 1/6/95), 648 So. 2d 921. The present record is sufficient to evaluate the merits of defendant's claims except as they relate to his allegations concerning trial counsel's failure to investigate, subpoena witnesses, or request a continuance. These latter claims should be asserted in an application for post-conviction relief where the necessary evidentiary hearing can be held.

Under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced him. With

regard to counsel's performance, the defendant must show that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. As to prejudice, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, i.e. a trial whose result is reliable. Id., 466 U.S. at 687, 014 S.Ct. 2064. Both showings must be made before it can be found that the defendant's conviction resulted from a breakdown in the adversarial process that rendered the trial result unreliable. Id. A claim of ineffective assistance may be disposed of on the finding that either of the Strickland has not been met. State v. James, 555 So.2d 519 (La. App. 4 Cir. 1989), writ denied 559 So. 2d 1374 (La. 1990). If the claim fails to establish either prong, the reviewing court need not address the other. State ex rel. Murray v. Maggio, 736 F.2d 279 (5th Cir. 1984).

If an error falls within the ambit of trial strategy, it does not establish ineffective assistance of counsel. State v. Bienemy, 483 So.2d 1105 (La. App. 4 Cir. 1986). Moreover, hindsight is not the proper perspective for judging the competence of counsel's decisions because opinions may differ as to the advisability of a tactic; and, an attorney's level of representation may not be determined by whether a particular strategy is successful. State v. Brooks, 505 So. 2d 714 (La. 1987), cert. denied Brooks v. Louisiana, 484

U.S. 947, 108 S.Ct. 337, 98 L.Ed.2d 363 (1987).

Defendant's first ineffective assistance of counsel claim centers on his argument that his attorney should have asserted an insanity defense based on defendant's mental history. Defendant refers to the testimony presented at his pretrial competency hearings as supporting an insanity defense; however, the psychiatric testimony dealt with defendant's competency to stand trial due to a gunshot wound to the head that defendant received after the killing of Cains. This testimony did not deal with defendant's mental state at the time of the offense, which is the focus of the insanity defense. La. R.S. 14:14. Thus, counsel cannot be deemed ineffective for not asserting an insanity defense based on the evidence presented at the competency hearings. There is nothing in the present record concerning defendant's mental state at the time of the offense; thus, it would be speculative to conclude that counsel was ineffective for failing to assert an insanity defense. But if there is such evidence, defendant should reassert his claim of ineffective assistance on this particular issue in an application for post-conviction relief where such evidence can be placed into the record and it can be determined if his counsel was ineffective for not asserting an insanity defense.

Defendant asserts, but does not present any argument, that defense

counsel was ineffective for informing the jury during the opening statement that defendant's co-defendant had already been convicted for the murder of Cains. This does not appear to be ineffective, as it falls within the ambit of trial strategy. Defendant also asserts, but does not present any argument, that counsel was ineffective for failing to cross-examine Pollard and Thomas about any promises of leniency, presumably with regard to any pending charges, in exchange for their testimony. In defendant's prior appeal, one of his assignments of error asserted that the trial court erred in not allowing his counsel to cross-examine Pollard and Thomas about their prior arrests so that he could establish whether or not the prosecutor had any leverage over these witnesses. This court found no merit to this assignment of error; therefore, the defense cannot be deemed ineffective for not cross-examining Pollard and Thomas on this matter. Accordingly, this assignment of error is without merit except as to those claims of ineffective assistance that should be asserted in an application for post-conviction relief.

DECREE

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

CONVICTION AND SENTENCE AFFIRMED