NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0966**
VERSUS	*	**COURT OF APPEAL**
ANDRE' E. FLOT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 395-986, SECTION "B"
Honorable Patrick G. Quinlan, Judge
* * * * * *
Judge William H. Byrnes III
* * * * * *

(Court composed of Judge William H. Byrnes III, Judge Steven R. Plotkin, Judge Patricia Rivet Murray)

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CONVICTION AND SENTENCE AFFIRMED

STATEMENT OF THE CASE

Defendant, Andre E. Flot, pled not guilty to a charge of simple burglary, a violation of La. R.S. 14:62. On July 28, 1998, this court granted defendant's writ application for the sole purpose of transferring his motion for a speedy trial to the trial court for consideration. The trial court granted defendant's motion for speedy trial on August 24, 1998. On October 7, 1998, this court denied defendant's writ application pertaining to his right to a speedy trial. The trial court denied defendant's motion to quash on December 8, 1998. Trial commenced on January 7, 1999, but a mistrial was declared that date after the jury was unable to reach a verdict. The trial court denied defendant's second motion to quash on February 1, 1999. This court denied defendant's writ application pertaining to his right to a speedy trial on February 25, 1999. Defendant was re-tried by a six-member jury on

April 5, 1999, and found guilty as charged. The trial court denied defendant's motion for speedy trial on April 27, 1999. The trial court denied defendant's motion for a bill of particulars on June 16, 1999. On June 21, 1999, this court denied defendants' writ application, pertaining to twenty-one claims of error. On August 23, 1999, this court ordered the trial court to sentence defendant on October 4, 1999. On October 4, 1999, the trial court sentenced defendant to twelve years at hard labor, with credit for time served. The trial court denied defendant's motion to reconsider sentence, and granted defendant's motion for appeal.

FACTS

New Orleans Police Department 911 operator Sandra Jackson testified that she received a 911 call at approximately 1:00 a.m. on December 27, 1997. She identified a computer print-out of the incident call, and said she typed in what the complainant told her, and acknowledged that the print-out reflected that the perpetrator was "Oriental," and wearing some kind of camouflage or fatigue-type garment. However, Ms. Jackson later stated that the caller said she did not know whether the perpetrator was white or Oriental. The complainant called twice, the first time reporting an apparent burglary in progress, the second time reporting that she could then see the

suspect lying on the roof. The tape recordings of both calls were played for the jury.

New Orleans Police Department dispatcher Levette Joseph testified that on December 27, 1997, at 1:24 a.m., she was notified by a 911 operator of a possible burglary in progress. Over defense counsel's objection, Ms. Joseph testified to dispatches she made to police units pertaining to the call. She said that once at the scene, a police unit radioed that a male was in the alley at one point, and on the roof at another point. She gave a description of a white male, about forty years of age, wearing a dark color knit cap, and a blue or black army jacket. She also noted that Ms. Jackson had made an entry describing the perpetrator as Oriental.

Nedra Bell testified that she was a cosmetologist and the owner of "The Flaming Design," a hair salon located at 5307 St. Claude Avenue, one of four businesses located in a strip. After she entered her business on the morning of December 27, 1997, she noticed that her VCR was missing, and that someone had chiseled open her rear door. She notified police, and later learned that a neighbor had reported the break-in, that someone had been arrested earlier in the morning, and that her VCR had been recovered. She said the person who reported the burglary lived in an apartment behind the businesses, more specifically, behind Joe's Food Store. She indicated that

the distance from that apartment to the back of her business was approximately the same distance as from the witness seat in the courtroom to an unspecified courtroom door. She identified her VCR, and said the last time she saw it before the break-in, it had been inside of her business, underneath her television set. She did not know defendant; she had never seen him before; and she did not give him permission to enter her business, nor to take her VCR.

New Orleans Police Officer Charles Augustus participated in defendant's arrest on December 27, 1997. Officer Augustus testified, over the objection of defense counsel, that he received a dispatch of a business burglary in progress at Joe's Food Store. He looked through a fence line and observed a male fitting the description given by the dispatcher–wearing a camouflage jacket and a dark knit cap. The man was carrying an object under his arm, which he placed next to the fence. The man then started to climb over the fence. As the man reached the top of the fence, Officer Augustus identified himself, and the man dropped back into the yard and fled. The dispatcher notified the officer that the man had jumped onto the roof of a nearby building, and was lying down flat to conceal himself. The dispatcher later advised that the man was on another roof, whereupon Officer Augustus and other officers entered that building. Officer Augustus

heard some noise, and saw defendant enter a rear window of an apartment, at which time defendant was arrested. A VCR was recovered next to the fence where defendant had placed it. Officer Augustus identified the jacket defendant was wearing at the time of his arrest, and a hammer defendant had in his possession as he was attempting to climb the fence. Ms. Bell identified her VCR the next day. Officer Augustus agreed on cross examination that the police report another officer wrote in connection with the case mentioned nothing about anyone seeing defendant holding a VCR.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR

By his sole assignment of error, defendant claims the trial court committed reversible error in admitting hearsay evidence–testimony by two police dispatchers and Officer Augustus, as well as the introduction of tape recordings of the two citizen complaint calls.

In the instant case, Sandra Jackson, a police 911 operator, identified an audiotape of a 911 call made by the complainant. Prior to playing the tape for the jury, defense counsel asked to approach the bench, and a discussion was held outside of the presence of the jury. However, the record does not reflect that defense counsel objected to the playing of the tape, and

defendant did not object at any time to Ms. Jackson's testimony. 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. Spain, 99-1956, p. 11 (La. App. 4 Cir. 3/15/00), 757 So. 2d 879, 886; State v. Brooks, 98-0693, p. 9 (La. App. 4 Cir. 7/21/99), 758 So. 2d 814, 819, writ denied, 99-2519 (La. 2/25/00), 755 So. 2d 247. The failure to contemporaneously object to this evidence precludes defendant from raising any error regarding it. Although defendant later objected to the State's introduction of the audiotape at the close of the State's case, the tape had already been played for the jury, and its introduction was a matter of housekeeping. Defendant suffered no prejudice from the filing of the tape into evidence.

Police dispatcher Levette Joseph identified an audiotape of her dispatches, and responses from police officers at the scene. That tape was played for the jury. Again, defense counsel approached the bench and an off-the-record discussion was heard, but the record does not reflect any objection by defense counsel to the playing of the tape for the jury. However, defense counsel did later object on hearsay grounds to testimony by Levette Joseph concerning what she broadcast over the police radio, and what officers on the scene said to her in response. Counsel also objected to

the State's introduction into evidence of the audiotape itself at the close of the State's case. Finally, defense counsel objected on hearsay grounds to testimony by Officer Augustus as to what the dispatcher said over the police radio.

Hearsay is 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. La. C.E. art. 801(C); State v. Castleberry, 98-1388, p. 18 (La. 4/13/99), 758 So. 2d 749, 765, cert. denied, Castleberry v. Louisiana, __ U.S. __, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999); State v. Raby, 98-1453, pp. 8-9 (La. App. 4 Cir. 6/2/99), 738 So. 2d 699, 703, writ den. 99-2236 (La. 1/28/00), 753 So.2d 230. Hearsay is not admissible except as otherwise provided by the Code of Evidence or other legislation. La. C.E. art. 802; State v. Richardson, 97-1995, p. 13 (La. App. 4 Cir. 3/3/99), 729 So. 2d 114, 121, writ denied, 99-1087 (La. 9/24/99), 747 So. 2d 1119. Evidence is only considered hearsay if it is a "statement." See La. C.E. art. 801(C); State v. Armstead, 432 So. 2d 837, 840 (La. 1983). A statement is an oral or written assertion, or nonverbal conduct of a person, if it is intended by him as an assertion. La. C.E. art. 801(A).

It is well-settled that a police officer may testify to information provided by another individual without such testimony constituting hearsay,

if the testimony is offered to explain the course of the police investigation and the steps leading to the defendant's arrest. State v. Hawkins, 96-0766, pp. 4-5 (La. 1/14/97), 688 So. 2d 473, 477. This includes an officer's testimony as to a description of a suspect broadcast over the police radio. State v. Johnson, 530 So. 2d 641, 642 (La. App. 4 Cir. 1988), writ denied, 538 So. 2d 608 (La. 1989). Under these circumstances the information is not being offered for the truth of the mater asserted and, thus, it is not hearsay. See La. C.E. art. 801(C). However, while an officer can testify to such information to explain his conduct, this exception may not be employed as a "passkey" to bring before the jury the substance of the out-of-court information that would otherwise be barred. State v. Hearold, 603 So. 2d 731, 737 (La. 1992).

In the instant case, Officer Augustus testified that he received a call of a business burglary in progress, and observed an individual wearing a camouflage jacket and dark knit cap, which, he said, "was the same description given by our dispatcher, that came from a nearby neighbor who called it in." He then testified that the dispatcher notified him that the individual had jumped onto a roof and was lying flat to conceal himself. Officer Augustus stated the dispatcher later informed him that the individual was attempting to gain entry into a rear window. All of the testimony herein

discussed–except perhaps for the notation that the description came from the neighbor–was necessary for Officer Augustus to explain his actions. As for Officer Augustus' reference to what the neighbor had told the dispatcher, the dispatcher had already testified that any such information she relayed to officers had been obtained from a computer screen in front of her, on which appeared information that the 911 operator had entered into the system. The 911 operator, Ms. Jackson, had testified that any such information she gave to the dispatcher had been obtained from the complainant. Therefore, the jury knew that any information concerning the suspect had been given by the complainant. Further, because there was no defense objection to the playing of the tapes of the two 911 calls, the jury had already heard everything the complainant had told the 911 operator. This included the information concerning the suspect's description and his actions in evading apprehension by climbing onto a roof and attempting to enter an apartment.

Before Officer Augustus testified, defense counsel's first hearsay objections were to statements by police dispatcher, Ms. Joseph, when she was asked by the prosecutor to go through the information that she broadcast over the radio. Again, this was after an audiotape of her dispatches had been played for the jury, without any objection on the record from defense counsel. The trial court found that such testimony was a part of the res

gestae, and overruled the objection. La. C.E. art. 801 provides in pertinent part:

> **D. Statements which are not hearsay.** A statement is not hearsay if:
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> * * *
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> (4) Things said or done. The statements are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events, and which are necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction.

La. C.E. art. 801(D)(4) refers to evidence that has traditionally been referred to as the res gestae which, in Louisiana, is a broad doctrine. State v. Castleberry, 98-1388, p. 19 (La. 4/23/99), 758 So. 2d 749, 765, cert. denied, __ U.S. __, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999). In State v. Colomb, 98-2813 (La. 10/1/99), 747 So. 2d 1074, the Louisiana Supreme Court stated:

> The res gesate [sic] or integral act doctrine thus "reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness." Old Chief v. United States, 519 U.S. 172, 186, 117 S.Ct. 644, 653, 136 L.Ed.2d 574 (1997). The test of integral act evidence is therefore not simply whether the state might somehow structure its case to avoid any mention of the uncharged act or conduct but whether doing so would deprive its case of narrative momentum and cohesiveness, "with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict." Id.

98-2813 at p.p. 3-4, 747 So. 2d at 1076.

In State v. Milton, 99-2092 (La. App. 4 Cir. 5/17/00), 764 So. 2d 1134, this court stated that "[t]he res gestae doctrine includes not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed before, during or after the commission of the crime, if a continuous chain of events is evident under the circumstances." Id. at p. 764 So. 2d at 1138

In the instant case, although Ms. Joseph was connected to the crime and sequence of events surrounding the apprehension of defendant by virtue of her position as a dispatcher in contact with officers at the scene, the res gestae doctrine more properly is limited to testimony concerning statements by those who were present at the scene. That conclusion notwithstanding, everything Ms. Joseph testified to had already been revealed to the jury by the playing of the audiotape of her dispatches, and most of it through the playing of the audiotape of the 911 call. Moreover, the objectionable testimony by Ms. Joseph was essentially the same testimony subsequently given by Officer Augustus, virtually none of which was hearsay. Ms. Joseph also testified that officers on the scene reported a man on the roof, the very information that Officer Augustus later testified had been given to him by

Ms. Joseph. Additionally, Ms. Joseph said officers reported seeing a man in the alley. While this was hearsay, Officer Augustus testified that he saw a man through the fence fitting the suspect's description. Therefore, the substance of Ms. Joseph's hearsay testimony was later properly presented to the jury. Ms. Joseph's testimony in this regard was merely cumulative. Counsel also objected to testimony by Officer Augustus, most of which was admissible, as discussed above. Officer Augustus did testify, over the objection of defense counsel, that the next day Ms. Bell identified the VCR recovered at the scene as belonging to her. This was hearsay. However, Ms. Bell had already testified to that fact.

The erroneous admission of hearsay evidence is subject to the harmless error analysis. See State v. West, 95-0411, p. 8 (La. App. 4 Cir. 1/31/96), 669 So. 2d 545, 549-550, writ denied, 96-0502 (La. 5/10/99), 672 So. 2d 920, citing State v. Veals, 576 So. 2d 566, 568 (La. App. 4 Cir. 1991), writ denied, 578 So. 2d 931 (La. 1991). In Veals, this court set out the following factors to be considered when determining whether an error admitting hearsay evidence was harmless:

> 1) the importance of the witness's testimony; 2) the cumulative nature of the testimony; 3) the existence of corroborating or contradictory evidence regarding the major points of the testimony; 4) the extent of cross-examination permitted; and 5) the overall strength of the State's case. State v. Wille, 559 So.2d 1321, 1332 (La.1990).

576 So. 2d at 568.

To the extent that anything Ms. Joseph testified to was inadmissible hearsay, it was, first of all, cumulative in nature. The same goes for Officer Augustus' hearsay testimony that Ms. Bell identified the VCR as hers. Defense counsel cross examined Ms. Joseph, bringing out, among other things, that the suspect was supposedly wearing a blue or black army jacket, not a camouflage jacket, which defendant was wearing when apprehended. Ms. Joseph's testimony was not important; it simply confirmed the admissible testimony of Officer Augustus that he received dispatches of the suspect's description and updates on the suspect's location. Moreover, Ms. Joseph testified that she first received a description from the 911 operator that the suspect was Oriental, then later, that he was white. The record reflects that defendant is a black male. It is difficult to see how such testimony prejudiced defendant at all; rather, it appears to have benefited him. The strength of the State's case lay primarily in (1) Officer Augustus' testimony that he saw defendant behind the fence carrying an object which later turned out to be CR, and (2) Ms. Bell's testimony that the VCR belonged to her, and that she discovered after defendant's arrest that someone had pried open her rear door and taken it. This court has held such evidence sufficient to sustain a conviction for simple burglary–an

unauthorized entry with the intent to commit a felony or any theft therein. See State v. Johnson, 530 So. 2d 641 (La. App. 4 Cir. 1988), writ denied, 538 So. 2d 608 (La. 1989).

Accordingly, any error in allowing hearsay testimony by Ms. Joseph or Officer Augustus was harmless. The admission of the 911 operator and dispatcher audiotapes was clearly harmless error, as both had been played for the jury without objection by defense counsel. The errors complained of by the defendant did not contribute to the verdict.

There is no merit to this assignment of error.

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

CONVICTION AND SENTENCE AFFIRMED