

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2000-KA-1603**  
**VERSUS** \* **COURT OF APPEAL**  
**MICHAEL D. HARRIS** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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APPEAL FROM  
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT  
NO. 99-0589, DIVISION "A"  
Honorable Anthony D. Ragusa, Judge  
\* \* \* \* \*  
**Judge David S. Gorbaty**  
\* \* \* \* \*

(Court composed of Judge Charles R. Jones, Judge Max N. Tobias, Jr.,  
Judge David S. Gorbaty)

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**AFFIRMED**

Michael D. Harris appeals his conviction and sentence for possession of cocaine, alleging that he received ineffective assistance of counsel at trial. For the following reasons, we affirm the conviction and sentence.

**STATEMENT OF THE CASE:**

Michael D. Harris was charged by bill of information with possession of at least 28 but less than 200 grams of cocaine, a violation of La. Rev. Stat. 40: 967. He was found guilty as charged by a six-member jury, and subsequently was sentenced to serve twenty years at hard labor without the benefit of probation or parole for a minimum of ten years, and to pay a fine of \$50,000.00.

**STATEMENT OF THE FACTS:**

Charles Adams, Jr., testified that he is a narcotics agent with the Plaquemines Parish Sheriff's Office, and has participated in eighty to one hundred undercover drug purchases. He testified that on December 13, 1998, he was contacted by a confidential informant who informed him that several subjects, driving a 1995 green Ford Escort station wagon with

damage to the front end, were transporting a large amount of crack cocaine, and were at the Deuces Wild Lounge in Venice, Louisiana. He was also given a partial license plate number of "FEP." He stated that the confidential informant was known to the Sheriff's Office for quite sometime and had given reliable information that resulted in numerous convictions. As a result of the call he contacted Sergeant Gilbert who also was assigned to the narcotics division of the Sheriff's Office. Both men decided to meet in Venice, Louisiana.

When Adams arrived at the Deuces Wild Lounge, he set up a surveillance of the suspect's car that was parked in the parking lot of the lounge. Sergeant Gilbert arrived shortly thereafter, and the two officers continued to maintain surveillance of the suspect vehicle. Sgt. Gilbert contacted the confidential informant and asked him to arrange for a drug purchase. Adams continued the surveillance of the suspect vehicle while Gilbert and the confidential informant telephoned one of the suspects, and ordered \$200.00 of crack cocaine to be delivered to room 27 of the Venice Inn Motel. About forty minutes later, the suspect vehicle was driven into the parking lot of the motel, and was parked in front of room 27. Adams and Gilbert drove their vehicles behind the suspect vehicle to block it in, identified themselves as police officers, and ordered the four suspects out of

the suspect vehicle. The suspects were separated and questioned. The driver was identified as Troy LaJaunie, the front seat passenger was identified as Jimmy Deloche, the left rear seat passenger was identified as the defendant, Michael Harris, and the rear right seat passenger was identified as Myra Breaux.

Adams stated that he first questioned Myra Breaux, who was extremely nervous and was stuttering. When questioned, she would hang her head and would not answer right away. She did, however, explain that she had come to the motel to see someone named "Chucky," whose last name she did not know. In Adams opinion, Breaux acted like someone who was trying to hide something. At this time, Adams called for a backup police unit, and Deputy Lee Jercovich joined them at the scene.

Adams questioned Deloche and LaJaunie. Deloche denied that there were drugs either on his person or in the vehicle. He stated that he had come to the motel to see someone with whom he worked, but was unable to provide a name. LaJaunie denied there were drugs in the vehicle, but did admit to having a partially smoked marijuana cigarette in his pocket, which Adams seized. LaJaunie stated that they had come to the motel to see someone, but he did not know the identity of the person.

Adams then questioned Michael Harris, who refused to cooperate.

Adams stated that LaJaunie, the driver, gave them permission to search the vehicle. Adams requested a narcotics sniffing canine to be transported to the scene. After the canine alerted on the vehicle, the officers searched the vehicle and found bags of crack cocaine hidden behind a door panel near the left rear seat belt. Adams testified that prior to requesting the canine, Breaux admitted to him that there were drugs in the vehicle. She told him that she was afraid of Harris, who was her boyfriend, because he had beaten her with a pistol several weeks earlier. Adams testified that he observed several knots and bruises on Breaux's head. She admitted to Adams that she has carried "dope" for Harris, and admitted that she had a quarter ounce of cocaine in her bra that night. Adams called for a female deputy, who took Breaux into the motel office to search her. Two plastic baggies containing crack cocaine were found in the pocket of a jacket Breaux was wearing. Adams stated that Breaux admitted removing the cocaine from her bra and putting it in the jacket pocket so that it would appear to belong to someone else, and Harris would not get into trouble. The jacket belonged to Troy LaJaunie. While being searched, Breaux told Officer Gilbert that narcotics were hidden in the side panel of the car between the front and back seats.

Agent Adams testified that none of the officers involved made any promises to any of the suspects that they would receive special treatment in

exchange for their testimony. After the cocaine was seized from the vehicle, Adams went to the front office of the motel and verified that no one had rented room 27 that day. At that point, all of the subjects were placed under arrest.

Adams later identified the owner of the vehicle as David Landry, who he located at the Deuces Wild Lounge. Deputy Jercovich interviewed Landry and asked him to return voluntarily to the motel parking lot and speak to the narcotics officers. Landry agreed, and told Agent Adams that he had driven down to Venice with the arrested subjects to party at the lounge. He denied knowing anything about the cocaine in the vehicle. Landry was then placed under arrest.

On cross-examination, Agent Adams testified that when the four suspects were taken from the vehicle, all but Myra Breaux were handcuffed. Adams stated that Landry told him that he had loaned the car to the four suspects. He denied that Landry told him that he was responsible for the drugs found in the car. Adams stated that he told Landry, LaJaunie, Deloche and Breaux that he would inform the district attorney that they had been cooperative, but he did not make any promises to them. He contradicted his earlier direct testimony, stating that the cocaine was found on the right side of the vehicle and that Harris was seated on the left side of the car.

On re-direct examination, Adams testified that he had done other traffic stops in which evidence was found secreted in gas tanks, trunks, under hoods and under the body of the vehicle.

On re-cross-examination, Adams stated that when he drove his vehicle behind the suspect vehicle, none of the suspects attempted to duck or hide anything. The only suspect found with cocaine on their person was Myra Breaux.

On re-re-direct examination, Adams stated that only Breaux informed the officers that drugs were in the vehicle.

David J. Landry testified that he is from Gretna, Louisiana and that he became acquainted with Harris through Myra Breaux, about one month before the incident. He testified that for the three weeks prior to his arrest, he was living with Harris and Breaux in their apartment in Gretna. He admitted that he was at the Deuces Wild Lounge in Venice, Louisiana, on December 13, 1998, when he was arrested and transported by a deputy sheriff to the Venice Inn Motel. He admitted that the subject vehicle was his. He stated that he gave Harris permission to use the car that day while Landry and his girlfriend, Dawn Bourgeois, went Christmas shopping using Dawn's car. Around noon, they all returned to Harris' apartment and decided to drive to Venice in Landry's vehicle. He admitted that they had

made several prior trips to Venice on Thursday and Friday of the same weekend, and that he also intended to look for a job in Venice. When they left, Harris drove because Landry had been drinking. Landry testified that on the way to Venice, they stopped in Port Sulphur at the house of Harris' friend, "Poker Joe." Harris and Breaux were in the kitchen, and he and LaJaunie were in the living room when Poker Joe brought out crack cocaine on a tray. Landry, his girlfriend and LaJaunie smoked some of the crack. He stated that they were provided with the cocaine to "keep them entertained." Landry went into the kitchen and saw a large amount of crack cocaine on the table. He did not know who was the dealer of the crack. After leaving Poker Joe's house, they stopped at a Circle K grocery store to buy gas, beer and cigarettes, and then proceeded to the lounge. They arrived at the Deuces Wild Lounge around 7 p.m., where they played slot machines, drank and danced. Landry admitted that he smoked crack that Harris gave him in the men's bathroom. He claimed that because he was part of "the group" he did not have to pay for the cocaine. He stated that the group planned on renting a motel room for the night. He testified that he remained at the bar that night, but that Harris and Breaux left the bar twice. The last time Harris and Breaux left, Breaux told Landry that they were going to the Venice Inn Motel, but did not tell him why. Sometime later the deputy



sheriff informed him that his car had been seized, and he was asked to go to the Venice Inn Motel. Landry stated that he did not lie in order to gain favor with the police. He denied that any of the drugs found in the car belonged to him. He admitted that he pleaded guilty in this case to possession of cocaine, claiming that he did so because he was a user, and that he would only be sentenced to serve five years. However, his sentence was suspended and he was given two years active probation and three years inactive probation. He was ordered to pay a fine of \$700.00, and, as a special condition of probation, was ordered to attend drug rehabilitation.

On cross-examination, Landry denied that Agent Adams told him that he would ask the district attorney to help him. He was allowed to plead guilty to simple possession despite the fact that the 28 grams of cocaine were found in his car. He admitted that he was in jail for 5 months in lieu of \$100,000 bond, but was released on his own recognizance prior to trial.

On re-direct examination, Landry again stated that the drugs found in the car did not belong to him. He stated that Harris had given him two rocks of crack cocaine at the Deuces Wild Lounge that night, as well as at Poker Joe's house earlier that day.

Myra A. Breaux testified that on December 13, 1998 she was arrested in Venice, Louisiana, for possession of cocaine and that she subsequently

pleaded guilty to the charge. Breaux stated that she had known Harris, who went by the nickname "Voice Box," for a year prior to this incident, and that they had been living together as a couple in Gretna for about six months. She stated that she knew David Landry, who had been living with her and Harris, and Troy LaJaunie, who lived in the apartment below hers. Breaux testified that she had known Jimmy Deloche for a couple of years. She stated that on December 13, 1998, she and Harris used Landry's car to go to Avondale, Louisiana, to eat. She stated that Harris also went to Avondale to visit either his cousin or a friend. At some time during the day, Harris dropped her off at a fast food restaurant in Avondale and later picked her up. She knew that Harris dropped her off at the restaurant because he was going to see about getting some drugs. When they returned to their apartment they discussed going to Venice with David Landry and his girlfriend.

She testified that she, Harris, LaJaunie, Landry, and Dawn Bourgeois all drove to Venice in Landry's car, with Harris driving. They stopped at Poker Joe's house where she saw crack cocaine on the kitchen table. Harris and Poker Joe were "cutting" the drugs into pieces of rock in the kitchen, while the others smoked crack that Poker Joe brought into the living room on a tray. She did not smoke any. At some point, Poker Joe took all of the drugs off of the table and left the house. Harris gave her a package of dope,

worth about \$200, to hold, which she put in her bra. Breaux admitted that she previously carried drugs and sold them for Harris. She also dealt drugs for other people. After leaving Poker Joe's house, they drove to the Deuces Wild Lounge in Venice where they drank and danced. Breaux stated that she had been to the lounge several times before, and admitted that she made about five sales of the crack that night, and gave the money to Harris. She testified that she, Harris, and LaJaunie left the bar to go to the Venice Inn Motel because "Les," another guy at the bar, told her someone at the motel wanted to buy some drugs. LaJaunie drove the car. As they drove into the motel parking lot, the police drove behind them and told them to get out of the car and sit on the ground. She was separated from the men and questioned. The police told her that they knew that they were selling drugs, and that if she cooperated she would "walk." She believed that they would let her go. Breaux testified that she was scared and had been drinking and smoking crack, and began telling the officers that she had drugs in her bra and that there were drugs in the car. A female deputy searched her and found drugs inside a pocket of the jacket Breaux was wearing. The jacket belonged to Troy LaJaunie. Breaux admitted putting the drugs from her bra into the jacket to make it look like the dope belonged to someone else. She stated that Harris did not want her to use drugs, and that is why they would

fight. She admitted that she would sometimes “pinch” off some of the drugs she carried for her own use, and would also keep some of the money from sales. Breaux admitted that Harris had hit her in the past, and that she told the deputies so that night. She assumed that the drugs found in the car belonged to Harris, because the others did not have access to the car that day, and she saw Harris “messing” with the panel in the car that day. She stated that Poker Joe gave LaJaunie and Landry drugs earlier that day. Breaux testified that no one left in the car from the Deuces Wild Lounge except her and Harris. She pleaded guilty to possession of cocaine and received five years probation. She was ordered to pay a fine and to attend drug rehabilitation. She stated that she pleaded guilty because she was in possession of cocaine. She stated that all of her testimony was the truth and that she did not receive any favors from the court or the state in return for her testimony.

On cross-examination, Breaux testified she did not see Harris buy drugs at Poker Joe’s house, but that she did see David Landry look inside the panel in the car where the drugs were found later that night. She denied that Harris beat her to force her to carry drugs, or that she told Agent Adams that Harris beat her. She denied having bruises on her head that day. She pleaded guilty to simple possession of cocaine, and denied that she received

any special treatment or promises to testify against Harris. She had also spent 5 months in jail, but was released on her own recognizance before trial.

On re-direct examination, Breaux testified that she and Harris did fight. She admitted having a “knot” on her head when she spoke to Agent Adams, but denied showing it to him. She said that she was not afraid to testify against Harris, and that her testimony was the truth. She admitted that testifying against Harris was upsetting to her because she still loved him.

On re-cross examination, Breaux testified that when she pleaded guilty she knew that she would receive probation because that was in the plea bargain. She stated that she was told if she did not testify against Harris she would have to go to trial.

Troy LaJaunie testified that on December 13, 1998, he was arrested for possession of cocaine. He stated that Harris was his upstairs neighbor, and Landry and the others were friends. On the day of the arrest, Harris asked him if he wanted to take a ride to the Deuces Wild Lounge. He testified that he had been there several nights before. Harris drove to Venice, while LaJaunie sat in the rear seat and smoked crack. He said that during the drive, the group stopped at Harris’ friend's house and at a gas

station. After they arrived at the lounge, he, Deloche, Breaux and Harris drove to the motel. Harris gave him the keys and told him to drive Landry's car. As they drove into the motel parking lot, the officers drove in behind them and told them to get out of the car. LaJaunie gave the officers permission to search the car because he did not have anything to hide. He told the officers that he did not have any drugs on his person, and could not remember if he had used drugs that night. He did not hear anyone say to whom the drugs belonged. He testified that while still at the Deuces Wild Lounge, Harris asked him to go to the parking lot and get "something" out of the side panel in the car. He could not get the panel open, so Harris accompanied him back to the car. He saw Harris take something wrapped in black tape from inside the panel in the car. He could not see what it was, and did not know what Harris did with what he removed from the door panel. He claimed that Harris asked him in jail to take the rap for him. At first he agreed because Harris had a clean record, and had been trying to help him stop using drugs (even though Harris gave him drugs to use). Later he refused because he would have been facing a long jail sentence because of prior offenses. He pleaded guilty to possession of cocaine.

On cross-examination, LaJaunie testified that he pleaded guilty to possession of cocaine because he was smoking dope that night.

## **DISCUSSION:**

### **ASSIGNMENT OF ERROR NUMBER 1:**

By his sole assignment of error Harris asserts that trial counsel was ineffective for allowing patently inadmissible “other crimes” evidence to be admitted without objection or motion for a mistrial. Specifically, he points to the testimony of Agent Adams who testified that Myra Breaux told him that Harris had beat her on her head with a pistol two weeks earlier. Adams claimed that Breaux showed him the knots on her head and that he observed bruises on her. During Breaux’s testimony the prosecutor further pursued this line of questioning. Breaux was questioned about the nature of her relationship with Harris. She admitted that Harris had struck her in the past and that they had engaged in several fights. Harris argues that this testimony was irrelevant pursuant to La.Code Evid. art. 402 and, that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice because it was offered only to demonstrate that Harris was a person of bad character. La.Code Evid. arts. 403 and 404. Furthermore, Harris argues that the offending testimony entitled him to a mistrial pursuant to La. Code Crim. Proc. art 770(2). He asserts that given the fact that the verdict rested primarily on the credibility of the testimony of the co-defendants, all of whom had reason to protect themselves, it must be

concluded that the offending testimony contributed to the verdict, thereby, rendering counsel ineffective for failing to object and causing prejudice to Harris. Specifically, Harris asserts that without the offending testimony, the jury would have found him not guilty or guilty of the lesser included offense of simple possession.

Generally, the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post-conviction relief, filed in the trial court, where a full evidentiary hearing can be conducted. Only if the record discloses sufficient evidence to rule on the merits of the claim do the interests of judicial economy justify consideration of the issues on appeal. See, *State v. Tucker*, 95-0030 (La.App. 4 Cir. 9/18/96), 682 So.2d 261.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), the Supreme Court enunciated the two-part test to be used in assessing a claim of ineffective assistance of counsel. A defendant must show that counsel's performance was deficient and that the deficiency prejudiced him. Both showings must be made to establish that counsel was so ineffective as to require reversal. *State v. Hongo*, 96-2060 (La. 12/02/97), 706 So.2d. 419; *State v. Sparrow*, 612 So.2d 191, 199 (La.App. 4 Cir. 1992).

Counsel's performance is ineffective when it can be shown that he



made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Strickland* at 686, 104 S.Ct. at 2064. 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 this burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome". *Strickland* at 694, 104 S.Ct. at 2068. However, if the facts adduced at trial so overwhelmingly point to defendant's guilt that even the most competent attorney would be unlikely to have obtained an acquittal, the claim of ineffective assistance must fail. *Green v. Lynaugh*, 868 F.2d 176 (5 Cir. 1989).

The record is sufficient to review Harris' claim.

Generally, evidence of other crimes is inadmissible at trial because of the danger that the trier of fact will convict the defendant of the offense for which he is being tried based on his prior criminal or bad acts. *State v. Davis*, 97-0817, p. 6 (La.App. 4 Cir. 3/24/99), 735 So.2d 708, 711.

The last sentence of La. Code Evid. art. 404(B)(1) is the codification of the principle of *res gestae*. *Davis*, 97-0817 at p. 6, 735 So.2d at 711. If

evidence is admissible under the *res gestae* exception, it is not subject to any notice requirements. *Id.* The Louisiana Supreme Court commented on the *res gestae* exception in *State v. Brewington*, 601 So.2d 656, 657 (La.1992), stating:

This court has approved the admission of other crimes evidence when it is related and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it. *State v. Boyd*, 359 So.2d 931, 942 (La.1978); *State v. Clift*, 339 So.2d 755, 760 (La.1976). In such cases, the purpose served by admission of other crimes evidence is not to depict the defendant as a bad man, but rather to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. McCormick, Law of Evidence 448 (2d ed.1972). The concomitant other crimes do not affect the accused's character, because they were done, if at all, as parts of a whole; therefore, the trier of fact will attribute all of the criminal conduct to the defendant or none of it. And, because of the close connection in time and location, the defendant is unlikely to be unfairly surprised. 1 Wigmore, Evidence § 218 (3d ed.1940). *State v. Haarala*, 398 So.2d 1093, 1097 (La.1981).

Clearly, the testimony of Adams and Breaux to the effect that Harris was violent toward Breaux in the past did not fall within the principle of *res gestae*. The testimony was far removed from the charge of possession of cocaine and did not serve to prove Harris' guilt. Therefore, it would be correct to conclude that the testimony was not admissible and that counsel should have objected and moved for a mistrial. However, the State argues counsel could have justifiably believed that the testimony of Adams and

Breaux showed a revenge factor against Harris that reflected on the credibility of Breaux's testimony regarding the ownership of the drugs. Defense counsel could have made a strategic decision not to object to Adams' and Breaux's testimony as part of the trial strategy. 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).

Further, Harris has failed to show that the result would have been different if counsel had objected. The facts adduced at trial overwhelmingly support Harris' guilt. A person found in the area of the contraband can be considered in constructive possession if the illegal substance is subject to his dominion and control. *State v. Trahan*, 425 So.2d 1222 (La. 1983).

In the instant case, Breaux, Landry and LaJaunie all testified that Harris was part of the group that drove to Venice, Louisiana. The testimony

adduced at trial clearly placed Harris inside the suspect vehicle where the drugs were found. Harris drove with LaJaunie and Breaux to the Venice Inn Motel where the drugs were to be sold to a buyer in room 27. The testimony at trial also placed Harris at the home of Poker Joe where cocaine was openly present, and where he was observed “cutting” cocaine. Breaux testified that Harris gave her the cocaine found on her person. She also testified that the money she made from several cocaine sales at the Deuces Wild Lounge was given to Harris. Landry testified that Harris gave him two rocks of crack cocaine, which he smoked at the Deuces Wild Lounge on the night in question. LaJaunie testified that Harris earlier that night retrieved an object wrapped in black tape from the inside door panel where the cocaine was found. Thus, it is unlikely that the jury verdict would have been different if counsel had objected to the complained of testimony. Even without this testimony the evidence was sufficient to support the verdict. Harris has failed to show prejudice or that trial counsel’s performance was so deficient as to deprive him of a fair trial.

**ERRORS PATENT:**

A review for errors patent reveals none.

Thus, for the reasons assigned above, Michael D. Harris’ conviction and sentence are affirmed.

**AFFIRMED**