**NOT DESIGNATED FOR PUBLICATION**

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| **STATE OF LOUISIANA** | * | **NO. 2003-KA-2154** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **LLOYD GAINER** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 424-426, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
**Judge Terri F. Love**
* * * * * *

(Court composed of Judge James F. McKay III, Judge Terri F. Love, Judge Max N. Tobias Jr.)

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**AFFIRMED**

Defendant was convicted of La. R.S. 14:95.1 relative to being a convicted felon in possession of a firearm by a jury. He was sentenced to ten years at hard labor, to be served without the benefit of probation, parole, or suspension of sentence, and imposed the mandatory fine of $1,000. On appeal the appellant alleges trial counsel was ineffective causing serious prejudice to the defendant, resulting in his conviction, without which he would have been acquitted. For the reasons assigned below, we affirm the defendant's conviction and sentence.

**PROCEDURAL HISTORY AND FACTS**

On September 4, 2001, the State filed a bill of information charging Lloyd Gainer ("Gainer") with one count of violating La. R.S. 14:95.1 relative to being a convicted felon in possession of a firearm. At his arraignment, he entered a not guilty plea. A hearing on the pretrial motion to suppress evidence was held and ultimately denied. The defendant was tried before a twelve-person jury that returned a guilty verdict. A week later, new counsel enrolled on behalf of the defendant. A motion for new trial was

filed arguing prior counsel was ineffective. Testimony was subsequently taken and the motion was ultimately denied. The trial judge sentenced Gainer to ten years at hard labor, to be served without the benefit of probation, parole, or suspension of sentence, and imposed the mandatory fine of $1,000. The defendant orally moved for an appeal, which was granted.

Officer Clay Clement of the New Orleans Police Department's Seventh District responded to a call regarding a suspicious person in front of the Read Market on August 5, 2001. The dispatcher relayed a description of the person as a black male wearing a white shirt and black pants. Additionally, the dispatcher provided information regarding a gold Oldsmobile parked in the store lot, including the license plate number, and that the subject might be armed.

Officer Clement testified at trial that, after he arrived he observed the defendant whose clothing matched the description provided. The officer also identified the gold Oldsmobile and positioned his police vehicle behind the car. Gainer was approaching the Oldsmobile when Officer Clement stopped him and stated that he matched the description of a suspicious person and was under investigation. The defendant informed the officer that he intended to purchase a money order, but the store did not have any. As

Gainer attempted to leave, he positioned his hand near his pants pocket. Officer Clement immediately directed him to place his hands on the car; after he complied, the officer saw the black butt of a gun protruding from the defendant's pocket. The defendant was then arrested. In open court, Officer Clement identified the firearm he seized from the defendant by its partially obliterated serial number.

During cross-examination, Officer Clement acknowledged that the defendant did not run or attempt to flee the scene. He also testified that the defendant made no formal statements, but did state his brother had given him the gun for protection. Defense counsel inquired about the ownership of the weapon, and Officer Clement responded that the follow-up investigation revealed that the gun was stolen. The State objected citing the information was hearsay. The trial court sustained the objection not allowing the fact that the gun was stolen to enter the record.

The State presented no further witnesses. Prior to the commencement of trial, both parties stipulated that the defendant had been previously convicted of attempted armed robbery in 1997. The State introduced the certified copies of the documents from that record without objection from the defense.

The defense called three witnesses at trial. The first was Terry

Johnson ("Johnson"), who stated that he had known the defendant his entire life and considered him a brother. Johnson testified that he and the defendant were the victims of a carjacking on July 1, 2001. Johnson identified a copy of the police report relating to this crime.

Johnson further testified that, approximately one month after the July robbery, he was followed from a different club by the same person and eluded the robber by driving to the New Orleans Police Department's Fifth District police station. The following day, Johnson's car was stolen from his home. On cross-examination, Johnson admitted that he was not with the defendant on the day that he was arrested.

The second defense witness was Christie Chapman ("Chapman"), who identified herself as the defendant's girlfriend at the time of the arrest. She had been in the defendant's company the entire day of the arrest and recounted the day's events. The two were at the defendant's home in the Carriage House apartment complex at or about 1:00 p.m., when she heard glass breaking. Chapman stated she went into the living room, saw that the window had been broken, and saw the defendant picking up a gun from the floor. She admitted that she saw the defendant put the gun in his pocket and that he was not supposed to have a gun.

Chapman further testified that after getting dressed they drove to the

Read Market to obtain a money order and call the police because they did not have a phone in the apartment. She walked across Read Boulevard to use a pay phone; at that time she realized the defendant was being arrested.

The defendant was the third and final witness. He confirmed the previous testimony of Johnson and Chapman regarding the carjacking and the broken window. The defendant added that on the day of his arrest he saw the person who had robbed him and Johnson previously outside the Read Market. Shortly thereafter someone broke his window, and the gun fell inside. He admitted picking it up and putting it in his pocket. He corroborated Chapman's testimony that they went to the store to buy a money order by introducing a money order dated August 5, 2001, the date of the defendant's arrest.

The defendant testified that he kept the gun in his pocket because he felt his life was threatened. He acknowledged that he had a felony conviction for attempted armed robbery and should not possess a gun.

Subsequent to the defendant's conviction, his new attorney filed a Motion for New Trial arguing the defendant's trial counsel was ineffective. The first witness at the post-trial hearing was Shantel Fochey ("Fochey"), who testified that she was a former neighbor of the defendant at the Carriage House apartments. Fochey testified that on the day of the defendant's arrest,

she heard glass break and saw two boys running down the stairs. She went outside and saw that the window glass had been broken at the defendant's apartment. Fochey further testified that she later told the defendant's mother and his former attorney, Benny George, what she had observed. She stated she thought she was supposed to be called for the defendant's trial, but was not. When questioned about the year the incident occurred, Fochey was unsure whether it was 2001 or 2002.

The second witness at the May hearing was the defendant's mother, Glenda Gainer Williams ("Williams"). She testified that she provided the defendant's trial attorney, Benny George, with pictures of the broken glass in the apartment, a bill for the damage (which she paid), and the names and addresses of four witnesses, Katelin Hunter ("Hunter"), Fochey, Chapman, and Johnson. According to Williams, Hunter would have testified that she was present at the Read Market when the defendant was arrested and that he came inside the store asking for help because he had just been robbed. Chapman would have testified that she was in the apartment when two boys came because "they wanted the car." Williams testified that the two boys had previously robbed the defendant and Johnson and now they were trying to break into the defendant's apartment. She testified that Johnson would have testified that he and the defendant had been robbed by two males who

told them they would come “back at them.” Williams testified that she had given Benny George a copy of the police report from the incident involving the defendant and Johnson.

Hunter was called to testify when the post-trial motion hearing continued. Hunter testified that she was not previously acquainted with the defendant nor did she recall the date of his arrest. However, she was present when he was arrested at the Read Market. Hunter stated that the defendant ran into the store saying he needed help because he had been robbed. Suddenly, the police came and arrested him. She stated that she had never seen him before and never saw him after the arrest.

In further testimony, Hunter stated that she was at the Read Market in line to buy a money order when the defendant entered the store. She testified that she never spoke to the police because she did not “interfere in that type of business.” Instead, Hunter got involved because the defendant’s mother came to the store and asked everyone if they had witnessed the arrest. The defendant’s mother obtained Hunter’s name and address and later contacted her to let her know that she might be needed to testify at the defendant’s trial. Hunter stated that she was never contacted about testifying at the trial by an attorney for the defendant.

The trial court denied the Motion for New Trial. Subsequently, the

defendant filed this appeal asserting the following six assignments of error:

1. Trial counsel's failure to object and exclude evidence of an obliterated serial number constituted ineffective assistance of counsel;
2. Trial counsel's introduction of evidence that the gun the defendant possessed was stolen, constituted ineffective assistance of counsel;
3. Trial counsel was ineffective when, after introducing evidence of a crime not charged, he failed to argue his theory or request the proper jury instruction;
4. Trial counsel was ineffective for not requesting a limiting instruction on crimes not charged;
5. Trial counsel was ineffective for not requesting an instruction concerning the right to arm in self-defense;
6. Trial counsel was ineffective for failing to call witnesses for defendant, which witnesses were available.

**ERRORS PATENT**

A review of the record for errors patent reveals that there are none.

**ANALYSIS**

Defendant assigns as error that his counsel at trial was ineffective to the extent that serious prejudice, his conviction, resulted. He identifies and argues six mistakes by his counsel in connection with this assignment of

error.

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. *State v. Jones*, 2002-2433, p. 3 (La. App. 4 Cir. 6/18/03), 850 So.2d 782, 785, *writ denied* 2003-1987 (La. 1/16/04), 864 So.2d 625. An exception is recognized when the record contains sufficient evidence to rule on the merits of the claim. In the latter context, the interests of judicial economy justify consideration of the issues on appeal. *Id.*

Although the appellant does not specifically assign the trial court's ruling on the motion for new trial as error, the claims regarding his counsel's conduct were raised in the motion, and testimony was taken on two separate days. We find the record is sufficiently developed for the issue of ineffectiveness of counsel to be considered and not relegated to post conviction relief proceedings.

A defendant's claim of ineffective counsel is to be assessed by a two-part test. *State v. Jones*, 2002-2433, pp. 4-5 (La. App. 4 Cir. 6/18/03), 850 So.2d 782, 785-86, *citing Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that

deficiency prejudiced him. 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*, 466 U.S. at 686, 104 S.Ct. at 2064. Counsel's deficient performance will have prejudiced the defendant if the defendant 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 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*, 466 U.S. at 693, 104 S.Ct. at 2067. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. *State v. Sparrow,* 612 So.2d 191, 199 (La.App. 4th Cir.1992).

**ASSIGNMENTS OF ERROR 1-4**

The appellant identifies six specific failures on the part of his trial counsel. The first four are related to what the appellant considers inappropriate admission of other crimes evidence. He argues that counsel first failed to object when Officer Clement testified that he could identify the gun he seized because the serial number was partially obliterated. The appellant suggests that the obliterated number was inadmissible evidence of

another crime. The trial counsel's error was then compounded, according to the appellant, because trial counsel on cross-examination specifically elicited testimony from Officer Clement that the police determined the gun was stolen. The appellant suggests that trial counsel elicited the information that the gun was stolen in a "lame attempt to discredit the State's allegation of obliteration." He argues further that counsel's question to elicit that the gun was stolen rendered him ineffective because it allowed evidence of another crime to go before the jury. The prejudicial effect of the admission of these other crimes allegedly was compounded because trial counsel did not request a jury instruction regarding the use of other crimes evidence, nor did he object when one was not given.

The trial transcript and the jury instruction transcript factually support the appellant's allegations regarding the testimony from Officer Clement and the lack of any objection to the jury instructions, which did not include any instructions on other crimes evidence. However, the facts do not support the appellant's arguments.

We have recognized that if an alleged 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. 4th 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." *State v. Brook*s, 505 So.2d 714, 724 (La.1987*), cert. denied, Brooks v. Louisiana,* 484 U.S. 947, 108 S.Ct.337, 98 L.Ed.2d 363.

In the case *sub judice*, the defendant's trial attorney presented witnesses, the defendant and Chapman, to show *how* the defendant came into possession of the firearm. He did not attempt to show the defendant did not possess it. Rather, through the testimony of the defendant and Johnson, trial counsel raised the possibility that an unknown assailant was pursing the defendant and Johnson. Trial counsel made a conscious decision to reveal the gun was not registered to the defendant or to anyone who was related to him, which resulted in the jury learning that the gun had been stolen. However, there was no attempt by the State to prove the defendant had stolen the gun. We find this to be an example of trial strategy.

**ASSIGNMENTS OF ERROR 5-6**

In the fifth and six specific allegations of ineffective assistance of counsel, the appellant complains that his trial attorney failed to request a jury instruction on self-defense and failed to present the additional available witnesses regarding the defendant's reason for having the gun on his person.

In *State v. Blache*, 480 So.2d 304 (La. 1984), the Louisiana Supreme Court held that self-defense or defense of others may provide a defense to a charge of felon in possession of a firearm. *State v. Jones*, 539 So. 2d 866, 868 (La. App. 4th Cir. 1989). However, the holding is subject to this limitation:

> [W]hen a felon is in imminent peril of great bodily harm, or reasonably believes himself or others to be in such danger, he may take possession of a weapon for a period no longer than is necessary or apparently necessary to use it in self-defense, or in defense of others. *Id*.

In *Jones*, the defendant, who was a convicted felon, possessed a firearm after three men attempted to rob the defendant's fiancée. After the robbers fled the scene, the defendant took possession of his fiancée's handgun and retained possession as he flagged down the police, who arrested him. The police officers testified that they went to the location of the defendant's arrest in response to a call that a man was waving a gun around. According to the police, when they arrived the defendant had the gun concealed in a holster in his belt. This court concluded the defendant was not in imminent danger when he possessed the firearm, and thus he was not entitled to a jury instruction on self-defense. *Jones*, 539 So.2d at 868.

In the case at bar, the defendant was not entitled to a jury instruction on self-defense as justification for his possession of a firearm; thus, his

attorney cannot be considered ineffective for failing to request such an instruction. The defendant's testimony indicated that he armed himself after his apartment window was broken. Fochey, one of the witnesses whom the appellant contends should have been called at trial, testified that the two boys who broke the window fled immediately down the stairs. Hunter, the other witness at the post-trial motion hearing whom the appellant contends should have been called at trial, testified to a version of events to which no other defense witness testified. Hunter's testimony was simply that the defendant sought help because he had just been robbed; his continued possession of a firearm after allegedly just having been robbed clearly did not appear likely.

If we rely on the testimony of Chapman and the defendant, it only establishes that someone attempted to break into their apartment and the defendant armed himself. The two waited for some period of time, then left the apartment to obtain a money order at the Read Market and to call the police. Earlier that day, according to the defendant, he had seen the man who had robbed him and Johnson at the same market where he decided to go for a money order. The defendant apparently made no attempt to call the police at that time. Moreover, on cross-examination the defendant conceded that he did not drive to the Seventh District police station which was less

than one mile from the Read Discount Market. Instead, the defendant drove to the market where he had earlier seen the robber while Chapman walked across the street to the drugstore to call the police.

Based on these facts, the defendant was not entitled to a jury instruction on self-defense, and therefore he was not prejudiced by counsel's failure to ask for one. Furthermore, even if Hunter and Fochey had testified at the trial, it is unlikely the outcome of the trial would have been different. We find the defendant admitted to possessing the firearm, knowing he had no legal right to do so, and he was not in immediate danger at the time he armed himself.

Accordingly, the trial counsel's defense was not successful because the pertinent facts and legal principles did not support it, yet it was also the only possible defense available. We find trial counsel's decision to pursue this defense was a valid trial strategy. Therefore, the appellant's argument that his counsel was ineffective is without merit.

**CONCLUSION**

For the foregoing reason, we affirm the trial court's denial of defendant's Motion for New Trial and the defendant's conviction.

**AFFIRMED**