NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2008-KA-0517**
VERSUS	*	**COURT OF APPEAL**
ANTHONY C. TAYLOR	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 472-387, SECTION "D"
Honorable Frank A. Marullo, Judge
* * * * * *
Judge David S. Gorbaty
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(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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CONVICTION AFFIRMED;
REMANDED

Anthony Taylor appeals his conviction for simple burglary. For the following reasons, we affirm the conviction, and remand the matter for consideration of Taylor's motion for reconsideration of sentence.

STATEMENT OF THE CASE:

On August 21, 2007 the State filed a bill of information charging the defendant-appellant Anthony Taylor with one count of simple burglary, a violation of La. R.S. 14:62. On December 13, 2007 the defendant was tried by a six-person jury which found him guilty as charged. He was subsequently sentenced to serve six years at hard labor. The court also granted the defendant's motion for an appeal; however, the trial court did not make a ruling on the defendant's motion for reconsideration of the sentence, which the defense filed for record purposes only.

Initially, a brief was filed by appointed counsel on Taylor's behalf, asking for a review of the record for errors patent. Original counsel also filed a motion to withdraw. Subsequently, another appointed attorney enrolled as counsel of record. He filed a motion to strike the original appellant's brief, which motion was granted. A new brief was filed on September 30, 2008. Additionally, the request of the defendant pro se to review the record and file a supplemental brief was

granted on July 15, 2008, however, no supplemental brief was ever filed by the defendant.

STATEMENT OF THE FACTS:

In the afternoon on August 12, 2007 Officer Leroy Matthews and his partner, Officer Terrel Seever, responded to a call of a burglary in progress at the Universal Furniture store located on St. Claude Avenue. The store had been closed since Hurricane Katrina struck New Orleans two years earlier. The officers turned onto St. Roch Avenue from St. Claude, and observed the side door of the business closing behind the defendant, who was "walking" a bed out of a door. The bed appeared to be a full-sized day bed, and the defendant was moving the mattress and frame toward St. Claude Avenue. Officer Matthews was less than ten feet from the defendant when he made these observations. The officers immediately exited their vehicle; Officer Seever ordered the defendant to the ground. The defendant did not comply at first, but instead he dropped the bed and took a position which Officer Matthews described at trial as either flight or fight. Officer Seever sprayed the defendant with pepper spray, and the officers then arrested him.

Following the apprehension of the defendant, Crime Lab personnel came to the scene. A technician took several photographs of the bed the defendant was carrying, which photographs were identified at trial by Officer Matthews.

During cross-examination, Officer Matthews was questioned about what medical attention was provided to the defendant. He testified that an EMS unit came to the scene and decontaminated the defendant, that is, washed his eyes to clear the pepper spray. Officer Matthews admitted that, during the preliminary hearing, he had testified that the defendant was transported to the hospital. He

explained that he remembered later on the day of the hearing that the defendant was not taken to the hospital, but rather was treated at the scene.

Also during cross-examination, Officer Matthews was shown several more photographs, which had been taken by Katie Carter, an investigator with the Orleans Public Defenders' Office. Officer Matthews was unable to identify all of the purported scenes in the photographs, but recognized that some of them depicted various views of the Universal Furniture building.

On redirect, Officer Matthews stated that he attempted to enter the store after the defendant's arrest, but was unable to do so.

Detective Cyril Evans testified that he was assigned to the Fifth District Investigative Unit on the day of the burglary and arrived at the scene after the initial responding officers had arrested the defendant. Detective Evans met with a representative from Universal Furniture who provided access to the building. According to Detective Evans, all of the doors of the building were secure, with the exception of a roof-top door. He stated that the door which the defendant was exiting had no handle or lock on the outside and could only be opened from the inside. Detective Evans further testified that, to his knowledge, the Crime Lab personnel had not attempted to obtain any fingerprints from any of the doors; he indicated that it was unnecessary to do so because an arrest had already been made. The State's third and final witness was Henry Brown, one of the store managers for Universal Furniture. He testified that on August 12, 2007 the store was not open for business.[1] The first floor, which had flooded, was devoid of furniture; however, the upper three floors did contain furniture in good condition.

[1] At the time of the trial held on December 13, 2007, the building had been turned over to the New Orleans Police Department for use as the Fifth District Police Station.

According to Mr. Brown, he arrived at the store in response to a call from the police about the burglary. He stated that he was unable to gain access to the building, even though he had the key, because he did not have the "clicker" which was needed to open the door. He further testified that he told the police that the burglar may have gained entry to the store through a door on the roof as someone had done this on a prior occasion.

During cross-examination, Mr. Brown testified that an inventory of the furniture in the St. Claude store was last done in February 2006. According to Mr. Brown, he was familiar with the inventory and recognized the bed the defendant had been seen carrying out of the building. He further stated that, although furniture had been placed outside the building in early 2006, no furniture had been placed outside since. He stated that he had seen the day bed upstairs only a couple of weeks before the burglary.

The defense presented two witnesses at trial. The first was Katie Carter. She identified the various photographs which the defense had shown to Officer Matthews, stating that they were taken a week or two before trial. She also stated that she opened and closed the two doors on the St. Roch side of the building. She testified that the one closest to St. Claude, the one which was seen closing behind the defendant, was a heavier door which shut "on its own."

The final defense witness was Justin McGary, who identified himself as the owner of Mr. T's Furniture which was located two doors down from the former Universal Furniture store. He stated that he had observed furniture outside the building while the contractors were doing renovations and that this continued up until a month or two before trial. Mr. McGary stated that he asked someone if he

could take the furniture and was told that he could. However, the items were completely waterlogged; they were not new items. Mr. McGary speculated that the good furniture had already been taken away by the time he asked about it.

ERRORS PATENT

A review of the record shows one error patent: The record does not reflect that the trial court ruled on the defendant's motion to reconsider his sentence. After the trial court imposed sentence, defense counsel informed the court that he was filing a motion for an appeal "and for record purposes a Motion to Reconsider Sentence." The trial court responded only by stating that the motions were filed; the court did not issue a ruling. Furthermore, there is no indication in the record that the judge granted or denied the written motion to reconsider. While the failure to rule on a motion to reconsider sentence would preclude review of a defendant's sentence, see *State v. McQun*, 02-0259 (La.App. 4 Cir. 6/19/02), 828 So.2d 598, the defendant here does not seek review of his sentence. Therefore, the failure to rule on the motion to reconsider sentence does not preclude review of the defendant's conviction. *State v. Hailey*, 02-1738 (La.App. 4 Cir. 9/17/03), 863 So.2d 564; *State v. Foster*, 02-0256, p. 3 (La.App. 4 Cir. 9/11/02), 828 So.2d 72, 74 (expressly declining to follow *State v. Roberts*, 01-0283 (La.App. 4 Cir. 1/23/02), 807 So.2d 1072, where this Court stated that without a final sentence a conviction is not appealable); *see also State v. Ferrand*, 03-1746 (La.App. 4 Cir. 1/14/04), 866 So.2d 322 (conviction affirmed, remanded for ruling on motion to reconsider); *State v. Davis*, 00-0275 (La.App. 4 Cir. 2/14/01), 781 So.2d 633 (conviction affirmed, remanded for ruling on motion to reconsider); *State v. Allen*, 99-2579 (La.App. 4 Cir. 1/24/01), 781 So.2d 88 (conviction affirmed, remanded for ruling on motion to reconsider).

DISCUSSION:

In his sole assignment of error, Taylor avers that the guilty verdict rendered by the jury in this matter rests primarily on inadmissible hearsay. Thus, the defendant contends, the trial court should have granted the motion for a mistrial which he made.

The allegedly inadmissible and prejudicial evidence consisted of Officer Matthews' testimony that he and his partner were dispatched to the Universal Furniture store because of a call that there was a burglary in progress. The defense counsel made a motion *in limine* just prior to the start of the trial to have the trial court bar this testimony on the grounds that it was hearsay and highly prejudicial, but the motion was denied. Defense counsel made another objection, this time on the grounds of relevancy and hearsay, during the State's opening argument when the prosecutor stated that "[s]omeone noticed that he [the defendant] was in the building when he shouldn't have been, . . . so they called 911." Again, the court overruled the objection, noting that the prosecutor's statement was merely a reference to what he intended to prove. Finally, defense counsel reiterated his hearsay objection when Officer Matthews testified that he and his partner had received a dispatch for a burglary in progress. The trial court **sustained** this objection, so defense counsel moved for a mistrial. The motion was denied. Counsel did not ask that the jury be admonished to disregard the testimony.

Hearsay evidence is not admissible except as otherwise provided by the Code of Evidence or other legislation. La.Code Evid. art. 802. Hearsay evidence is excluded because the value of the statement rests on the credibility of the out-of-court asserter who is not subject to cross-examination and other safeguards of reliability. *State v. Everidge*, 96-2665, p. 7 (La. 12/2/97), 702 So.2d 680, 685.

Addressing the relationship between hearsay evidence and the confrontation clause, the Court in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930 (1970), listed the following three reasons for excluding hearsay evidence; to wit: (1) to insure that the witness will make his assertions under oath, thus impressing him with the seriousness of the matter and subjecting untrue statements to a penalty for perjury; (2) to force the witness to submit to cross-examination, characterized as the "greatest legal engine ever invented for the discovery of truth;" and (3) to permit the jury which decides the defendant's fate to observe the demeanor of the witness in making his statements, thus aiding the jury in assessing the witness' credibility. *Green*, 399 U.S. at 158, 90 S.Ct. at 1935.

Under certain circumstances, the testimony of a police officer may include information provided by another individual without constituting hearsay if it is offered to explain 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. However, the fact that an officer acted on information obtained from an informant may be relevant to explain his conduct, but that information cannot be used as a passkey to bring before the jury the substance of the out-of-court assertion that would otherwise be barred by the hearsay rule. *Hawkins*, at p. 5, 688 So.2d at 477-478; *State v. Wille*, 559 So.2d 1321, 1331 (La. 1990).

Whether a police officer can testify to the substance of information he received in the course of an investigation without violating the defendant's right to confront his accusers is an issue that has been repeatedly addressed by the Louisiana Supreme Court. For example, in *State v. Broadway*, 96-2659, pp. 8-9 (La. 10/19/99), 753 So.2d 801, 809, the Court discussed that this type of testimony should be admitted with great caution:

> Information about the course of a police investigation is not relevant to any essential elements of the charged crime, but such information may be useful to the prosecutor in "drawing the full picture" for the jury. However, the fact that an officer acted on information obtained during the investigation may not be used as an indirect method of bringing before the jury the substance of the out-of-court assertions of the defendant's guilt that would otherwise be barred by the hearsay rule. *State v. Wille,* 559 So.2d 1321, 1331 (La.1990); *State v. Hearold*, 603 So.2d 731, 737 (La.1992). As this Court emphasized in *Hearold*, 603 So.2d at 737,
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> > Absent some unique circumstances in which the explanation of purpose is probative evidence of a contested fact, such hearsay evidence should not be admitted under an "explanation" exception. 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.
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> The prosecutor has some latitude to present a full picture because the jury may "penalize the party who disappoints them by drawing a negative inference against that party." *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 654, 136 L.Ed.2d 574 (1997). Reasonable jurors may expect to learn that the police did not arrest the defendant out of thin air, but as the result of a thorough professional investigation.

See also *State v. Maise*, p. 17, 00-1158 (La. 1/15/02), 805 So.2d 1141, 1152-53.

In *State v. Hawkins*, 96-0766 (La. 1/14/97), 688 So.2d 473, the investigating officer testified that an anonymous caller reported that there were three women in the vehicle with the defendant, whom the caller stated was the perpetrator of the robbery and murder. The detective interviewed the women, who gave statements inculpating the defendant. They later testified at trial. The defendant objected to the testimony of the detective regarding the substance of the tip he received. On review, the Supreme Court held that the first part of the detective's testimony regarding the tip, where he testified that the caller stated that there were several individuals in the car with the perpetrator, was relevant and not hearsay. The Court stated that this testimony squarely fit within the rule set down by the Court

as merely explaining the course of the police investigation and the steps leading to the defendant's arrest. *Hawkins,* at p. 5, 688 So.2d at 478. The Court then found that the second part of the testimony setting forth the substance of the tip provided by the caller, that the perpetrator was the defendant, constituted inadmissible hearsay because it did not fall within any of the exceptions to La.Code Evid. art. 802. *Hawkins,* at p. 5, 688 So.2d at 478. The Court did not end its analysis at that point however, stating:

> We now must decide whether or not the hearsay testimony elicited at trial was harmless error. An error is harmless if the verdict rendered was surely unattributable to the error. La.Code Crim.P. art. 921. The correct standard of review is as follows:
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> > Confrontation errors are subject to a *Chapman* [*v. State of Cal.*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] harmless error analysis. *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). The correct inquiry is whether the reviewing court, assuming that the damaging potential of the cross-examination were fully realized, is nonetheless convinced that the error was harmless beyond a reasonable doubt. *Id.* at 684, 106 S.Ct. at 1438. Factors to be considered by the reviewing court include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.* at 684, 106 S.Ct. at 1438.
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> *State v. Wille*, 559 So.2d 1321 (La.1990).

Id. The Court found that the admission of the error was harmless, as it was not important to the State's case and was cumulative to the trial testimony of the witnesses who were in the vehicle with the defendant and had actually been the persons who gave the defendant's name to the investigating officer.

In *State v. Broadway, supra*, the investigating officers testified at some length regarding statements made by a co-perpetrator, who had been convicted and sentenced to death at a separate trial, which led to the defendant being arrested for the crime. The Court found that the testimony was hearsay, especially because the prosecutor during closing argument relied upon the out-of-court statement of the co-perpetrator to bolster the argument that the defendant was guilty. Furthermore, the Court noted that the prosecutor had deliberately elicited the content of the out-of-court statement. After determining that the introduction of the hearsay was "significant error," *Broadway,* at p. 10, 753 So.2d at 810, the Court reviewed the other evidence presented at trial to determine whether the confrontation error was harmless. The Court concluded that it was harmless given the unrecorded confession of the defendant, the identification of the defendant by the surviving victim, and the trial testimony of another co-perpetrator. *Broadway, at* p. 25, 753 So.2d at 818.

The testimony of Officer Matthews regarding the reason for the police presence on the scene of the burglary was extremely limited, consisting only of the simple nature of the dispatch. Arguably, the jury did not have to be made aware of why the officers were present. However, it was important to the State to prove that the defendant had been inside the store. In light of Officer Matthews' testimony that he observed the defendant carrying the bed out of the side door of the store **and** the door closing behind the defendant, if the officers were just randomly driving by, the jury may have questioned why the officers would have noticed the door closing. Knowing that the officers were responding to a call of a burglary in progress explained why Officer Matthews' attention was focused on the door as

well as the defendant. Thus, it appears that this minimal testimony was permissible under the jurisprudence.

Nevertheless, the defendant complains in his brief that the prosecutor's reference in his opening statement to an unknown person's report that he saw the defendant inside the building, which specific information was never elicited at trial, compounded the prejudice arising from Officer Matthews' more limited testimony. Thus, he argues that the court should have granted the mistrial because of the cumulation of the admission of hearsay which allowed the jury to find an unauthorized entry of the building. In support of this argument, he notes that the conflicting evidence regarding the point of entry, or lack thereof, and whether Detective Evans was able to access the building with Mr. Brown.

Recently, in *State v. Camper*, 08-0314, p. 4 (La.App. 4 Cir. 10/1/08), ___ So.2d ___, 2008WL4489774, this Court addressed a motion for mistrial based upon a reference in the State's opening statement to hearsay evidence which was ultimately not presented at trial:

> A mistrial is a drastic remedy, warranted only when an error at trial results in substantial prejudice and effectively deprives the defendant of a fair trial. *State v. Edwards*, 420 So.2d 663, 679 (La.1982). "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. Jones*, 2003-0829, p. 19 (La. App. 4 Cir. 12/15/04), 891 So.2d 760, 774 (citing *State v. Wessinger*, 98-1234, p. 24 (La. 5/28/99), 736 So.2d 162, 183). In accordance with Article 766 of the Louisiana Code of Criminal Procedure, the State's opening statement is designed to "explain the nature of the charge, and set forth, in general terms, the nature of the evidence by which the state expects to prove the charge." La. Code Crim. Proc. art. 766; *see State v. Green*, 343 So.2d 149, 151 (La.1977) (the prosecutor's opening statement, designed to inform the jury so that they may understand the evidence as it unfolds and to protect the defendant from surprise, is not evidence and has no probative force). Therefore, because proof frequently falls short of professional expectations, misstatements of the evidence or references

> to evidence later ruled inadmissible in opening remarks generally does not serve as a ground for a mistrial absent bad faith on the part of the prosecutor or clear and substantial prejudice. *Green*, 343 So.2d at 151*; see also State v. Gray*, 542 So.2d 684, 686 (La. App. 4 Cir. 1989) (when there is sufficient evidence to connect the defendant with the crime independent of the reference in the opening statement, the prosecutor's reference to inadmissible hearsay in an opening statement is not reversible error); *State v. Scott,* 454 So.2d 851, 853 (La. App. 5 Cir.1984) (opening statement that police officer would testify that he used a license plate number to determine that the getaway vehicle in an armed robbery belonged to the defendant was not reversible error even though the license plate number was never introduced into evidence); *Clark v. Blackburn*, 605 F.2d 163, 165 (5th Cir. 1979) (citing *Green, supra*, to hold that under Louisiana law, failure to prove a part of the prosecution's opening statement does not constitute grounds for reversal).

Id., ___ So.2d at ___.

Here, there is no indication that the prosecutor was acting in bad faith. The trial court had already denied the defendant's motion *in limine* to prohibit any reference to the report of a burglary in progress. The prosecutor may have believed that Officer Matthews would be permitted to testify in more detail regarding this report; however, the trial court prevented him from doing so by sustaining the defense counsel's objection and directing the prosecutor to move on.

Furthermore, there is no indication that the defendant was substantially prejudiced by this testimony. Officer Matthews testified that he saw the defendant moving merchandise away from the open door of the building. Although the defense tried to show that the merchandise may have already been outside the building. Mr. Brown testified unequivocally that he had seen the mattress and frame of the daybed on an upper floor of the building only a couple of weeks before the burglary. Even the defense witness Justin McGary testified that the few items of merchandise which had been outside the building were waterlogged, while the subject daybed was described by other witnesses as being in good condition.

The trial court did not err when it denied the motion for a mistrial. This assignment of error lacks merit.

CONCLUSION:

Accordingly, the defendant's conviction is affirmed, and this matter is remanded for a ruling on the motion to reconsider sentence.

CONVICTION AFFIRMED;
REMANDED