NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 1238

STATE OF LOUISIANA

VERSUS

DON HAYES

Judgment Rendered: February 9, 2007

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 385141-1

The Honorable Donald M. Fendlason, Judge Presiding

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Don Hayes

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

GAIDRY, J.

The defendant, Don Hayes, was charged by bill of information with possession of a Schedule I controlled dangerous substance with the intent to distribute (heroin) (count 1), a violation of La. R.S. 40:966(A)(1), and possession of a Schedule II controlled dangerous substance with the intent to distribute (cocaine) (count 2), a violation of La. R.S. 40:967(A)(1). The defendant pled not guilty. Following a hearing on a motion to suppress the evidence, the trial court denied the motion. Following a jury trial, the defendant was found guilty as charged on count 1 and guilty of the responsive offense of possession of cocaine on count 2, a violation of La. R.S. 40:967(C). The defendant was sentenced on count 1 to ten (10) years imprisonment at hard labor, five years of the sentence to be served without benefit of probation or suspension of sentence. The defendant was sentenced on count 2 to five (5) years imprisonment at hard labor. The sentences were ordered to run concurrently. The defendant made an oral motion to reconsider sentence, which was denied. The defendant now appeals, asserting three assignments of error. We affirm the convictions and sentences.

FACTS

At about 1:00 a.m. on June 30, 2004, the New Orleans Police Department, with the help of the Slidell Police Department and St. Tammany Parish Sheriff's Office, executed an arrest warrant for the defendant on the charge of attempted murder. The defendant was staying at a residence in Slidell with his girlfriend, Kinade Williams, his brother, and his brother's girlfriend. Prior to arresting the defendant, officers surrounded the residence. Detective Nick Mistretta with the Slidell Police Department was on the side of the residence. He looked through a window and saw the

defendant sitting on a couch. When Sergeant Danny Fontay with the St. Tammany Parish Sheriff's Office knocked repeatedly on the front door announcing, "Sheriff's Office," Detective Mistretta saw the defendant get up and run to a bedroom. When Detective Mistretta came to the front of the house, Williams opened the front door. Several officers entered the residence. The defendant, who had come out of the bedroom, was arrested and handcuffed without incident.

Detective Mistretta saw in plain view two "lines" of a white powdery substance suspected to be cocaine on the coffee table by the couch in the front room. Williams's driver's license was next to the cocaine. At that point, Williams was also handcuffed. Sergeant Fontay, Detective Mistretta, and Detective Steven Ingargiola with the St. Tammany Parish Sheriff's Office executed a protective sweep to make sure no one else was in the residence. Detective Mistretta went into the bedroom he had earlier seen the defendant running into. Detective Mistretta immediately observed on a stereo system in plain view a cellophane bag containing a brown powdery substance suspected to be heroin. No one else having been found, the residence was secured, and officers prepared a search warrant to have the cocaine and heroin seized and to search the entire residence. Pursuant to the search warrant, officers seized $2,747 in cash, various drug paraphernalia, 15.01 grams of cocaine, and 118.86 grams of heroin.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the trial court erred in denying his motion to suppress the evidence. Specifically, the defendant contends that, pursuant to an arrest warrant whereby the defendant presented himself at the door and surrendered, a search of the entire house was improper since there were no exigent circumstances.

Trial courts are vested with great discretion when ruling on a motion to suppress. Consequently, the ruling of a trial judge on a motion to suppress will not be disturbed absent an abuse of that discretion.[1] *State v. Long*, 2003-2592, p. 5 (La. 9/9/04), 884 So.2d 1176, 1179, cert. denied, 544 U.S. 977, 125 S.Ct. 1860, 161 L.Ed.2d 728 (2005). The trial court in the instant matter found that once the officers were in the residence pursuant to a lawful arrest warrant, they saw in plain view what appeared to be cocaine in the living room. Following the arrest of the defendant and, in light of the newly discovered criminal activity, i.e., drug use, the officers conducted a protective sweep of the premises to determine if there were other people there who could harm them or destroy evidence. During the protective sweep of one of the rooms, one of the officers saw what appeared to be heroin. Despite having obtained a search warrant to seize the drugs, the trial court felt that the officers could have seized the drugs without the warrant based on the criminal activity in the living room. Accordingly, the trial court denied the motion to suppress the evidence.

We agree with the trial court's ruling. When Detective Mistretta entered the residence and arrested and handcuffed the defendant, he saw in plain view what appeared to be cocaine on the coffee table in the living room. At that point, the female who had opened the front door was also handcuffed. To ensure there were no other people present who posed a threat to the officers' safety, Detectives Mistretta and Ingargiola, and Sergeant Fontay effected a protective sweep of the residence. Detective Mistretta went into the bedroom that he had seen the defendant go into and, again, in plain view, saw what appeared to be a cellophane bag of heroin on

[1] In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. *State v. Chopin*, 372 So.2d 1222, 1223 n.2 (La. 1979).

top of a stereo system. Under the plain view doctrine, Detective Mistretta could have seized the cocaine and the heroin, but did not. See *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66, 91 S.Ct. 2022, 2037-38, 29 L.Ed.2 564 (1971). Instead, all evidence of criminality was left in place until a search warrant was obtained.

Thus, the defendant's reliance on a lack of exigent circumstances in order to justify suppression of the evidence is misplaced. The following sequence of events, all reasonable under the Fourth Amendment, led to the discovery and ultimate seizure of 15 grams of cocaine and 118 grams of heroin: the arrest of the defendant pursuant to a valid arrest warrant, followed by the discovery of cocaine in plain view, followed by a protective sweep of the residence, followed by the discovery of heroin in plain view, followed by the securing of a search warrant, followed by the seizure of the drugs in plain view, as well as other drugs found pursuant to the search warrant. Exigent circumstances played no part in the instant matter.[2] Notwithstanding the defendant's mischaracterization of a search pursuant to exigent circumstances, we address separately the issue of the reasonableness of the protective sweep, since, broadly speaking, the defendant is attacking the officers' search of the residence.

A protective sweep is a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers and others. It is narrowly confined to a cursory visual inspection of those

[2] In his brief, the defendant maintains that since the arrest warrant was unrelated to drug charges and since he surrendered to the police at the door, no exigent circumstances existed to justify a full search of the residence. According to the defendant, the search (protective sweep), ostensibly justified by the discovery of cocaine on the coffee table, was illegal because there was actually no cocaine on the table. Thus, the arrest warrant was merely a pretext to search the residence. The defendant contends there is no mention of alleged cocaine in the search warrant affidavit. The defendant is incorrect. The search warrant affidavit does mention cocaine, and this issue is addressed more fully in the second assignment of error.

places in which a person might be hiding. *Maryland v. Buie*, 494 U.S. 325, 327, 110 S.Ct. 1093, 1094, 108 L.Ed.2d 276 (1990).

In upholding a police officer's ability to conduct a protective sweep, the Louisiana Supreme Court in *State v. Guiden*, 399 So.2d 194, 199 (La. 1981), cert. denied, 454 U.S. 1150, 102 S.Ct. 1017, 71 L.Ed.2d 305 (1982), in quoting from *United States v. Agapito*, 620 F.2d 324, 336 (2nd Cir.), cert. denied, 449 U.S. 834, 101 S.Ct. 107, 66 L.Ed.2d 40 (1980), stated the following:

> The reasonableness of a security check is simple and straightforward. From the standpoint of the individual, the intrusion on his privacy is slight; the search is cursory in nature and is intended to uncover only "persons, not things." Once the security check has been completed and the premises secured, no further search [-] be it extended or limited [-] is permitted until a warrant is obtained. From the standpoint of the public, its interest in a security check is weighty. The delay attendant upon obtaining a warrant could enable accomplices lurking in another room to destroy evidence. More important, the safety of the arresting officers or members of the public may be jeopardized. Weighing the public interest against the modest intrusion on the privacy of the individual, a security check conducted under the circumstances stated above satisfies the reasonableness requirement of the Fourth Amendment. (citations omitted).

An arrest is not always, or *per se*, an indispensable element of an in-home protective sweep. Although an arrest may be highly relevant, particularly as tending to show the requisite potential of danger to the officers, that danger may also be established by other circumstances. *United States v. Gould*, 364 F.3d 578, 584 (5th Cir.) (en banc), cert. denied, 543 U.S. 955, 125 S.Ct. 437, 160 L.Ed.2d 317 (2004). In fact, "the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected[.]" *Michigan v. Long*, 463 U.S. 1032, 1052, 103 S.Ct. 3469, 3482, 77 L.Ed.2d 1201 (1983).

Applying these principles to the instant matter, we find that the protective sweep clearly satisfied the reasonableness requirement of the Fourth Amendment. Given the officers were executing an arrest warrant for a person charged with attempted murder and the fact that once inside, the officers discovered cocaine in plain view, Sergeant Fontay and Detectives Mistretta and Ingargiola could reasonably have believed that the areas they swept could have harbored an individual posing a danger to those on the arrest scene, or attempting to destroy evidence. See *Buie*, 494 U.S. at 334, 110 S.Ct. at 1098; *Guiden*, 399 So.2d at 199.

We find no abuse of discretion by the trial court in denying the defendant's motion to suppress. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the search warrant was invalid. Specifically, the defendant contends that the affidavit in support of the search warrant makes no mention that officers saw cocaine in plain view on the coffee table.

Article 1, § 5 of the Louisiana Constitution requires that a search warrant may issue only upon an affidavit establishing probable cause to the satisfaction of an impartial magistrate. See also La. Code Crim. P. art. 162. Probable cause exists when the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched. *State v. Johnson*, 408 So.2d 1280, 1283 (La. 1982). The facts establishing the existence of probable cause for the warrant must be contained within the four corners of the affidavit. *State v. Duncan*, 420 So.2d 1105, 1108 (La. 1982).

The affidavit in support of the search warrant states in pertinent part:

> Detectives conducted a sweep of the residence to assure that there were no further subjects inside the residence. The sweep was conducted for officer safety.
>
> While conducting the sweep of the residence, Sgt. Mistretta observed in plain view a cellophane bag in the bedroom of the residence where Don Hayes was observed running. This cellophane contained a brown rock like substance suspected to be heroin. Sgt. Mistretta also observed a clear plastic bag and a white powdery substance on the coffee table in the front room in plain view suspected to be cocaine. No further subjects were located

The facts in the search warrant affidavit clearly established probable cause that an offense or offenses had been committed and that additional evidence or contraband might be found at the place to be searched. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues that defense counsel was ineffective for failing to file a motion in limine to keep out a prejudicial statement made by him on a videotape. In the alternative, the defendant argues defense counsel was ineffective for failing to move for a mistrial.

When the defendant and Williams were arrested, they were placed together in the back seat of a police unit. Their conversation was videotaped by a camera mounted in the unit. The videotape was played for the jury. The statement made by the defendant was, "I don't want to cry, Kin. I don't want these mother f------, white mother f------ to see me crying, Kin." According to the defendant, the statement was clearly prejudicial since the demographic makeup of St. Tammany Parish is primarily white.

Louisiana Code of Criminal Procedure article 771 provides in pertinent part:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:
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> * * * *
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> (2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.
>
> In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

Although a claim of ineffective assistance of counsel is normally raised in an application for post-conviction relief, this court may address the merits of the claim when the record on appeal is sufficient. *State v. Moody*, 2000-0886 (La. App. 1st Cir. 12/22/00), 779 So.2d 4, 8, writ denied, 803 So.2d 40 (La. 12/7/01). In this instance, the record is sufficient, and we will therefore address the defendant's claim.

In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

"In evaluating the performance of counsel, the 'inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" *State v. Morgan*, 472 So.2d 934, 937 (La. App. 1st Cir.

1985) (citing *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *State v. Robinson*, 471 So.2d 1035, 1038-1039 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

While we do not find defense counsel's decision to not file a motion in limine or move for a mistrial to be error, even if we were to find that such failure to object constituted deficient performance, the result would be the same. The *Strickland* inquiry is whether 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. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. *Strickland*, 466 U.S. at 694-695, 104 S.Ct. at 2068-2069.

After considering the totality of the evidence before the jury, we do not find a reasonable probability exists that, absent the alleged errors of failing to file a motion in limine or to object to the defendant's ostensibly racial epithet, the jury would have had a reasonable doubt as to the defendant's guilt. See *State v. Hilton*, 99-1239, p. 14 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1036, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066.

The defendant has not met his burden of showing that the decision reached would reasonably have been different absent the alleged errors. The defendant has failed to show sufficient prejudice to meet his burden. See

Hilton, 99-1239 at p. 15, 764 So.2d at 1037. His claim of ineffective assistance of counsel, therefore, must fall.

This assignment of error is without merit.

REVIEW FOR ERROR

Appellate counsel asks that this court examine the record for patent error. This court routinely reviews the record for errors, whether or not such a request is made by a defendant. Under La. Code Crim. P. art. 920(2), we are limited in our error review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. See *State v. Allen*, 94-1941, p. 11 (La. App. 1st Cir. 11/9/95), 664 So.2d 1264, 1273, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. Our review of the record reveals no errors that warrant a reversal of the defendant's convictions or sentences.

For the above and foregoing reasons, defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.