NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 0363

STATE OF LOUISIANA

VERSUS

ROSE J. FREEMAN

Judgment Rendered: May 2, 2008

Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 389001/3/4

Honorable Peter J. Garcia, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY AND HUGHES, JJ.

Guidry, J. concurs.
Hughes, J., dissents in part with reasons.

WHIPPLE, J.

The defendant, Rose J. Freeman, was charged by three bills of information with the following offenses: (1) four counts of distribution of cocaine, a violation of LSA-R.S. 40:967(A)(1) (count 2 and count 3 of bill no. 389001, and count 1 and count 2 of bill no. 389004); (2) one count of distribution of hydrocodone, a violation of LSA-R.S. 40:967(A)(1) (count 4 of bill no. 389001); and (3) one count of possession with intent to distribute cocaine, a violation of LSA-R.S. 40:967(A)(1) (count 1 of bill no. 389003).[1] The defendant pled not guilty to the charges. Following a jury trial, the defendant was found guilty as charged on all counts.

On each of the four counts of distribution of cocaine and the count of possession with intent to distribute cocaine, the defendant was sentenced to five years at hard labor, with the sentences to run consecutively for a total of twenty-five years. As to each of these counts, the first two years of the sentences were ordered without the benefit of parole, probation, or suspension of sentence, for a total of ten years without benefits. On the count of distribution of hydrocodone, the defendant was sentenced to ten years. This ten-year sentence was ordered to run concurrently with the other sentences.

The State subsequently filed a multiple offender bill of information seeking to enhance the conviction for distribution of cocaine on September 22, 2004 (count 1 of bill no. 389004). The defendant waived a multiple offender hearing and admitted to being a second-felony habitual offender. The trial court vacated the original five-year sentence for the conviction of distribution of cocaine on September 22, 2004 and sentenced the defendant to fifteen years, with the sentence to run consecutively to the sentences already imposed for the other three counts of

[1]The charges were consolidated. The defendant was not tried for count 1 (distribution of cocaine) in bill no. 389001 because the count was severed by the State.

distribution of cocaine and the count of possession with intent to distribute cocaine and concurrently with the ten-year sentence for distribution of hydrocodone (and also concurrently with other sentences unrelated to this matter). The defendant now appeals, designating three assignments of error.

Finding no merit to the assignments of error, we affirm the convictions, habitual offender adjudication, and sentences.

FACTS

In 2004, Sergeant Nicky Mistretta with the Slidell Police Department developed information that the defendant was involved in narcotics activity. Sergeant Mistretta arranged for Detective Emile Lubrano with the St. Tammany Parish Sheriff's Office to work undercover and to pose as someone wanting to purchase drugs from the defendant. Over an approximate seven-week period, Detective Lubrano purchased drugs from the defendant. On a few occasions, the defendant had her son, Kenneth Freeman, deliver the drugs, and on one occasion, the defendant had Andrew Long, Jr. ("Bo"), her live-in boyfriend, deliver the drugs.[2] Most of the drug transactions were either videotaped or audiotaped. Also, many of the telephone conversations setting up the transactions were audiotaped. The audiotapes and videotapes of the negotiations and transactions were played for the jury at trial.

The record reflects the following chronology of the various drug transactions: On August 18, 2004, Detective Lubrano swapped a car stereo for $100.00's worth of crack cocaine from Kenneth on Lopez Street in Slidell. The stereo was worth $200.00, but the defendant wanted to give Detective Lubrano only $100.00's worth of crack cocaine and give him the difference at a later date. The stereo was subsequently installed in the defendant's Dodge pickup truck.

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[2]Long, who had already been convicted and sentenced in connection with this matter, testified at the defendant's trial.

On September 2, 2004, Detective Lubrano met with Kenneth at the Beer Box in Slidell to collect the $100.00's worth of drugs he was owed, as well as some additional drugs. Prior to this meeting, Detective Lubrano spoke with the defendant on the telephone about getting hydrocodone pills in addition to the crack cocaine. Detective Lubrano also spoke with Kenneth on the telephone and agreed to pay an extra $100.00 for more drugs. At the Beer Box, Detective Lubrano gave Kenneth $100.00, and Kenneth gave Detective Lubrano $200.00's worth of crack cocaine and hydrocodone pills. The transaction was videotaped.

On September 22, 2004, Detective Lubrano met with the defendant and Long at a Racetrac gas station in Slidell. The defendant was driving her truck and Long was the passenger. When Detective Lubrano approached the truck, the defendant tossed crack cocaine into Long's lap. She then exited the truck, spoke briefly to Detective Lubrano, and walked into the Racetrac store. Detective Lubrano got in the truck and briefly spoke with Long. Long handed him the crack cocaine and Detective Lubrano exited the truck and left. Long gave the $100.00 he got from Detective Lubrano to the defendant. The transaction was videotaped.

On October 1, 2004, Detective Lubrano met with the defendant at an Oak Harbor gas station in Slidell. Long was again with the defendant. The purpose of this drug buy was to arrest the defendant and Long. Detective Lubrano purchased $200.00 worth of crack cocaine from the defendant. Following the transaction, several detectives rushed the defendant's truck and arrested the defendant and Long. The incident was audiotaped, but not videotaped.

On October 2, 2004, the defendant had already been brought to jail in Slidell and processed. Her clothes were put in a property bag. Roy Ann Posey, a corrections officer with the Slidell Police Department, was getting the defendant ready for transport to the Covington jail. Roy Ann opened the property bag and examined each piece of the defendant's clothes. At the bottom of the property bag

she found crack cocaine.

ASSIGNMENT OF ERROR NO. 1

In her first assignment of error, the defendant argues that the trial court erred in allowing the jury to hear audiotapes of Kenneth Freeman arranging a drug deal with Detective Lubrano. Specifically, the defendant contends that the statements of Kenneth were inadmissible hearsay. Further, the defendant contends that since Kenneth was not available to testify, she was denied her right of cross-examination.

On August 18, 2004, Detective Lubrano traded a car stereo valued at $200.00 with Kenneth for $100.00's worth of crack cocaine on Lopez Street in Slidell. The State marked for evidentiary identification a microcassette audiotape (S-2), which contained several telephone conversations recorded on August 18, 2004, between Detective Lubrano and Kenneth, discussing the specifics of trading the car stereo for drugs. The State also marked for evidentiary identification a microcassette audiotape (S-4), which contained telephone conversations recorded on September 1 and September 2, 2004. On the S-4 audiotape, Detective Lubrano spoke with both the defendant and Kenneth on the September 1st call and with Kenneth on the September 2nd call. Detective Lubrano planned to meet with Kenneth on September 2 to collect the $100's worth of drugs that he was owed for the car stereo. Sergeant Mistretta testified at trial and identified the contents of S-2 and S-4.

At trial, prior to the audiotapes being played for the jury, defense counsel objected on the basis that Kenneth's statements were hearsay and that, if the audiotapes were allowed into evidence, the defendant's right to confrontation would be violated.[3] The trial court asked defense counsel to identify the specific hearsay to which he was objecting. Defense counsel indicated that his objection

[3]Kenneth had already been convicted in connection with this matter, and was in prison serving his sentence.

was only to the first conversation with Detective Lubrano and Kenneth on August 18, 2004, (S-2) where "Kenneth is on the phone and makes arrangements to trade a car stereo for crack cocaine." The trial court overruled the hearsay objection, finding Kenneth's statements admissible and "intertwined with the transaction."

We agree with the trial court's ruling. Under LSA-C.E. art. 801(D)(4), Kenneth's statements were part of the res gestae and, therefore, were not hearsay.[4] See State v. Castleberry, 98-1388, pp. 18-19 (La. 4/13/99), 758 So. 2d 749, 765, cert. denied, 528 U.S. 893, 120 S. Ct. 220, 145 L. Ed. 2d 185 (1999). Article 801(D)(4) incorporates what was formerly LSA-R.S. 15:447 and 448, known as the "res gestae" exception to the hearsay rule. Louisiana jurisprudence interpreting LSA-C.E. art. 801(D), and its predecessor, LSA-R.S. 15:448 (repealed 1988), have consistently held that the conversations between persons who are negotiating a drug transaction are admissible either as a *res gestae* exception to the hearsay rule or, as provided in LSA-C.E. art. 801(D)(4), as not constituting hearsay. See State v. Caldwell, 616 So. 2d 713, 723 (La. App. 3d Cir.), writ granted in part on other grounds, 620 So. 2d 859 (La. 1993).

While it is not clear from the record exactly how much time had elapsed from the time of the negotiations between Detective Lubrano and Kenneth until the actual exchange, it is clear from the evidence that the negotiations and the exchange occurred on the same day, August 18, 2004. Accordingly, the statements made by Kenneth in the course of his negotiations with Detective Lubrano to trade a car stereo for drugs were part of one continuous transaction of the criminal act of distributing crack cocaine. See Castleberry, 98-1388 at pp. 17-19, 758 So. 2d at

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[4]Louisiana Code of Evidence Article 801(D)(4) provides that the following statements are not hearsay:

> **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.

764-766 (where the court allowed testimony about an unadjudicated crime (the "hitchhiker incident") involving the defendant; the hitchhiker incident comprised one event in the continuous transaction that was the approximately thirteen-hour trip from Houston to Montgomery); see State v. Feeback, 414 So. 2d 1229, 1235 (La. 1982) (where the defendant distributed drugs and was owed $750.00, but was paid only $300.00 at the time; three weeks later, the defendant was paid the $450.00 balance; the trooper was allowed to state at trial that the subject of the conversation was drugs and money owed to the defendant); see State v. Joseph, 341 So. 2d 861, 867 (La. 1977) (where the time between preliminary negotiations and the actual delivery of the drugs was about two hours, and the statements establishing such were part of the res gestae); see State v. Walters, 25,587, pp. 4-7 (La. App. 2d Cir. 1/19/94), 630 So. 2d 1371, 1374-75 (where the admissible statement about a killing was made over four hours before the actual killing); see State v. Green, 448 So. 2d 782, 785-86 (La. App. 2d Cir. 1984) (where the negotiations carried on by the undercover officer and the defendant occurred on the evening prior to the actual drug sale, and the statements establishing such constituted part of the res gestae).

We find further, pursuant to LSA-C.E. art. 801(D)(3)(b), that Kenneth's statements were made while participating in a conspiracy to commit a crime and therefore were not hearsay.[5] A criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime and where one or more of such parties does an act in furtherance of the object of the agreement or combination. See LSA-R.S. 14:26(A).

The entirety of the State's evidence clearly established that the defendant

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[5]Pursuant to LSA-C.E. art. 801(D)(3)(b), a statement is not hearsay if it is offered against a party and it is made "by a declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of the conspiracy, provided that a prima facie case of conspiracy is established."

and her son, Kenneth, were involved in selling drugs together. When Detective Lubrano was speaking to Kenneth about trading the car stereo for drugs, Kenneth informed Detective Lubrano that his mother (the defendant) did not want to give him $200.00's worth of crack cocaine, but, instead, would give him $100.00's worth of crack cocaine, and would "take care of [him]" at a later date. When Detective Lubrano and Kenneth were discussing the place to meet for the exchange, Kenneth asked his mother about Exxon as a meeting place. On September 1, 2004, Detective Lubrano called the defendant to see about getting the $100.00's worth of drugs he was owed. When he asked the defendant about the car stereo, which was installed in the defendant's vehicle, she said that we got it hooked up and it's "fronting." Based on the evidence, Kenneth conspired with the defendant to exchange crack cocaine for a car stereo.

The defendant's assertion that her right to confrontation was violated is also baseless. In Crawford v. Washington, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004), the Supreme Court held that, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. However, the Crawford Court drew a distinction between testimonial and nontestimonial statements, and confined its holding to testimonial evidence. Crawford, 541 U.S. at 61-68, 124 S. Ct. at 1370-74. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." Crawford, 541 U.S. at 68, 124 S. Ct. at 1374. The court noted that historically, in a criminal context, "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial," citing, as examples, business records or, as here, statements in furtherance of a conspiracy. Crawford, 541 U.S. at 56, 124 S. Ct. at 1367. Accordingly, under Crawford, since

Kenneth's statements constitute the out-of-court declarations of a co-conspirator, made in the course and in furtherance of the conspiracy, the Confrontation Clause was not implicated, and the defendant's right to confrontation was not violated. See Bourjaily v. U.S., 483 U.S. 171, 181-84, 107 S. Ct. 2775, 2782-83, 97 L. Ed. 2d 144 (1987).

We further note that even assuming, *arguendo*, that Kenneth's statements constituted hearsay, given the overwhelming evidence of the defendant's guilt, such statements by Kenneth were cumulative and corroborative of other testimony and evidence establishing the defendant's guilt. Evidence of guilt included the audiotape and videotape recordings of the defendant discussing the types of drugs she would procure for Detective Lubrano and the areas where they would meet to complete the transactions. Also, Detective Lubrano testified that during one transaction when he met with the defendant and Andrew Long, Jr., the defendant tossed the crack cocaine into Long's lap before she exited the truck and walked into the Racetrac store. Detective Lubrano further testified that during the last transaction on October 1, 2004, before the defendant and Long were arrested, the defendant handed Detective Lubrano $200.00's worth of crack cocaine. Also, Long testified that the drug operation was the defendant's operation and that she got her supplies out of New Orleans and Slidell. Therefore, even if erroneous, the admission of Kenneth's statements into evidence was harmless beyond a reasonable doubt. LSA-C.Cr.P. art. 921; see State v. Byrd, 540 So. 2d 1110, 1114 (La. App. 1st Cir.), writ denied, 546 So. 2d 169 (La. 1989).

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 2

In her second assignment of error, the defendant argues that the trial court improperly allowed Sergeant Mistretta and Detective Lubrano to identify a background voice as hers on some of the audio recordings. Specifically, the

defendant contends that the police officers gave no basis for their identification of her voice.

Initially, we note that no tapes were played during the testimony of Sergeant Mistretta and, as such, he did not identify any recorded voices, background or otherwise. While the audiotapes and videotapes were played during the testimony of Detective Lubrano, Detective Lubrano did not identify any background voice as being that of the defendant. Accordingly, there was no objection lodged regarding this issue. Moreover, when defense counsel made his objection to Kenneth's statements on the grounds of hearsay and violation of defendant's right of confrontation, defense counsel specifically informed the trial court, "There are a couple of tapes where they are alleging that her voice is audible in the background. I don't have a problem with involving her voice. Obviously, that's statement [sic] by the defendant."

There was no contemporaneous objection made at trial regarding this issue. An irregularity or error cannot be complained of after the verdict unless it was objected to at the time of the occurrence. Accordingly, this argument is not properly preserved for appellate review. LSA-C.E. art. 103(A)(1); LSA-C.Cr.P. art. 841(A). See State v. Young, 99-1264, p. 9 (La. App. 1st Cir. 3/31/00), 764 So. 2d 998, 1005.

This assignment of error is also without merit.

ASSIGNMENT OF ERROR NO. 3

In her third assignment of error, the defendant argues that during his testimony, Sergeant Mistretta expressed an opinion as to the ultimate issue of guilt or innocence. Specifically, the defendant argues Sergeant Mistretta indicated that the defendant was "in charge" of the operation.

Louisiana Code of Evidence article 704 provides that "in a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the

accused." At trial, while, ostensibly, the prosecutor attempted to qualify Sergeant Mistretta as an expert, the trial court made no ruling regarding his expertise. Since Sergeant Mistretta was never qualified as an expert, Article 704 is inapplicable. See State v. Hubbard, 97-916, p. 16 (La. App. 5th Cir. 1/27/98), 708 So. 2d 1099, 1106, writ denied, 98-0643 (La. 8/28/98), 723 So. 2d 415.

Furthermore, defense counsel never objected to Sergeant Mistretta's testimony on the ground that he was expressing an opinion as to the ultimate issue of guilt or innocence. Instead, defense counsel objected on the ground that Sergeant Mistretta's testimony regarding who was in charge of the drug operation was opinion testimony.

Pursuant to LSA-C.E. art. 701, Sergeant Mistretta was entitled to give his opinion as a lay witness. A law officer may testify as to matters within his personal knowledge acquired through experience without first being qualified as an expert. State v. Short, 2006-1451, p. 12 (La. App. 3d Cir. 5/16/07), 958 So. 2d 93, 101; see State v. LeBlanc, 2005-0885, p. 7 (La. App. 1st Cir. 2/10/06), 928 So. 2d 599, 603. Sergeant Mistretta was the supervising investigating officer on this case. He listened to the audiotapes and observed the videotapes of the drug transactions. During the transactions when Detective Lubrano wore a Kel transmitter (a wire), Sergeant Mistretta provided backup by listening to the conversations nearby in an undercover vehicle. Following the transactions, Detective Lubrano immediately brought the drugs to Sergeant Mistretta for identification and processing. At trial, the prosecutor asked, "Was it clear to you who was in charge of this operation?" Sergeant Mistretta responded, "Ms. Rose Freeman." We find that Sergeant Mistretta's lay opinion testimony was based on his experience, observations, and evidence gathered at the various scenes, and that it was helpful to the determination of a fact in issue. See Short, 2006-1451 at pp. 12-13, 958 So. 2d at 100-01; see also Hubbard, 97-916 at pp. 16-17, 708 So. 2d at 1106.

Moreover, we do not find that the challenged testimony was tantamount to an opinion on the ultimate issue of guilt. Sergeant Mistretta's testimony that the defendant was in charge of the drug operation helped make clear the defendant's place among the other participants and in the overall criminal scheme. Sergeant Mistretta made no assertions or intimations that the defendant was guilty.

We find further that even if Sergeant Mistretta could be deemed to have expressed an opinion as to the guilt of the defendant, the improper testimony would constitute harmless error as being cumulative and corroborative of other testimony establishing the defendant's role in the drug operation. Two other witnesses, without objection, testified essentially the same as Sergeant Mistretta. During direct examination, the following exchange took place between the prosecutor and Detective Lubrano:

> Q. During this operation, did it become clear to you who was in charge of the deal of this cocaine and Hydrocodone?
> A. Yes.
> Q. Who was that?
> A. Rose Freeman.

On redirect examination, the prosecutor asked, "Any doubt in your mind that Rose Freeman was head of this operation?" Detective Lubrano responded, "No doubt in my mind."

Later during trial, the following exchange occurred between the prosecutor and Andrew Long:

> Q. Is this your operation?
> A. My operation?
> Q. Yes. All this drugs[sic], all the transactions; are these your operation?
> A. No, sir.
> Q. Whose operation was it?
> A. Ms. Freeman.
> Q. Where did she get the supplies?
> A. Out of New Orleans and out of Slidell.

Based on our review of the record, we find that the verdicts actually rendered in this trial were surely unattributable to any error in the admission of the

testimony in question. See State v. Code, 627 So. 2d 1373, 1384-85 (La. 1993), cert. denied, 511 U.S. 1100, 114 S. Ct. 1870, 128 L. Ed. 2d 490 (1994); Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993). See also LSA-C.Cr.P. art. 921.

Accordingly, this assignment of error lacks merit.

CONCLUSION

For the above reasons, the defendant's convictions, habitual offender adjudication, and sentences are affirmed.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

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STATE OF LOUISIANA

VERSUS

ROSE J. FREEMAN

HUGHES, J., dissenting

I respectfully dissent in part as to Count #2. The defendant was not taped during the 8/18/04 incident. I do not believe she can be convicted on this count solely on the purported taped statements of the only participant, Kenneth Freeman, who did not testify. There are hearsay, confrontation, and authentication issues, any way you slice it.