

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0342

STATE OF LOUISIANA

VERSUS

DANIS E. CABALLERO

Judgment Rendered: December 22, 2010

APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 472,558, DIVISION "H"

THE HONORABLE ALLISON H. PENZATO, JUDGE

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

The defendant, Danis E. Caballero, was charged by grand jury indictment with aggravated rape, a violation of La. R.S. 14:42.¹ The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.² The defendant now appeals, arguing in a sole assignment of error that the trial court should have declared a mistrial herein. For the forthcoming reasons, we affirm the conviction and sentence.

FACTS

On November 5, 2005, two female teenage associates of K.H., the victim, took her to a trailer park and lured her to the bedroom of one of the trailers, stating that someone had left a gift for her in the room.³ Several men entered the room and raped the victim. K.H. unsuccessfully attempted to fight off the men. Specifically, according to the victim, each male perpetrator vaginally penetrated her with his penis. K.H. identified two of the perpetrators as the defendant, who was dating one of the female associates at the time, and the co-defendant. K.H. did not know the names of the other individuals. One of the unknown males hit the victim in the face and busted her lip, warning her to be quiet as someone approached and began knocking on the bedroom door. He dropped his cellular telephone before running out of the bedroom, and K.H. used it to contact her mother, who in turn reported the incident. K.H. was sixteen years of age at the time of the offense.

¹ Co-defendant, Dago Mencias, was charged in the same indictment with aggravated rape, tried with the defendant, and found not guilty.

² The sentencing minute entry does not include the parole restriction imposed by the court as reflected in the sentencing hearing transcript. It is well settled that the transcript prevails over the minute entry where there is a discrepancy. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983). Moreover, the statutory requirement that the defendant be sentenced without benefit of parole, probation, or suspension of sentence is self-activating. La. R.S. 15:301.1; **State v. Williams**, 2000-1725, p. 10 (La. 11/28/01), 800 So.2d 790, 799.

³ The victim is referenced herein only by her initials. See La. R.S. 46:1844W.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the trial court erred by failing to declare a mistrial when a witness testified that the defendant chose not to be interviewed in jail after his arrest. The defendant argues that the testimony consisted of a comment on his Fifth Amendment constitutional right to remain silent and resulted in a deprivation of his fundamental right to a fair trial. The defendant alternatively argues, in the event that this court determines that the defense counsel waived this issue by failing to object or move for a mistrial, he received ineffective assistance of counsel. The defendant contends the failure of the defense counsel to object or move for a mistrial on this ground was not strategic.

During the defense's cross-examination of State witness Sergeant Charlie Craddock, of the St. Tammany Parish Sheriff's Office, the following colloquy took place in connection with the contested statement:

Q. Okay. At what point in your investigation, Sergeant, did you actually interview Danis Caballero regarding the events of that night?

A. At the jail when he was arrested.

Q. Did you speak to him in Spanish?

A. No, sir.

Q. How were you able to communicate with him?

A. Very difficult. I asked him if he could speak English, he said a little. I explained what was going on, gave him his rights. He stated he did not want to speak, so the conversation ended.

* * *

Q. Is that your report, Sergeant?

A. Yes, sir, it is.
That was the time that he was arrested.

Q. So did you actually write the sentence that's contained in this report that says: Caballero did agree to be interviewed but requested a translator?

A. Yes, sir.

Q. Did you ever return with a translator to interrogate Danis Caballero?

A. No, no, sir. I don't believe so.

Under La. C.Cr.P. art. 771, where the prosecutor or a witness makes a reference to a defendant's post-arrest silence, the trial court is required, upon the request of the defendant or the State, to promptly admonish the jury. In such cases where the court is satisfied that an admonition is not sufficient to assure the defendant a fair trial, upon motion of the defendant, the court may grant a mistrial. **State v. Kersey**, 406 So.2d 555, 560 (La. 1981).

Herein, no objection, request for admonition, or motion for mistrial was lodged as the witness gave the testimony elicited by the defense attorney. To preserve an issue for appellate review, a party must state an objection contemporaneously with the occurrence of the alleged error, as well as the grounds for the objection. La. C.Cr.P. art. 841. See also La. C. Evid. art. 103A(1). The purpose behind the contemporaneous objection rule is to put the trial judge on notice of an alleged irregularity so that he may cure the problem, and to prevent the defendant from gambling on a favorable verdict, then resorting to appeal on errors that might easily have been corrected by an objection. Since the defendant did not lodge an objection, he is precluded from raising the issue on appeal. Accordingly, the issue raised in this assignment of error is not properly preserved for appellate review. See State v. Tipton, 95-2483, pp. 7-8 (La. App. 1st Cir. 12/29/97), 705 So.2d 1142, 1147-48. However, as previously stated, the defendant alternatively argues that his counsel was ineffective in not objecting or moving for a mistrial, and thereby waiving the issue.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, § 13 of the Louisiana

Constitution. An attorney owes his client a duty of loyalty--a duty to avoid conflicts of interest. **Strickland v. Washington**, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Counsel also has a duty to conduct reasonable investigations or to make a reasonable decision that a particular investigation is unnecessary. **Strickland**, 466 U.S. at 691, 104 S.Ct. at 2066. When a defendant seeks reversal of a conviction based on ineffective assistance of counsel, he must establish two separate elements to succeed. 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. See Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. A failure to make the required showing of either deficient performance *or* sufficient prejudice defeats the ineffectiveness claim. **State v. Robinson**, 471 So.2d 1035, 1038-39 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

When a claim of ineffective assistance of counsel is raised on appeal, the issue is generally referred to post-conviction proceedings in which both sides can introduce evidence and the validity of the claim can be properly determined. **State v. Wille**, 559 So.2d 1321, 1339 (La. 1990).⁴ However, where the record discloses evidence needed to decide the issue of ineffective assistance of counsel and that issue was raised by assignment of error on appeal, the issue may be addressed in the interest of judicial economy. **State v. Bourgeois**, 451 So.2d 172, 174 (La. App. 1st Cir.), writ denied, 457 So.2d 18 (La. 1984). Under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic

⁴ The defendant would have to satisfy the requirements of La. C.Cr.P. art 924, *et. seq.*, in order to receive such a hearing.

and tactical, which must be made before and during trial rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Folsie**, 623 So.2d 59, 71 (La. App. 1st Cir. 1993). Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond that contained in this record, could such allegations be sufficiently considered. **State v. Eames**, 97-0767, p. 8 (La. App. 1st Cir. 5/15/98), 714 So.2d 210, 216, writ denied, 98-1640 (La. 11/6/98), 726 So.2d 922.

In **Doyle v. Ohio**, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976), the United States Supreme Court held that the use, for impeachment purposes, of the defendant's silence at the time of arrest and after receiving the **Miranda** warnings, violates the Due Process Clause of the Fourteenth Amendment. See also **Portuondo v. Agard**, 529 U.S. 61, 74-75, 120 S.Ct. 1119, 1128, 146 L.Ed.2d 47 (2000). However, not every mention of the defendant's post-arrest silence is prohibited by **Doyle**. As specified by the Louisiana Supreme Court, in **State v. George**, 95-0110, p. 9 (La. 10/16/95), 661 So.2d 975, 980 (quoting **Doyle**, 426 U.S. at 619, 96 S.Ct. at 2245), "*Doyle* condemns only 'the use **for impeachment purposes** of [the defendant's] silence at the time of arrest, and after receiving **Miranda** warnings. . . .'" A brief reference to post-**Miranda** silence does not mandate a mistrial or reversal where the trial as a whole was fairly conducted, the proof of guilt is strong, and the State made no use of the silence for impeachment. See **State v. Smith**, 336 So.2d 867, 868-70 (La. 1976). See also **State v. Stelly**, 93-1090, p. 7 (La. App. 1st Cir. 4/8/94), 635 So.2d 725, 729, writ denied, 94-1211 (La. 9/23/94), 642 So.2d 1309.

Herein, the testimony at issue was elicited by the defense. Specifically, the defendant's trial counsel elicited testimony regarding the defendant's willingness to

cooperate and participate in an interview with an interpreter. Seemingly, the decision to elicit the testimony at issue falls within the ambit of trial strategy and would not be subject to review on appeal. At any rate, the defense counsel did not pursue this line of questioning for the purpose of calling the jury's attention to the defendant's post-arrest silence or having the jury make an inappropriate inference. See Kersey, 406 So.2d at 559. The defense counsel ultimately elicited the Sergeant's admission that he did not pursue an interview of the defendant with an interpreter. Moreover, the defendant did not testify at the trial, and thus, the statement in question certainly was not used for impeachment purposes. Thus, the defendant has failed to show that his counsel's performance was deficient or that he was prejudiced. The sole assignment of error lacks merit.

CONVICTION AND SENTENCE AFFIRMED.