

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1986

STATE OF LOUISIANA

VERSUS

DARRIAN DEMOND NEAL

Judgment Rendered: September 14, 2011

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 06-06-0383

Honorable Louis R. Daniel, Judge Presiding

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BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

SAJ
RHO
TMH

HIGGINBOTHAM, J.

The defendant, Darrian Demond Neal, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1.¹ He pled not guilty and, following a jury trial, the defendant was found guilty as charged. He was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

Sometime after midnight on May 9, 2006, the defendant and his friends, Richard Prosper and David Jones, were riding around Baton Rouge. Prosper was driving Jones's cousin's late model Lincoln sedan. When they drove to Hillcrest Avenue, the defendant told Prosper to stop at the home of Edward Simmons, who was outside talking to his girlfriend on a cordless telephone. According to Prosper, who testified at trial, Simmons owed the defendant money for marijuana that the defendant had previously sold to Simmons. When Simmons did not have the money the defendant asked for, the defendant ordered Simmons into the Lincoln at gunpoint. Once in the car, the defendant repeatedly struck Simmons with his gun.

Prosper drove to an abandoned house across the street from the defendant's house on Avenue F. Simmons was removed from the car and taken to the front yard of the abandoned house. The three men repeatedly struck Simmons and forced him to take off his clothes. Jones removed an iron cord from the trunk, and he and the defendant tied up Simmons with the cord and forced him into the trunk. At the defendant's request, Prosper drove to a secluded lot on Mount Pleasant Road off La. Highway 61 in Zachary. The three men exited the car. The defendant had a Colt .38 Special revolver, and Prosper had a Hi-Point .40 semiautomatic handgun. Jones did not have a gun. The defendant fired several

¹ Co-defendants Richard Prosper and David Jones were also charged with second degree murder. The State filed a motion to sever and the defendant was tried separately.

shots into the trunk while it was still closed. Simmons was then removed from the trunk, and the defendant and Prosper repeatedly shot Simmons. The three men returned to the car, leaving Simmons to die.

The men hid Simmons's clothes in the woods behind a friend's house in Baker. Prosper hid the guns behind the defendant's girlfriend's trailer in Woodville, Mississippi. Lieutenant Leonardo Moore, with the East Baton Rouge Parish Sheriff's Office, was the lead investigator on the case and quickly compiled leads and information regarding the identity of the suspects. Within three days of Simmons's killing, all three men were arrested. The defendant and Prosper turned themselves in to the police, and Jones was picked up by the police at his house. The defendant did not give a statement. Prosper gave a statement implicating himself, the defendant, and Jones in the crime. Prosper also told the police where they could find the guns and Simmons's clothes. Based on Prosper's information, the police found the guns and clothes. Jones gave a statement implicating himself, the defendant, and Prosper in the crime. Jones also told the police where they could find the Lincoln, which contained Simmons's blood.

Dr. Gilbert Corrigan, a pathologist, performed the autopsy on Simmons. Dr. Corrigan testified at trial that Simmons suffered at least fourteen gunshot wounds and bled to death.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues he received ineffective assistance of counsel at his trial. Specifically, the defendant contends defense counsel was ineffective for failing to object and move for a mistrial when Lieutenant Moore testified about the defendant's post-arrest silence.

A mistrial under the provisions of LSA-C.Cr.P. art. 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the

witness or of the prosecutor make it impossible for the defendant to obtain a fair trial. See State v. Miles, 98-2396 (La. App. 1st Cir. 6/25/99), 739 So.2d 901, 904, writ denied, 99-2249 (La. 1/28/00), 753 So.2d 231. However, a mistrial is a drastic remedy, which should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal without abuse of that discretion. State v. Berry, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

Lieutenant Moore testified at trial about how all three suspects -- the defendant, Jones, and Prosper -- were ultimately apprehended. Lieutenant Moore explained that the defendant turned himself in to the authorities, but noted the defendant did not make a statement. According to the defendant, defense counsel was ineffective for failing to object to Lieutenant Moore's remark about the defendant not providing a statement. The alleged improper comment by Lieutenant Moore took place during his direct examination by the prosecutor:

Q. Did -- ultimately, did Neal's attorney turn him [sic] in to you?

A. He eventually turned himself in at Scotlandville substation at approximately 3:00 -- at approximately 3:02, to be exact.

Q. In the morning?

A. In the morning.

Q. Okay.

A. Upon making contact with Neal, in the presence of his attorney, he was advised of [his] rights. At that time he did not make a statement. He was then transported, after processing, to the central booking area where he was then processed and dressed out in his orange clothing.

Defense counsel did not object, move for a mistrial, or request an admonition regarding this line of questioning, specifically Lieutenant Moore's comment about the defendant not making a statement after being **Mirandized**. An irregularity or error cannot be availed of after the verdict unless it was objected to at the time of occurrence. LSA-C.E. art. 103(A)(1); LSA-C.Cr.P. art. 841(A).

Accordingly, the issue raised in this assignment of error was not properly reserved for appellate review. See **State v. Tipton**, 95-2483 (La. App. 1st Cir. 12/29/97), 705 So.2d 1142, 1147-48.

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). 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).

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court, where a full evidentiary hearing may be conducted.² However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. **State v. Carter**, 96-0337 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438. The record is sufficient regarding the defendant's allegation that defense counsel failed to object to Lieutenant Moore's comment about the defendant's

² The defendant would have to satisfy the requirements of LSA-C.Cr.P. art 924, *et seq.*, in order to receive such a hearing.

post-arrest silence. We will therefore address the defendant's claim.

We find that the single reference to post-arrest silence did not warrant a mistrial or even prejudice the defendant. In **Doyle v. Ohio**, 426 U.S. 610, 611, 96 S.Ct. 2240, 2241, 49 L.Ed.2d 91 (1976), the United States Supreme Court found that it was improper for the prosecutor to impeach the defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving **Miranda** warnings after his arrest. See **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In other words, **Doyle** condemns only "the use *for impeachment purposes* of [the defendant's] silence at the time of arrest, and after receiving **Miranda** warnings...." **State v. George**, 95-0110 (La. 10/16/95), 661 So.2d 975, 980. **United States v. Moreno**, 185 F.3d 465, 473 (5th Cir. 1999), cert. denied, 528 U.S. 1095, 120 S.Ct. 835, 145 L.Ed.2d 702 (2000), extended **Doyle** to include a violation where the prosecutor on direct examination elicits testimony from a witness about a defendant's refusal to give a statement.

The questions to Lieutenant Moore by the prosecutor were not used to impeach the defendant, who did not testify at trial. Further, the questions by the prosecutor on direct examination were not designed to elicit a response by Lieutenant Moore about the defendant's post-arrest silence. The questions by the prosecutor were simply to establish how the defendant came to be in police custody during Lieutenant Moore's investigation of the case. The prosecutor did not call attention to the defendant's post-arrest silence or ask questions about what transpired after the defendant was read his rights. Lieutenant Moore testified, unsolicited, that the defendant did not make a statement at that time. In his testimony, Lieutenant Moore described how each suspect came to be in custody. The police found Jones at his house two days after the murder. The defendant and Prosper turned themselves in. Lieutenant Moore explained that, while in custody,

both Jones and Prosper gave statements which implicated all three suspects, including the defendant, in the murder of Simmons. When the defendant was in custody, Moore simply noted for the sake of narrative completeness that the defendant did not give a statement before being booked. The prosecutor had not elicited such a response from Moore. Moreover, there was no further questioning or testimony about the defendant not giving a statement.

Accordingly, the defendant's post-arrest silence was not used against him within the meaning of **Doyle** or **Moreno**. This case involved a single, gratuitous comment by a witness to which the prosecutor made no further reference. The purpose of the State's line of questioning was to summarize how the investigation culminated in the formal arrest of the defendant with the routine incidents of custody, and was not designed to exploit the defendant's failure to claim his innocence after his arrest in an effort to impeach his testimony or attack his defense. See **George**, 661 So.2d at 979-80.

We do not find defense counsel's decision to not object or move for a mistrial was error. The defendant did not suffer such substantial prejudice that he was deprived of any reasonable expectation of a fair trial. See **Berry**, 684 So.2d at 449. Further, we note that, even if we were to find that such failure to object or move for a mistrial constituted deficient performance, the result would have been 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 694-95, 104 S.Ct. at 2068-69. After considering the totality of the evidence before the jury, we do not find a reasonable probability exists that, absent the alleged error of failing to object and move for a mistrial, the

jury would have had a reasonable doubt as to the defendant's guilt. See State v. Hilton, 99-1239 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1036, writ denied, 00-0958 (La. 3/9/01), 786 So.2d 113. The evidence presented at trial overwhelmingly established the defendant's guilt. 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 by the jury would reasonably have been different absent the alleged error. The defendant has failed to show sufficient prejudice to meet his burden. See Hilton, 764 So.2d at 1037. His assignment of error regarding ineffective assistance of counsel, therefore, is without merit.

CONVICTION AND SENTENCE AFFIRMED.