NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 1929

STATE OF LOUISIANA

VERSUS

MARQUEL D. JONES

Judgment Rendered: March 27, 2009

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On Appeal from the Twenty-Third Judicial District Court
In and For the Parish of Ascension
State of Louisiana
Docket No. 20328

Honorable Pegram J. Mire, Jr., Judge Presiding

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* * * * * *

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

McCLENDON, J.

Defendant, Marquel D. Jones, was charged by bill of information with one count of armed robbery (count I), a violation of LSA-R.S. 14:64; one count of armed robbery additional penalty (count II), a violation of LSA-R.S. 14:64.3; one count of aggravated burglary (count III), a violation of LSA-R.S. 14:60; and one count of attempted first degree murder (count IV), a violation of LSA-R.S. 14:27 and 14:30.[1] He pled not guilty on all counts. Following the selection of the jury, but prior to the presentation of opening statements, the court quashed count III. Following a jury trial, defendant was found guilty as charged on counts I and II, and guilty of the responsive offense of attempted second degree murder, a violation of LSA-R.S. 14:27 and 14:30.1, on count IV.[2] On count I, he was sentenced to fifteen years at hard labor without benefit of probation, parole, or suspension of sentence. On count II, defendant was sentenced to five years at hard labor, without benefit of probation, parole, or suspension of sentence to be served consecutively with the sentence imposed on count I. On count IV, he was sentenced to twenty years at hard labor, without benefit of probation, parole, or suspension of sentence, to be served concurrently with the sentences imposed on counts I and II. Defendant moved for reconsideration of sentences, but the motion was denied. He now appeals, designating the following thirteen assignments of error:

1. Trial counsel erred in failing to move for a severance when a codefendant began using an antagonistic defense.

2. Trial counsel erred in failing to move for mistrial when the state offered exculpatory evidence after the completion of voir dire.

3. Trial counsel rendered ineffective assistance by failing to object to hearsay testimony given by Louella Charles.

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[1] Joseph Johnson and John H. Martin were also charged by the same bill of information with the same counts.

[2] The sentencing minutes are inconsistent with the trial transcript and verdict sheet concerning the verdict on count IV. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

4. Trial counsel erred in failing to meaningfully cross-examine Louella Charles.

5. Trial counsel erred in failing to meaningfully cross-examine Q.A.[3]

6. Trial counsel erred in failing to meaningfully cross-examine Samuel Charles.

7. Trial counsel erred in failing to meaningfully cross-examine Detective David Baldwin.

8. Trial counsel erred in not allowing Detective Baldwin to testify about why defendant ran.

9. Trial counsel erred in failing to meaningfully cross-examine Lanetra Alexander.

10. Trial counsel erred in failing to meaningfully cross-examine Lieutenant Andrew Duhe.

11. Trial counsel erred in failing to meaningfully cross-examine Detective Willie Taylor.

12. Trial counsel erred in believing he was working with the lawyers for the codefendants to defend defendant.

13. The trial court erred because the evidence was insufficient for the conviction of defendant.

For the following reasons, we affirm the convictions on counts I, II, and IV, and affirm the sentences on counts I and IV. We amend the sentence on count II, affirm the sentence as amended, and remand with instructions.

FACTS

The victim, Samuel Charles, testified at trial. On June 6, 2006, he was living with his girlfriend, Lanetra Alexander, her sister, and five children in a house trailer in Gonzales. At approximately 4:00 a.m., a man woke up the victim, put an "AK, a big gun,"[4] to the back of his head, and told him to, "Get up." The man was wearing a red and white striped shirt, short beige pants, and a bandanna around

[3] We reference this victim only by his initials. See LSA-R.S. 46:1844(W).

[4] Although the victim described "the big gun" as an "AK-47," he identified the SKS assault rifle recovered from the vehicle with defendant as the weapon used in the crimes.

his face. The man stated, "Lay down, bitch. Get on the ground." Another man present with the man with the big gun, stated, "Kill him. Shoot that mother f-----. Kill that bitch." The man with the big gun clicked the trigger, but the gun misfired, and the men ran away from the house with the victim's wallet containing $100, his personal and commercial driver's licenses, and a bank card.

Q.A., who was fifteen years old at the time of the offenses, testified he was living with his cousin, Lanetra Alexander, her boyfriend, and their children in June of 2006. On June 6, 2006, he was awakened by noise in the house and saw two men with guns. One of the men was holding a long gun with a banana clip. He was dressed in red "Dickies," with a red and white shirt, and a red "rag" around his mouth. The other man had a pistol. He was wearing blue pants and a blue shirt. He heard the men demanding, "Where the money at?" and heard the reply, "I don't have no money." The man with the pistol then came into Q.A.'s room, put the gun in his face, and told him to lie down. Q.A. complied with the demand, and the man left the room. He then heard someone say, "Shoot him. Shoot him," followed by a noise. The men then ran from the house. Q.A. looked out of the window after the men ran out and testified that he saw them run to a silver Ford Taurus and drive off. He stated that the men had come to the house earlier that day with two girls, looking for the victim. Q.A. testified that the man with the long gun was defendant, his cousin.

Lanetra Alexander testified that she was living with the victim, her four children, her sister, and her cousin on June 6, 2006. She was awakened during the night when someone kicked in her front door and her bedroom door. Upon awakening, she saw two men in her room. One was wearing a striped red and white shirt and a red "rag" around his mouth. He was carrying a big gun. The other man was wearing a blue shirt and a blue "rag" around his mouth. He had a smaller gun. A gun was pointed at the victim and he was told to get on the floor. The men shouted at the victim, "Where the money at?" The victim handed the men his wallet from the dresser. They also demanded drugs, but the victim told them he did not have any drugs. They threatened to kill one of the victim's family

members in the house if he made any sudden moves. Then the man with the smaller gun told the man with the big gun to "go ahead and knock his head off." The man with the big gun then pulled the trigger, but the gun jammed, and the men ran off. Before leaving, the man with the smaller gun broke away some of the sheetrock behind the door and searched for something. When asked if she knew any of the men who had invaded the home, she indicated that she knew the defendant, her cousin, but did not recognize him that night, although she learned about it later.

S.J.,[5] who was seventeen years old at the time of the offenses, testified she was living with her brother-in-law, her sister, Lanetra Alexander, and her nieces and nephews in June of 2006. On June 6, 2006, S.J. was watching television at about 4:30 a.m., when she heard a sound like someone had kicked in the door. She hid under the covers on the living room sofa with one of her nieces. S.J. then heard the door to Lanetra's room being opened or kicked open. She heard someone shouting, "Get up. Get up[,]" and heard demands for money and threats to "lay one of his people down or all these people down in the house." S.J. was also aware of someone pacing back and forth in the living room. This person was the first of the assailants to leave. S.J. also stated that on their way out, the other assailants discussed whether or not the car was running.

On June 6, 2006, at approximately 5:00 a.m., St. James Parish Sheriff's Office Lieutenant Andrew Duhe received an all points bulletin concerning a gold-colored Taurus with a temporary license plate, occupied by three subjects. At approximately 5:28 a.m., he saw a vehicle matching the description of the suspect vehicle and instigated a stop of the vehicle. Lieutenant Duhe's police car was equipped with a video camera that recorded the traffic stop of the vehicle. Codefendant Martin was driving the vehicle. When asked for a driver's license, he handed Lieutenant Duhe the victim's driver's license. Lieutenant Duhe arrested codefendant Martin and read him his **Miranda** rights. A search of his pockets revealed the victim's other driver's license, the victim's bank card, codefendant

[5] We reference this victim only by her initials. See LSA-R.S. 46:1844(W).

Martin's driver's license, and a twenty dollar bill. The front-seat passenger of the vehicle was ordered out of the vehicle. He got out, backed up, and fled from the scene. Codefendant Johnson, the back-seat passenger of the vehicle, was then arrested. A loaded SKS assault rifle was located on the back floor of the vehicle, and a loaded clip and a bag containing eleven smaller bags of marijuana were located in the back-seat area of the vehicle. A blue bandanna and a red shirt were recovered from the front passenger floor and door of the vehicle. A small package of cocaine was recovered from the ground where codefendant Johnson had been standing when he was arrested. A second bag of cocaine was recovered from codefendant Johnson's mouth when he was checked into jail. The front seat passenger was eventually apprehended and identified as defendant. A palm print matching the left palm of defendant was recovered from the right quarter panel of the vehicle.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 13, defendant argues that the state failed to prove beyond a reasonable doubt that he committed an armed robbery and an attempted second degree murder against Samuel Charles. Defendant claims the evidence of the armed robbery was insufficient because of inconsistencies between Louella Charles's testimony and Q.A.'s testimony concerning whether or not girls were present in the car when the defendant came to Samuel Charles's house prior to the incident, and because Q.A. testified that he saw only two people leaving the trailer after the incident.[6] Also, Q.A. described the getaway car as being silver, when in fact it was gold. Defendant claims the evidence concerning attempted second degree murder[7] was insufficient due to inconsistencies between whether or not the robbers said they would kill someone and because a motion of cocking a gun back is insufficient to prove the intent to kill.

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[6] In contrast, Louella Charles testified that when defendant came by her home earlier in the day looking for her son (the victim), only two "guys" were with defendant. No mention was made of any girls.

[7] Defendant incorrectly references his conviction on count IV as a conviction for attempted first degree murder rather than a conviction for attempted second degree murder.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the state proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438; **State v. Wright**, 98-0601, p. 2 (La.App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 00-0895 (La. 11/17/00), 773 So.2d 732.

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 98-0601 at p. 3, 730 So.2d at 487.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. LSA-R.S. 14:30.1A(1). Further, a specific intent to kill is an essential element of the crime of attempted murder. **State v. Butler**, 322 So.2d 189, 192 (La. 1975).

Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. LSA-R.S. 14:27A. Specific criminal intent is that "state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." LSA-R.S.

14:10(1); **State v. Henderson**, 99-1945, p. 3 (La.App. 1 Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235. Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **Id.** It may also be inferred from a defendant's aiming a firearm directly at the victim and pulling the trigger or from a defendant's relentless pursuit of the victim through a neighborhood with a dangerous weapon. See **State v. Maxey**, 527 So.2d 551, 555 (La.App. 3 Cir. 1988), writ denied, 541 So.2d 868 (La. 1989); **State v. Stacker**, 02-768, p. 5 (La.App. 5 Cir. 12/30/02), 836 So.2d 601, 606, writ denied, 03-0411 (La. 10/10/03), 855 So.2d 327.

After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the state, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of armed robbery and attempted second degree murder and defendant's identity as the perpetrator of those offenses against Samuel Charles. The verdict rendered against defendant indicates the jury accepted the testimony of the state's witnesses. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The testimony of the victim alone is sufficient to prove the elements of the offense. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **State v. Lofton**, 96-1429, p. 5 (La.App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Further, in reviewing the

evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662.

This assignment of error is without merit.

MISTRIAL

In assignment of error number 2, defendant argues that trial counsel erred in not moving for a mistrial after the state revealed that Samuel Charles and Lanetra Alexander recanted statements that marijuana had been taken during the home invasion.

As is pertinent here, LSA-C.Cr.P. art. 775 provides that a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial. 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 a mistrial will not be disturbed on appeal without abuse of that discretion. **State v. Berry**, 95-1610, p. 7 (La.App. 1 Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

On December 5, 2007, voir dire was conducted, and the state began presenting its case. On December 6, 2007, the state advised the court and defense counsel of potential **Brady** material. The state indicated that when it interviewed Samuel Charles again in preparation for trial, he stated that the statement he had given to the police concerning marijuana being stolen from him was not true and that he had included the statement to "make the case better" at the suggestion of a police officer. The trial court indicated that the defense was free to impeach Charles with his prior inconsistent statement.

Thereafter, the state questioned Charles about his prior inconsistent statement, and he conceded that he had made the statement. Charles also conceded that he was arrested "[f]or the marijuana." In response to questioning

from counsel for codefendant Martin, Charles denied that the only reason he was recanting his statement was because of the marijuana charge pending against him. Additionally, in closing argument, the state argued that Charles had lied when he claimed marijuana was not stolen from him. In response to questioning from the state, Lanetra Alexander also conceded that she had initially told Detective Baldwin that Charles had handed the robbers a bag of marijuana from behind the door, but that statement was false.

Upon a review of the record, we cannot say that there was a showing of prejudice tending to deprive defendant of the reasonable expectation of a fair trial. The state promptly disclosed Charles's inconsistent statement, and the state and the defense attacked Charles's credibility on the basis of his recantation.

This assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In assignments of error numbers 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 defendant argues that trial counsel was ineffective or performed deficiently for various reasons, which we examine infra.

A claim of ineffective assistance of counsel is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal. **State v. Miller**, 99-0192, p. 24 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001). However, when appropriate, a claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that the defendant was deprived of a fair

trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 859-60 (La.App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

Allegations of ineffectiveness relating to the choice made by counsel to pursue one line of defense as opposed to another constitute an attack upon a strategy decision made by trial counsel. The investigation of strategy decisions requires an evidentiary hearing and, therefore, cannot possibly be reviewed on appeal.[8] **State v. Allen**, 94-1941, p. 8 (La.App. 1 Cir. 11/9/95), 664 So.2d 1264, 1271, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. Further, under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic 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. Folse**, 623 So.2d 59, 71 (La.App. 1 Cir. 1993).

Antagonistic Defense

In assignment of error number 1, defendant argues trial counsel erred in failing to move for a severance when it became clear during voir dire that counsel for codefendant Joseph Johnson was arguing an antagonistic defense suggesting that Johnson was with the "wrong crowd" and was "guilty because he belonged to the group."

Defendants who are jointly indicted are to be tried together unless the court finds that justice requires a severance. LSA-C.Cr.P. art. 704(2). The

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[8] Defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924, *et seq.*, in order to receive such a hearing.

courts have permitted a severance to codefendants whose defenses are antagonistic to each other. Defenses are antagonistic when each defendant intends to exculpate himself by putting the blame for the offense on a codefendant. However, a mere allegation that the defenses are antagonistic is insufficient because convincing evidence of actual antagonism must be present to justify a severance. An accused is not entitled to a severance as a matter of right; the decision is one resting within the sound discretion of the trial judge. A denial of a motion to sever will not be overturned on appeal absent a clear abuse of discretion. Reversal of a conviction for failure to sever where antagonism is shown is not always mandated unless prejudice can be shown. **State v. Price**, 93-0625, 93-0626, pp. 3-4 (La.App. 1 Cir. 3/11/94), 636 So.2d 933, 936-37, writs denied, 94-0742 (La. 6/17/94), 638 So.2d 1091, and 94-1566 (La. 10/14/94), 643 So.2d 159.

During voir dire, Susan K. Jones, counsel for codefendant Johnson, stressed to the prospective jurors that each defendant had to be considered individually. She asked one prospective juror if she thought that because Johnson was "with the other two people, he's seated at the table called the 'defense table,' that he's probably guilty?" She asked another prospective juror what he thought about "this hanging around with the wrong crowd?" She asked another prospective juror if she would be able to separate out Johnson from the other individuals sitting at the defense table, stating that "this is not guilt by association in this great country." At trial, Ms. Jones argued that the evidence did not exclude the reasonable hypothesis that Johnson was innocent based upon Q.A.'s testimony that Johnson was not in the house during the home invasion.

David R. Smith, counsel for defendant, argued at trial that the jury should reject the multiple identifications of defendant as the assailant with the SKS assault rifle because Q.A.'s initial identification was based on the shirt defendant had worn earlier in the day *prior* to the home invasion.

After reviewing the record, we are unable to find convincing evidence of antagonistic defenses and thus cannot say that Mr. Smith performed deficiently in not moving for a severance on the basis of antagonistic defenses. Defendant's defense was not antagonistic to codefendant Johnson's defense. Defendant relied on a defense of mistaken identity; not that he had been mistaken for codefendant Johnson. Codefendant Johnson relied on his lack of participation in the home invasion and following offenses. See **State v. Dilosa**, 01-0024, p. 14 (La.App. 1 Cir. 5/9/03), 849 So.2d 657, 669-70, writ denied, 03-1601 (La. 12/12/03), 860 So.2d 1153 (extent of participation of each defendant in the transaction is not grounds for granting a severance).

This assignment of error is without merit.

Hearsay

In assignment of error number 3, defendant argues that trial counsel rendered ineffective assistance by failing to object to the hearsay testimony of Louella Charles, who did not witness the crimes.

At trial, Ms. Charles testified that she is the mother of Samuel Charles and lives next door to him. On direct examination, she stated that defendant and codefendant Martin came over earlier on the day of the incident, asking for her son. Ms. Charles had previously worked with defendant at Piccadilly Cafeteria, and he greeted her and asked how she had been doing. At trial, she identified the Taurus that defendant and the codefendants were apprehended in as the vehicle she had seen earlier. She indicated, however, that she was asleep when the crimes occurred later that night. When Blaine M. Hebert, counsel for codefendant Martin, questioned Ms. Charles on cross-examination as to why she had not gone to the police immediately after the incident, she answered that she did not know that it was the same people "until they told me later it was the same people." Ms. Charles then claimed she knew it was the "same people" because she had seen the car. She conceded, however, that she had not seen anyone go into her son's house on the morning of June 6, 2006, that she had not seen anyone break into her son's house on the morning of June 6, 2006, and

that she had not seen the Taurus at her son's house on the morning of June 6, 2006.

The decision of whether to raise a hearsay objection during the cross-examination of Ms. Charles was a strategy decision. Mr. Smith may have reasonably decided that allowing Mr. Hebert to attack Ms. Charles's answers was more beneficial to defendant than interrupting the cross-examination with a hearsay objection. Again, the fact that a particular strategy proves unsuccessful does not establish ineffective assistance of counsel. **Folse**, 623 So.2d at 71.

This assignment of error is without merit or is otherwise not subject to appellate review.

Adequacy of Cross-Examination

In assignments of error numbers 4, 5, 6, 7, 9, 10, and 11, defendant argues that trial counsel rendered ineffective assistance of counsel by not asking certain questions on cross-examination of Louella Charles, Q.A., Samuel Charles, Detective David Baldwin, Lanetra Alexander, Lieutenant Andrew Duhe, and Detective Willie Taylor, respectively. The decision of what questions to ask, if any, on cross-examination of the referenced witnesses was clearly a strategy decision.

Accordingly, these assignments of error are without merit or otherwise not subject to appellate review.

Failure to Object to Exclusion of "Exculpatory" Evidence

In assignment of error number 8, defendant argues that trial counsel rendered ineffective assistance by failing to object to the exclusion of Detective Baldwin's testimony concerning defendant's statement of why he fled.

At trial, the state interrupted Detective Baldwin as he began to disclose defendant's response when asked why he had run from the police. Outside the presence of the jury, the state indicated that Detective Baldwin was about to disclose that defendant had stated that he had run because there was an active bench warrant for his arrest and because he was a suspect in a burglary in which an SKS assault rifle was stolen. Mr. Smith asked the state if defendant had also stated that he had run "because of child support." The state responded that

defendant had stated that he had bench warrants, but did not give any details concerning why the warrants had been issued. The trial court asked defense counsel if they were going to object to the testimony, and Ms. Jones and Mr. Hebert answered negatively. Mr. Smith did not answer. The state indicated that it would instruct Detective Baldwin to omit defendant's answer and would leave it to the defense to ask defendant for the answer on cross-examination. The defense attorneys did not question Detective Baldwin regarding defendant's response when asked why he had run from the police.

A witness's direct or indirect reference to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible may result in a mistrial. See LSA-C.Cr.P. arts. 770 and 771. The state diligently avoided the risk of a mistrial by preventing Detective Baldwin from disclosing defendant's statements at issue. We cannot say that Mr. Smith performed deficiently in failing to place the statements before the jury. Rather than being exculpatory for defendant, defendant's statement that he was a suspect in a burglary involving the taking of an SKS assault rifle would have inculpated him in the armed robbery and attempted murder at issue herein, because of the identity between that weapon and the weapon used in the armed robbery and attempted murder.

This assignment of error is without merit.

Erroneous Assumption of Trial Counsel

In assignment of error number 12, defendant argues that his trial counsel's statements to the jury in closing argument indicated that he wrongfully believed that he and the other defense attorneys were working together in joint representation of all of the defendants.

Mr. Smith, who examined witnesses after Ms. Jones and Mr. Hebert at trial, began his closing argument as follows:

> It's kind of fallen upon me in this trial to take the rear portion of everything, and by the time I get to you guys, everything has been covered that needs to be covered. Plus, I must see to the more-experienced co-counsels. Even though I'm older than they are, they have more criminal trial experience. They took the lead. They did

what they needed to do. They presented the evidence, and I will continue with Marquel Jones.

Mr. Smith's statement that "by the time I get to you guys, everything has been covered that needs to be covered," did not reflect the abdication of his responsibility to defend defendant, but rather his recognition that repeating the challenges to the witnesses and evidence made by his fellow defense attorneys would delay the trial for no legitimate purpose. Thereafter, Mr. Smith stated, "I sat back. I've been quiet mostly because everything has been covered sufficiently for you guys. For me to get up here and just keep repeating what's already been said serves no purpose other than to delay you another day."

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to LSA-C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." LSA-C.Cr.P. art. 920(2). After a careful review of the record in these proceedings, we have found no reversible errors. However, we note error in the sentence imposed on count II.

On count II, defendant was sentenced to five years at hard labor, without benefit of probation, parole, or suspension of sentence, to be served consecutively with the sentence imposed on count I. The instant offense occurred prior to the amendment of LSA-R.S. 14:64.3 by 2006 La. Acts, No. 208, § 1, to provide for imprisonment at hard labor. Accordingly, the trial court erred in imposing hard labor under LSA-R.S. 14:64.3 for count II.

Accordingly, we amend the sentence by deleting that provision of the sentence on count II which requires the additional penalty of imprisonment for five years under LSA-R.S. 14:64.3 to be served at hard labor. We remand this case to the trial court for correction of the minutes and, if necessary, the commitment order regarding count II. See **State v. Williams**, 01-1398, pp. 6-8

(La.App. 1 Cir. 3/28/02), 815 So.2d 378, 382-83, writ denied, 02-1466 (La. 5/9/03), 843 So.2d 388.

CONVICTIONS ON COUNTS I, II, AND IV AFFIRMED; SENTENCES ON COUNTS I AND IV AFFIRMED; SENTENCE FOR COUNT II AMENDED AND, AS AMENDED, AFFIRMED; REMANDED WITH INSTRUCTIONS.