NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 KA 0079

STATE OF LOUISIANA

VERSUS

HARRY E. PRATER, JR.

Judgment Rendered: NOV 06 2015

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On Appeal from the Eighteenth Judicial District Court
In and for the Parish of Iberville
State of Louisiana
No. 900-12

Honorable William C. Dupont, Judge Presiding

* * * * * *

Richard J. Ward, Jr. District Attorney Tony Clayton and Elizabeth Engolio Assistant District Attorneys Plaquemine, Louisiana	Counsel for Appellee State of Louisiana
Mary E. Roper Baton Rouge, Louisiana	Counsel for Defendant/Appellant Harry E. Prater, Jr.
Harry E. Prater, Jr. Angola, Louisiana	Defendant/Appealant Pro Se

* * * * * *

BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McCLENDON, J.

Defendant, Harry E. Prater, Jr., was charged by grand jury indictment with one count of second-degree murder of Ronald Harrell (count I), a violation of LSA-R.S. 14:30.1, and one count of second-degree murder of Junius Dedrick, III, also a violation of LSA-R.S. 14:30.1 (count II). At arraignment, defendant entered a plea of not guilty, but following trial, he was found guilty as charged by a unanimous jury on both counts. On each count, defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The trial court further ordered the sentences to be served consecutively. He now appeals with two counseled assignments of error: first, to the sufficiency of the evidence presented at trial, and second, to the trial court's denial of his motion for mistrial. Further, in a pro se brief, defendant assigns error to the effectiveness of his trial counsel, and to an alleged sequestration violation. For the following reasons, we affirm defendant's convictions and sentences.

STATEMENT OF FACTS

On September 24, 2012, at approximately 6:42 a.m., Iberville Parish Sheriff's Deputy Erik Tankersly was driving on LA Highway 1 southbound when he observed a black, 2005 Mazda car, "sitting in the cane field on the east side of LA 1 North, kind of slanted into the cane field." Deputy Tankersly testified that "as [he] was going by [he] noticed that the yield sign was laying in between one of the turnarounds and there were some deep trenches that led around where the car was." Initially believing that a traffic accident occurred, Deputy Tankersly turned around, approached the driver's side door, looked in, and observed a black male, later identified as Ronald Harrell, who was not breathing and was slumped towards his right side. Deputy Tankersly then observed another black male, later identified as Junius Dedrick, III, who "had a hole in the side of his head, a rather large hole and a couple of what looked like bullet holes in the chest area." The vehicle's emergency flashers or headlights were not operating at the time Deputy Tankersly discovered the vehicle. Additionally, he did not observe any guns inside

the vehicle, nor were any other vehicles in the area. Deputy Tankersly immediately returned to his patrol unit and notified his supervisors.

Detective Lori Morgan, a crime scene investigator with the Iberville Parish Sheriff's Office, testified that she responded to the scene and assisted in the investigation by taking photographs. After speaking with, and obtaining statements from, various "witness[es]" at the scene, Detective Morgan began searching for a red T-shirt. During a helicopter search of the area, in which Detective Morgan participated, a red T-shirt bearing mud and blood stains was located. Detective Morgan also attended the autopsies, where she collected the bullet fragments from the victims' bodies. Detective Morgan sent the fragments, as well as the red T-shirt, for testing with the crime lab.

Later that morning, following Deputy Tankersly's discovery, Iberville Parish Sheriff's Detective Ronnie Hebert responded to the scene as the lead detective. Detective Hebert testified that upon observing the crime scene, he did not see any evidence that would indicate that the victims were shot in self-defense. While Detective Hebert was investigating the crime scene, defendant called the sheriff's office, asking to speak with a detective, stating that he was in the car with the victims the night before, and wanting to possibly "shed some light on what happened." Detective Hebert testified that during defendant's first interview on September 24, 2012, defendant was not a suspect, and was not under arrest. During this interview, defendant told Detective Hebert that he did not know whether the victims had a gun the previous night. He also stated that his girlfriend threw his cell phone into the Mississippi River. In defendant's second interview, on September 28, 2015, he was a suspect, arrested, and read his **Miranda**[1] rights before speaking with Detective Hebert. During this interview, defendant did not tell Detective Hebert what happened on the night of the incident, and again did not say he shot the victims in self-defense. However, defendant did state, at the

[1] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

conclusion of the interview, that, "if it wasn't them it was going to be me," and that "it wasn't no way out."

Vincent Jerome Collins testified that on September 23, 2012, the day before the incident, three men, one of whom was wearing a red shirt, came to his residence. Collins testified that the other men, one of whom Collins recognized as the victim Ronald Harrell, introduced the individual in the red shirt as one of his "partners." Next, Eurika Mitchell testified that on September 23, 2012, she was at Club Secrets when an individual in a red shirt, whom she positively identified at trial as defendant, came up to her and gave her a card with the name "Harry" on it. Mitchell testified that defendant made no attempt to hide his identity during their conversation.

John Nguyen testified that he and defendant have been friends since they were teenagers, and that during the early morning hours of September 24, 2012, defendant called him to pick him up "somewhere over in Plaquemine." Nguyen told defendant that, because his children were home, he could not help him. Nguyen testified that defendant called him a second time, but that he did not speak with defendant as he missed the call. Nguyen also testified that defendant owned a revolver which he called his "baby." Later in the morning on September 24, 2012, defendant told Nguyen that he was going to see if anyone wanted to buy his "baby." Nguyen testified that he visited defendant two months prior to trial (approximately March 2014), and that defendant never told him that he had to kill the victims in self-defense.

Brandy Singleton, who has a child with defendant, testified that at approximately 2:00 a.m., she drove to Plaquemine and picked up defendant in an unfamiliar area. At the time, defendant was wearing a white shirt and blue jeans. Singleton testified that after she drove defendant to his home, he went inside, took a shower, and then returned to her car. The two then drove to her house and spent the night. Later, the following morning, Singleton received a phone call from defendant, informing her that he had spoken with detectives about the shooting because he was with the victims before they died. Singleton indicated

that during this conversation, defendant asked her to tell the detectives that she broke his phone, when in actuality, defendant had thrown his phone away. Furthermore, defendant instructed Singleton to tell the detectives that she did not know what time she picked him up on the night of the shooting. Lastly, Singleton testified that from the night of the shooting to the day of trial, defendant never told her that he had to shoot the two victims in self-defense.

Charles Watson, a firearms examiner and crime scene investigator with the Louisiana State Police Crime Lab, was qualified as an expert at trial in firearm and ballistics examination. Watson testified that he examined an intact bullet retrieved from defendant's home – a .41 magnum caliber bullet. He noted that the .41 magnum is a "fairly uncommon cartridge," and that in his sixteen years with the crime lab, he has only seen three or four firearms chambered for the .41 magnum round. Watson testified the Smith and Wesson Model 47 revolver is the only currently produced firearm chambered for the .41 magnum. In his investigation of the murders, Watson recovered five bullets from both autopsies and the Mazda car. Watson testified that after comparing the bullet retrieved from defendant's home and one of the bullets recovered from one of the victim's forearms, the two bullets were of the same weight, profile, shape, and dimension. While he could not affirmatively state whether all five recovered bullets were from the same manufacturing batch as the intact bullet retrieved from defendant's home, Watson did testify that they were "very, very similar in manufacture and origin." Additionally, Watson affirmatively stated that four of the five recovered bullets were fired from the same firearm.[2] Furthermore, in his investigation of the Mazda car, Watson noted that the back glass was not shot out, and bullets were not recovered from the back seat, but rather all identified bullets were located in the front seat. Lastly, while he did not have a firearm to analyze, Watson testified the

[2] Although Watson testified the fifth bullet contained the same general rifling characteristics, profile, style, and shape, he could not positively state that it was fired from the same gun as the other four due to extensive damage.

recovered bullets were consistent with being fired from a .41 caliber firearm, which he opined would produce wounds that were not survivable.

Dr. Alfredo Suarez testified at trial, and was qualified as an expert in the field of forensic pathology. Dr. Suarez stated that he did not conduct the victims' autopsies, but he did review both autopsy reports. Concerning Junius Dedrick, Dr. Suarez testified there were two gunshot wounds in his upper chest, which entered in his back, and exited in his upper abdomen and right thigh. Additionally, Dr. Suarez identified the fatal shot as the one to Dedrick's head, because it separated the brainstem. Regarding Ronald Harrell, the driver of the vehicle, Dr. Suarez testified that the fatal gunshot was the one to his head, which resulted in "instantaneous" death. Furthermore, Dr. Suarez testified that this shot would have been from a distance, due to the lack of gunpowder soot or tattooing around the wound. Dr. Suarez testified that the manner of death was homicide for both victims, but he could not definitively say whether the gunshot that killed Dedrick came from the front or back seat. However, Dr. Suarez did testify that Harrell was "definitely" shot from the backseat.

Jeremy Dubois, a forensic DNA analyst with the Acadiana Crime Lab, was qualified as an expert in DNA analysis. He testified that he obtained reference swabs from both victims, from defendant, from Brandy Singleton's vehicle, and from the red shirt. Dubois indicated that a blood mixture was located on the right sleeve of the red shirt and that both victims could not be excluded as contributors. Further, Harrell could not be excluded as a contributor of the DNA found on the blood-stained portion of the red shirt's left sleeve. Additionally, after turning the shirt inside-out, Dubois was able to identify a mixture of both defendants' and Dedrick's DNA. Lastly, Dedrick's DNA was located on the front passenger seat of Brandy Singleton's vehicle.

SUFFICIENCY OF THE EVIDENCE

In his second assignment of error, defendant admits that he shot both victims, but avers that he was "driven to a dark area near a cane field that he was unfamiliar with[,]...that a gun was pulled on him[,] and that he felt in imminent

danger." Defendant argues that "[h]e believed that if he hadn't killed [the victims], that they would have killed him." He claims he was "faced with a life or death situation which required that he defend himself," and, therefore, because the State "did not present any evidence which controverted [his] version of events inside of the vehicle prior to the gunshots," his convictions should be reversed and his sentences vacated.

The standard of review for sufficiency of the evidence to support a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime, and defendant's identity as the perpetrator of that crime, beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Patton**, 10-1841 (La.App. 1 Cir. 6/10/11), 68 So.3d 1209, 1224. In conducting this review, we must also be expressly mindful of Louisiana's circumstantial evidence test, i.e., "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." LSA-R.S. 15:438; **State v. Millien**, 02-1006 (La.App. 1 Cir. 2/14/03), 845 So.2d 506, 508-09.

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. **State v. Wright**, 98-0601 (La.App. 1 Cir. 2/19/99), 730 So.2d 485, 487, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 and 00-0895 (La. 11/17/00), 773 So.2d 732.

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). 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." La. R.S. 14:10(1). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503 (La. 11/25/96), 684 So.2d 382, 390. 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. **State v. Henderson**, 99-1945 (La.App. 1 Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235. Furthermore, "[a]lthough an individual's flight does not in and of itself indicate guilt, it can be considered as circumstantial evidence that the individual has committed a crime; flight shows consciousness of guilt." **State v. Williams**, 610 So.2d 991, 998 (La.App. 1 Cir. 1992), writ denied, 95-0533 (La. 3/25/94), 617 So.2d 930.

When a defendant charged with a homicide claims self-defense, the State has the burden of establishing beyond a reasonable doubt that he did not act in self-defense. **State v. Rosiere**, 488 So.2d 965, 968 (La. 1986). Louisiana Revised Statutes 14:20, in pertinent part, provides:

> A. A homicide is justifiable:
>
> (1) When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.
>
> (2) When committed for the purpose of preventing a violent or forcible felony involving danger to life or of great bodily harm by one who reasonably believes that such an offense is about to be committed and that such action is necessary for its prevention. The circumstances must be sufficient to excite the fear of a reasonable person that there would be serious danger to his own life or person if he attempted to prevent the felony without the killing.

However, LSA-R.S. 14:21 provides:

> A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.

The relevant inquiry on appeal is whether, after viewing the evidence in the light most favorable to the prosecution, a rational fact finder could have found beyond a reasonable doubt that the defendant did not act in self-defense. **Rosiere**, 488 So.2d at 968-69; see also **State v. Wilson**, 613 So.2d 234, 238 (La.App. 1 Cir. 1992), writ denied, 635 So.2d 238 (La. 1994).

A thorough review of the record indicates that any 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 second degree murder, and defendant's identity as the perpetrator of the victims' murders. The verdict rendered in this case indicates the jury credited the testimony of the witnesses against defendant, and rejected his attempts to discredit them, particularly in light of his statement to Detective Hebert that "if it wasn't them it was going to be me," the uniqueness of the bullet and firearm by which the victims were killed, the blood and DNA from both victims, as well as defendant, located on the red T-shirt, and the expert testimony concerning the gunshot wounds, DNA evidence, and firearm ballistics. 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 (La.App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. The credibility of witnesses will not be reweighed on appeal. **State v. James**, 02-2079 (La.App. 1 Cir. 5/9/03), 849 So.2d 574, 581.

Additionally, any rational trier of fact could find, beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that defendant did not act in self-defense. Testimony at trial revealed that no other weapons were found inside the Mazda vehicle, bullets were not located in the car's backseat but solely in the front of the vehicle, defendant removed and abandoned his bloodstained red T-shirt following the murders, defendant told John Nguyen the

day after the murders that he wanted to sell his revolver, and his coercion of Brandy Singleton to lie to the police that she broke his cell phone, when, in actuality, he threw it away. Moreover, defendant's flight from the scene after the murders was also inconsistent with a theory of justifiable homicide. See **State v. Wallace**, 612 So.2d 183, 191 (La.App. 1 Cir. 1992), writ denied, 614 So.2d 1253 (La. 1993) ("Furthermore, [the defendant's] actions after the shooting are also inconsistent with a theory of justifiable homicide. After the shooting occurred, he and [the co-defendant] fled the scene and were arrested at a motel in Mandeville the following day.").

The unanimous verdicts rendered in this case further indicate the jury rejected defendant's sole hypothesis of innocence – that his life was in "imminent danger," and that "if he hadn't killed [the victims] [...] they would have killed him." Defendant does not allege any additional facts or details which might support his hypothesis of innocence. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and defendant is guilty unless there is another hypothesis that raises a reasonable doubt. See **State v. Moten**, 510 So.2d 55, 61 (La.App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987). No such hypothesis exists in this case.

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 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Based on the foregoing reasons, this assignment of error lacks merit.

DENIAL OF MOTION FOR MISTRIAL

In his first assignment of error, defendant contends the trial court erred in failing to grant a mistrial after Detective Hebert characterized the case as a "cold

blooded murder." He argues that because Detective Hebert was the "lead detective," he "conferred a certain air of authority, which served to exalt him over the other fact witnesses." Although the trial court sustained defendant's objection, admonished the jury that Detective Hebert was not to give opinions, and instructed the jury that it was their prerogative to decide the case, defendant asserts that "[t]he failure of the court to grant the mistrial, caused undue prejudice to [defendant] and rendered him unable to receive a fair trial. The jury was left with the impression that the lead detective had information which he was not allowed to talk about and that he had concluded that [defendant] had not acted in self-defense. There was no way to undo this impression with an admonition." As such, defendant concludes the trial court should have granted a mistrial, and the failure to do so constituted reversible error.

Louisiana Code of Criminal Procedure Article 775 provides, in pertinent part, that a mistrial shall be ordered, and, in a jury case, the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771. Louisiana Code of Criminal Procedure Article 771(2) provides:

> 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:
>
> * * *
>
> (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.

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 make it impossible for the defendant to obtain a fair trial. See **State v. Miles**, 98-2396 (La.App. 1 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 that 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. Friday**, 10-2309 (La.App. 1 Cir. 6/17/11), 73 So.3d 913, 933, writ denied, 11-1456 (La. 4/20/12), 85 So.3d 1258.

During the State's examination of Detective Hebert, the following exchange took place:

> Prosecutor: Now, you were here during opening [statements], you heard Mr. Chris Washington said it was self-defense. That was [the] first you heard of that?
>
> Detective Hebert: Yes, I did. This is not no (sic) self-defense, this is just cold-blooded murder.

Defense counsel objected and moved for a mistrial, arguing it was "very prejudicial for [Detective Hebert] to give his opinion that this is a cold-blooded killing..." The trial court sustained defendant's objection, admonished the jury that the "witness is not to give opinions," and denied defendant's motion for mistrial.

Unsolicited and unresponsive testimony is not chargeable against the State to provide a ground for mandatory reversal of a conviction. Furthermore, a statement is not chargeable to the State solely because it was in direct response to questioning by the prosecutor. While a prosecutor might have more precisely formulated the question that provoked the witness's response, where the remark is not deliberately obtained by the prosecutor to prejudice the rights of the defendant, it is not the basis for a mistrial. **State v. Tran**, 98-2812 (La.App. 1 Cir. 11/5/99), 743 So.2d 1275, 1280, writ denied, 99-3380 (La. 5/26/00), 762 So.2d 1101 (Despite defense counsel's argument that the word "gang" was highly prejudicial, a mistrial was not warranted when a witness corrected the prosecutor by answering "Asian Gang Task Force" in response to the prosecutor's question concerning the "Houston Police Officers," as the prosecutor's question did not elicit

such a response, and there was no indication the defendant was unable to obtain a fair trial because of this statement.).

Moreover, contrary to defendant's assertion, even if a mistrial was warranted under Articles 770, 771, or 775, the failure to grant a mistrial would not result in an automatic reversal of defendant's conviction, but would be a trial error subject to the harmless error analysis on appeal. See **State v. Givens**, 99-3518 (La. 1/17/01), 776 So.2d 443, 453, n.8. Trial error is harmless where the verdict rendered is "surely unattributable to the error." **State v. Johnson**, 94-1379 (La. 11/27/95), 664 So.2d 94, 102.

There was no abuse of discretion in the denial of the motion for mistrial. The prosecutor did not deliberately elicit the comment "cold-blooded murder" from Detective Hebert, and, therefore, this unsolicited testimony is not the basis for a mistrial under Article 771(2). The purpose of the prosecutor's question was to establish that defendant had not claimed self-defense when questioned by Detective Hebert. The State did not ask for the detective's opinion on whether or not defendant murdered the victims or acted in self-defense. Further, Detective Hebert's response did not result in such substantial prejudice to defendant that he was deprived of any reasonable expectation of a fair trial, and the admonition given by the trial court was sufficient to assure defendant a fair trial. Moreover, the prosecutor's question was not deliberately designed to prejudice the rights of defendant. See **Tran**, 743 So.2d at 1280. Therefore, the denial of the motion for mistrial was harmless, and, based on the foregoing reasons, this assignment of error lacks merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his first pro se assignment of error, defendant claims his Sixth Amendment right to effective assistance of counsel was violated, and advances four arguments in support of this contention: (1) alleged failure of trial counsel to object and move for a mistrial based upon the State's reference to impermissible other crimes evidence; (2) alleged failure of trial counsel to obtain an independent expert to counter the testimony of the State's forensic pathologist, Dr. Suarez; (3)

alleged failure of trial counsel in advising defendant not to testify at trial; and (4) alleged failure of trial counsel to obtain a toxicology expert to discuss the effects of bath salts which were found in victim Ronald Harrell's system on the night of his murder. As a result of these alleged deficiencies, defendant contends his convictions and sentences should be reversed.

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 (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, where the claim is raised as an assignment of error on direct review and where the record on appeal is adequate to resolve the matter, the claims should be addressed in the interest of judicial economy. **State v. Calhoun**, 96-0786 (La. 5/20/97), 694 So.2d 909, 914.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution. In assessing a claim of ineffectiveness, a two-pronged test is employed. The defendant must show that (1) his attorney's performance was deficient, and (2) the deficiency prejudiced him. The error is prejudicial if it was so serious as to deprive the defendant of a fair trial, or "a trial whose result is reliable." In order to show prejudice, the defendant must demonstrate that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. **Strickland v. Washington**, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674 (1984); **State v. Felder**, 00-2887 (La.App. 1 Cir. 9/28/01), 809 So.2d 360, 370, writ denied, 01-3027 (La. 10/25/02), 827 So.2d 1173. 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, 860 (La.App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

Failure to object and move for a mistrial

In his first argument, defendant contends that, due to the prosecutor's reference to alleged other crimes evidence, his trial counsel should have objected

and moved for a mistrial under LSA-C.Cr.P. art. 770. Defendant avers that "the prosecutor's reference to the alleged crime of robbery and/or attempt[ed] robbery in his opening statements, which was not supported by any evidences [sic]...at trial, should have mandated a mistrial under LSA-C.Cr.P. art. 770." He continues, asserting that "[t]he prosecution failed to offer clear and convincing evidences [sic] that a robbery or [attempted] robbery was even committed in this matter." As such, because of his trial counsel's purported failure to object and move for a mistrial, defendant claims this conduct constitutes ineffective assistance of counsel.

Defendant specifically focuses on the following portion of the prosecutor's opening statement:

> They stopped off by Club Secrets, they hung out at Club Secrets which is right there. They left to go to the Tipsy Tiger and little places like that. And they ended up in a strip club – ended up leaving the strip club. That strip club and those clubs are what caused Ronald Harrell and Junius Dedrick to die, to be dead. You know why? Because they were flashing money and they were buying drinks and they were taking care of him. But they were showing him hundreds, they were showing that money. And in the back of his mind he's saying look at that money these dudes got. And when they left the little strip club down the road, you know what happens, guys put out cash money for women. They ride, leave, they come into Plaquemine, he is sitting in the back while they're riding around; they're headed back towards Donaldsonville. He is sitting in the middle because Junius is a big old guy so the seat is leaning way back. He's is sitting in the middle of them and it's about 1 o'clock in the morning, and they're headed in or whatever they're about to do, wrap it up, he knows they got loaded with money. He knows they're packed with money. He being him. And you know what he does? Self-defense. He is sitting in the middle – and I will tell, you are going to see Ronald – strike that – Junius Dedrick, for some reason Junius does this (indicating) 'Hey man,' and he gets a bullet right here. (Indicating.) Boom. Right here. I mean blows the side of his face up, and you're going to see it. Boom. Then he shoots.

Contrary to defendant's assertion, the prosecutor's reference regarding the possible robbery of both victims by defendant was offered in support of his motive for the instant crimes, not as other crimes evidence from defendant's past. This theory was offered in support of the State's case-in-chief – not for an inadmissible purpose under LSA-C.E. art. 404B. Therefore, the prosecutor's theory would not be grounds for a mistrial under LSA-C.Cr.P. art. 770. Furthermore, this Court has held that when the substantive issue an attorney has not raised has no merit, then

the claim that the attorney was ineffective for failing to raise the issue also has no merit. **State v. Baker**, 14-0222 (La.App. 1 Cir. 9/19/14), 154 So.3d 561, 569, writ denied, 14-2132 (La. 5/15/15), 170 So.3d 159. Accordingly, this argument is without merit.

Failure to obtain or call particular witnesses during trial

In the second and fourth arguments advanced in support of his ineffective assistance of counsel claim, defendant asserts that his trial counsel should have hired two experts to counter the State's witnesses and strengthen his theory of justifiable homicide. First, defendant claims that his trial counsel did not "possess the requisite expertise to effectively cross-examine Dr. Suarez," and that because of "weaknesses" in Dr. Suarez's testimony, an expert should have been obtained who could have "exploited" the alleged weaknesses. Defendant asserts that "[t]he prosecution was able to present Dr. Suarez['s] very questionable interpretation of the autopsy report without defense counsel effectively rebutting it. And, therefore, it cannot be said that counsel's performance was that guaranteed by the Sixth Amendment." Second, defendant asserts that his trial counsel "erred in failing to obtain a [toxicology] expert to help prepare [the] defense about the [effects] of 'bath salts' that [were] found in alleged victim Ronald Harrell['s] system [on the night of the murder]."

In his third argument, defendant contends that his trial counsel was ineffective for "advising [him] not to testify" during trial. He claims that because he "was the only eye witness to his action and also to the alleged victims' actions at the time of the killing," his testimony was "crucial to defense counsels' defense theory [of self-defense]." He argues that he would have presented the jury "with a different [version] of the events of the night of the [murders]," and that "[t]here is a reasonable probability that the jury would have found more than likely that [he] indeed feared for his life and in return acted in self-defense..." Moreover, he maintains that "defense counsel did not call any witness[es] to the witness stand, [present] any evidence to substantiate his defense theory and did not effectively rebut any evidence presented by the prosecution..." As such, he concludes that

because "defense counsel's performance was deficient, and denied [him his] right to effective assistance of counsel guaranteed by the Sixth Amendment," his convictions and sentences should not be maintained.

Allegations of ineffectiveness relating to the choice made by counsel to pursue one line of defense as opposed to another constitutes an attack upon a strategy decision made by trial counsel. See **State v. Allen**, 94-1941 (La.App. 1 Cir. 11/9/95), 664 So.2d 1264, 1271, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. The election to call or not call a particular witness is a matter of trial strategy and not, per se, evidence of ineffective counsel. **State v. Folse**, 623 So.2d 59, 71 (La.App. 1 Cir. 1993). The investigation of strategy decisions requires an evidentiary hearing[3] and, therefore, cannot possibly be reviewed on appeal. 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 rests with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **Folse**, 623 So.2d at 71; see also **State v. McMillan**, 09-2094 (La.App. 1 Cir. 7/1/10), 43 So.3d 297, 307, writ denied, 10-1779 (La. 2/4/11), 57 So.3d 309. Therefore, because the securing of expert witnesses is a strategic and tactical decision made by defendant's trial counsel, this argument cannot be reviewed on appeal absent an evidentiary hearing, and, therefore, is not subject to appellate review.

Regarding defendant's claim that his trial counsel was ineffective for advising him not to testify at trial, he has failed to provide any specific facts or theories which would create a "reasonable probability that the jury would have found more than likely that [he] indeed feared for his life," as suggested in his pro se brief. Rather, he broadly asserts that if he would have testified, he could have presented a different version of events which would have led to his acquittal. However, general, unsupported assertions of deficiency do not support a Sixth

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

Amendment claim for ineffective assistance of counsel. See **State v. Stallworth**, 08-1389 (La.App. 4 Cir. 4/29/09), 11 So.3d 541, 546, writ denied, 09-1186 (La. 1/29/10), 25 So.3d 829; **State v. Harris**, 01-1908 (La.App. 4 Cir. 4/3/02), 815 So.2d 402, 410, writ denied, 02-1500 (La. 12/13/02), 831 So.2d 982. Moreover, "[t]he determination of the defense to remain silent does not in itself constitute ineffective assistance...." **State v. Myles**, 389 So.2d 12, 21 (La. 1979). Accordingly, these allegations concerning defense counsel's trial strategy are not subject to appellate review. See **State v. Albert**, 96-1991 (La.App. 1 Cir. 6/20/97), 697 So.2d 1355, 1363-64. Therefore, this assignment of error is without merit or otherwise not subject to appellate review.

SEQUESTRATION VIOLATION

In his second pro se assignment of error, defendant briefly claims that Detective Hebert violated the trial court's sequestration order when he admitted to being present during defense counsel's opening statement. The record reflects that prior to opening statements, the State moved for witness sequestration, with the exception of Detective Hebert, as he was designated as the State's case agent. The trial court then ordered all witnesses, other than Detective Hebert, to be sequestered. Louisiana Code of Evidence Article 615 governs the exclusion of witnesses, and Article 615B(2) specifically provides that sequestration is not authorized for "[a] single officer or single employee of a party which is not a natural person designated as its representative or case agent by its attorney." Therefore, a sequestration violation did not occur as a result of Detective Hebert remaining in the courtroom during defense counsel's opening statements. As such, this assignment of error lacks merit.

CONCLUSION

For the foregoing reasons, we affirm defendant's convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED.