STATE OF LOUISIANA	*	**NO. 2018-KA-1039**
VERSUS	*	
		COURT OF APPEAL
BLAIR TAYLOR	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 522-732, SECTION "I"
Honorable Karen K. Herman, Judge
* * * * * *
Judge Paula A. Brown
* * * * * *

(Court composed of Judge Terri F. Love, Judge Joy Cossich Lobrano, Judge Paula A. Brown)

Christopher A. Aberle
LOUISIANA APPELLATE PROJECT
P.O. Box 8583
Mandeville, LA 70470-8583

COUNSEL FOR APPELLANT

Leon Cannizzaro
DISTRICT ATTORNEY, ORLEANS PARISH
Donna Andrieu
Irena Zajickova
DISTRICT ATTORNEY'S OFFICE, ORLEANS PARISH
619 S. White Street
New Orleans, LA 70119

COUNSEL FOR APPELLEE

AFFIRMED
04/17/19

Defendant, Blair Taylor, appeals his convictions of two counts of second degree murder and five counts of attempted second degree murder, asserting claims of ineffective assistance of counsel. For the reasons set forth below, we affirm Defendant's convictions and sentences.

PROCEDURAL HISTORY

Defendant, a.k.a. "Blood," along with co-defendants, Joseph Nelson and Michael Finnie, were indicted on the following charges:[1]

- second degree murder of Terrence McBride
- second degree murder of Jasmine Anderson
- attempted second degree murder of J.R.
- attempted second degree murder of K.R.
- attempted second degree murder of A.R.
- attempted second degree murder of H.C.
- attempted second degree murder of Q.H.[2]

[1] The names of the defendants were spelled in accordance with the bill of indictment and may differ from how they were spelled in the trial transcript.

[2] Initials were used as set forth in the bill of indictment.

Finnie pled guilty to two counts of manslaughter, a lesser charge, and five counts of attempted second degree murder, and he was sentenced to seven concurrent terms of twenty-years at hard labor.

Following a jury trial, Defendant and Nelson were found guilty as charged.[3] Although Defendant filed a motion for new trial, the district court sentenced Defendant before ruling on the motion. Defendant appealed, and this Court dismissed the appeal without prejudice as the record failed to reflect a ruling on the motion for new trial.[4] On remand, the district court denied the motion for new trial, vacated the original sentences, and resentenced Defendant to life imprisonment at hard labor on each conviction of second degree murder, and fifty years at hard labor on each conviction of attempted second degree murder. All the sentences were ordered to run concurrently to each other and "any and all other sentences." Defendant filed a motion to reconsider sentence which was denied.

This appeal follows.

ERRORS PATENT

This Court routinely reviews the record on appeal for errors patent. *State v. Lewis*, 15-0773, p. 9 (La. App. 4 Cir. 2/3/16), 187 So.3d 24, 29. A review of the record reveals one error patent which requires no action by this Court.

Defendant's sentences are illegally lenient. La. R.S. 14:30.1, second degree murder, and La. R.S. 14:(27)30.1, attempted second degree murder, require that the sentence imposed be served without benefit of parole, probation, or suspension of sentence. The transcript of the resentencing proceeding reflects the district court

[3] Defendant was also charged with two counts of obstruction of justice and one count of conspiracy to obstruct justice, but these charges were dismissed by the State.

[4] *State v. Taylor*, 18-0084 (La. App. 4 Cir. 6/6/18), 244 So.3d 1289.

failed to order Defendant's sentences be served without benefit of parole, probation, or suspension of sentence. Nevertheless, La. R.S. 15:301.1(A) mandates these restrictions are self-activating:

> When a criminal statute requires that all or a portion of a sentence imposed for a violation of that statute be served without benefit of probation, parole, or suspension of sentence, each sentence which is imposed under the provisions of that statute shall be deemed to contain the provisions relating to the service of that sentence without benefit of probation, parole, or suspension of sentence. The failure of a sentencing court to specifically state that all or a portion of the sentence is to be served without benefit of probation, parole, or suspension of sentence shall not in any way affect the statutory requirement that all or a portion of the sentence be served without benefit of probation, parole, or suspension of sentence.

Accordingly, no action needs to be taken by this Court. *State v. Williams*, 00-1725, p. 10 (La. 11/28/01), 800 So.2d 790, 798-99; *State v. Wyatt*, 11-0219, p. 20 (La. App. 4 Cir. 12/22/11), 83 So.3d 131, 143.

FACTS

On August 10, 2014, Finnie, along with Defendant and Nelson, left Finnie's house with the purpose to kill Terrence McBride. Mr. McBride was located at a neighboring house on Burgundy Street. Upon arrival, Defendant and Nelson opened fire on Mr. McBride, along with the other adults, teens, and children located in the front yard and front porch of the house. Mr. McBride and sixteen year old Jasmine Anderson died, and five others, including several young children, were wounded.[5]

At trial, Finnie testified he lived with his mother at the intersection of Flood and Burgundy Streets. Mr. McBride would come to Finnie's residence to buy drugs from Finnie's mother. A dispute arose between Mr. McBride and Finnie

[5] The recitation of facts adduced from the transcript is limited to those facts germane to Defendant's assigned errors.

when Mr. McBride owed Finnie's mother money for pills and drugs. For this reason, Finnie planned to kill Mr. McBride. As part of the plan, Finnie contacted Defendant, a friend since childhood, and told Defendant to obtain a gun for the purpose of killing Mr. McBride. According to Finnie, Defendant, along with Defendant's friend, Nelson, drove to Finnie's home and pulled up to the corner of Flood and Burgundy Streets. Defendant brought with him an AK-47, and Nelson had a handgun. When Defendant and Nelson arrived, Finnie got in the driver's seat, while Defendant rode in the front passenger's seat with Nelson in the back seat. The three men proceeded down Burgundy Street, and Finnie spotted Mr. McBride on the porch of a neighboring house, 5439 Burgundy Street; it was about a half of a block away from Finnie's home. Finnie recalled that upon arrival at the neighboring house, Finnie told Defendant that he had changed his mind about shooting Mr. McBride at that time because too many people were around. Finnie testified that Defendant responded that he had not "come way down here for nothing." Defendant then exited the vehicle and "started wild gunfire." Defendant told Nelson to "get out and finish [Mr. McBride] off," and Nelson obeyed. Finnie stated that after Defendant and Nelson returned to the vehicle, Finnie drove around the block, stopped, exited the vehicle, and walked back to his house.

Detective Timothy Bender, employed by the New Orleans Police Department ("NOPD"), was the lead detective for the investigation of the shootings. He testified that during his investigation, he received information from confidential informants ("CIs") and tips through Crime Stoppers.[6]

[6] At trial, neither the CIs testified nor were the identities of the CIs revealed.

Detective Bender stated he spoke to a CI who claimed to be standing on the corner when he/she saw a gray SUV arrive at the corner of Flood and Burgundy Streets; the gray SUV was occupied by two individuals. The driver exited the vehicle and Finnie took his place in the driver's seat. The CI reported to the detective that the two individuals originally occupying the vehicle ended up sitting in the passenger seat and the backseat on the passenger side; one was armed with an AK-47, and the other was armed with a handgun. Shortly thereafter, the CI observed Finnie return on foot coming from "Rampart Street on [F]lood towards Burgundy" and overheard Finnie say something like "[w]e took care of that n*****."

Detective Bender testified that three days after the shooting, a CI sent him a photograph of a dark gray Chevrolet Captiva (the "gray SUV") and indicated that the vehicle had been used in the commission of the homicides. The photograph depicted the vehicle being driven through a parking lot. The CI informed Detective Bender that the parking lot was in New Orleans East and Defendant was the driver of the vehicle depicted in the picture. Detective Bender stated that the CI, who identified Defendant in a photograph, also confirmed Defendant was one of the perpetrators of the shooting. The CI informed the detective that Defendant resided in the Chateau D'Orleans apartment complex, located in New Orleans East.

Detective Bender enlisted the assistance of the Louisiana State Police (the "LSP"). Sergeant William Blackwell, employed by the LSP, assisted Detective Bender by conducting surveillance on the Chateau D'Orleans apartment complex, apartment numbers 504, Defendant's apartment, and 1411, Jeffery Rivers' apartment. Sergeant Blackwell also surveilled the gray SUV. During his surveillance, Sergeant Blackwell conducted a traffic stop on a vehicle matching the

description of the gray SUV. Police had learned the gray SUV had been reported stolen. At the time of the stop, Defendant exited the vehicle and attempted to flee on foot, but was apprehended and detained.

Also, Sergeant Blackwell approached apartment 1411 and spoke to the residents, Rivers and his wife, Vivien Anderson. With the residents' cooperation, Sergeant Blackwell located a loaded Smith and Wesson nine-millimeter pistol and a box of forty-five-caliber ammunition above a kitchen cabinet. Sergeant Blackwell testified that Ms. Anderson told him the weapon belonged to "Blood," which he knew to be one of Defendant's aliases.

Rivers, who met Defendant through Nelson, recalled that he told the police, when they searched his apartment, where the pistol was located, and that it belonged to Defendant.[7] He explained that Defendant came to his apartment the day after the shooting. Defendant told Rivers to look at "NOLA.com" and he "had to smash him"; Rivers took that to mean Defendant killed someone. According to Rivers, Defendant placed the pistol in Rivers' apartment above the kitchen cabinets where it remained until the police recovered it. Rivers further testified that he received the stolen gray SUV "from a guy," and he loaned the gray SUV to Defendant the day before the shooting. Rivers said Defendant never returned the stolen gray SUV.

It was determined two weapons were used during the shooting—the Smith and Wesson nine-millimeter pistol and a 7.62 x 39 caliber AK-47. According to a ballistics expert from the NOPD crime lab, seven nine-millimeter cartridge cases were recovered from the crime scene and testing determined these cases had been fired from the Smith and Wesson nine-millimeter pistol recovered in Rivers'

[7] As a result of his involvement, Rivers pled guilty to four counts of obstruction of justice.

kitchen. Six of the projectiles recovered from both the scene and the two autopsies were also fired from the nine-millimeter pistol. The ballistics expert further testified that three of the 7.62 x 39 caliber cartridge cases recovered from the scene were fired from the same weapon, an AK-47. The ballistics expert, as well as Detective Bender, testified that the weapon which fired the 7.62 x 39 caliber cartridge cases was not located; thus, it was not submitted for comparison.

Following the search of Defendant and Rivers' apartments at Chateau D'Orleans Apartment, arrests warrants were obtained for both Defendant and Rivers. The telephone calls Defendant made while he was incarcerated, which were recorded, were introduced into evidence. In one call that was played for the jury, Defendant phoned his girlfriend, Ashley Shorts, and asked her if she had "moved the hammer" from the kitchen. Ms. Shorts responded that she had not and the police had taken it. Detective Bender testified he believed "hammer" referred to a gun. Based on this phone call, Detective Bender issued an arrest warrant for Ms. Shorts.

K.K., an eye-witness who was present during the shooting, recalled that the perpetrators drove a gray vehicle.[8] She testified that once the car pulled in front of the residence, she heard gunshots. When the gunshots subsided, she noticed that "everybody was shot," and she observed someone emerge from the vehicle, walk up onto the porch, and shoot Mr. McBride. K.K. identified Nelson as one of the perpetrators to Detective Bender after selecting Nelson's photograph from a six-photograph lineup.[9] Following the identification, Nelson was arrested.

[8] As a courtesy, the initials of the eye-witness were used.

[9] Detective Bender had received an email from a CI containing a photograph of Nelson.

DISCUSSION

Defendant, through his appellate counsel, argues his trial counsel rendered ineffective assistance of counsel in the following respects:

> 1. Defense counsel rendered ineffective assistance by failing to object to the State's flagrant use of prejudicial testimonial and accusatory hearsay that had no arguable basis for admissibility; and
>
> 2. Defense counsel rendered ineffective assistance by causing the jury to forgo knowing that a gun, unrelated to the shooting, was found in [Defendant's] apartment, where such knowledge would have weakened the State's argument that [Defendant's] "hammer" reference related to the murder weapon.[10]

The United States Supreme Court set forth a two-ponged test for a defendant to attain relief for a claim of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984):

> 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 . . . . resulted from a breakdown in the adversary process that renders the result unreliable.[11]

To establish ineffective assistance of counsel, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The *Strickland* Court explained that "the object of an ineffectiveness claim is not to grade counsel's performance," rather, "[j]udicial

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[10] This Court granted Defendant until March 29, 2019, to file a *pro se* brief. However, Defendant failed to file a *pro se* brief.

[11] The *Strickland* standard was adopted by the Louisiana Supreme Court. *See State v. Washington*, 491 So.2d 1337, 1339 (La. 7/18/86); *State v. Estes*, 17-1654 (La. 1/14/19), __ So.3d __ (2019 WL 192742); *State v. Mills*, 17-912 (La. 8/31/18), 251 So.3d 1067; and *State v. Jackson*, 16-1100 (La. 5/1/18), 248 So.3d 1279.

scrutiny of counsel's performance must be highly deferential." *Id*. at 689, 697. When reviewing a claim of ineffective assistance of counsel, an appellate court does "'not sit to second-guess strategic and tactical choices made by trial counsel.'" *State v. Small*, 13-1334, p. 14 (La. App. 4 Cir. 8/27/14), 147 So.3d 1274, 1284 (citing *State v. Hoffman*, 98-3118, p. 40 (La. 4/11/00), 768 So.2d 542, 579, quoting *State v. Myles*, 389 So.2d 12, 31 (La. 1979)). The *Strickland* Court opined that even if counsel's error is professionally unreasonable, setting aside of the judgment of a criminal proceeding is not warranted "if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691 (citations omitted). The *Strickland* Court held that the appropriate test for prejudice is a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "'The likelihood of a different result must be substantial, not just conceivable.'" *State v. Jackson*, 16-1100, p. 6 (La. 5/1/18), 248 So.3d 1279, 1283 (quoting *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 792 (2011)).

Generally, issues of ineffective assistance of counsel are best addressed in an application for post-conviction relief where the district court can conduct a full evidentiary hearing on the matter, if one is warranted. *See State v. Leger*, 05-0011, p. 44 (La. 7/10/06), 936 So.2d 108, 142 (citations omitted); *see also Small*, 13-1334, p. 13, 147 So.3d at 1283 (citations omitted). However, "there is no law or jurisprudential rule that prohibits a defendant from raising the issue of ineffective assistance of counsel on appeal, nor is there a mandate for reviewing courts to only consider this issue during post-conviction relief." *State v. King*, 17-0126, p. 17 (La. App. 4 Cir. 10/27/17), 231 So.3d 110, 121. Where the record contains evidence

"sufficient to decide the issue, and it is raised on appeal by an assignment of error, courts may consider the issue in the interest of judicial economy." *See Leger*, 05-0011, p. 44, 936 So.2d at 142 (citations omitted).

With these precepts in mind, the sufficiency of the record and in the interest of judicial economy, we will address Defendant's claims that his counsel was ineffective.

Failure to object to prejudicial hearsay testimony

Defendant complains his trial counsel should have objected to Detective Bender's prejudicial hearsay testimony regarding the information the CIs provided to him. Defendant further contends the failure of the CIs to testify violated his constitutional right to confront his accusers. Defendant points to three separate instances where his trial counsel failed to object.

First, Defendant cites to the State's cross-examination of Detective Bender regarding the CI standing on the corner when Defendant arrived at Finnie's home:

> Q. [THE STATE] Let me ask you this, [Defendants' trial counsels] both asked you what that person [CI] or that individual indicated to you. What did they indicate to you?
>
> * * *
>
> Q. I want the one we were talking about that implicated Mr. Finney [sic].
>
> * * *
>
> Q. What did that person tell you?
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> A. [DETECTIVE BENDER] That person said that at the corner or Flood and Burgundy, a gray SUV type vehicle arrived, occupied by two subjects. At the time that it arrived, the driver of that car got out; got back in the car with Mr. Finney [sic] exiting the scene with him driving. The other two occupants both on the passenger side of the car - front and rear passenger.
>
> Q. And did that person indicate whether those individuals were armed? Whether they saw any firearms on those individuals?

A. That person said, yes, they were both armed. One with a AK-47 type rifle, and the other one with a handgun.

Q. And did he indicate - at any point did Mr. Finney [sic] return to the scene following the shooting?

A. Yes, ma'am.

Q. And what did Mr. Finney [sic] say, according to that person?

A. He walked back - he was still - the Cl was still on the corner. Mr. Finney [sic] walked back - coming from Rampart Street on flood towards Burgundy. And when he walked up he said – it's written in the report, I can paraphrase, I think I know what he said.

Q. Paraphrase is fine.

A. Something along the lines of,["]We took care of that n[*****].["]

Q. Now Det[ective] Bender, when you received this information, did this person actually see the shooting?

A. No, ma'am.

Q. Okay, so if you simply stayed in the corner of-

[NELSON'S TRIAL COUNSEL]: Objection, Judge.

THE COURT: Sustained. Sustained.

[THE STATE]: Solicited by Defense Counsel. . . .

Following the district court's ruling sustaining trial counsel's objection, the State ended the questioning as to what the CI told the detective. Although Nelson's trial counsel objected to Detective Bender speculating about what the CI may have seen, Defendant emphasizes his trial counsel did not object to Detective Bender's testimony regarding what the CI told him.

Second, Defendant calls attention to Detective Bender's testimony during direct examination by the State, wherein the detective testified that the CI sent him a photograph of the gray SUV, claiming it was the vehicle used in the shooting.

Also, he recalled the CI stated the photograph depicted Defendant driving the vehicle in a parking lot in New Orleans East. The record reflects Defendant's trial counsel objected when the detective stated the information came from a CI; however, following an unrecorded side bar discussion, the objection was withdrawn.[12]

Third, Defendant complains his attorney failed to object to Detective Bender's testimony that although the CI was willing to talk to him, he/she was unwilling to testify, and Detective Bender's comment that he did not reveal the names of CIs because "[t]hey'll get killed."

Defendant contends that his trial counsel's error of failing to object to this inadmissible hearsay testimony was unreasonable as it was both direct and indirect hearsay offered for the truth of the matter asserted—Defendant was seen with a gun heading to the scene of the crime with Finnie and Nelson. Defendant argues that the State's case "turned primarily on the jury's assessment of [Finnie and Rivers'] credibility." Defendant points out that the State, during closing arguments, referenced "that one or more 'documented confidential informants' identified Blair Taylor 'as being on the scene' of the crime." He explained that the alleged

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[12] Defendant also references Detective Bender's testimony on cross-examination by the State:

> Q. [THE STATE] And during one of those meetings, [the CI] indicated that there was a grey [sic] colored SUV involved in this case, correct?
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> [DEFENDANT'S TRIAL COUNSEL]: Objection. Even though we called him—
>
> THE COURT: Sustained.
>
> [THE STATE]: Your Honor, they elicited the hearsay.
>
> THE COURT: I understand. I'm sustaining the objection.

Because Defendant's trial counsel objected to this complained of testimony, Defendant fails to prove the first prong of *Strickland*—his attorney was deficient. Thus, this claim lacks merit.

inadmissible hearsay evidence improperly corroborated Finnie and Rivers' testimony and bolstered their credibility which resulted in a "reasonable probability" of a different outcome warranting reversal of Defendant's conviction.

"Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. La. C.E. art. 801(C)." *State v. Randolph*, 16-0892, p. 11 (La. App. 4 Cir. 5/3/17), 219 So.3d 425, 433. "Hearsay evidence is generally not admissible, unless provided for by the Code of Evidence or other legislation. La. C.E. art. 802." *Id*., 16-0892, p. 11, 219 So.3d at 433. In *Randolph*, this Court explained an exception to hearsay prohibition regarding a police officer's testimony concerning an unavailable CI:

> There are some exceptions to the general hearsay prohibition. For example:
>
> > The testimony of a police officer may encompass information provided by another individual without constituting hearsay, if it is offered to explain the course of the police investigation and the steps leading to the defendant's arrest. However, this exception does not allow the state carte blanche authority to bring before the jury the substance of the out-of-court information that would otherwise be barred by the hearsay rule.
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> *State v. Legendre*, 05-1469, p. 11 (La.App. 4 Cir. 9/27/06), 942 So.2d 45, 52-53. (internal citations omitted). "Generally, an explanation of the officer's actions should never be an acceptable basis upon which to admit an out-of-court declaration when the so-called 'explanation' involves a direct assertion of criminal activity against the accused." *State v. Hearold*, 603 So.2d 731, 737 (La. 1992). "Absent some unique circumstances in which the explanation of purpose is probative evidence of a contested fact, such hearsay evidence should not be admitted under an 'explanatory' exception." *Id.*

Id., 16-0892, p. 11-12, 219 So.3d at 433-34. If the trial court errs in admitting hearsay, any such error is subject to a harmless error analysis. *Id*., 16-0892, p. 12, 219 So.3d at 434 (citing *State v. Wille*, 559 So.2d 1321, 1332 (La.1990)).

Moreover, defense counsel cannot claim reversible error on the basis of evidence he elicited. *Id*., 16-0892, p. 12, 219 So.3d at 434 (citations omitted).

The relationship between hearsay and the confrontation clause was explained by the Louisiana Supreme Court in *Wille*, 559 So.2d at 1329, 1332 (La. 1990)(footnotes omitted):

> One of the primary justifications for the exclusion of hearsay is that the adversary has no opportunity to cross-examine the absent declarant to test the accuracy and completeness of the testimony. The declarant is also not under oath at the time of the statement. Moreover, the confrontation clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him". U.S. Const amend. VI. There is no opportunity for confrontation when an assertion by one party is presented through the testimony of another party.
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> * * *
>
> [T]he erroneous admission of the hearsay and irrelevant evidence does not require a reversal of defendant's conviction because the error was harmless beyond a reasonable doubt. Reversal is mandated only when there is a reasonable possibility that the evidence might have contributed to the verdict. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Gibson*, 391 So.2d 421 (La.1980); *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

The State argues that, even assuming Defendant's trial counsel was deficient in failing to object to the complained of testimony, Defendant fails to prove the second prong of *Strickland* that he suffered prejudice as a result of the alleged deficiency. The State asserts it presented ample evidence to convict Defendant, especially in light of the testimony of Finnie and Rivers. We agree.

In *Strickland*, the United States Supreme Court explained that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by defendant as a result of the alleged deficiencies." *Id*., 466

U.S. at 697. Thus, whether Defendant proved the first prong of *Strickland*—that his attorney was deficient—need not be determined.[13]

At trial, direct testimony and evidence as well as circumstantial evidence was offered to support the finding of the jury that Defendant shot the victims. Finnie testified Defendant and Nelson used a pistol and an AK-47 to shoot the victims. Rivers testified that Defendant hid the pistol in his apartment. The ballistics expert confirmed that the pistol found by police in Rivers' apartment was used in the shooting. K.K. recalled the perpetrators were in a gray SUV, and Rivers stated that he loaned Defendant a gray SUV the day before the shooting. Moreover, the alleged hearsay testimony of Detective Bender—information reported to him by the CI that Defendant complains his attorney failed to object to—did not implicate Defendant. Rather, the information implicated Finnie, who was seen with two armed men in a gray SUV. Further, even assuming admission of the complained of testimony was error, any such error was harmless because the complained of testimony was merely cumulative. Defendant fails to prove that his trial counsel's alleged deficiency of failing to object to the complained of testimony resulted in "reasonable probability . . . sufficient to undermine the confidence in the outcome" or the likelihood that a different result was substantial.

Failure to present the gun found in Defendant's apartment as evidence

Defendant contends his trial counsel erred "by causing the jury to forgo knowing that a gun, unrelated to the shooting, was found in [Defendant's] apartment, where such knowledge would have weakened the State's argument that [Defendant's] 'hammer' reference related to the murder weapon."

[13] The State also asserts that the complained of testimony was in response to questions from defense attorney, and/or Defendant's trial counsel's failure to object or his withdrawal of the objection was part of trial counsel's trial strategy to attack Finnie's credibility.

While executing a search warrant, the police found a gun in Defendant's apartment. Prior to trial, the State sought to have the gun admitted into evidence. The district court ruled the gun, that was unrelated to the shooting, was inadmissible at trial, and it ordered the State to black out any references to the gun in the State's exhibits.

During the trial, the audio of Defendant's calls from prison were introduced into evidence and played for the jury. In one of the calls, Defendant asked Ms. Shorts if she had moved the "hammer" from the kitchen. Detective Bender testified that based on his experience, he thought Defendant's reference to "hammer" meant a gun.

After the State rested, Defendant's trial counsel withdrew his pre-trial objection to the admissibility of the gun found at Defendant's apartment:

> Your Honor, I did not file a motion in limine as to that weapon. I understand our conversations that we had as to that weapon. But with the introduction of that phone conversation [between Defendant and Ms. Shorts], that has changed my—changed what I have to do as far as trial strategy. I have to change what I have to do as far as introduction of evidence.

The record indicates following discussions between all the parties and the district court, Defendant's trial counsel viewed the gun seized from Defendant's apartment in the judge's chambers. After viewing the gun, Defendant's trial counsel withdrew his request to allow the gun to be admitted into evidence, but no reasons for the withdrawal were set forth on the record.[14]

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[14] Following Defendant's trial counsel's withdrawal of his request, the district court stated in pertinent part:

> All right. Let the record reflect we have fleshed out this topic fully and completely. And after brief reconsideration by all parties, the motion - your objection remains. And there will be no further testimony elicited regarding this weapon.

During closing arguments, the State argued the phone call between Defendant and Ms. Shorts was reference to the gun found in Rivers' kitchen which was used during the shootings.[15]

Defendant asserts he was denied his right to present evidence of his own defense when his attorney failed to have the gun found in his apartment introduced into evidence. Moreover, Defendant contends that because this gun was not introduced into evidence the jury "had no choice but to conclude that [Defendant] was referring to the murder weapon." He argues this error, together with the "problematic credibility" of the co-defendants and "alleged hearsay statements" of the CI, undermines confidence in the verdict.

The State responds trial counsel's decision to exclude the unrelated gun was reasonable. The State asserts that if trial counsel would have allowed the jury to view this gun, it could have prejudiced the jury and "caused them to view [Defendant] as a violent person."

We find Defendant's trial counsel's decision to not introduce the gun found in Defendant's apartment into evidence strategic in nature. Our review of the record shows that it was initially Defendant's trial counsel's strategy to exclude the gun found in Defendant's apartment from being introduced into evidence. After the jailhouse tapes were played to the jurors, trial counsel changed his trial strategy and sought to have the gun admitted into evidence and viewed by the jurors. After viewing the gun himself, trial counsel changed his trial strategy, once again, opting to exclude the gun from the evidence. Even assuming trial counsel's failure to

[15] During closing argument, the State stated that Defendant "knows that, that hammer in the kitchen, is the same hammer that . . . the ballistics expert, said fired all those rounds from the 9 millimeter that were on the scene, that were in Terrance's body. He knows he's caught. He knows that they got the weapon."

introduce the gun found in Defendant's apartment into evidence was not trial strategy, Defendant fails to prove the second prong of *Strickland*—what prejudice, if any, he suffered as a result of the alleged deficiency. Detective Bender testified that the only weapon recovered and used in the shooting was the nine-millimeter pistol that was found in Rivers' apartment. Rivers testified Defendant hid this pistol in Rivers' apartment. The ballistics expert confirmed this nine-millimeter pistol found in Rivers' apartment was used in the shooting. The testimony of the ballistics expert and Detective Bender also confirmed that the weapon which fired the 7.62 x 39 caliber cartridge cases recovered at the scene was ***not*** located. Further, with all of the contrary evidence presented, a reasonable juror would not have believed that the "hammer" Defendant mentioned in the phone call was the same gun found in Rivers' kitchen. Again, Defendant fails to prove that his trial counsel's alleged deficiency in failing to introduce the gun found in Defendant's apartment resulted in a "reasonable probability . . . sufficient to undermine the confidence in the outcome" or the likelihood that a different result was substantial warranting reversal of Defendant's convictions. *See Strickland*, 466 U.S. at 694; *Jackson*, 16-1100, p. 6, 248 So.3d at 1283.

This assignment of error lacks merit and is denied.

CONCLUSION

Defendant's convictions and sentences are affirmed.

AFFIRMED