NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 KA 2531

STATE OF LOUISIANA

VERSUS

JAMES TURNER

DATE OF JUDGMENT: September 15, 2006

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
(NUMBER 06-04-0844 SEC. VII), PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

THE HONORABLE TODD HERNANDEZ, JUDGE

* * * * * *

Hon. Doug Moreau District Attorney and Dylan C. Alge Aaron Brooks Assistant District Attorneys Baton Rouge, Louisiana	Counsel for Appellee State of Louisiana
Bruce G. Whittaker New Orleans, Louisiana	Counsel for Defendant/Appellant James Turner
James Turner Angola, Louisiana	Defendant/Appellant In Proper Person

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

Welch J. Concurs without reasons.

Kuhn, J.

Defendant, James Turner, was originally charged by grand jury indictment with conspiracy to commit first degree murder, a violation of Louisiana Revised Statutes 14:26 and 30, and first degree murder, a violation of Louisiana Revised Statutes 14:30. Defendant entered a plea of not guilty. The indictment was subsequently amended to charge defendant with conspiracy to commit second degree murder, a violation of Louisiana Revised Statutes 14:26 and 14:30.1, and second degree murder, a violation of Louisiana Revised Statutes 14:30.1.

Defendant was tried before a jury, which found defendant guilty as charged. The trial court sentenced defendant to a term of thirty years at hard labor for his conviction of conspiracy to commit second degree murder. The trial court also sentenced defendant to a term of life imprisonment at hard labor without benefit of probation, parole or suspension of sentence for his second degree murder conviction. The trial court ordered the sentences to be served concurrently.

FACTS

On June 21, 2004, John Claiborne was working as a security guard at the Brandywine Apartment complex in Baton Rouge. At approximately midnight, Claiborne was approached by one of the tenants, Mary Leon, who told him that her friend had been badly beaten. Claiborne followed Leon to Michael Maggio's apartment. When Claiborne arrived, Maggio was dead. Leon told Claiborne that "June and a skinny, white boy" were the ones who killed Maggio. Claiborne identified defendant as the second individual.

After the police were called to the scene, Claiborne retrieved a security videotape showing defendant and "June" entering and leaving Maggio's apartment. "June" was subsequently identified as Willie Variste.

Dr. Gilbert Corrigan, who was accepted by the trial court as an expert forensic pathologist, performed the autopsy on Maggio. According to Dr. Corrigan, Maggio was a fifty-three year old white male, whose death was caused by strangulation with a belt and several severe blows to his head.

Mary Leon lived next door to Maggio at the Brandywine Apartments. On the night Maggio was killed, Leon saw defendant and Variste entering and leaving Maggio's apartment. Earlier that evening, Leon had encountered defendant near the mailbox area of the complex. Leon testified that defendant threatened her with a gun until she gave him a cigarette. Later that evening, Leon heard knocking and looked out of her window. Leon saw defendant knocking on Maggio's door and saying, "Let me in." Defendant was accompanied by Variste. Maggio eventually opened his door. About forty-five minutes later, Leon grew concerned for Maggio and left her apartment to go check on him. Leon then observed defendant and Variste leaving Maggio's apartment "smiling and laughing."

Leon went over to Maggio's door and found it partially open. She entered Maggio's apartment, found him dead, and then notified security. Leon subsequently identified defendant in a photographic lineup.

The security videotape was played for the jury, and the videotape corroborated Leon's version of events that occurred between 11:00 p.m. and midnight near Maggio's apartment.

Defendant's mother, Sheila Turner, was called by the State. Mrs. Turner testified that she consented to a search of her family's apartment. The police seized a pair of khaki shorts from the defendant's bedroom. During the trial, Mrs. Turner claimed the shorts were hers. The Turners were in the process of moving between apartments that day. Mrs. Turner told the police that she thought the blood on the shorts was hers.

Detective Robert Gann of the Baton Rouge Police Department testified that he took possession of the shorts in question. They were a men's size 34, and Detective Gann testified that when he seized the shorts, Mrs. Turner claimed the shorts belonged to defendant, but the blood on the shorts was hers. The police eventually arrested defendant, and after waiving his rights, he gave three statements.

In defendant's first statement, he claimed he was in Maggio's apartment, left the room to use the bathroom, and when he returned he found Variste holding the belt around the victim's neck. Defendant denied he had a gun that night. At no time during his first statement to the police did defendant claim he was under the influence of crack cocaine at the time Maggio was killed, nor did he claim Variste held a gun to his head. At the time of his statement, defendant had numerous cuts and abrasions on his hands.

Defendant then gave a second statement to the police wherein he claimed he was "forced to do it."

Defendant subsequently gave a third statement wherein he stated that the belt used was his, but that Variste had grabbed his wrists while he was holding the belt to make the belt twist tight.

Defendant testified on his own behalf. Defendant stated he was twenty years old, had quit school in the ninth grade, and thereafter started using drugs. Defendant had done plumbing work for a while, but in the months prior to Maggio's death he had worked as a carpet layer. Defendant knew Variste from his association with a local rap musician and admitted that he and Variste had smoked crack cocaine and marijuana together.

Defendant claimed he was doing some minor plumbing work for Maggio and was supposed to finish it that night and be paid. Defendant claimed he owed Variste $10 and was going to repay it as soon as Maggio paid him.

Once defendant and Variste entered Maggio's apartment, Variste began using Maggio's phone, which angered Maggio. Maggio told Variste to leave. Meanwhile, defendant asked to use Maggio's bathroom before he finished his plumbing work, and Maggio agreed. Defendant entered the bathroom, but before he could do anything, he heard a loud noise and exited the bathroom only to find Variste on top of Maggio punching him. According to defendant, Variste pulled a gun on him and said he would kill him if he did not do what he was told. Defendant claimed Variste forced him to remove his own belt and strangle Maggio. Defendant denied entering Maggio's apartment to rob or kill him.

Defendant denied having a gun or that he had threatened Leon earlier that same day. Defendant claimed that at the time of Maggio's death he was on both crack cocaine and acid. Defendant admitted to removing Maggio's wallet, but claimed Variste removed its contents.

Defendant's father, James Turner, Sr., testified on his son's behalf. Mr. Turner testified that earlier that evening defendant mentioned that Maggio had not

paid him for his repair work, and that he told defendant to return to Maggio's apartment to collect his money. When defendant returned from Maggio's apartment, he was "all shook up." Before he could get defendant to tell him what happened, Variste entered the apartment without knocking and proceeded to the bathroom. Mr. Turner claimed that he asked Variste to be quiet so as not to wake his wife. Mr. Turner testified that he noticed Variste had blood all over his clothing and that it was dripping off him. After Variste left the apartment, defendant locked the door and told his father that Maggio had been killed.

JURY SELECTION

In his first assignment of error, defendant argues that it was error to select the jury out of his presence. Specifically, he argues that the trial court held unrecorded bench conferences out of his presence and that these unrecorded conferences make appellate review of the exercise of challenges to jurors impossible. In his second assignment of error, defendant argues that these deficiencies in the appeal record (the unrecorded bench conferences) deprive him of meaningful review on appeal.

Defendant maintains that the "Peremptory Challenge Sheets" contained in the record indicate that defendant used nine peremptory challenges and the State used five peremptory challenges. The only other evidence of a challenge by either party was one challenge for cause that was granted at the request of the State.

Louisiana Code of Criminal Procedure article 831 provides:

> Except as may be provided by local rules of court in accordance with Articles 522 and 551, a defendant charged with a felony shall be present:
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> (1) At arraignment;

> (2) When a plea of guilty, not guilty, or not guilty and not guilty by reason of insanity is made;
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> (3) At the calling, examination, challenging, impanelling, and swearing of the jury, and at any subsequent proceedings for the discharge of the jury or of a juror;
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> (4) At all times during the trial when the court is determining and ruling on the admissibility of evidence;
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> (5) In trials by jury, at all proceedings when the jury is present, and in trials without a jury, at all times when evidence is being adduced; and
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> (6) At the rendition of the verdict or judgment, unless he voluntarily absents himself.

Louisiana Code of Criminal Procedure article 831 provides for a defendant's due process right to be present at every stage of the trial when his absence might frustrate the fairness of the proceeding. However, the provisions of Louisiana Code of Criminal Procedure article 831 are not absolute. A defendant may waive his right to be present by voluntarily absenting himself, Louisiana Code of Criminal Procedure article 832; or by failing to contemporaneously object to preserve the matter for review, Louisiana Code of Criminal Procedure article 841.

In the present case, although defendant may not have been physically standing at the bench during the conferences addressing the juror challenges, he was actually present in the courtroom sitting at the defense table. It is also clear that his attorney participated in these bench conferences and made no objections regarding the procedure used. Accordingly, we find that defendant's sitting at the defense table while his attorney challenged jurors at the judge's bench constitutes "presence" for the purpose of Louisiana Code of Criminal Procedure article 831(A)(3). ***State v. Williams***, 34,359, pp. 11-12 (La. App. 2d Cir. 5/9/01), 786

So.2d 203, 212, writ denied, 01-2275 (La. 5/10/02), 815 So.2d 835. Defendant was never outside the presence of the jurors, the judge, the prosecutor, or his attorney during the "challenging" of the jurors. We conclude that the participation of defendant's attorney during these discussions, as well as defendant's continuous presence in the courtroom, is sufficient to provide the constitutional protection mandated by Louisiana Code of Criminal Procedure article 831.

With respect to the issue of the completeness of the record, both the Louisiana Supreme Court and the United States Supreme Court have made it clear that a criminal defendant has a right to a complete transcript of the trial proceedings. See **Hardy v. United States**, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d. 331 (1964); **State v. Robinson**, 387 So.2d 1143, 1144 (La. 1980). Further, in Louisiana, a defendant is constitutionally guaranteed the right to appeal "based upon a complete record of all evidence upon which the judgment is based." La. Const. art. I, § 19. Thus, material omissions from the transcript of the proceedings at trial bearing on the merits of an appeal will require reversal. See **State v. Landry**, 97-0499 (La. 6/29/99), 751 So.2d 214 (finding appellate record was so deficient that the court could not properly review the case for error); **State v. Robinson**, 387 So.2d at 1145 (holding that reversal was required when record failed to contain the testimony of a State and defense expert witness); **State v. Ford**, 338 So.2d 107 (La. 1976) (determining that reversal was required when record was missing the testimony of four State witnesses and the voir dire of prospective jurors); see also **State v. Deruise**, 98-0541, pp. 10-11 (La. 4/3/01), 802 So.2d 1224, 1234, cert. denied, 534 U.S. 926, 122 S.Ct. 283, 151 L.Ed.2d 208 (2001).

On the other hand, inconsequential omissions or slight inaccuracies do not require reversal, as an incomplete record may nonetheless be adequate for appellate review. See **State v. Castleberry**, 98-1388, p. 29 (La. 4/13/99), 758 So.2d 749, 773, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999); **State v. Hawkins**, 96-0766, p. 8 (La. 1/14/97), 688 So.2d 473, 480; **State v. Allen**, 95-1754, p. 11 (La. 9/5/96), 682 So.2d 713, 722. Finally, a defendant is not entitled to relief because of an incomplete record absent a showing of prejudice based on the missing portions of the transcript. **State v. Castleberry**, 98-1388 at p. 29, 758 So.2d at 773 (holding that the defendant failed to show any prejudice resulting from bench conferences not being transcribed and, therefore, there was no reversible error); **State v. Allen**, 95-1754 at p. 11, 682 So.2d at 722 (finding that defendant was not prejudiced by failure of the court reporter to record attorneys' arguments concerning some of their peremptory challenges which were made during bench conference); see also **State v. Deruise**, 98-0541 at p. 11, 802 So.2d at 1234.

In the present case, by defendant's own admission, he used only nine of his twelve peremptory challenges. The Louisiana Supreme Court has held that the failure to exhaust peremptory challenges bars review on appeal of a claim of an improperly denied challenge for cause. See **State v. Jones**, 03-3542, pp. 14-15 (La. 10/19/04), 884 So.2d 582, 591 (and authority cited therein). Because defendant's failure to exhaust his peremptory challenges bars him from seeking review of the granting of the State's challenge for cause, any complaint he may have as to deficiencies in the record is moot as to this issue.

Regarding defendant's second assignment of error that the transcript denies his right to appellate review, we also find this assignment is without merit.

Louisiana Code of Criminal Procedure article 843 provides in pertinent part:

> In felony cases, ... the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, ruling, orders, and charges by the court, and objections, questions, statements, and arguments of counsel.

Louisiana courts have never articulated a per se rule either requiring the recording of bench conferences or exempting them from the scope of Article 843. **State v. Hoffman**, 98-3118, p. 50 (La. 4/11/00), 768 So.2d 542, 586, cert. denied, 531 U.S. 946, 121 S.Ct. 345, 148 L.Ed.2d 277 (2000). However, in **Hoffman**, the supreme court interpreted Article 843's requirement that "objections" and "arguments" be recorded as normally applying only to objections made in open court and the arguments of counsel in closing, because only these objections and arguments rise to a level of materiality sufficient to invoke Article 843. The supreme court further determined in that case that La. Const. article I, § 19's mandate that "evidence" be recorded does not encompass bench conferences; at least, not ones that do not satisfy the materiality requirements of Article 843. **State v. Hoffman**, 98-3118 at p. 50, 768 So.2d at 586-87; **State v. Deruise**, 98-0541 at pp. 14-15, 802 So.2d at 1236. In any event, the supreme court has held that a defendant waives review of irregularities in the selection of the jury when no objection is lodged in a timely manner. See **State v. Deruise**, 98-0541 at pp. 9-10, 802 So.2d at 1233.

In the present case, the record of the proceedings indicates that no objection to the selection of the jury was made in open court. Thus, defendant's second assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his third assignment of error, defendant argues that his trial counsel was ineffective for basing his defense on a defense specifically prohibited by law. The defense presented was that defendant was held at gunpoint and forced to strangle Maggio. Defendant claimed he was in fear of his own life if he failed to follow Variste's instructions. Defendant maintained he could not form the specific intent to kill because he was under duress.

The trial court denied defense counsel's request to charge the jury on the law of justification on the basis that justification by compulsion is specifically excluded as a defense to the charge of murder. See La. R.S. 14:18(6). When defendant testified on his own behalf, he specifically acknowledged on cross-examination that justification was not a defense to murder, yet asked that the jury "have mercy upon me."

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted.[1] Where the record discloses evidence needed to decide the issue of ineffective assistance of counsel and that issue was raised by assignment of error on appeal, the issue may be addressed in the interest of

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[1] The defendant would have to satisfy the requirements of Louisiana Code of Criminal Procedure article 924, et seq., in order to receive such a hearing.

judicial economy. **State v. Lockhart**, 629 So.2d 1195, 1207 (La. App. 1st Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132.

In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two-part test for review of a convicted defendant's claim that his counsel's assistance was so defective as to require reversal of a conviction. First, the defendant must show that counsel's performance is deficient. Second, the defendant must show that this deficient performance prejudiced the defense.

The issue raised by defendant clearly questions the trial strategy and preparation put forth by his trial counsel. Such an issue can only be resolved on evidentiary findings regarding his trial counsel's investigation, preparation, strategy, and whether counsel's performance was deficient such that it prejudiced defendant. These questions cannot be determined by this appellate review and should be asserted through an application for post-conviction relief. See **State v. Eames**, 97-0767, p. 8 (La. App. 1st Cir. 5/15/98), 714 So.2d 210, 216, writ denied, 98-1640 (La. 11/6/98), 726 So.2d 922. Accordingly, these portions of defendant's pro se arguments are not subject to appellate review.

Moreover, we note in defendant's first pro se argument of error, he alleges that several times during his trial he asked his lawyer to stop the trial and let him plead guilty to manslaughter. There is no evidence in the record supporting the fact that such a plea was available to defendant once the trial began. However, in an abundance of caution, we remind defendant that any complaint regarding the effectiveness of his trial counsel should be raised in an application for post-conviction relief.

Accordingly, this portion of defendant's first pro se argument is without merit.

SUFFICIENCY OF THE EVIDENCE

Also contained in defendant's first pro se argument is a request that this Court review the "law of principles." Defendant's second pro se argument raises the issue that because Dr. Corrigan testified that Maggio also received fatal blows to his head (which defendant maintains were caused by Variste), his act of strangling Maggio was not what killed Maggio.

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. **State v. Wright**, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 00-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

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 at p. 3, 730 So.2d at 487.

Defendant's arguments presume that the jury accepted his defense that he was "forced" to strangle Maggio. We note that the jury rejected this theory of defense by finding defendant's own testimony to lack credibility. When faced with such a credibility determination by the jury and viewing the evidence in the light most favorable to the prosecution, we find the evidence sufficiently supports defendant's convictions.

The pro se arguments are without merit.

REVIEW FOR ERROR

In his fourth counseled assignment of error, defendant asks this court to review the record for "patent" errors. Under Louisiana Code of Criminal Procedure article 920(2), our review is limited to discovery of structural defects in the proceedings that are apparent by a mere inspection of the pleadings and without an evaluation of the evidence. Trial errors that do not constitute structural defects are subject to the harmless error analysis. ***State v. Hano***, 05-2090, p. 12 (La. App. 1st Cir. 6/9/06), ___ So.2d ___. After a careful review of the record in these proceedings, we have found no reversible errors.

DECREE

For these reasons, we affirm the convictions and sentences of defendant, James Turner.

CONVICTIONS AND SENTENCES AFFIRMED.