NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0512**
VERSUS	*	**COURT OF APPEAL**
SETH A. SMITH	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 379-778, SECTION "B"
Honorable Patrick G. Quinlan, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Michael E. Kirby, Judge Terri F. Love, Judge David S. Gorbaty)

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AFFIRMED

STATEMENT OF THE CASE

Defendant Seth Smith was charged by grand jury indictment on November 16, 1995 with second degree murder, a violation of La. R.S. 14:30.1. Defendant pleaded not guilty at his November 21, 1995 arraignment. On August 11, 1998, a jury found defendant guilty as charged. On January 20, 1999, the trial court denied defendant's motion for a new trial. After defendant waived all legal delays, the trial court sentenced defendant to life imprisonment, without benefit of parole, probation or suspension of sentence, with credit for time served. The trial court denied defendant's motion to reconsider sentence, and granted defendant's motion for appeal.

FACTS

New Orleans Police Sergeant Steve Gaudet testified that he and Sergeant Timothy Bayard were working a private neighborhood security patrol on the night of September 21, 1995 when they responded to a call of a shooting at Austerlitz and Magazine Streets, finding one black male shot, with two black males kneeling next to him. One of the men told officers he

knew where the perpetrator lived, and directed the officers to 1029 Ninth Street. The witness also pointed out a brown Toyota pickup truck he said had been used by the perpetrator. When other officers later saw defendant exiting the residence, Sgt. Gaudet returned to the scene and stopped defendant. He recovered a loaded .32 caliber "Rossi" brand revolver from defendant's waistband.

New Orleans Police Officer Fred Austin testified that he investigated the murder of Arthur Shorpshire, which occurred on the night of September 21, 1995, in the 800 block of Austerlitz Street. He learned that the victim had been talking to two individuals in a Toyota pickup truck when two shots fired from inside of the truck struck the victim. Two witnesses, Vernon Aych and Darryl Butler, comforted the victim. One of the witnesses later led Officer Austin to defendant's residence at 1029 Ninth Street. Police watching the residence arrested defendant at 8:30 p.m. that night, as he was leaving his residence. Defendant was in possession of a .32 caliber revolver when arrested. Officer Austin said two .380 caliber spent casings were found at the scene of the homicide. A subsequent search of defendant's residence turned up four .45 caliber cartridges, four .380 cartridges, ten .25 caliber cartridges, eleven .32 caliber cartridges, and twenty-three .22 caliber cartridges. Also recovered were one 9mm caliber bullet, one .25 caliber

bullet, and one .25 caliber magazine. The cartridges were in a plastic bag. The police found a .380 caliber pistol in either defendant's residence or in the Toyota pickup truck. During cross examination, Officer Austin identified the .32 caliber revolver seized from defendant's person by other officers when he was arrested. Officer Austin said the .32 caliber cartridges seized from defendant's residence were .32 auto cartridges, while the handgun defendant was carrying when arrested was a revolver, which had six cartridges in it. However, he said no cartridges of that type were found in defendant's residence. Officer Austin said he did not recall interviewing Lester Thomas or Calvin Waters in connection with his investigation.

Dr. Paul McGarry, qualified by stipulation as an expert in the field of forensic pathology, performed an autopsy on the body of Arthur Shorpshire on September 22, 1995. The victim sustained what he believed to be two separate gunshot wounds, one fatal shot to the chest, which penetrated his heart and left lung, and a through and through wound to his left hand. Dr. McGarry conceded that one bullet could have caused both wounds. The evidence led Dr. McGarry to believe that the shot or shots were fired from more than two feet away. The victim had a blood alcohol level of .05, but tested negative for the presence of drugs. The copper bullet he recovered from the body was approximately 9mm/.380 caliber.

New Orleans Police Department Criminalist Teresa Lamb was qualified by stipulation as an expert in the analysis and testing for gunpowder residue. She found no gunpowder residue on the victim's clothing.

Officer Millard Green, a New Orleans Police Department Crime Lab Technician, photographed the murder scene at Magazine and Austerlitz Streets, including a Toyota truck there. He also collected two spent casings there that he recalled were .380 caliber. Officer Green said he did not see any bullet holes in the wall of a grocery store, Genie's Grocery, at the scene.

Darryl Butler testified that he was at the corner of Magazine and Austerlitz Streets when his friend Arthur Shorpshire was shot and killed. That evening he and the victim had been sitting on milk crates at the rear of the grocery store talking. At some point, the victim was standing on the sidewalk near the corner when defendant drove up with a female passenger. Defendant and the victim got into an argument, and defendant drove off. Defendant returned five or ten minutes later by himself and shot the victim. Mr. Butler said he heard two shots. Mr. Butler identified a photograph of the truck defendant was in that night, as well as other photographs depicting the scene that night. He said he never saw the victim with a gun, but did not recall whether the victim had been drinking.

Mr. Butler said on cross examination that he never said that the victim liked to fight. He said he knew defendant from the neighborhood. He agreed that the argument between defendant and the victim lasted about ten minutes. He did not hear what defendant and the victim were talking about. Mr. Butler said he did not know how far away he was from the truck, but was confronted with his testimony from an earlier hearing that he was about one foot away. Mr. Butler stated three times that defendant pulled up on the sidewalk, "grabbed" the victim, and then shot him.

Vernon Aych knew defendant and had grown up with the victim. On the night of the murder he rode up on his bicycle to the victim and Darryl Butler. The victim said he had just gotten into an argument with someone, and Mr. Aych suggested to the victim that he take a walk. As the victim started to walk off, the victim saw defendant in his truck and pointed him out to Mr. Aych. Mr. Aych said defendant pulled up on the sidewalk, grabbed the victim by his shirt, shot him twice, and then sped off. Mr. Aych later directed police to defendant's residence, and pointed out his truck for them. Mr. Aych did not see the victim make any threatening movements towards defendant. Mr. Aych was confronted on cross examination with an earlier statement that he was coming out of the grocery store when the first shot was fired, and that he could not see the two men as he exited the store because

the building was in the way. In his earlier statement he had said that he ran in the opposite direction after the first shot. Mr. Aych told police he heard someone say "Let it go, let it go," and said that he did know whether the victim had grabbed the gun. He said the victim did not like to fight, but that he would fight. He said that "if it came down to it," the victim would rather fight than use a weapon, but subsequently said the victim would walk away from a fight.

Calvin Waters testified for the defense, and said he grew up with the victim and Mr. Aych, and was a friend of Mr. Butler. He also knew defendant from the neighborhood. Mr. Waters said he was at Genie's Grocery before the shooting, but left before Mr. Butler and Mr. Aych got there. Mr. Waters said he had not seen the victim with a gun, or seen him dealing drugs. He admitted that the victim had a quick temper, a hot temper at times, and got into a lot of fights, so many that he could not keep track of them. Mr. Waters admitted giving a statement to an investigator, and to initialing each page of a written statement. But, when shown that the statement reflected that he said the victim was selling rocks of crack cocaine, he said he did not recall telling that to the investigator. Mr. Waters was present when the victim and defendant were arguing, but did not know what the argument was about. He claimed he was in the middle of the block,

across the street, and could not hear what they were saying. However, he admitted telling the investigator that he had heard that the two had been arguing about crack cocaine and money. Mr. Waters admitted that the victim kept a sawed-off shotgun at his residence. He confirmed on cross examination that the statement he signed was in fact simply a summary of what he said to the investigator. He recalled a woman being in defendant's truck with him. The argument lasted five minutes, and during that time he never saw the victim strike defendant or wave a gun. At the end of the argument he heard defendant, whom he knew as "Brother," say he would be back. Mr. Waters left the scene at some point. He later heard gunshots, and returned to find the victim had been shot.

Thi Van Lai testified that he was the owner of Genie's Grocery, and was working on the night of the murder. He heard cursing outside and, five to ten minutes later, heard two gunshots. He said one bullet came through a window of his store, about twelve feet up.

Lester Thomas testified that he knew defendant and the victim. He said he was half drunk that night, heard some arguing, and ran when the shots were fired. He saw the victim come toward defendant's truck with something in his hand, and said it could have been a gun. He indicated that he had talked to an investigator, and said on cross examination that the

investigator had harassed him.

Ivan Federoff, a licensed private investigator, testified that he interviewed Calvin Waters, taping the conversation and later reducing it to a summary, which Mr. Waters read and signed in his presence. He said this was standard operating procedure in the private investigation business. Mr. Federoff identified a photograph of a bullet hole in the window of Genie's Grocery. Mr. Federoff said he also spoke to Lester Thomas, who, when asked whether one man (defendant or the victim) had a gun or both men had guns, "indicated" that both had guns. He asked Mr. Thomas about this because he had received "soft information" that Mr. Aych had handed the victim a gun shortly before the shooting. Mr. Federoff said Mr. Thomas was intoxicated at the time he interviewed him, but was not slurring his speech. Mr. Federoff's indicated on cross examination that he spoke to Mr. Thomas approximately one year after the murder. He admitted that he had demanded of Mr. Thomas that he directly answer his questions. He said the interview got unpleasant, and Mr. Thomas pulled a knife on him.

Defendant, who was forty-three years old at the time of trial, testified that before the shooting he was self-employed, repairing appliances. Defendant admitted two prior convictions for simple robbery, and another for what he recalled was trespassing. He testified that on the night of the

shooting he was in his neighbor's pickup truck with his girlfriend, Sheila. He stopped at the grocery store to buy a six-pack of beer for his neighbor, and some cigarettes. He saw Lester Thomas, and asked him if he had seen someone. The victim came up to the truck and attempted to sell him some crack cocaine. He said he had never met the victim before that evening. He informed the victim he did not want to purchase any drugs, and the victim began cursing and berating him. Darryl Butler, whom he knew as "Banana," was standing there, and he attempted to calm down the victim. The victim asked for a ride around the corner, and defendant declined, causing arguing between the two men. Defendant then left, but said that as he drove off he began to think that he should not leave the matter unresolved, as he had to often drive through that neighborhood. He dropped Sheila off at a gas station at Peniston and Magazine Streets, a couple of blocks away, and returned to the scene. When he pulled up to the grocery store, Darryl Butler and the victim were standing there. The victim walked up the truck with his right hand in his pocket, and defendant told him that he did not want any trouble, but wanted to clear up the dispute. The victim started cursing him, and pulled a revolver out. Defendant said he pulled his gun, but that the victim did not see it. When the victim cocked the hammer of his revolver, defendant grabbed it, blocking the firing pin with his index finger.

Defendant fired a "warning" shot, and the victim started to bring his left hand up. Defendant then shot the victim, who then released his grip on his revolver. Defendant took control of the victim's revolver, threw it on the passenger seat of his truck, and drove off. As he drove off he saw Vernon Aych, whom he knew as "Manny Man," drive up in his truck. When he got home he hid the .380 caliber murder weapon in the bottom of a potted plant. Defendant said on cross examination that he thought he had just shot the victim in his hand. He said he hid the gun because he was a convicted felon. Defendant estimated that the victim had been two and one-half to three feet from his truck when he shot him. He only shot the victim when the victim raised his left hand and attempted to grab his gun.

ASSIGNMENT OF ERROR NO. ONE

Defendant claims the evidence is insufficient to convict him. Defendant concedes he shot and killed Arthur Shorpshire. However, he claims he acted in self-defense, and submits that the State failed to prove beyond a reasonable doubt that he did not act in self-defense.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most

> favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.
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> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-228.

Second degree murder is the killing of a human being when, among other circumstances, the offender has a specific intent to kill or inflict great

bodily harm. La. R.S. 14:30.1. A homicide is justifiable "[w]hen 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." La. R.S. 14:20(1). When a defendant asserts self-defense, the State has the burden of establishing beyond a reasonable doubt that he did not act in self-defense. State v. Ross, 98-0283, pp. 10-11 (La. App. 4 Cir. 9/8/99), 743 So. 2d 757, 763; State v. Byes, 97-1876, p. 8 (La. App. 4 Cir. 4/21/99), 735 So. 2d 758, 764. Although there is no unqualified duty to retreat, the possibility of escape is a factor in determining whether or not the defendant had a reasonable belief that deadly force was necessary to avoid the danger. State v. Isaac, 98-0182, p. 5 (La. App. 11/17/99), 762 So. 2d 25, 27. However, a defendant 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 the defendant desires to withdraw and discontinue the conflict. State v. Ventry, 99-0302, pp. 3-4 (La. App. 4 Cir. 6/14/00), 765 So. 2d 1129, 1132.

Defendant first argues that the State's two eyewitnesses, Darryl Butler and Vernon Aych, were unbelievable because they both testified that defendant grabbed the victim and then shot him. Defendant implies that this

was not possible because Dr. McGarry testified that, as there was no "soot" on the victim's body, including his hand, it was his opinion that the gun was fired from a distance of at least two feet away from the victim. Dr. McGarry said his findings precluded the gun from being fired during a struggle between the murderer and the victim. Police criminalist Teresia Lamb, who was qualified by stipulation as an expert in the analysis and testing for gunpowder residue, found no gunpowder residue on the victim's clothing. Defense counsel questioned Ms. Lamb using demonstrative examples, eliciting from her equivocal responses about whether a shot fired from particular distances or angles would leave gunpowder residue. For instance, Ms. Lamb said in answer to one question that it "would depend on the particular weapon involved." Asked what if the gun were a .380 caliber semi-automatic, she said again it would depend on variables such as what side of the firearm one were standing, what side of the firearm the ejection port was on, etc. The jury was able to observe these demonstrative questions by defense counsel that the record does not adequately reflect. Defendant's argument is undermined by his own testimony–he testified that he had a grip on the victim's gun when he shot him. Thus, the testimony of the State's two eyewitnesses is no more unbelievable than the testimony of defendant insofar as the physical evidence is concerned. It is undisputed that defendant

shot and killed the victim, firing the fatal shot at a close range. The jury obviously reconciled the testimony of Dr. McGarry and Teresia Lamb with the testimony of the State's witnesses. In view of the overall evidence, the testimony of the State's witnesses simply cannot be considered as irreconcilable with the physical evidence.

Defendant next argues that the State's version makes no sense because both Mr. Butler and Mr. Aych testified that he pulled the victim to his truck while he sat in the driver's seat. Defendant submits that it is inconceivable that a person seated in a truck would have the strength to pull a grown man to him, and then, with his free hand fire shots at him. There was no testimony that it would be a superhuman feat for a person seated in a truck to grab a person standing outside with one hand, pull that person toward the truck, and then shoot that person with his free hand. There is no merit to this argument.

Defendant claims that the fact that a bullet was fired by him into a window twelve-feet up on the side of the grocery store supports his self-defense theory, and contradicts the State's witnesses. However, it is not outside the realm of possibility that defendant missed the victim with his first shot. Perhaps the victim deflected defendant's gun hand. Perhaps defendant tried to scare the victim with one shot, not in self-defense, but just

to scare the victim. Then, when defendant did not scare, he shot and killed him.

Defendant claims that it is consistent with his self-defense claim that he had a gun on his person when arrested that was not the one used to kill the victim. Defendant claimed that this was the gun the victim had attempted to shoot him with, which he took from the victim after or as he shot him. However, it is just as conceivable that the victim had not been armed with that gun, that defendant simply went home, hid the murder weapon, armed himself with another gun that he had at home, and was going out again when stopped by police. It is true that police found cartridges for several types of firearms at defendant's residence, including some in .380 auto caliber, the caliber of the gun used to shoot the victim, but none for a .32 caliber revolver. While this too would be consistent with defendant's self-defense theory, it can be noted that the .380 auto cartridges found in defendant's residence were not of the same manufacture as the spent cartridge casings found at the scene of the murder.

Defendant maintains that if he had really wanted to kill the victim he could have shot him as he drove by in his truck. This argument is plainly without merit. People murder other people everyday under myriad circumstances. Defendant also notes that witnesses from both the State and

defense heard someone yell “let it go,” and argues that this is consistent with his testimony that he was trying to take the victim’s gun from him. Vernon Aych testified at a prior hearing that he heard someone say “let it go, let it go,” and that he did know whether the victim had grabbed the gun. This could indicate that the victim grabbed the gun, and defendant was telling the victim to let the gun go. This could be another explanation as to why one bullet ended up penetrating a window twelve feet up on the side of the grocery store; the victim could have grabbed the gun, and it could have discharged as defendant wrested it from the victim’s grip.

The jury could have discredited defendant’s self-defense testimony, and believed the State’s witnesses. It is undisputed that defendant and the victim argued, that defendant left the scene, dropped his female companion off somewhere, and returned to confront the victim, while armed with the murder weapon. It is noteworthy that defendant’s female companion, who presumably would have heard the victim offer to sell crack cocaine to defendant, as defendant claimed, did not testify to confirm defendant’s story that the whole incident arose after he refused to buy crack cocaine from the victim. Both Darryl Butler and Vernon Aych testified that defendant drove up, grabbed the victim, fired two shots, and fled. Darryl Butler said he did not see the victim with a gun. Vernon Aych said he did not see the victim

make any threatening movements toward defendant. Calvin Waters, who testified for the defense, said he was there before the shooting, and did not see the victim with a gun or see him selling drugs, although he admitted telling a defense investigator that he heard that the victim and defendant had been arguing about drugs and money. Lester Thomas testified for the defense that he saw the victim approach defendant's truck with something in his hand, something he admitted could have been a gun. Private Investigator Ivan Federoff said that Lester Thomas "indicated" that the victim and the defendant both had guns that night. Lester Thomas is an admitted alcohol abuser who admitted that he was "half drunk" on the night of the shooting, and was intoxicated when he spoke to Mr. Federoff–a year after the murder.

Testimony of one witness, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. State v. Marshall, 99-2176, p. 12 (La. App. 4 Cir. 8/30/00), __ So. 2d __, 2000 WL 1486278. A factfinder's credibility decision should not be disturbed unless it is clearly contrary to the evidence. State v. Harris, 99-3147, p. 6 (La. App. 4 Cir. 5/31/00), 765 So. 2d 432, 435. Flight from the scene of the crime indicates consciousness of guilt and is a circumstance from which a jury may infer guilt. State v. Ashley, 33,880, p. __ (La. App. 2 Cir. 10/4/00), __ So. 2d __, __, 2000 WL 1468556; accord State v. Davies, 350 So. 2d. 586, 588 (La. 1977).

Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that defendant did not shoot the victim to death under the reasonable belief that the killing was necessary to save himself from an imminent danger of death or great bodily harm.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. TWO

In this assignment of error, defendant claims that the record is incomplete, preventing a full and complete review of his appeal.

La. Const. Art. I, § 19 provides that "[n]o person shall be subjected to imprisonment ... without the right of judicial review based upon a complete record of all evidence upon which the judgment is based." La.C.Cr.P. art. 843 requires, in all felony cases, the recording of "all the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements and arguments of counsel." As a corollary, La. R.S. 13:961(C) provides that, in criminal cases tried in the district courts, the court reporter shall record all portions of the proceedings required by law and shall transcribe those portions of the proceedings required. A criminal defendant has a right to a complete transcript of his trial proceedings,

particularly where appellate counsel on appeal was not also trial counsel. State v. Landry, 97-0499, p. 3 (La. 6/29/99), 751 So. 2d 214, 215. "[W]here a defendant's attorney is unable, through no fault of his own, to review a substantial portion of the trial record for errors so that he may properly perform his duty as appellate counsel, the interests of justice require that a defendant be afforded a new, fully recorded trial." Id. (quoting State v. Ford, 338 So. 2d 107, 110 (La. 1976)). However, this court has held that under some circumstances a complete appellate review of a conviction and sentence can be accomplished, even when there are missing portions of the trial record. See, e.g., State v. Cooley, 98- 0576, p. 9 (La. App. 4 Cir. 12/2/99), 747 So. 2d 1182, 1187.

"A slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal would not cause us to reverse defendant's conviction." State v. Allen, 95-1754, p. 11 (La.9/5/96), 682 So.2d 713, 722 quoting State v. Ford, 338 So.2d 107, 110 (La.1976). Indeed, an incomplete record may nonetheless be adequate for appellate review. State v. Hawkins, 96-0766, p. 8 (La.1/14/97), 688 So.2d 473, 480. Finally, a defendant is not entitled to relief absent a showing of prejudice based on the missing portions of the transcripts. Id." State v. Castleberry, 98-1388, p. 29 (La. 4/13/99), 758 So. 2d 749, 773, cert. denied,

Castleberry v. Louisiana, __ U.S. __, 120 S.Ct. 220, L.Ed.2d 185 (1999).

Defendant asserts that several questions and answers have either been changed or are missing from the transcript of his testimony. There is nothing to support this claim. Defendant's memory is apparently so acute that he can recall what questions were asked of him and what answers he gave in response. However, defendant fails to point out what questions and answers have been changed or have been altered, so as to make a showing of prejudice.

Defendant is correct that his testimony was transcribed separately from the rest of the trial. The main transcript contains a notation after the State's second-to-last witness, defendant being the last defense witness, that defendant's testimony had already been transcribed, and would be attached to the end of the trial transcript. Defendant avers that the court reporter was switched before his testimony. However, the main transcript contains a certification by the court reporter, Charlene Faucheaux, that she took the objections during opening statements and closing arguments, if any, and trial testimony. Similarly, the transcript of defendant's testimony contains a certification by Ms. Faucheaux that she took defendant's testimony. While it is certainly irregular that defendant's testimony was transcribed separately, there is no indication that a different court reporter took it.

The main transcript contains a notation by the trial court, after the State's rebuttal witness left the witness stand, wherein the court stated: "Let's do one thing real quick and switch court reporters, and then we'll do the closing arguments." Immediately thereafter in the main transcript is a notation by Ms. Faucheaux that there were no objections by any parties during closing arguments. Defendant suggest that Ms. Faucheaux did not record the closing arguments, presumably for the above reason. However, this notation by the trial court simply indicates that it had to do something on the record relating to another case, and switched court reporters for that matter, returning to Ms. Faucheaux for closing arguments. In any case, defendant does not suggest that there were any objections during closing argument. Thus, defendant fails to show any prejudice.

Defendant has failed to demonstrate that the trial transcript is incomplete. There is no merit to this argument.

ASSIGNMENT OF ERROR NO. THREE

Defendant claims that the trial court erred in not declaring a mistrial when a State witness testified to matters that had been ruled inadmissible during a motion in limine.

Prior to Detective Austin testifying, the defense objected to the

admissibility of any evidence concerning the varied collection of ammunition found in defendant's residence, other than the .380 auto and .32 auto cartridges. The trial court ruled in favor of the defense. Detective Austin later testified concerning all of the ammunition. However, prior to that testimony, the trial court noted that during a bench conference subsequent to the ruling on the motion in limine, evidence–about the full assortment of ammunition–had been agreed to by defense counsel. Accordingly, there was no objection by defense counsel, or motion for a mistrial when Detective Austin testified about the ammunition. Defendant asserts that the jury should have been excused and the reasons for the "stipulation" stated for the record. There is no merit to this argument. Defense counsel obviously made a strategic decision to admit evidence of the assorted lot of loose ammunition, presumably to show that there was no .32 caliber revolver ammunition in the lot.

There is no merit to this assignment of error.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED