STATE OF LOUISIANA * **NO. 2000-KA-2756**

VERSUS * **COURT OF APPEAL**

STANLEY WALDRON * **FOURTH CIRCUIT**

* **STATE OF LOUISIANA**

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APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 211-012, DIVISION "D"
HONORABLE KIRK A. VAUGHN, JUDGE
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JAMES F. MCKAY, III
JUDGE
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(Court composed of Chief Judge William H. Byrnes, III, Judge Charles R. Jones, Judge James F. McKay, III)

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AFFIRMED

The defendant Stanley Waldron was charged by bill of information on March 30, 1998, with attempted first-degree murder. The defendant pleaded not guilty at his May 4, 1998 arraignment. On June 15, 1998, the defendant changed his plea to not guilty and not guilty by reason of insanity. On July 20, 1998, the defendant was found incompetent to proceed, and ordered committed to Feliciana Forensic Facility. He was found competent to proceed on February 22, 1999. The trial court denied the defendant's motion to suppress the evidence on April 26, 1999. On July 19, 1999, the trial court granted the defendant's motion to represent himself, with his appointed counsel acting as an advisor. The trial court denied the defendant's second motion to suppress on November 29, 1999, and his motion for two State funded experts. On February 18 and 23, 2000, this Court denied the defendant's two applications for supervisory writs. On May 10, 2000, the State amended the bill of information to charge attempted second degree murder, and the defendant was arraigned, entering a plea of not guilty and not guilty by reason of insanity. The defendant was found

guilty as charged on May 12, 2000, at the close of a three-day trial by a twelve-person jury. On May 22, 2000, the trial court denied the defendant's motion for post verdict judgment of acquittal and for new trial. The defendant waived the sentencing delay and was sentenced to fifty years at hard labor without benefit of parole, probation or suspension of sentence, to run consecutive to a sentence imposed in St. Tammany Parish. The trial court denied his motion to reconsider sentence, and granted his motion for appeal.

FACTS

The defendant was alleged to have unlawfully entered the St. Bernard Parish home of Lawrence McCall on March 12, 1998, and repeatedly stabbed him.

St. Bernard Parish Sheriff's Office Deputy Albert Clavin testified that he arrived at the Juno Street townhouse of Larry McCall at approximately 5:00 a.m. on March 12, 1998. He processed the crime scene, collecting evidence and taking numerous photographs, noting that there was a lot of blood in the living room, on furniture cushions and on the floor. Deputy Clavin removed three, perhaps four, sections of sofa material. A broken piece of a knife was recovered near the living room sofa, which the deputy understood that the victim had been lying or sleeping on that morning. The

walls and floor of the kitchen were marked with a considerable amount of blood. The bathroom had a bloody fillet knife on the top of the wash basin; there were also bloody knives in the kitchen sink, and a frying pan on the stove with a red substance on it. Blood was located going up the stairwell. The outside telephone line had been cut. Deputy Clavin also photographed the defendant after he was arrested in Slidell later that morning that showed that the defendant had fresh/recent cuts on his arm and a finger. Deputy Calvin also took photographs of the victim, Larry McCall, and his daughter, whom he recollected, had a cut to her left hand. Evidence from the scene was packaged and sent to the Louisiana State Police Crime Lab in Baton Rouge. The defendant's car was found at gas station in Mississippi. It appeared that there were bloodstains in the defendant's car, and Deputy Calvin cut out pieces of the vinyl armrest and seat as evidence. Two bloodstained latex gloves were located in a nearby dumpster.

Deputy Clavin identified numerous items of evidence and photographs. Deputy Clavin took photographs numbered 1-108; Detective Mark Jackson took photographs numbered 129-210. A Mississippi Department of Public Safety investigator took photographs numbered 109-128 at the scene of the recovery of the defendant's car. Deputy Clavin said the crime scene was preserved by crime scene tape until he arrived. He said

no fingerprints were found in the kitchen, noting that there was a lot of grease on the items. No fingerprints were found where the telephone line was cut, and no footprints were observed. In cross-examining Deputy Clavin, the defendant, acting as his own attorney, stated: "And what about Mr. McCall? He was wearing just a pair of briefs, I believe?" Deputy Clavin said he had not seen what Mr. McCall had been wearing that day.

Carl Waldron, the defendant's father, testified that the defendant telephoned him from Gulfport, Mississippi after daylight on the morning of March 12, 1998. The defendant told his father that the car had broken down. Carl Waldron said he had no idea what the defendant was doing before the car broke down. He denied telling Detective Scott Davis from the St. Bernard Parish Sheriff's Office that the defendant admitted to stabbing the victim and that he helped the defendant dispose of a mask and body armor. Carl Waldron admitted that the defendant had a cut on his hand and a wound on his back, but did not ask the defendant about the cuts.

St. Bernard Sheriff's Office Detective Scott Davis testified that on March 12, 1998, he went to Carl Waldron's residence in Slidell, Louisiana, in an effort to locate the defendant. Carl Waldron informed him that the defendant had admitted over the telephone that he stabbed Larry McCall, and Detective Davis said he recorded this in his report. Detective Davis said

he searched Carl Waldron's home for a mask or body armor that the defendant may have been wearing, but found neither. Amanda McCall, the victim's daughter, reported to him that she struck the defendant on the head with a frying pan in an attempt to stop him from attacking her father. Detective Davis said the defendant had a contusion on the top of his head. When asked if there was any evidence of forced entry into the McCall residence, he responded in the affirmative, and said it appeared that the rear sliding glass door appeared to have been tampered with.

On cross-examination, Detective Davis when confronted with his earlier testimony, which he gave at an earlier hearing, responded in the negative when asked whether he had found any pry marks or other indication that the door had been forced open. Detective Davis admitted that no pellet gun, mask, body armor, hammer or wig was found in either the car the defendant that had been driving or in the home of his father. Detective Davis did state that Carl Waldron had informed him that the defendant was wearing dark clothing when he picked the defendant up in Mississippi, but that police never were able to locate that dark clothing. Detective Davis stated on redirect examination that police located a bloodied latex glove at the bottom of a dumpster at the location in Mississippi where the defendant's vehicle was found. The victims informed him that the defendant

had been wearing latex gloves.

Dr. Richard Vallette testified that he treated Lawrence McCall for multiple stab wounds to his arms, face, neck, chest and abdomen. A portion of Mr. McCall's colon was bulging through the abdominal wound. Mr. McCall also had a small-depressed fracture in his skull, which Mr. McCall related had been caused by a hammer. Dr. Vallette testified that Mr. McCall would have died from blood loss without treatment. A potentially life threatening cut to Mr. McCall's throat was approximately an inch away from his jugular vein, and a stab wound to his chest was one or two inches from his descending aorta. Dr. Vallette conceded on cross-examination that the wound to the throat was superficial, and was not dangerous. Four pints of blood were found in the perivertebral space, and one wound to the abdomen severed the lowest rib and pierced Mr. McCall's colon in two places. However, no wound penetrated into the pleura or lungs. Dr. Vallette conceded on cross-examination that the lacerations on the neck and chest were not life threatening, but noted that the wound to the abdomen was. He confirmed on redirect examination that there were multiple defensive wounds about Mr. McCall's hands and arms and fingers; some had partially severed tendons in his fingers.

Amanda McCall testified that Larry McCall was her father, and that

the defendant had been married to her mother at one time. She awoke on March 12, 1998, after hearing her father screaming. She ran downstairs to find the defendant on top of her dad, stabbing him. She did not recognize the defendant at the time, as he was wearing a wig and had something covering his face. The defendant was dressed in all black—black jeans, black sweat shirt and shoes with Velcro. He was wearing plastic gloves, and may have had other gloves over those. Amanda said her father was screaming that "he" was stabbing him, and to call 911. Amanda said neither the downstairs nor the upstairs telephones worked. Her father told her to get help from a neighbor, but the defendant stopped her as she attempted to run out the back door. At that point, Larry McCall attempted to run out of the back door, but the defendant caught him in the kitchen, where the two men struggled. She testified that she picked up a frying pan and hit the defendant in the head twice, but it did not faze him. The defendant's mask fell off, and only then did she realize it was the defendant. Her father said the defendant's name, and Amanda exclaimed that it was "Stan." Afterward, she grabbed a knife out of the kitchen drawer and tried to stab the defendant several times, but each time the blade broke. Amanda said she thought the defendant was wearing medieval chest armor that tied on the sides. After they stopped fighting, and the defendant stopped stabbing her father, all

three went into the living room where they sat down. The defendant said it would have never happened if they had made a deal with him in St. Tammany Parish. While in the living room, she kept telling the defendant her father was about to die. The defendant replied that he was not going to die, that he was fine. The defendant even went over to her father and spread apart the wounds and looked inside. She also testified that she told the defendant to go into the bathroom, wash up, get out of the house, and let them go to the hospital. After the defendant went into the bathroom, her father told her he had to get out of the house or he was going to die. She opened the door, and her father ran out. Although she attempted to follow her father the defendant grabbed her and put a pellet or BB gun to her head but she escaped. The defendant chased them, but was diverted by a neighbor turning on an outside light. The defendant then fled. Amanda said the defendant had a mallet that night, but took it with him when he left. Amanda also testified that the defendant entered the residence through the sliding glass door as wiggling and jimmying could open it; she guessed that was what the defendant had done.

On cross-examination she did not recall what type of mask the attacker was wearing but that a wig hair was covering it. She remembered the wig as she had sat on it. She asked the defendant if it was his wig, and

the defendant grabbed it. She said she told police she was sixteen, and admitted that she was going to turn seventeen the next day. During his cross-examination of Amanda, the defendant read part of Amanda's statement to police in which she said that the district attorney's office had offered to drop a charge from rape to sexual molestation. It came out during this questioning that the defendant had been charged with the sexual molestation of Amanda. The defendant asked her why she told police that he had been charged with rape when the only charge was sexual molestation, and she replied that she wished he would have been charged with rape because that was what he did. The defendant asked Amanda how she got the cut on her hand that night. She said it happened as she helped her father bend back the knife that the defendant had placed to her father's throat. The defendant quizzed Amanda about her attempt to stab him in the back, breaking the knife in the process, inferring that it was then that she cut her hand.

Lawrence McCall confirmed that his ex-wife had voluntarily surrendered custody of Amanda to him because of problems in the household of his ex-wife and the defendant. He confirmed that he pursued some action in St. Tammany Parish with regard to those problems, and that this was ongoing as of the date he was attacked by the defendant.

Mr. McCall testified that on the night of the attack he had fallen asleep on his sofa after watching television, when he was awakened by a blow to his head. He also felt a knife "raking" across his neck. He opened his eyes to see a masked figure in front of him. Mr. McCall recalled that it felt like the defendant had heavy plastic on his back and chest. He stated that he did not know that the defendant was his attacker until his mask came off after the struggle had moved into the kitchen. Mr. McCall said he was cut on his chest and hands during the course of the struggle and that the defendant was definitely trying to kill him. He also testified that the defendant stopped him and Amanda from running out the door. Mr. McCall said he was feeling so weak that he lay down on the sofa. He said that based on his emergency medical service training he knew that at the rate he was bleeding he would soon be unconscious. Mr. McCall believed he spent six days in the intensive care unit and another week in the hospital.

Mr. McCall confirmed on cross-examination that the defendant had hit him only once in the head. Mr.Call said on redirect examination that he was in his underwear that night.

David W. Carrington, M.D. testified that he was the defendant's treating psychiatrist at the Feliciana Forensic Facility from the date of the defendant's admittance, October 6, 1998, to the date of his discharge in

April 2000. Dr. Carrington's initial diagnosis of the defendant was adjustment disorder with depressed mood, with anxiety and a personality disorder not otherwise specified. The defendant also had psychogenic dyspepsia, an inability to keep down food for emotional reasons. According to the defendant's self-report, he had lost approximately 65 to 70 pounds during his six months in St. Bernard Parish Prison. The defendant was declared competent to stand trial in February 1999. The defendant had problems in prison, so it was thought best to keep him in Feliciana Forensic Facility until he went to trial. He continued to receive psychological treatment while there. Dr. Carrington believed that the defendant's distress at being in jail resulted in his acting out in such a fashion likely to result in being sent back to a more hospitable environment. Dr. Carrington said his role was not to address the defendant's state of mind at the time of the offense, but to restore the defendant to competency. The doctor said on cross-examination that he had no opinion as to the defendant's mental status at the time of the offense.

Harold Kirby, a social worker at the Feliciana Forensic Facility, provided case management and direct care to the defendant at the medium security ward where the defendant was for the last part of his stay. He talked with the defendant at least weekly. He said the defendant had no write-ups

during his stay on the medium security ward.

Carl Waldron testified that the defendant lived with him and his wife after being charged in St. Tammany Parish (for molesting Amanda McCall) and released on bond. The defendant worked during that period. When asked how the defendant coped with the separation from his wife and family, Carl Waldron said the defendant was quite concerned, and even took a part-time job as a cashier so he could send more money to his family. Carl Waldron said the defendant had a hard time sleeping during that period and described the defendant during this period as physically burned out. The defendant's wife and family came to visit him from Florida in November 1997. The defendant improved for a while, but then relapsed. Carl Waldron recalled that the defendant attempted to commit suicide in January 1998 by taking some pills. When asked whether there was any place to hide masks, body armor or weapons in the house, Carl Waldron replied in the negative.

Carl Waldron said he received a telephone call from his daughter-in-law in the early morning hours of March 12, 1998, advising him that the defendant was somewhere in Mississippi, and was going to kill himself. The defendant telephoned him after dawn. He indicated that the defendant did not make any sense, but he gathered that the defendant was somewhere at a service station between Gulfport and Biloxi. Carl Waldron and his wife

drove to Biloxi, pulling in all of the exits along the way until he came upon the defendant sitting on the curbing. Carl Waldron said he led the defendant to his truck and put him into the back seat. He did not recall what the defendant was wearing. He indicated that he did not pay attention to those types of details, explaining that he was just so relieved the defendant had not killed himself. He did recall the cuts to the defendant's hands and his back. He said that after returning home, his daughter-in-law telephoned to say that she thought the defendant had been in some trouble. He telephoned the attorney that was then representing the defendant who advised the defendant not to go anywhere, saying that police would come to Carl Waldron's home and pick him up. Carl Waldron said he did not know whether the defendant changed clothes at the house. The defendant turned himself in to police when they arrived. Carl Waldron allowed police to search his home, but they did not find anything. He told them where the car was located in Mississippi. Carl Waldron recalled that his son lost sixty pounds in the St. Bernard Parish jail, before he was transferred to the mental institution. The defendant used to say things over and over as if he could not get the thought out of his mind. He noticed a change in the defendant after being in the mental institution for a month, and he just got better and better. Carl Waldron said that on the day of the stabbing, the defendant was either in

shock or just was “not there.” He said the defendant was not talking, and that he could not get anything out of the defendant that made sense. When he talked to the defendant at the mental institution, the defendant said he could not remember what happened.

On cross-examination, Carl Waldron testified that he did not know how his daughter-in-law, knew to call him from Florida and tell him that the defendant was going to kill himself. He did not know whether the defendant telephoned her and told her he had just stabbed Larry McCall. Moreover, the defendant had never expressed any anger about what was going on in St. Tammany Parish, although he conceded the defendant said the charge was not truthful. Carl Waldron said the defendant had attempted suicide several times over a lifetime, but that he had never been hospitalized, and that he had never taken the defendant to a hospital or a doctor. He said on redirect examination that he was shocked to hear what the defendant had allegedly done, describing the defendant as the peacemaker in the family. He said the defendant never got involved in fights with other kids or argued with teachers or people. He had never seen the defendant express any violence. He had seen him argue with his wife, but never strike her. Carl Waldron said Amanda McCall lied quite often and was in trouble with teachers at school. She stole several things. Carl Waldron was asked on redirect

examination whether the defendant ever had any access to body armor, he said only when the defendant was serving as a police officer, around fifteen years ago.

Rene W. Culver, M.D., was qualified by stipulation as an expert in forensic psychiatry. Dr. Culver testified that he had no reason to doubt that the defendant could understand right from wrong at the time of the commission of the offense. He stated, however, that when he conducted his examinations, it was to determine competency to proceed. He indicated, however, that sometimes in conducting a competency examination he would see something that was very obvious and very clearly wrong with an individual insofar as legal sanity was concerned, implying that such was not the case with the defendant. Dr. Culver confirmed on cross-examination that he had no evidence of hallucinations or psychosis in the defendant, or an inability to know what was going on around oneself. He saw no evidence of mental disease or defect that would make the defendant unable to appreciate the wrongfulness of his act.

Captain Bonnie Cook, of the St. Bernard Sheriff's Department, confirmed that the defendant had issued a subpoena *duces tecum* for offense reports relating to Larry McCall and Amanda McCall. She said she received a report from Florida that was forwarded to the Louisiana Department of

Social Services, a child protection agency. She found no documentation in the St. Bernard Parish Sheriff's Department of any complaints against Larry McCall.

St. Bernard Sheriff's Department Detective Mark Jackson arrived on the stabbing crime scene before Deputy Clavin. He helped Deputy Clavin process the scene. He confirmed that the defendant had several lacerations to his arms and hands. Detective Darrin Hope was the first person to arrive at the scene. Detective Jackson was flagged down before arriving at the address by a white male with blood on his shirt. He exited his vehicle and found the victim lying on the ground covered in blood. His throat was slashed and he had numerous wounds on his body.

Elizabeth Waldron, the defendant's mother, testified that the defendant was very depressed while out on bond in the St. Tammany Parish case and living with her and Carl Waldron. He was working at three different places to earn money to send to his wife. He was not getting much sleep during that time. After the defendant's wife visited him for a week and left, the defendant's condition worsened. She discovered after the fact that he had taken a bottle of blood pressure pills in an attempt to kill himself. She described the defendant as calm, friendly and not easily agitated. To her knowledge, he had never been violent. During the time the charges were

pending in St. Tammany Parish, the defendant did not make any threats or comments concerning Larry McCall or Amanda McCall. He might have said something about trying to talk to Larry, but she told him she did not think that would be a good idea, that Larry might try to hurt him. The defendant was at home when she went to bed on March 11, 1998 at approximately 10:30 p.m. After she and Carl Waldron found the defendant in Mississippi, she asked him if he was all right and what happened. He said he did not know. He appeared to be in shock. He said his back was hurting, and he had a cut there. She had him wash his cuts and put Band-Aids and a butterfly patch on the large cut on his forearm. The defendant's wife called from Florida to say that Larry McCall was injured. Mrs. Waldron said the defendant slept in her sewing room and she did not see how he could have hidden weapons, wigs, masks, body armor or items of that nature in the home. She said the defendant's condition worsened after he was put in jail, and he lost sixty pounds. He slowly improved after being placed in the Feliciana Forensic Facility, attaining the state he was in at the time of trial in three or four months. Mrs. Waldron said Amanda was always a difficult person and caused a lot of problems. She egged houses and stole things, and the police were there a lot. Amanda had problems in school, and would not do her homework. Amanda lied so much Mrs. Waldron did not know when

she was telling the truth. Mrs. Waldron said she did not believe that Amanda was being honest with regard to the allegations in St. Tammany Parish. She said Amanda had told her siblings that she did not have a father so she was going to see to it that they did not either, meaning that she was going to get rid of the defendant.

Mrs. Waldron testified that the defendant's wife told her and Carl Waldron when she called from Florida on the morning of the stabbing that the defendant had telephoned her. This seemingly contradicted Carl Waldron's testimony indicating that he did not know how the defendant's wife knew that the defendant was in Mississippi contemplating suicide. Mrs. Waldron confirmed that when she talked to the defendant after picking him up in Mississippi he knew that he was in trouble relating to Larry McCall.

Roger Anastasio, M.D., qualified by stipulation as an expert in the field of forensic psychiatry, testified that he examined the defendant twice as a member of the sanity commission. Dr. Anastasio testified that it was his opinion that at the time of the offense the defendant was able to distinguish right from wrong; he had a realization that his actions were not in line with what would be expected from society. He said that, from the standpoint of a psychiatrist, a person would have to be psychotic, out of touch with reality,

to be in such a psychological state that he would not be able to tell the difference between right and wrong. He did believe the defendant had some very significant psychiatric symptoms, but they were not severe enough to render him incapable of distinguishing right from wrong. On cross-examination, the defendant asked Dr. Anastasio to read a question apparently asked of him at an earlier hearing. Dr. Anastasio was asked if there was any other testing necessary to fully evaluate the defendant's mental state on the day of the offense. He answered that a more complete assessment involving psychological tests would certainly be better and more complete than his assessment on the basis of an interview. He analogized it to a physician basing his treatment of a patient only on a physical examination, without the aid of diagnostic tools such as laboratory tests and x-rays.

The defendant testified in his own behalf, without an attorney questioning him. He reiterated the negative comments made by his parents about Amanda McCall. He said she threatened to falsely accuse him of sexually molesting her because he attempted to discipline her. He also said she falsely accused her mother of having known about the abuse. The defendant was arrested on a warrant from St. Tammany Parish while living in Florida. While awaiting extradition to Louisiana, he was charged by

Florida authorities with sexual battery. That charge was dropped after he spent four and-one half months in jail, and he then was extradited to Louisiana. His wife started pulling away from him, because she was told that he would be convicted. He started having trouble sleeping. He could not eat. He lived with his parents and worked offshore and at a convenience store, sometimes working double shifts, so that he could earn money to send to his wife and children in Florida. The defendant attempted to commit suicide in or around January 1998 by taking an overdose of high blood pressure medication and Tylenol. He had been staying up twenty-four to forty-eight hours and getting two or three hours sleep before doing it again. His wife apparently conceived a child with another man, and lost her job at some point.

The defendant said he had been up for thirty-six hours on the night of March 12, 1998. He took some Tylenol sleep medication and lay down to go to sleep. He had what he thought was a dream that he was struggling with someone in the dark. He could not see who he was struggling with, but sensed that it was Larry McCall. When he woke up it was dark. He was in his brother's car, broken down on the side of the road in Mississippi. His arms were cut up. He was disoriented and had no memory of how he had gotten there or what happened. However, he knew something had happened.

He walked until he found a telephone. He called his wife in Florida and told her that he could not take it any longer, that something had happened. He told her he was gong to commit suicide, that the strain was too much. He attempted to walk back to the car but passed out and woke up in the daylight. He telephoned his parents, telling them what he had told his wife. His father reassured him, and told him to wait for him to pick him up. After returning to his parents' home, his wife telephoned and told them that Larry McCall was in the hospital.

The defendant said that he began to recall some of the events of March 12, 1998, over a period of time after looking at the physical evidence in the case and reading the reports. He said he went to the McCall home that night to attempt to talk to Larry McCall about the St. Tammany Parish case. Larry McCall invited him in, and told him to sit on the loveseat while he went upstairs to get dressed and get Amanda. The defendant said when Larry McCall returned he was still in his underwear, and Amanda was not with him. Larry McCall allegedly told the defendant how stupid he was, that this was his parish, that the defendant had cut his telephone lines and broken into his home, and that it was a shame that he was going to have to kill the defendant in self defense. The defendant said Larry McCall then pulled out a butcher knife and came toward him. The two struggled, and the defendant

said he was able to get the knife away from Larry McCall. Amanda came downstairs, and her father told her to call the police. The defendant indicated that he was happy she was going to call the police. When Amanda returned and screamed that the telephones were not working, the defendant said he got really scared, realizing that Larry McCall was seriously planning to kill him. The defendant recited a detailed story about the subsequent events in the McCall household, all essentially conflicting with the earlier testimony by Amanda and Larry McCall. He said the stab wound to Larry McCall's side was accidental, and that he had been trying to protect himself. He remembered that after everything happened, he headed back to his car. The next thing he remembered was waking up in Mississippi.

The defendant indicated on cross-examination that if the jury believed the testimony of Amanda and Larry McCall, then he had to have been insane to have done it. He admitted that his case in St. Tammany Parish was supposed to go to trial on March 17, 1998. He said that "they," apparently meaning the State, turned down a plea bargain, at the insistence of Larry McCall. He admitted that he blamed Larry McCall for trying to destroy him and his wife and family. He denied cutting the telephone line, and said he could not have cut it and been unable to remember having done it. He admitted that his father knew he had telephoned his wife from Mississippi

after the stabbings.

ERRORS PATENT

A review of the record reveals no errors patent.

PRO SE ASSIGNMENT OR ERROR NO. 1

In this assignment of error, the defendant claims the evidence was insufficient to support his conviction.

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.
>
> 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.

The defendant was convicted of attempted second degree murder, a violation of La. R.S. 14:27(30.1). La. R.S. 14:27 provides that an attempt is committed when a person who, having the specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of the object; it is immaterial whether, under the circumstances, the offender would have actually accomplished his purpose. Second degree murder is defined in pertinent part by La. R.S. 14:30.1(A)(1) as the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. However, to convict a person of attempted second degree murder, the State must prove that the offender had the specific intent to kill. State v. Hongo, 96-2060, pp. 2-3 (La. 12/2/97), 706 So. 2d 419, 420; State v. Sullivan, 97-1037, p. 20 (La. App. 4 Cir. 2/24/99),

729 So. 2d 1101, 1111.

Specific intent is defined as "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); State v. Scott, 99-0241, p. 7 (La. App. 4 Cir. 1/5/00), 752 So. 2d 255, 258-259. Specific intent need not be proven as fact, but may be inferred from the circumstances and actions of the defendant. State v. Hebert, 2000-1052, p. 12 (La. App. 4 Cir. 4/11/01), 787 So. 2d 1041, 1050. Specific intent can be formed in an instant. State v. Cousan, 94-2503, p. 13 (La. 11/25/96), 684 So. 2d 382, 390.

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.

The defendant argues that the State failed to prove that he specifically intended to kill Larry McCall. He submits that the defense proved that Larry

McCall, with the help of others, was attempting to frame the defendant on the charge of attempted second degree murder, and that he was acting in self-defense when he seriously injured Larry McCall. Thus, the defendant admits stabbing Larry McCall. That is not at issue.

The defendant cites what he claims are numerous inconsistencies between the testimony of Larry and Amanda McCall regarding the events on the night in question, between their testimony and the physical evidence, and between the testimony of various State witnesses and the physical evidence. For instance, the defendant claims that Larry McCall's trial testimony about the defendant wearing body armor and stabbing him twice in the living room contradicts his original statement given to police. Contrary to the defendant's assertion, Larry McCall never testified that he was stabbed twice in the living room. He testified on direct examination that he was "cut" twice in his chest during the course of the struggle, and on cross-examination that the defendant stabbed him twice in the side. In the relatively brief taped statement, given by Larry McCall in the hospital shortly after the attack, he stated that he was asleep on his sofa in the living room when he was awakened after being struck in the head by what he later discovered was a hammer. He said a masked man with long hair (a wig) was on top him trying to push a knife down into his chest. Larry McCall further

stated that he pushed on the knife trying to stop the defendant, and that the knife was moving back and forth, getting closer to his jugular vein and cutting his hands. He said he wrestled with the man and hit a couple of times. They wrestled into the kitchen, where he got the mask off. He said the defendant stabbed him in the side while in the kitchen, and that the stabbing was very painful.

The medical records from Chalmette Medical Center tell the story more accurately than Larry McCall. The clinical history reflects that he entered the hospital with three chest wounds—two in his right upper chest, and a large gash in the left upper quadrant of his chest. He also suffered two perforating wounds to the colon, and multiple stab wounds to the face, hands, neck and upper and lower arms. While Larry McCall's credibility was not wholly irrelevant to the case, it cannot be disputed that he sustained these wounds, or that the defendant inflicted these wounds on him.

The defendant asserts in his pro se brief that Amanda McCall testified that the defendant used a fillet knife to stab her father, and that this testimony was proven false by the State Police Crime Lab report which stated that no blood was found on that knife. Amanda McCall was shown the fillet knife and asked if it was one used by the defendant. She replied in the affirmative, noting that one of the knives had a curved blade. Deputy

Clavin testified that he found this fillet knife, S-3, sitting on the basin in the downstairs bathroom of the McCall residence. Deputy Clavin described the knife as having blood on it. The State Police Crime Lab report listed by number the items submitted to it that were found to have "blood" on them, and the items found to have "human blood" on them. The fillet knife was not listed among those items found to have either blood or human blood on them. However, four photographs taken of the knife lying on the sink clearly show what looks like blood on it. There was no testimony to explain this apparent discrepancy. Amanda McCall's testimony in this regard was consistent with that of Deputy Clavin. Further, the jury had an opportunity to view the photographs and the State Police Crime Lab report. Finally, the defendant informed the jury in his closing argument about this discrepancy and others dealing with blood evidence.

The State Police Crime Lab report confirmed that human blood was found on the frying pan Amanda used to strike the defendant in his head as he struggled with Larry McCall. The report also confirmed that three broken pieces of a knife were once one knife, thus supporting Amanda's testimony that when she tried to stab the defendant with a knife the blade broke.

The defendant notes that there were no signs of forced entry. However, Amanda McCall testified that one could open the rear sliding door

by repeatedly jiggling it.

Some of the defendant's arguments appear ludicrous. For instance, he notes that Dr. Vallette testified that the cuts to Larry McCall's hands were self-defensive in nature, but that Larry McCall's testimony that he grabbed the knife to "regain control of it" showed that the wounds were "self-inflicted." The defendant frivolously asserts that Amanda McCall lied to police, telling them on the day of the crime that she was sixteen years old, when in fact she was going to turn seventeen the next day. It is absurd to argue that she lied about her age when she correctly reported when asked her age that she was then sixteen years old.

While Dr. Vallette testified that only the wound to Larry McCall's chest/abdomen that severed a rib and resulted in his colon bulging out of his abdomen was potentially fatal, the evidence as whole establishes that the defendant brutally attacked Larry McCall. The defendant sustained only minor lacerations himself in the process, including apparently at least one wound to his back inflicted by Amanda McCall. Larry McCall testified without objection that a police officer told him that he had sustained over forty wounds in the attack. It is not unreasonable to believe that had Larry McCall not defended himself, sustaining numerous lacerations to his hands and arms in the process, he might not have lived to testify against the

defendant. Moreover, though the defendant assured the McCalls that Larry was not going to die, had Larry McCall remained in his home as the defendant apparently wished him to do, instead of escaping out the front door, he would have bled to death. It is undisputed that the defendant had a motive to kill Larry McCall; the defendant freely testified at trial that it was Larry McCall he blamed for not being offered a plea bargain on the charge that he molested Amanda.

The defendant's painstaking dissection of the testimony and evidence, as discussed above and as otherwise reflected in the defendant's argument with regard to this assignment of error, is for naught. Despite any discrepancies and/or contradictions between the testimony of the witnesses and/or between their testimony and the physical evidence, viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have concluded beyond a reasonable doubt that the defendant stabbed Larry McCall with the specific intent to kill him, and that the State negated any claim of self-defense. The trial court correctly denied the defendant's motion for post verdict judgment of acquittal.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the trial

court erred in permitting him to represent himself.

In State v. Strain, 585 So. 2d 540 (La. 1991), the court stated:

> U.S. Const. amend. VI, as well as La. Const. art. I, § 13, guarantees the accused in a criminal proceeding the right to assistance of counsel for his defense. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); State v. White, 325 So.2d 584 (La.1976); State v. Carpenter, 390 So.2d 1296 (La.1980). The right to counsel may be waived, but the accused must know of the right and intentionally relinquish the right. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1958). Waiver of the right to counsel, in order to be valid, must be made knowingly, understandingly and intelligently. Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). A defendant may waive his right to counsel "if he knows what he is doing and his choice is made with eyes open". Adams v. United States ex rel McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942).
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> * * *
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> The judge, in accepting a waiver of counsel at trial, should advise the accused of the nature of the charges and the penalty range, should inquire into the accused's age, education and mental condition, and should determine according to the totality of the circumstances whether the accused understands the significance of the waiver. See Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948). While the judge need not inquire into each and every factor stated in the Von Moltke plurality opinion in order to establish a valid waiver of the right to counsel at trial, there must be a sufficient inquiry (preferably by an interchange with the accused that elicits more than "yes" and "no" responses) to establish on the record a knowing and intelligent waiver under the overall circumstances. 2 W. LaFave & J. Israel, supra; 3 D. Rudstein, C. Erlinder & D. Thomas, Criminal Constitutional Law ¶ 13.04[2][a] (1990). Whether an accused has knowingly and intelligently waived his right to counsel is a question which depends on the facts and circumstances of each case. Johnson v. Zerbst, 304 U.S. 458,

58 S.Ct. 1019, 82 L.Ed. 1461 (1938). (footnote omitted).

585 So. 2d at 542.

The United State Court of Appeals for the Fifth Circuit recently held that a defendant convicted of a capital offense could waive his right to counsel at the penalty phase of his trial, even though the defendant planned to employ what the appellate court characterized as the "admittedly risky strategy" of attacking the strength of the government's case rather than present traditional mitigating evidence. U.S. v. Davis, __ F.3d __, __ (5 Cir. 2002), 2002 WL 377165. The court quoted Faretta v. California, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975), as follows:

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' (citations omitted).

__ F.3d at __.

The record contains a fifty-two-page transcript of a July 19, 1999 hearing at which the trial court ultimately determined that the defendant knowingly and intelligently was waiving his right to counsel. It can be noted that the trial court had found defendant competent to proceed on February 22, 1999. Dr. Culver, a psychiatrist who had previously examined

defendant, and who examined him again on the day of the right to counsel hearing, testified that defendant suffered from no mental illness rendering him incompetent to stand trial. Dr. Culver replied in the affirmative when asked whether, from a psychiatric standpoint, defendant was capable of making a knowing, understanding and intelligent waiver of his right to counsel. He said defendant was then taking Prozac for depression and the sedative Klonopin as a sleep aid.

The trial court questioned the defendant extensively, first informing him of the purpose of the hearing—that he needed to make a record of the fact that he was knowingly and intelligently waiving his right to counsel. The trial court determined that the defendant was a high school graduate with two years of college. An Air Force veteran, he had received training in communications and computers. The defendant had been making use of the law library at the Feliciana Forensic Facility since December, apparently meaning December 1998, when, as the defendant phrased it, his mind started clearing up so that he could think straight. When asked what he knew about the jury selection process, the defendant correctly explained that he would be tried by a jury of twelve persons, and would have twelve peremptory challenges. When asked if he knew what a peremptory challenge was, the defendant replied that it was when he did not have to give a specific reason

why he did not want a person to be on the jury. The defendant correctly stated that challenges for cause were "outlined" in the law. The trial court read the statutes defendant was accused of violating, and ascertained that he understood what they meant. The defendant stated that he would be looking at ten to fifty years in prison if convicted. The trial court informed the defendant of various aspects of the trial proceeding, and ascertained that he understood them. The defendant was advised that he would not receive any favoritism from the court, and that his appointed counsel would serve only in an advisory capacity. The trial court advised the defendant that the danger of representing himself was that he could be convicted. The prosecutor ascertained that the defendant understood that he would be under a lot of pressure at trial. The defendant replied in the affirmative when asked if he would be able to handle it.

The defendant's counsel ascertained that the defendant felt competent to represent himself, and that he had enough knowledge of the legal system to be able to do so. Counsel noted that the defendant came to court with a copy of West's Louisiana Statutory Criminal Law and Procedure. The defendant said he had been studying it, as well as other law books, since December. Counsel advised the defendant that the prosecutor had undergraduate and law degrees, and twenty years of trial experience.

Counsel informed the defendant that he too had undergraduate and law degrees, and had thirty years of criminal law practice. Counsel informed the defendant that courts had advised defendants in the past that it was almost always unwise for a person to represent themselves, whether lawyer or layman, and that it usually worked to their detriment. The defendant acknowledged he had heard that, as well as the adage that a lawyer who represents himself has a fool for a client. When asked what that meant to him, the defendant replied that one is generally too close to the subject to be able to look at it impartially. The trial court noted that one of the motions the defendant was filing that date indicated that he was giving the state notice of a defense based on a mental condition, and asked if the defendant understood that such a defense was often fairly complicated. The defendant replied in the affirmative, and said he was trying to do research in that area as well. The trial court noted that trial was then set for August 10, 1999. The defendant said he did not feel he would have adequate time to prepare a defense, because he had not seen any of the evidence. At the conclusion of the hearing, the court continued the trial until October 26, 1999. Ultimately, trial was not held until May 2000.

The trial court concluded by stating that it agreed with the general rule that a person should not represent himself, but found the defendant

“certainly demonstrated a capacity or an ability to do that.” The court noted that as early as July 6, 1998, when Dr. Culver testified, the defendant was aware of the legal system. Although the court did not parrot that he found the defendant knowingly and intelligently waived his right to counsel, it is obvious the trial court made that finding.

The defendant acknowledges that the trial court did a commendable job of exploring with him the wisdom of representing himself. The defendant submits that nevertheless, in this case, considering his established mental instability, it was error to permit him to waive his right to counsel. He claims that the trial transcript reveals that he failed to understand the elements of the contradictory defenses he crudely put forth. The defendant more or less testified at trial that he had a dream about the attack, and awoke on the highway in Mississippi. He further testified that after receiving mental health treatment, and examining the evidence in the case, he began to recall details of the incident. He recalled that Larry McCall lured him into his home and attempted to kill him, and the defendant acted in self-defense, although he said the single life-threatening wound he inflicted on Larry McCall was inflicted accidentally.

The defendant’s argument conflicts with his acknowledgement that the adequacy of a defendant’s self-representation and legal competence is

not determinative of a valid waiver of counsel. His argument is simply that because his self-representation was inadequate, and he was incompetent acting as his own attorney, the trial court erred in permitting him to represent himself. An attorney cannot be forced on a defendant who is competent to stand trial. State v. Marts, 98-0099, p. 6 (La. App. 5/31/00), 765 So. 2d 438, 442. "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." State v. Santos, 99-1897, p. 3 (La. 9/15/00), 770 So. 2d 319, 321, quoting Godinez v. Moran, 509 U.S. 389, 399, 113 S.Ct. 2680, 2687, 125 L.Ed.2d 321 (1993) (emphasis in original). Further, a defendant who chooses to waive his right to assistance of counsel does not need to be more competent that one who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning that the decision to waive other constitutional rights. Godinez, 509 U.S. at 399, 113 S.Ct. at 2686.

In Santos, the Louisiana Supreme Court reversed the defendant's conviction for possession of heroin because the trial court had denied him the right to represent himself. This court affirmed, stating that the defendant "appeared incompetent to serve as his own counsel in that he did not understand how to proceed on important aspects of his case." Santos, 99-

1897, p. 1, 770 So. 2d at 320, quoting State v. Santos, unpub. 97-1893, p. 8 (La. App. 4 Cir. 5/19/99), 744 So. 2d 241. The defendant in Santos had informed the trial court that he had enjoyed an "A" average during two years of college, and had no mental or physical problems that might interfere with his understanding of the proceedings, an assertion which the Supreme Court found was fully borne out by his colloquy with the court. However, the Supreme Court did not dispute that the trial court had established for the record that the defendant had only the most rudimentary knowledge of how to summon a witness on his behalf, and no knowledge about the use of peremptory and cause challenges in the selection of a jury. The defendant explained that he wanted to represent himself because he believed the indigent defendant board was working with the police of St. Bernard Parish to keep him there, presumably meaning in jail. Although the Supreme Court found that the defendant thereby had voiced a concern at the heart of the right to self-representation, such a belief reasonably might be viewed as an example of irrational paranoia on the part of the defendant.

In State v. Sullivan, 97-1037 (La. App. 4 Cir. 2/24/99), 729 So. 2d 1101, the defendant represented himself and was convicted as charged of two counts of attempted second degree murder. The defendant pleaded not guilty and not guilty by reason of insanity. Two lunacy commissions

determined that the defendant was competent to stand trial. At the first lunacy hearing, the examining psychiatrist or psychologist testified that although the defendant suffered from some depressive symptoms and from alcohol abuse, he understood the proceedings against him and had the ability to assist his attorney. At the second lunacy hearing, the psychiatrist or psychologist stated that the defendant suffered from chemical dependency and had been treated for mental problems six years earlier. That witness found that defendant was sane at the time of the offense. The defendant first expressed his desire to represent himself at a pretrial hearing at which his counsel failed to appear. When the trial judge advised the defendant against representing himself, the defendant replied, "If I'm to be sold out, I would rather have it be done by my own lips than by that of a harlot." 97-1037, p. 7, 729 So. 2d at 1105. The defendant had an eleventh grade education. This court rejected the defendant's argument on appeal that the trial court had erred in permitting him to waive his right to counsel and represent himself.

In the instant case, although the defendant had some mental problems, he was clearly competent to stand trial—and to waive his right to trial by jury. The defendant's initial diagnosis upon being placed in the Feliciana Forensic Facility was adjustment disorder with depressed mood and anxiety, a personality disorder not otherwise specified, and psychogenic dyspepsia,

an inability to hold down food for emotional reasons. He was taking Prozac for depression at the time of trial, and a drug to help him sleep. The defendant was never diagnosed as psychotic. He was never diagnosed as suffering from alcohol abuse as was the defendant in Sullivan, supra. The lengthy hearing established the defendant's knowing and intelligent waiver of his right to counsel. That the defendant did a poor job of representing himself does not alter this fact.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2
PRO SE ASSIGNMENT OF ERROR NO. 5

In these assignments of error, the defendant claims that the trial court imposed a constitutionally excessive sentence. The trial court sentenced the defendant to fifty years at hard labor, without benefit of parole, probation or suspension of sentence, the maximum sentence possible for a conviction of attempted second degree murder. See La. R.S. 14:27, La. R.S. 14:30.1.

The defendant filed an oral motion to reconsider sentence after sentence was imposed, without stating any specific ground. The defendant also filed a written motion to reconsider sentence, on the grounds of excessiveness. Both motions were denied by the trial court on the date of sentencing. Accordingly, the defendant has preserved this claim of error for appellate review. La. C.Cr.P. art. 881.1.

La. Const. art. I, § 20 explicitly prohibits excessive sentences; State v. Baxley, 94-2982, p. 4, (La. 5/22/95), 656 So. 2d 973, 977. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Brady, 97-1095, p. 17 (La. App. 4 Cir. 2/3/99), 727 So. 2d 1264, 1272, rehearing granted on other grounds, (La. App. 4 Cir. 3/16/99); State v. Francis, 96-2389, p. 6 (La. App. 4 Cir. 4/15/98), 715 So.2d 457, 461, grant of post conviction relief on other grounds affirmed, 2001-1667 (La. App. 4 Cir. 2/6/02), __ So. 2d __, 2002 WL 264582. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 94-2984 at p. 10, 656 So.2d at 979, citing State v. Ryans, 513 So. 2d 386, 387 (La. App. 4 Cir. 1987). A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 677; State v. Webster, 98-0807, p. 3 (La. App. 4 Cir. 11/10/99), 746 So. 2d 799, 801, reversed on other grounds, State v. Lindsey, 99-3256 (La. 10/17/00), 770 So. 2d 339. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to

society, it shocks the sense of justice. Baxley, 94-2984 at p. 9, 656 So.2d at 979; State v. Hills, 98-0507, p. 5 (La. App. 4 Cir. 1/20/99), 727 So. 2d 1215, 1217.

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in La. C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. State v. Trepagnier, 97-2427, p. 11 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181, 189; State v. Robinson, 98-1606, p. 12 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 127. If adequate compliance with La. C.Cr.P. art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. State v. Ross, 98-0283, p. 8 (La. App. 4 Cir. 9/8/99), 743 So. 2d 757, 762; State v. Bonicard, 98-0665, p. 3 (La. App. 4 Cir. 8/4/99), 752 So. 2d 184, 185.

However, in State v. Major, 96-1214 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813, this court stated:

> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1.

> State v. Lanclos, 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La.C.Cr.P. art. 881.4(D).

96-1214 at p. 10, 708 So. 2d at 819.

In State v. Soraporu, 97-1027 (La. 10/13/97), 703 So. 2d 608, the Louisiana Supreme Court stated:

> On appellate review of sentence, the only relevant question is " 'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.' " State v. Cook, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959 (quoting State v. Humphrey, 445 So.2d 1155, 1165 (La.1984)), cert. denied, --- U.S. ----, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes "punishment disproportionate to the offense." State v. Sepulvado, 367 So.2d 762, 767 (La.1979). In cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating circumstances but also factors militating for a less severe sentence, State v. Franks, 373 So.2d 1307, 1308 (La.1979), a remand for resentencing is appropriate only when "there appear [s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha[ve] merit." State v. Wimberly, 414 So.2d 666, 672 (La.1982).

Id.

In sentencing the defendant in the instant case, the trial court noted that a lesser sentence than the one it was about to impose would deprecate the seriousness of the offense. It found that the defendant was in need of correctional treatment in a custodial environment. The court found that the

defendant knowingly and intentionally created a risk of death or great bodily harm to more than one person. It noted that the defendant's actions were done with the intent to influence the outcome of a criminal proceeding in St. Tammany Parish. The court noted that actual violence was used, and that a dangerous weapon was used. The court indicated that the lengthy sentence was the only way to insure that Amanda McCall would not be endangered by him again in her lifetime, and also to protect Larry McCall.

The defendant argues that nothing in the record warrants a maximum sentence. The defendant complains that the trial court's reasons indicated that its sentence was based only on the nature of the crime and on various statements made by him in his closing argument. The trial court did comment on several things the defendant said during his closing argument, such as that when Amanda McCall tried to stab him, the knife broke and by the grace of God he was uninjured. The trial court noted that statement, saying that the defendant was protected by a vest and actually it was by the grace of God that Larry McCall survived the attack. The trial court did particularize the sentence to the defendant as to its length, indicating that it was the only way to protect Amanda McCall from him. The record does not exactly support this reason, as it appears that she was not the object of the defendant's attack, but was injured incidentally when she interceded in an

effort to protect her father. However, the court also indicated that the lengthy sentence was to protect Larry McCall.

The defendant is correct in implying that the trial court stated for the record only aggravating factors in imposing sentence. However, the defendant points out no mitigating factors, and a review of the mitigating factors specifically listed in La. C.Cr.P. art. 894.1(B)(22)-(32) reveals none that are unqualifiedly applicable. While it is undisputed that the defendant had mental problems, even serious ones, it cannot be said that these in any way tended to "excuse or justify" his conduct, although failing to establish a defense. See La. C.Cr.P. art. 894.1(B)(25). At the time of trial and sentencing, the defendant apparently had been convicted of molestation of a juvenile, Amanda McCall. She claimed it had been going on for ten years prior to the defendant's arrest for that crime. Other than the molestation offense and the instant one, there is no indication the defendant had ever been arrested before. See La. C.Cr.P. art. 894.1(B)(28). The trial court seemed to reject as a mitigating factor that the defendant's conduct was the result of circumstances unlikely to recur, La. C.Cr.P. art. 894.1(B)(29), by its finding that the sentence was necessary to protect Amanda and Larry McCall.

The defendant complains that the trial court did not permit him to

make any comments prior to sentencing or after he filed his motion for reconsideration. The transcript of the sentencing hearing does not reflect that the defendant sought to make any comments before sentencing. The defendant filed a motion to reconsider sentence immediately following sentencing, which the trial court denied. The defendant asked the trial court if it was refusing to allow him to argue the motion, and the trial court simply denied the motion again. The defendant cites no authority for the proposition that the trial court abused its discretion in summarily denying his motion to reconsider the sentence it had just imposed.

The defendant asserts that in order to survive a review for excessiveness, this court must conclude that the record supports a finding that he was the worst possible offender and committed the offense in the worst possible manner. Maximum sentences should be reserved for the most egregious violators of the offense so charged. Ross, 98-0283, p. 8, 743 So. 2d at 762; Bonicard, 98-0665, p. 3, 752 So. 2d at 185.

In State v. Hill, 431 So. 2d 871 (La. App. 2 Cir. 1983), the appellate court affirmed a maximum fifty-year sentence imposed on a mildly retarded psychotic first-felony offender who lured a jailer close to his cell door and slashed him with a razor blade. The wound required sixteen stitches. As in the instant case, the trial court specifically stated that the defendant was in

need of custodial care, and indicated that if he was at liberty there would clearly be an undue risk that he would commit another violent crime. The defendant in Hill had seven misdemeanor convictions for such offenses as simple battery, assault, theft, gambling and two for concealed weapons.

Considering all of the circumstances in the instant case, it cannot be said that the sentence imposed on defendant makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, is grossly out of proportion to the severity of the crime, or that defendant is not among the most egregious offenders of the offense of attempted second degree murder.

There is no merit to this assignment of error.

PRO SE ASSIGNMENT OF ERROR NO. 2

In this assignment of error, the defendant claims that the prosecutor knowingly suborned and solicited perjurious testimony and lied to the jury in rebuttal closing argument concerning the test results from the State Police Crime Lab.

As to the suborning of perjury, where a prosecutor allows a State witness to give false testimony without correction, a reviewing court must reverse the conviction if the witness's testimony reasonably could have

affected the jury's verdict, even if the testimony goes only to the credibility of the witness. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959); State v. Broadway, 96-2659, p. 17 (La. 10/19/99), 753 So.2d 801, 814; State v. Williams, 338 So.2d 672, 677 (La. 1976). To prove a Napue claim, the defendant must show that the prosecutor acted in collusion with the witness to facilitate false testimony. Broadway, 96-2659, p. 17, 753 So. 2d at 814. Furthermore, fundamental fairness, i.e., due process, is offended "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue, 360 U.S. at 269, 79 S.Ct. 1173. When false testimony has been given under such circumstances, the defendant is entitled to a new trial unless there is no reasonable likelihood that the alleged false testimony could have affected the outcome of the trial. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). However, the grant of a new trial based upon a Napue violation is proper only if: (1) the statements at issue are shown to be actually false; (2) the prosecution knew they were false; and (3) the statements were material. United States v. O'Keefe, 128 F.3d 885, 893 (5 Cir. 1997). The court in O'Keefe, a case cited by defendant, elaborated on the materiality element of the analysis, stating:

> The Supreme Court has recently defined materiality in terms of a "reasonable probability" of a different outcome. Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131

> L.Ed.2d 490 (1995). Such a reasonable probability results when nondisclosure places the case in a different light so as to undermine confidence in the verdict. Id. at 435, 115 S.Ct. at 1566. The relevant inquiry examines the challenged evidence collectively, not on an item-by-item basis. Id. at 436, 115 S.Ct. at 1566- 67. "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." Yates v. Evatt, 500 U.S. 391, 403, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991).

128 F.3d at. 894.

The defendant points to several witnesses from whom the prosecutor allegedly suborned perjury. First, he submits that the prosecutor suborned perjury from Deputy Clavin in that he testified that blood was on a number of State exhibits: S-3, the previously mentioned fillet knife found in the bathroom; S-24, a pillow case; S-26, a T-shirt; S-22, a multicolored section of sofa material; S-25, a Nike brand T-shirt; and on S-25, 26, and 27, Amanda's clothing. The State Police Crime Lab report indicated, by omission, that no blood was found on these items.

Deputy Clavin testified that, S-3, the fillet knife, had blood on it. The prosecutor later asked him whether he had sent it to "the lab" for analysis to determine whether it contained human blood. When the prosecutor asked the deputy if it did, the deputy replied in the affirmative. This was incorrect insofar as it effectively constituted testimony that the State Police Crime Lab report showed that the knife had human blood on it. The lab report indicated

by omission that the fillet knife had neither blood nor human blood on it. However, four photographs (#9, 10, 11, & 150), including three close-ups, show the fillet knife as having a red substance on it.

Deputy Clavin first testified that S-24, the black and white pillowcase, had a red substance on it 'believed to be blood." The prosecutor asked him to remove it from an evidence bag, and in doing so Deputy Clavin noted that it was "a large amount of blood." Two photographs (#141 & 143) taken in the McCall's living room depict the pillow case at issue—the only pillowcase submitted to the State Police Crime Lab. The pillowcase, which is depicted covering a pillow sitting next to the sofa, has red stains all over it which appear to be blood. These appear to be the same red stains that are all over the sofa. The stains are all over the sofa and the pillowcase, and all over the kitchen of the residence—the floor, the walls, the rear glass door, the counter, the refrigerator, the sink, a frying pan and on two knives in the kitchen.

Considering what is obviously a very bloody crime scene, along with the two photographs of the pillowcase, the accuracy of the State Police Crime Lab report insofar as it indicates that there is no blood on the pillowcase is somewhat questionable. Further considering the four photographs of the fillet knife, identified by Amanda McCall as one she tried

to stab the defendant with, the accuracy of the report is also questionable insofar as it indicates that no blood was found on that knife. Accordingly, the statements by Deputy Clavin that the fillet knife and the pillowcase have blood on them are merely inconsistent with the State Police Crime Lab report. It cannot be said this testimony was false. The deputy's testimony indicating that the report reflected that human blood was found on the fillet knife was, however, incorrect.

Deputy Clavin testified that S-25, a white Nike T-shirt with dark trim and S-26, a pink-colored T-shirt, both found in Amanda McCall's bedroom, had red substances on them "believed to be blood." Four photographs (# 100, 101, 104 and 174) of the pink T-shirt and one (#172) of the white T-shirt show reddish stains on them one could reasonably believe to be blood. The State Police Report Crime Lab report does not list these exhibit/item numbers as ones on which blood or human blood was detected. Nevertheless, as the deputy did not testify that either had blood on it, only that the stains were believed to be blood, it cannot be said that his testimony was false. Deputy Clavin merely identified S-27, the pair of black-colored nylon shorts taken from Amanda McCall's bedroom. He said nothing on direct examination about the pair of shorts having blood on it. The deputy simply identified S-22, a piece of multi-colored fabric, as a piece of the

McCall's living room sofa. The prosecutor asked if it had blood on it or whether it simply had a cut on it, and the deputy replied that it either should have a cut or a red substance on it. Deputy Clavin did not testify to anything false with respect to either S-27 or S-22.

The defendant next claims a Napue violation in that the prosecutor suborned perjury through the testimony of Deputy Clavin that there were two marks on the sliding glass door which appeared to be "jimmy" marks, and Detective Davis's trial testimony that there appeared to be signs of tampering by the lock on the door. The defendant impeached Detective Davis's testimony with a transcript of his testimony given at a preliminary examination at which he answered in the negative when asked whether he found any pry marks or other indication that the door had been forced open. However, Detective Davis said he believed the door had been forced open because the victim indicated that it had been shut and locked before the attack. This is merely conflicting testimony, and the defendant has failed to show that any of this testimony was false, much less that the prosecutor knew it to be false. Further, in light of the overwhelming evidence against the defendant, any error in this regard is unimportant in relation to everything else the jury considered, and thus the statements were not "material." There is no actionable Napue violation here.

The defendant next claims that the prosecutor suborned perjury when he asked Deputy Clavin if S-28, a latex glove, was found in the defendant's car, and the deputy replied in the affirmative. The defendant points to a statement by a prosecutor at a motion to suppress evidence indicating that S-28 and S-29, two latex gloves, were seized from the dumpster in Mississippi. The record reflects that the State resisted the motion to suppress the gloves on the ground that they were not seized from the defendant, but were found in the dumpster. The trial court denied the motion on the ground that the gloves were in plain view in the dumpster. The defendant also cites as false testimony by Detective Davis that one latex glove was found in the dumpster. This is not false, as Detective Davis did not testify that "only" one glove was found there. It appears that both gloves were found in the dumpster. However, it must be remembered that the dumpster was located at the convenience store where the defendant's vehicle was discovered by police and apparently the store where the defendant used a telephone to call his father. Even assuming the complained of testimony by Deputy Clavin with respect to one glove being found in the car was false, and the prosecutor knew it was false, considering the overwhelming evidence against the defendant, any error in this regard is unimportant in relation to everything else the jury considered, and thus the statement was not

"material." Accordingly, there is no actionable Napue violation.

The defendant claims the prosecutor suborned perjury in eliciting testimony from Larry McCall that he was shot by a pellet gun and from Deputy Clavin that a lead pellet was removed from Larry McCall. Larry McCall testified that he recalled hearing the sound of a BB or pellet gun, but did not know at the time that he had been hit by a pellet or BB. When asked where he was struck, Larry McCall stated that he believed it was in his bicep. Deputy Clavin identified S-2, a plastic container containing one pellet he said was removed from the victim by Dr. Vallette. In addition, Amanda McCall testified that the defendant pointed a pellet/BB gun at her that night. The defendant claims the testimony about the pellet was false because Larry McCall did not mention it when giving his taped statement; no medical evidence mentioned it; and that when Dr. Vallette was asked about it by the prosecutor, he said he could not recall. The defendant is correct in his factual assertions. However, he has failed to prove that the testimony by the victim and Deputy Clavin concerning the pellet was false, much less that the prosecutor knew the testimony was false. The testimony concerning the pellet was merely inconsistent.

Finally, the defendant claims that Dr. Vallette's testimony that Larry McCall suffered a skull fracture was perjurious, because Larry McCall's CT

scan reports reflected that one finding was suggestive of a prior skull fracture and another was believed to be post-surgical in nature. Dr. Vallette testified on direct examination that Larry McCall had a small depressed skull fracture. On cross examination, Dr. Vallette testified that the CT report which indicated a prior skull fracture and something else that was post-surgical indicated to him that the person who "read" (interpreted) Larry McCall's CT scan was unaware that he had been struck in the head by a hammer. Moreover, Larry McCall's hospital discharge summary reflects a diagnosis of a depressed skull fracture with open scalp wound. The defendant has failed to establish an actionable Napue violation as to this matter because he has failed to show any false testimony.

There is only one piece of evidence about which a witness arguably gave false testimony: Deputy Clavin's testimony indicating that the State Police Crime Lab report reflected that S-3, the fillet knife had human blood on it. However, the defendant concedes that in his closing argument he informed the jury of the results of the State Police Crime Lab report as to these two exhibits, as well as others. The prosecutor stated during his direct examination of Deputy Clavin that a copy of the report had been given to the defendant. The report was admitted into evidence, along with the photographs, and the jury had the opportunity to view them. Even assuming

that the prosecutor knew or should have known that this statement was false, considering the overwhelming evidence against the defendant, any error in this regard is unimportant in relation to everything else the jury considered, and thus the statements were not "material." Accordingly, there was no actionable Napue violation.

In this assignment of error, the defendant also claims that the prosecutor lied to the jury in his closing argument concerning blood being found on S-3, the fillet knife, and on S-21 and 22, which were two of the three pieces of multi-colored sofa upholstery fabric removed from the sofa, and in his rebuttal argument as to blood being found on S-24, 25, 26 and 27. This claim of error falls under prosecutorial misconduct/improper argument, not Napue. The defendant cites to four pages from the transcript of the prosecutor's closing and rebuttal arguments. In his closing argument, the prosecutor states in general that the photographs introduced in evidence "do not lie." The prosecutor states that the photographs showed, among other things, "that blood stained the sofa", and "the blood -- the knives in the bathroom where [defendant] went to clean up." The defendant did not object to either of these comments at the time they were made. Accordingly, he is precluded from raising these alleged errors on appeal. La. C.Cr.P. art. 841(A); State v. Deruise, 98-0541, p. 22 (La. 4/3/01), 802 So. 2d 1224,

1241, cert. denied, Deruise v. Louisiana, __ U.S. __, 122 S.Ct. 283, 151 L.Ed.2d 208 (2001). Moreover, one of the three fabric swatches removed from the sofa, S-23, did test positive for the presence of human blood, according to the State Police Crime Lab report. Thus, the prosecutor's statement as to the sofa was not entirely incorrect. As to the fillet knife, as previously discussed, the defendant informed the jury during his closing argument that the report indicated that this item did not have blood on it, and the jury viewed the evidence—including the photographs of the red-stained knife. The guilty verdict actually rendered in this trial was surely unattributable to any error here, and thus any error was harmless. State v. Snyder, 98-1078, p. 15 (La. 4/14/99), 750 So. 2d 832, 845.

During his rebuttal argument, the prosecutor referred to blood being found on defendant's tennis shoes, the pair of which were identified as S-30. The defendant makes no argument as to the tennis shoes. The prosecutor next refers to blood being all around the room, mentioning "the pillow." The defendant objected that the prosecutor was misstating that the "stuff" on the pillow was blood, as the State Police Crime Lab report said otherwise. The court noted that it was closing argument, and that the jurors would have the report available to them to make determinations based on that report. As previously discussed, two photographs of S-24, the pillowcase, vividly

depict it soaked with blood-red stains, sitting next to a blood-stained sofa, and the State Police Crime Lab report might be incorrect insofar as it reflects that the pillowcase did not have blood on it. The jury was free to consider the evidence for itself. Finally, considering the overwhelming evidence against the defendant, the guilty verdict actually rendered in this trial was surely unattributable to any error here, and thus any error was harmless. Snyder, supra.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error, the defendant claims that the trial court erred in refusing to issue an instanter subpoena on the morning of trial for a psychologist to testify in his behalf, thus violating his constitutional right to compulsory process.

The right of a defendant to compulsory process is the right to demand subpoenas for witnesses and the right to have those subpoenas served. State v. Duplessis, 2000-2122, p. 12 (La. App. 4 Cir. 3/28/01), 785 So. 2d 939, 947; United States Constitution, Amendment 6; La. Const. Art. I, § 16 (1974); La.C.Cr.P. art. 731 ("[t]he court shall issue subpoenas … when requested to do so by … the defendant.").

The record contains two subpoenas issued to be served on Dr. Marc L.

Zimmermann, Ph.D., at his Baton Rouge office. The first was for a January 25, 2000 trial date that was continued. The second was for the May 9, 2000 trial that proceeded as scheduled. On the morning of trial, the court denied the defendant's request to issue an instanter subpoena to Dr. Zimmermann, who had not appeared for trial.

The record contains a January 29, 1999 order by the trial court, directed to the Louisiana Indigent Defender Board, ordering it to pay Dr. Zimmermann, of the Zimmermann Psychology Clinic in Baton Rouge, $1,764 for services rendered. The record also contains an itemized invoice from Dr. Zimmermann for conducting a clinical interview and psychological evaluation of defendant, and for reviewing the police report and an evaluation apparently done by another mental health professional. On the morning of trial, following opening statements, before the first witness was sworn, the trial court noted that a problem had come to its attention regarding Dr. Zimmermann not being paid. The court said it had not received any notice, at least prior to the day before trial, that there had been a request for payment, or it would have ordered it. It was unclear whether this referred to Dr. Zimmerman not being paid the $1,764 by the Louisiana Indigent Defender Board as previously ordered by the trial court, or to a witness fee for the doctor to testify at trial. The court noted that there had

been no personal service on Dr. Zimmermann, only service upon someone at his office. The court also noted that the doctor was not local—although his office was in Baton Rouge and the defendant did not begin to present his defense until the second day of trial. The trial court denied the defendant's request for an instanter subpoena for Dr. Zimmermann, but did issue an instanter subpoena for a local doctor, Dr. Culver, another of the defendant's witnesses who had not appeared for trial.

There is a general rule that a defendant's inability to "obtain service" of a requested subpoena will not be a ground for reversal of his conviction or a new trial unless he shows prejudicial error by demonstrating that the testimony of the witness would have been favorable to him, and the possibility of a different result if the witness were to testify. Duplessis, 2000-2122, pp. 12-13, 785 So. 2d at 947, citing State v. Nicholas, 97-1991 (La. App. 4 Cir. 4/28/99), 735 So. 2d 790. The defendant could have sought a continuance in order to secure the attendance of Dr. Zimmermann, but he did not. Had the defendant made such a request, he would have had to state facts as to which the psychologist was to testify, showing the materiality of the testimony. See La. C.Cr.P. art. 709. While the trial court's failure to issue an instanter subpoena in the instant case differs from the inability of the sheriff to locate and serve a witness, the defendant must show prejudice

as a result of the trial court' action in order to obtain relief on appeal. See La. C.Cr.P. art. 921 ("A judgment or ruling shall not be reversed by an appellate court because of any error … which does not affect substantial rights of the accused.").

Even assuming the trial court abused its discretion in failing to issue the instanter subpoena for the Baton Rouge psychologist, to obtain relief the defendant must show that he was prejudiced. He fails to show any prejudice. The defendant asserts that his right to present a defense was violated by being forced to prove an insanity defense with psychologists who had done no testing on him. However, the defendant does not state what Dr. Zimmerman's testimony would have been. The record contains a letter from Dr. Zimmermann to the defendant, dated August 25, 1999. In the letter, Dr. Zimmermann advises the defendant that his diagnosis of the defendant at the time of his evaluation, based on data obtained from the defendant and psychological testing, was that the defendant was suffering from anxiety, depression, and partial amnesia. With regard to the amnesia, Dr. Zimmermann advised the defendant that accessing lost memories was very complicated and complex, and he would not be able to help the defendant in this regard. Thus, Dr. Zimmermann's diagnosis of the defendant, with the exception of the amnesia, was the same as that of Dr.

Carrington, who had been the defendant's treating psychiatrist at the Feliciana Forensic Facility—anxiety and depression. Dr. Culver testified that he saw no signs that the defendant was unable to distinguish right from wrong. Dr. Anastasio, another psychiatrist who testified at trial, believed the defendant was able to distinguish between right and wrong at the time of the offense, but noted that the defendant did have some very significant psychiatric symptoms. The defendant fails to show how Dr. Zimmermann's testimony would have materially aided his insanity defense, i.e., that he was unable to distinguish right from wrong at the time of the offense. Accordingly, the defendant has failed to demonstrate that the testimony of the witness would have been favorable to him, or the possibility of a different result had the witness testified. See Duplessis, supra. Further, as for the amnesia, by the time of trial in May 2000, the defendant was testifying that he recalled the events of the night in question—Larry McCall allegedly lured him into his home to kill him, and any injuries he inflicted on Larry McCall or Amanda were done while acting in self-defense. Finally, even assuming there was error here, it was harmless—the guilty verdict rendered in this case was surely unattributable to the failure of Dr. Zimmermann to testify on defendant's behalf. Snyder, supra.

In this assignment of error, the defendant also asserts that the trial

court refused to issue an instanter subpoena for Michael Groetsch, who the defendant represents was an acknowledged expert in the field of serial batterers, and who the defendant claims had testimony relevant to his defense that he was not the aggressor and was acting in self-defense. The record reflects that the defendant made this request on the day of trial, following opening statements. The defendant stated that he had subpoenaed Michael Groetsch but had never received a confirmation of service. The trial court asked who Michael Groetsch was, and the defendant informed him that he was a senior probation officer for the City of New Orleans, reminding the court that he had filed a motion with the court. The trial court said it had denied that motion already, and was not going to issue an instanter subpoena for the individual. The defendant had filed a motion for a state-funded expert, Michael Groetsch. The defendant attached to his motion what apparently was a newspaper article about Michael Groetsch, a senior probation officer for the Municipal Court for the City of New Orleans. The article covered an address by Michael Groetsch before a meeting of the Louisiana Association of Chiefs of Police. The topic was what Michael Groetsch characterized as "serial batterers," men who repeatedly beat women. The trial court implicitly denied the motion at a November 29, 1999 hearing. The issue of serial batterers has no relevance

to the defendant's case. It was never alleged by anyone that the defendant repeatedly beat women. Michael Groetsch's testimony on this subject as an expert would have been irrelevant. Considering that the trial court had already denied the defendant's motion for funds to pay this expert, and that his testimony would have been irrelevant, the defendant had failed to demonstrate that the testimony of the witness would have been favorable to him, or the possibility of a different result had the witness testified. See Duplessis, supra.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 4

In this assignment of error, the defendant claims that the trial court erred in instructing the jury on specific criminal intent, creating an unconstitutional burden-shifting presumption concerning that element. In instructing the jury on intent, the trial court gave separate instructions as to specific intent and general intent. It then stated several generalities, including:

> Whether criminal intent is present must be determined in light of ordinary experience. Intent is a question of fact which may be inferred from the circumstances. You may assume that the defendant intended the natural and probable consequences of his acts.

The defendant failed to object to any part of the trial court's jury

instructions. La. C.Cr.P. art. 801(C) provides that "[a] party may not assign as error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error." The defendant argues that this court should consider his claim of error anyway. Any deviation from the general rule requiring an objection to a jury instruction rests on State v. Williamson, 389 So. 2d 1328 (1980), where the Louisiana Supreme Court departed from the general rule that an alleged error in instructing the jury is not reviewable absent an objection. In Williamson, the trial court erroneously instructed the jury as to the evidence required to find the defendant guilty of the crime charged, attempted first degree murder, and a responsive verdict, attempted second degree murder. Both the first degree and second degree murder statutes had been amended, which amendments had taken effect nineteen days prior to the offense. However, the trial court, along with the prosecutor and counsel for the defendant, incorrectly assumed that the law as it appeared prior to the amendments was still in effect at the time of the offense. The trial court based its jury instructions on the old statutes. The State correctly noted that the defendant had failed to object to the instruction. The Louisiana Supreme Court held that because the asserted error involved "the very definition of the crime of

which defendant was in fact convicted," it would review the claim of error.

This court discussed the Williamson progeny and the issue in general in State v. LeBlanc, 97-1388 (La. App. 4 Cir. 9/23/98), 719 So. 2d 592, as follows:

> [I]n State v. Thomas, 427 So.2d 428 (La.1982), on rehearing, the Supreme Court cautioned:
>
> > Williamson should not be construed as authorizing appellate review of every alleged constitutional violation and erroneous jury instruction urged first on appeal without timely objection at occurrence.
>
> 427 So.2d at 435.
>
> In Thomas, the trial court erroneously instructed the jury on the basis of a superseded first degree murder statute. The Supreme Court rejected the notion that there exists in Louisiana criminal jurisprudence a so-called "plain error rule," authorizing appellate review of the record for plain errors even in the absence of a contemporaneous objection. 427 So.2d at 432- 33. In dicta, the court noted that, even if it had reviewed the claim of error, no relief was warranted because the defendant failed to demonstrate that he was substantially prejudiced by the irregularity.
>
> Also, in another post-Williamson decision, State v. Belgard, 410 So.2d 720 (La.1982), the trial court gave an instruction to the jury from which it could have inferred that proof of specific intent to "create" great bodily harm was sufficient to convict the defendant of attempted second degree murder. The Supreme Court refused to review the defendant's claim of error as to the giving of that jury instruction because he failed to object at trial. 410 So.2d at 720.
>
> Nevertheless, in State v. Cavazos, [610 so. 2d 127 (La. 1992)], the Supreme Court cited Williamson for the proposition that:

> A substantial probability that jurors may have convicted the defendant under an incorrect definition of the crime justifies setting aside a conviction on due process grounds even in the absence of a contemporaneous objection.
>
> 610 So.2d at 128.
>
> In State v. Chisolm, [95-2028 (La. App. 4 Cir. 3/12/97), 691 So. 2d 251], as in the instant case, the trial court erroneously charged the jury that to convict the defendant it had to find that the defendant had a specific intent to kill or inflict great bodily harm, but, also as in the instant case, the defendant failed to object. This court cited Thomas, supra, noting the general rule that the failure to object precludes appellate review, but, nevertheless, finding that "there is ample basis for concluding that the erroneous jury charge on specific intent was harmless.... The guilty verdict of attempted second degree murder was surely unattributable to the erroneous charge ...." 95-2028 at p. 7, 691 So.2d at 255.

97-1388, pp. 5-7, 719 So. 2d at 595.

The defendant in LeBlanc raised as his sole assignment of error that the trial court had erred in charging the jury that it could convict him of attempted first degree murder upon proof that he specifically intended to kill a police officer or inflict great bodily harm upon him. Proof of specific intent to kill, alone, was required for conviction. After considering the above jurisprudence, this Court refused to consider the claim of error on the ground that the defendant failed to object to the jury instruction. However, as it did in Chisolm, supra, and as the Louisiana Supreme Court did in

Thomas, supra, this court went on to conclude that any such error was harmless. The defendant, who had shot an individual to death earlier in the evening, had fired his gun at a police officer from a distance of fifteen to twenty feet.

In State v. White, 96-1534 (La. App. 4 Cir. 5/21/97), 695 So. 2d 1020, the defendant raised a pro se assignment of error that the trial court failed to instruct the jury that there were any possible lesser verdicts to the charge of second degree murder. There had been no contemporaneous objection to the trial court's jury instructions. This court cited Williamson, supra, held that the alleged error raised by the defendant involved, as in Williamson, the very definition of the crime for which he was convicted, and chose to consider the assignment. However, the court found no merit to the claim of error.

In a recent case addressing the issue, State v. Porter, 2000-2286 (La. App. 4 Cir. 12/27/01), 806 So. 2d 64, this Court refrained from considering a claim on the merits that the trial court erred in instructing the jury on attempted second degree murder where there was no objection, because it had to review the error in addressing the defendant's claim of ineffective assistance of counsel for counsel's failure to object to the instruction. The court ultimately found counsel was deficient in failing to object to the

instruction that a jury could convict the defendant of attempted second degree murder based merely on specific intent to inflict great bodily harm. However, the court found the error harmless, concluding that no rational juror could have found that the defendant's intent was merely to inflict great bodily harm.

In a recent case from this court, State v. Jarvis, 2001-1277 (La. App. 4 Cir. 2/13/02), __ So. 2d __, 2002 WL 271284, the trial court failed to give a jury instruction as to the State's burden of proof as to constructive possession of a firearm by a convicted felon, as elaborated by a decision rendered by the Louisiana Supreme Court two months before defendant's trial. Defense counsel failed to object to the instruction. This Court cited Williamson in holding that the instruction went to the very definition of the crime, and therefore it would consider the assignment of error. Jarvis is similar to Williamson, in that in each case both counsel and the court were apparently unaware of, respectively, a recent judicial pronouncement and a recent legislative act, both of which the respective courts held went to the very definitions of the crimes of which the defendants were convicted.

In the instant case, unlike in Williamson or Cazavos, or this Court's decisions in Leblanc, Chisholm, White, Porter or Jarvis, the use of the term "may assume" instead of "may infer" as to the defendant intending the

natural and probable consequences of his actions does not truly go to the "very definition of the crime" of which he was convicted, as the court phrased it in Williamson. Therefore, as the defendant failed to object to the instruction, we decline to address this assignment of error. Nevertheless, even assuming the error is properly reviewable, the trial court's use of the term "may assume" was at most harmless error.

The defendant implies that the use of the word assume violates the holding in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), where the court held that the trial court erred in instructing the jury that the law "presumes" a person intends the ordinary consequences of his voluntary acts, since that instruction could be considered by the jury to be a mandatory presumption, and thus improperly shifts the burden of proof from the State. In State v. Copeland, 530 So. 2d 526, 539 (La 1988), the trial court instructed the jury that it "may presume" that the defendant intended the natural and probable consequences of his acts. The court noted that the trial court had used the permissive "may" immediately before "presume," and thus that the jury would not be inclined to view it as a mandatory presumption. The court in Copeland stated that the preferable instruction was "may infer," but held that, taking the jury instructions as a whole, no reasonable juror would have understood that the burden of

persuasion as to the element of specific intent had been shifted to the defendant.

In the instant case, as in Copeland, the trial court used the permissive "may" before "assume." As in Copeland, taking the jury instruction as a whole, no reasonable juror would have understood that the burden of persuasion as to the element of specific intent had been shifted to defendant.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 6

In his last assignment of error, the defendant recites a litany of alleged violations of his constitutional rights which he claims fall under "Judicial Vindictiveness." For example, he cites the action of a court officer filing a notice of appeal listing the defendant as his own attorney, instead of the Louisiana Appellate Project, as the defendant requested. He cites no prejudice as a result of this act.

He also claims that judicial officers withheld various transcripts. For instance, he claims that the transcript of May 10, 2000 is missing, and thus he is precluded from briefing and arguing a Batson claim involving the State's use of a peremptory challenge to remove a black juror, as well as the denial of his motion for a change of venue. This is incorrect, as the transcript of the May 10, 2000 hearing was filed in this court on January 2,

2002. He claims that the withholding of other transcripts constitutes an effort by judicial officers to prevent a complete review of the record. He attaches three transcripts to his brief, from July 6 and 20, 1998, and February 22, 1999. All three are transcripts of competency hearings. The defendant has raised no claim that the transcripts evidence some error on the part of the trial court in ruling that he was competent to proceed, nor does he argue that he was incompetent to proceed.

There is no indication that the other transcripts the defendant sought are unavailable, or that the defendant requested them. Nor does the defendant point to any possible need for them. A docket master entry from June 15, 1998 reflects that the defendant simply changed his plea from not guilty to not guilty and not guilty by reason of insanity. The docket master entry for July 7, 1998 reflects that the appearance was simply a continuation of the competency hearing from July 6, 1998; the July 7 hearing was continued to July 20, and the trial date was continued to September 15. A September 15, 1998 handwritten docket master entry reflects that the trial date was continued, to be reset.

A docket master entry from April 26, 1999 reflects that a motion to suppress a confession and evidence was held, and the trial court denied both motions. A minute entry from that date reflects that the State introduced a

copy of the search warrant, affidavit, order of search and return, and that Detective Davis testified. The record does not contain a transcript of this motion hearing. However, there was no mention at trial of any inculpatory statements the defendant made, and the defendant points to none. A transcript of a November 29, 1999 hearing, at which the trial court denied the defendant's motion to suppress the latex gloves recovered from the dumpster in Mississippi, reflects that the trial court noted it had already heard a motion to suppress. The defendant informed the court that the previous motion to suppress concerned a search warrant for his vehicle. Thus, it appears that the April 26, 1999 hearing involved a motion to suppress evidence seized from the defendant's vehicle pursuant to a search warrant. The defendant raises no claim that the trial court erred in denying a motion to suppress evidence seized from his vehicle.

A May 24, 1999 docket master entry reflects that the appearance concerned the State's response to a defense motion to produce lab reports, photographs, and a transcript. The defendant's counsel advised the court that the transcript and State Police Crime Lab reports had been provided, and the State was to provide copies of the crime scene photographs. The defendant claims that part of the State Police Crime Lab report was withheld from the record, apparently referring to a one-page document reflecting that

no latent fingerprints were found on either of the latex gloves recovered from the dumpster. However, there apparently was no request for latent fingerprint analysis of any other items of evidence. The trial transcript clearly reflects that the full report was provided to defendant; he referred to it during trial.

A June 15, 1999 docket master entry reflects that the defendant was present for trial, but that the matter was continued until the next day. A June 16, 1999 docket master entry reflects that the trial was continued to August 10. It was continued to October 26, 1999 on July 19, 1999. An August 16, 1999 docket master entry reflects that the defendant advised the court that his motion to produce additional evidence was satisfied. The trial court denied the defendant's motion that would have permitted his brother access to the physical evidence, but said it would permit the defendant access to the evidence on September 20, 1999. That docket master entry also reflects that the court granted the defendant access to the law library at the Feliciana Forensic Facility. A docket master entry from September 20, 1999 reflects that the State provided the defendant with a rap sheet on Larry McCall, but that the trial court denied a motion for other incident reports. The defendant does not suggest that the trial court erred in its ruling denying him other incident reports.

A January 25, 2000 docket master entry simply reflects that trial was stayed by order of this court. A May 9, 2000 docket master entry reflects that the trial court denied the defendant's motion for a continuance. The defendant does not argue that the trial court erred in denying this motion for a continuance. The May 10, 2000 docket master entry reflects that the State amended the bill of information to reduce the charge from attempted first degree murder to attempted second degree murder, and the defendant entered a plea to that charge. It further reflects that a jury panel was sworn and seated, and that the trial court denied the defendant's motion for change of venue. The defendant does not raise any claims of error with regard to anything that happened on May 10, 2000.

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, "[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.

Even assuming the record is "incomplete" insofar as it does not

contain transcripts of each and every one of these court appearances by the defendant, the defendant has failed to show that he was prejudiced by the absence of any of them. Therefore, he is entitled to no relief.

The defendant also claims in this assignment of error that a subpoena was never issued for his wife, a Florida resident, to testify at his May 2000 trial. The record reflects that he requested service on her, but no subpoena for that trial date is contained in the record, and she did not testify. The defendant concedes, however, that a subpoena for an earlier January 2000 trial date reflects that the address given for his wife was incorrect. The same address was listed in his subpoena request for the May 2000 trial. Under these circumstances, it cannot be said that the appropriate authority was remiss in not issuing a second subpoena to be served at an address it had already determined was incorrect. The defendant complains that the address was correct, but offers no evidence to support his claim.

Further, the right to compulsory process does not exist in a vacuum, and a defendant's inability to obtain service of requested subpoenas will not be grounds for reversal of his conviction or the grant of a new trial unless he demonstrates prejudicial error by showing that the testimony of the absent witness would have been favorable to the defense, and would indicate the possibility of a different result had the witness testified. State v. Duplessis,

2000-2122, pp. 12-13 (La. App. 4 Cir. 3/28/01), 785 So. 2d 939, 947. The defendant has failed to show that he was prejudiced by the failure to issue another subpoena to his wife, or indicate the possibility of different result had she testified.

The defendant next argues that the St. Bernard Parish Sheriff's Office did not comply with a subpoena for "offense" reports of Larry McCall, only arrest reports. The defendant concedes that Captain Bonnie Cook testified at trial that no such reports ever existed. Captain Cook testified that she had no documentation of any complaints being filed against Larry McCall in St. Bernard Parish. The defendant submits that this was a "blatant lie," but offers no evidence to support his claim. There is no merit to this argument.

The defendant next asserts error concerning a *per curiam* submitted to this court relative to a writ application he filed. The defendant applied to this court for supervisory review of the trial court's November 29, 1999 denial of his motion for a state-funded expert to hypnotically refresh his testimony, as well as another ruling. This Court issued an order staying all proceedings, and ordered a transcript of the motion hearing. The transcript was obtained, and the trial court issued a *per curiam* giving a background of the case, and setting forth specific reasons why it denied the defendant's motion for a hypnosis expert. The trial court viewed the motion as frivolous,

and found that the defendant had failed to demonstrate the scientific validity for the use of hypnosis in a case such as the instant one. This Court denied the writ application, finding no error in the rulings of the trial court. State v. Waldron, unpub., 99-3088 (La. App. 4 Cir. 2/18/00), writ denied, 2000-0852 (La. 5/5/00), 761 So. 2d 550.

The defendant cites what he says are several incorrect and/or misleading statements made by the trial court in giving the background of the case, and "feels" that this court denied his writ application "in large part" based on the *per curiam*. He argues the trial court was incorrect in stating that a sanity hearing was conducted at his request, when the motion was made by the State—after the defendant pleaded not guilty and not guilty by reason of insanity. This fact had no bearing on the denial of the defendant's request for supervisory relief. The defendant also complains of the trial court's statement in its *per curiam* that on at least one trial date defendant explored the possibility of a plea bargain, but that the State was unwilling to commit to a term of imprisonment satisfactory to the defendant. With respect to this representation, the defendant asserts that the State constantly attempted to get him to accept a plea bargain, and the fact that he turned down all such entreaties did not mean that he ever actively considered a plea bargain. This is a meaningless argument. Whether or not he expressed

interest in a plea bargain had no bearing on this court's denial of his writ application.

Next, the defendant notes that the trial court stated in its *per curiam* that Dr. Culver, a member of the sanity commission, did not indicate that the defendant had any difficulty remembering the events of March 12, 1998. However, the defendant cites Dr. Culver's response at a February 22, 1999 hearing to a question concerning a report that defendant said he remembered very little about the time of the offense, that he did remember some key details, but that his overall recollection of details was somewhat murky at best. Dr. Culver was asked if that report was in accord with his findings, and he said it was exactly the same. Thus, the trial court's statement indicating the contrary was somewhat misleading. However, the defendant fails to mention that the trial court also stated in its *per curiam* that Dr. Anastasio, the other member of the sanity commission, indicated that the defendant had little memory of events surrounding the alleged offense—based on a history given by the defendant. Thus, this Court was aware that the defendant was claiming memory problems, and it cannot be said that the writ denial was based on the assumption that the defendant claimed no memory problems. Further, the defendant has shown no prejudice by the denial of his motion to have his memory refreshed by hypnosis. He testified

at trial that he recalled enough of the events of March 12, 1998 to know that Larry McCall lured him to his home that morning to murder him and make it look like self-defense. While the defendant may have preferred to represent to the jury that he remembered these events only after being hypnotized, considering the overwhelming evidence against defendant, the verdict rendered in this case was surely unattributable to any error in denying him the use of an expert to hypnotically refresh his memory; thus, any such error was harmless. Snyder, supra.

There is no merit to the defendant's claims that the actions of any officials concerned with his case constituted "judicial vindictiveness." There is no merit to this assignment of error.

For the foregoing reasons, we affirm the defendant's conviction and sentence.

AFFIRMED