NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2006-KA-1490**
VERSUS	*	**COURT OF APPEAL**
CHARLES E. MCTHOMAS, JR.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 451-197, SECTION "C"
Honorable Benedict J. Willard, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., and Judge Edwin A. Lombard)
JONES, J., CONCURS

Eddie J. Jordan, Jr.
District Attorney
Alyson Graugnard
Assistant District Attorney
1340 Poydras Street
Suite 700
New Orleans, LA 70112-1221
COUNSEL FOR PLAINTIFF/APPELLEE

A. Bruce Rozas
A. BRUCE ROZAS, ATTORNEY AT LAW
1212 East Street
P. O. Drawer 280
Mamou, LA 70554-0280
COUNSEL FOR DEFENDANT/APPELLANT

JUNE 27, 2007

AFFIRMED

On August 18, 2004, the State of Louisiana charged Charles McThomas with one count of possession with the intent to distribute cocaine. At his arraignment on September 13 he pled not guilty. The court heard and denied his motion to suppress the evidence on January 14, 2005. On May 18, a twelve-person jury found him guilty as charged. He filed a motion for new trial, which the court denied. On that date, the court sentenced McThomas to serve ten years at hard labor and imposed a fine of $358. Although the State indicated it would file a multiple bill, it failed to do so. The court granted McThomas' motion for out-of-time appeal on August 21, 2006.

FACTS

Shortly before 2:00 a.m. on July 30, 2004, police officers arrested the defendant Charles McThomas in connection with drug activity. At trial, Off. Chadwick Jacobs testified that he and his partner Robert Norris were on patrol at approximately 1:45 that morning when they passed a driveway in the Magnolia Housing Project. He testified that his partner alerted him, and he backed up to look down the driveway. He stated that he saw a man later identified as McThomas standing with two unknown women. He testified

that he saw the women give McThomas some money, and in return he gave them an unknown object. He testified that he turned into the driveway, and his partner got out of the car and began walking toward the group. McThomas looked up and then ran from the scene. Off. Jacobs testified that Off. Norris gave chase on foot while he followed in the police car, but at some point the driveway narrowed, and he could not get through. He stated that he got out of the car and followed his partner. He stated that he soon found that his partner had stopped McThomas on the next street. Off. Jacobs then went back to the police car and drove it to the scene of the apprehension.

Off. Robert Norris' testimony basically tracked that of Off. Jacobs up to the point that he chased McThomas. In addition, Off. Norris testified that as he chased McThomas, McThomas threw down a bag near the corner of Freret and Sixth Streets and then stopped running about five feet after abandoning the bag. Off. Norris apprehended McThomas, handcuffed him, and retrieved the bag that he had seen McThomas abandon. Inside the bag, he found sixty small pieces as well as one medium and one large piece of what appeared to be crack cocaine. He stated that by this time Off. Jacobs had arrived in the police car, and he put McThomas in the back of the car and advised him of his rights. He stated that they searched McThomas and

found $358 in his pocket. On cross-examination, Off. Norris stated that he was able to see McThomas put an object in one of the women's hand in exchange for the money, but he could not see what the object was. He insisted that McThomas threw down the plastic bag in a grassy area, from which he was easily able to retrieve it.

The parties stipulated that if the N.O.P.D. criminalist were to appear, he would testify that the substance in the bag tested positive for cocaine and weighed 24.7 grams.

Charles McThomas testified on his own behalf, denying that he trying to sell drugs to the women or that he threw down the bag containing the cocaine. He stated that he had won the money seized from him by playing video poker at a nearby convenience store. He stated that he left the store because he needed to urinate, and the bathrooms in the store were not working. He stated that he entered the driveway and was relieving himself when the officers arrived. He admitted there were two women in the driveway at the time, but he insisted that they were half-way down the driveway and not near him. He testified that he ran when he saw the officers because he believed they were other officers who had beaten him in the past. He denied that Off. Norris captured him just after he emerged from the project. Instead, he testified that he eluded the officers and went to a

friend's house in the project to call a ranked police officer he knew to tell him that the other officers were after him. He testified that when he learned that those officers were not on duty that night, he went back outside, intending to return to the convenience store to get at ride home. He insisted that at that point, Off. Norris captured him, knocked him to the ground, and handcuffed him. He stated that when the other officer drove up, Off. Norris walked back through the driveway. He stated that the other officer picked him up from the ground, put him in the police car, and drove back to the place where the officers had originally encountered him. McThomas stated that Off. Norris then entered the car, and they drove to the police station. Once there, Off. Norris produced the bag containing the cocaine and stated: "Look at what I found." McThomas insisted he did not see Off. Norris pick up the bag. McThomas admitted he had prior convictions for simple possession of marijuana and cocaine. When shown documentation that showed he actually pled guilty to possession with intent to distribute marijuana and distribution of cocaine, he stated that he thought he had pled guilty to the lesser charges and did so in order to be released from jail (he was placed on probation for both offenses). He testified that he successfully completed his probation in those cases.

DISCUSSION

A. Errors Patent

A review of the record for patent reveals one. There is no indication in the minute entry or the transcript of sentencing that the appellant waived his right to a twenty-four-hour delay between the denial of his motion for new trial and the imposition of sentence, as mandated by La. C.Cr.P. art. 873. However, this error is not fatal to the sentence because as per State v. Collins, 584 So. 2d 356 (La. App. 4 Cir. 1991), the failure to observe the twenty-four-hour delay mandated by La. C.Cr.P. art. 873 is harmless where the defendant does not complain of his sentence on appeal. See also State v. Riley, 2005-1311 (La. App. 4 Cir. 9/20/06), 941 So. 2d 618; State v. Wheeler, 2004-0953 (La. App. 4 Cir. 3/9/05), 899 So.2d 84. Here, the appellant is not challenging his sentence on appeal. Thus, any failure to observe La. C.Cr.P. art. 873's delay is harmless.

There are no other patent errors.

B. Assignments of Error

I.

By his first assignment of error, the appellant contends that the State failed to introduce evidence sufficient to support his conviction for possession with the intent to distribute cocaine. Specifically, he argues that the State presented inconsistent testimony that failed to prove every element

beyond a reasonable doubt.

In State v. Brown, 2003-0897, p. 22 (La. 4/12/05), 907 So. 2d 1, 18, the Court set forth the standard for determining a claim of insufficiency of evidence:

> When reviewing the sufficiency of the evidence to support a conviction, Louisiana appellate courts are controlled by the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under this standard, the appellate court "must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt." *State v. Neal*, 00-0674, (La.6/29/01) 796 So.2d 649, 657 (citing *State v. Captville*, 448 So.2d 676, 678 (La.1984)).
>
> When circumstantial evidence is used to prove the commission of the offense, La. R.S. 15:438 requires that "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." *Neal*, 796 So.2d at 657. Ultimately, all evidence, both direct and circumstantial must be sufficient under *Jackson* to prove guilt beyond a reasonable doubt to a rational jury. *Id.* (citing *State v. Rosiere*, 488 So.2d 965, 968 (La.1986)).

See also State v. Sykes, 2004-1199 (La. App. 4 Cir. 3/9/05), 900 So. 2d 156.

Here, the appellant was charged with and convicted of possession with the intent to distribute cocaine. To sustain its burden, the State was required

to show that the appellant possessed the cocaine and that he had the intent to distribute it. See State v. Howard, 2000-2700 (La. App. 4 Cir. 1/23/02), 805 So. 2d 1247; State v. Williams, 594 So.2d 476, 478 (La. App. 4 Cir. 1992). In Howard, this court discussed the State's burden in proving the intent to distribute:

> Specific intent to distribute may be established by proving circumstances surrounding defendant's possession which give rise to a reasonable inference of intent to distribute. *State v. Dickerson*, 538 So.2d 1063 (La. App. 4 Cir. 1989). In *State v. Hearold*, 603 So.2d 731 (La. 1992), the Louisiana Supreme Court set forth five factors to consider in determining whether a party had the intent to distribute narcotics. Reversing the defendant's conviction in that case, the court stated:
>
> > Intent is a condition of mind which is usually proved by evidence of circumstances from which intent may be inferred. *State v. Fuller*, 414 So.2d 306 (La. 1982); *State v. Phillips*, 412 So.2d 1061 (La. 1982); La. Rev. Stat. 15:445. In *State v. House*, 325 So.2d 222 (La. 1975), this court discussed certain factors which are useful in determining whether circumstantial evidence is sufficient to prove the intent to distribute a controlled dangerous substance. These factors include (1) whether the defendant ever distributed or attempted to distribute the drug; (2) whether the drug was in a form usually associated with possession for distribution to others; (3) whether the

> amount of drug created an inference of an intent to distribute; (4) whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and (5) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute.
>
> * * *
>
> In the absence of circumstances from which an intent to distribute may be inferred, mere possession of a drug does not amount to evidence of intent to distribute, unless the quantity is so large that no other inference is possible. *State v. Greenway*, 422 So.2d 1146 (La. 1982); *State v. Harveston*, 389 So.2d 63 (La. 1980); *State v. Willis*, 325 So.2d 227 (La. 1975).

Id. at pps. 735 - 736.

> In *State v. Cushenberry*, 94-1206, p. 6, (La. App. 4th Cir. 1/31/95), 650 So.2d 783, 786, this court described the *Hearold* factors as "useful" but held that the evidence need not "fall squarely within the factors enunciated to be sufficient for the jury to find that the requisite intent to distribute."

Howard, at pp. 22-23, 805 So. 2d at 1261-1262. In Howard, officers set up a surveillance of a residence and saw the defendant conduct a hand-to-hand transaction in front of the residence. They stopped him after he put a

package into a car parked nearby. The officers seized the package, which contained four rocks of crack cocaine. They also seized $225 from the defendant's pocket. On appeal, this court rejected the defendant's claim that there was insufficient evidence to support his conviction for possession with the intent to distribute the cocaine. This court concluded:

> The testimony of the officers that they observed the defendant engage in a narcotics transaction and the discovery of additional rocks of cocaine in the defendant's vehicle and two hundred twenty-five dollars on the defendant's person were sufficient evidence for the jury to conclude that the defendant was guilty of possession with the intent to distribute cocaine. The jury was within its discretion in choosing to accept the testimony of the police officers over the testimony of defendant's witnesses.

Id. at p. 23, 805 So. 2d at 1262.

Likewise, in Sykes, police officers observed the defendant engage in at least three hand-to-hand transactions. Although the amount of cocaine and heroin found in the defendant's possession was small, the jury apparently believed the testimony of the officers rather than that of the defendant, who insisted that he was on the scene only to buy drugs, not sell them. This court upheld the defendant's convictions for possession with intent to distribute cocaine and heroin.

In State v. Johnson, 2000-1528 (La. App. 4 Cir. 2/14/01), 780 So. 2d

1140, officers set up a surveillance of a residence and conducted a controlled purchase from the residence. They obtained a search warrant, and before executing the warrant they saw the defendant (who was not the target of the investigation) walk out of the house carrying a grocery bag. The defendant left in a car, and the officers followed him to a motel, where they observed him meeting with the target of the investigation. The suspect examined the contents of the bag, took the bag inside the motel room, and then left with the defendant. The officers stopped the pair and saw the suspect throw something into the back of the car. The officers retrieved the object, which was a bag containing a pound of marijuana. The officers also seized a gun. The search of the residence pursuant to the warrant revealed four baggies each containing one ounce of marijuana, as well as three one-pound bags of marijuana. On appeal, this court upheld the defendant's conviction for possession with the intent to distribute marijuana, holding that four pounds of marijuana was not consistent with personal use, even though there had been no expert testimony as to what was a reasonable amount for personal consumption.

In State v. Crowell, 99-2238 (La. App. 4 Cir. 11/21/00), 773 So. 2d 871, officers set up a surveillance after receiving a tip concerning drug sales, and they observed the defendant conduct three hand-to-hand transactions.

They obtained a search warrant, and before executing the warrant they saw the defendant engage in another hand-to-hand transaction wherein the defendant received currency from the codefendant in exchange for a tin foil object from a matchbox. The officers executed the warrant and found one matchbox in a shirt pocket hanging inside the residence containing twelve tin foil packets of heroin. On appeal, this court found these factors were sufficient to support the defendant's conviction for possession with the intent to distribute the twelve tin foil packets of heroin found in the shirt pocket.

In State v. Jones, 97-2217 (La. App. 4 Cir. 2/24/99), 731 So. 2d 389, State v. Ash, 97-2061 (La. App. 4 Cir. 2/10/99), 729 So. 2d 664, and State v. Bentley, 97-1552 (La. App. 4 Cir. 10/21/98), 728 So. 2d 405, this court found sufficient evidence to support convictions for possession of drugs with the intent to distribute based merely upon the amount of drugs seized, even though in no case did the officers involved observe any suspected transactions. Nor did the State present any expert testimony in these cases to indicate that the amount of drugs seized was inconsistent with personal use. In Jones the officers seized sixty-four tin foil packets of heroin; in Ash the officers seized twenty-one pieces of crack cocaine and a bag of powdered cocaine; in Bentley, the officers seized thirty-four pieces of crack cocaine.

Likewise, in State v. Martin, 97-2904 (La. App. 4 Cir. 2/24/99), 730 So. 2d 1029, this court rejected the argument that the State should have presented evidence to show that the amount of cocaine (thirty-nine individually-wrapped pieces of crack cocaine) was inconsistent with personal use, but in that case the officers also seized a few hundred dollars and had observed drug transactions.

By contrast, in State v. Perry, 97-1175 (La. App. 4 Cir. 7/22/98), 720 So. 2d 345 this court reversed the defendant's conviction for possession with the intent to distribute cocaine. This court noted that although the State presented evidence that the officers seized twenty-two rocks of crack cocaine from the defendant's house and over $200 from his hand, the State had been estopped from producing at trial any evidence of drug transactions at the house. Thus, this court concluded that the evidence supported only a conviction for simple possession of cocaine.

Here, the officers testified that they saw the appellant engaged in what appeared to be a hand-to-hand transaction with two unknown females. The appellant ran when he saw the officers approaching, and Off. Norris testified that he saw the appellant throw down a bag during his flight. The bag contained sixty small pieces of crack cocaine, as well as one medium and one large piece of crack. Thus, there was ample evidence for the jury to find

he possessed cocaine with the intent to distribute it.

The appellant argues, however, that Off. Norris' testimony was so full of inconsistencies that it was unbelievable. Unfortunately, most of his argument on this matter references evidence that was not presented at trial: testimony from the suppression hearing, the police report, and a Mapquest map and aerial photograph. None of these items, however, was presented at trial, and this court cannot consider them on appeal. He first argues that there was a discrepancy as to whether Sixth Street continued through the project or whether it became only a driveway in the block through the project. A reading of the testimony shows that the extension of Sixth Street through the project is really a driveway. Indeed, Off. Jacobs testified that the driveway in which the chase took place was Sixth Street. The appellant's argument as to the inconsistencies on how far he ran after purportedly abandoning the bag of cocaine is totally based on testimony from the suppression hearing. This testimony was not before the jury, and the officer's testimony at trial was not internally inconsistent. A reading also shows that there were no inconsistencies in where the abandonment occurred. Off. Norris consistently testified at trial that the appellant ran through the driveway to Freret Street, crossed Freret, and then threw the bag down in a walkway. Nor was Off. Norris' testimony on the lighting in the

driveway inconsistent; he testified that although he could not remember if there were lights farther back into the driveway, there were lights in the front part of it.

The biggest "discrepancy" to which the appellant refers is the inconsistency between his testimony and that of the officers as to what happened as they chased him through the driveway. Obviously, the jury chose to believe the officers' testimony over that of the appellant. This court has repeatedly held that a factfinder's credibility decision should not be disturbed unless it is clearly contrary to the evidence. State v. Huckabay, 2000-1082 (La. App. 4 Cir 2/6/02), 809 So. 2d 1093; State v. Harris, 99-3147 (La. App. 4 Cir. 5/31/00), 765 So. 2d 432. Here, it does not appear that the jury's finding that the officers were more credible than the appellant was clearly contrary to the evidence. The evidence fully supports the jury's verdict. This assignment has no merit.

II.

By his second assignment of error, the appellant contends that his conviction should be reversed because his right to be present at all trial proceedings was violated. Specifically, he argues that he was not present when the judge, defense counsel, and the prosecutor went to the jury room so that the judge could answer the jurors' questions and given them further

instructions. Although the original transcript of trial does not indicate that the judge further instructed the jury, present counsel supplemented the record with a copy of the transcript of this incident. In it, the judge again instructed the jury on the definitions of La. R.S. 40:967A, possession, and the responsive verdict of attempt. The judge then noted that both the defense attorney and the prosecutor did not object to the jury looking at the diagram that Off. Norris drew in connection with his testimony. The transcript indicates that both defense counsel and the prosecutor were present, and neither objected to the jury viewing this diagram during deliberations. The judge further noted that he could not comment on how far away the officers were from the alleged drug transaction. The parties then left the jury room, and the jury continued deliberation.

The appellant now argues that this right to be present during trial was violated because there is no indication that he was also present during this meeting, and indeed appellate counsel filed a handwritten affidavit from the appellant stating that he was not present. The minute entry and the transcript of this hearing are silent as to the appellant's presence when the court instructed the jurors in the jury room. Thus, we will assume that the appellant was not present in the jury room when the court instructed the jury.

As per La. C.Cr.P. art. 831(5), a defendant's presence is required "[i]n

trials by jury, at all proceedings when the jury is present," although as per La. C.Cr.P. art. 832 a defendant can voluntarily absent himself after the beginning of trial. In addition, La. C.Cr.P. art. 808 provides in pertinent part: "If the jury or any member thereof, after having retired to deliberate upon the verdict, desires further charges, the officer in charge shall bring the jury into the courtroom, and the court shall in the presence of the defendant, his counsel, and the district attorney, further charge the jury." Here, instead of calling the jurors into the courtroom to answer their questions, the court, along with defense counsel and the prosecutor, went into the jury room, re-instructed the jury, and answered two questions.

The appellant now argues that the failure to have him present in the jury room was reversible error. Although there were earlier cases that held that the defendant's absence when the court re-instructed the jury was reversible error, such as State v. Eddie Williams, 260 La. 1153, 258 So. 2d 534 (La. 1972), later cases have either applied the harmless error standard or have found that the failure to object precluded review of the error. In Williams, the defendant was not present when the court gave the jury additional instructions in the courtroom. The case was silent as to whether defense counsel was present. The defendant filed a motion for new trial on this basis, which the trial court denied. On appeal, the Court first remanded

the case to the trial court for the determination of whether the defendant was present. When the case returned to the Supreme Court, the Court found that because there was no indication that the defendant was present, it was required to reverse the defendant's conviction and sentence.

By contrast, in State v. Hoffman, 98-3118 (La. 4/11/00), 768 So. 2d 542, during deliberation during the penalty phase of trial the jury sent out a question concerning whether the State would have been aware if the defendant had any juvenile adjudications. The trial court discussed the matter with defense counsel and the prosecutor and then sent a written response to the jury that the question could not be answered. On appeal, the defendant alleged that his rights were violated because the court sent the written response instead of bringing the jury into open court in his presence to answer the question. The Court rejected this argument, first noting that there was no objection to this procedure at the time. The Court further stated: "In any event, even assuming that the trial court erred by not orally responding to the jury's question in the presence of defense counsel and the defendant, prejudice cannot be shown." Id. at p. 30, 768 So. 2d at 571. The Court noted that even if the defendant had been present and the court had orally responded, the response would have undoubtedly been the same.

Likewise, in State v. Simmons, 99-93 (La. App. 5 Cir. 4/12/00), 759

So. 2d 940, at the jury's request, the court re-read to the jury in open court definitions of second degree murder, general intent, and specific intent. Although defense counsel and the prosecutor were present, the defendant was not, and defense counsel specifically waived the defendant's presence. The jury returned to the jury room deliberate, but it soon returned for a re-reading of portions of the second degree murder statute. Again, defense counsel was present, but the defendant was not. In addition, defense counsel asked the court to re-read the definition of manslaughter. On appeal, the defendant contended that his absence was reversible error, but the court rejected this argument, finding that defense counsel was present and that the defendant did not show how he was prejudiced by his own absence.

The Simmons court relied upon an earlier opinion by the same court, State v. Sterling Williams, 98-1146 (La. App. 5 Cir. 6/1/99), 738 So. 2d 640, where the jury first requested a transcript of the victim's testimony. The judge assembled defense counsel, the prosecutor, and the defendant in the courtroom and discussed the matter with them. The judge called the jurors into the courtroom and told them that they could not get the transcript but had to rely on their memories. The jury retired, but a few minutes later it sent out more questions. Again, the judge assembled both counsel and the defendant, read them the questions, and gave them his anticipated response,

which was that he could not comment on or recapitulate the evidence. The judge then went into the jury room and verbally gave his response. When he returned into open court, the judge noted that the jury asked also for some of the evidence, to which the judge replied that they could only get the physical evidence introduced at trial. On appeal, the defendant argued that the judge erred by instructing the jury the second time in the jury room out of the defendant's presence. The court rejected this argument, noting that both defendant and his attorney were present when the judge indicated what he would say to the jury, and defense counsel specifically indicated he had no objection. The court found the defendant suffered no prejudice, in that the judge would have responded the same way if the defendant had been present.

Here, there is no indication in the record that the appellant was present when the judge, defense counsel, and the prosecutor went into the jury room. The judge re-read his instructions on attempt, possession, and La. R.S. 40:967A. With the consent of both the defense attorney and the prosecutor, the judge allowed the jury to view the diagram drawn by Off. Norris. The judge also noted that he could not comment on the jurors' question concerning how close the officers were to the appellant when they viewed the alleged drug transaction. There was no objection to the appellant's

absence, either at the time or later in a motion for new trial. The appellant has not shown that the judge's responses would have been different if he had called the jury into the courtroom in the appellant's presence instead of going with both counsel into the jury room. Thus, the appellant has shown no prejudice from his absence. Even if this claim was preserved, as per Hoffman, Simmons, and Sterling Williams, any error was harmless. This assignment has no merit.

III.

By his final assignment of error, the appellant contends that his counsel was ineffective because she was not prepared for trial. In State v. Mims, 97-1500 pp. 44-45 (La. App. 4 Cir. 6/21/00), 769 So. 2d 44, 72, this court discussed the standard to be used to evaluate an effective assistance of counsel claim:

> Generally, the issue of ineffective assistance of counsel is more properly addressed in an application for post-conviction relief filed in the trial court, where a full evidentiary hearing can be conducted. *State v. Smith*, 97-2221, p. 14 (La. App. 4 Cir. 4/7/99), 734 So.2d 826, 834, *writ denied*, 99-1128 (La. 10/1/99), 747 So.2d 1138. Only if the record discloses sufficient evidence to rule on the merits of the claim does the interest of judicial economy justify consideration of the issues on appeal. *Id.* Here, however, we believe the record is sufficient to address defendant's claims, which are essentially evidentiary.
>
> The defendant's claim of ineffective

> assistance of counsel is to be assessed by the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *See State v. Fuller*, 454 So.2d 119 (La.1984). The defendant must show that his counsel's performance was deficient and that this deficiency prejudiced him. The defendant must make both showings to prove counsel was so ineffective as to require reversal. *State v. Sparrow*, 612 So.2d 191, 199 (La.App. 4 Cir.1992). Counsel's performance is not ineffective unless it can be shown that he or she made errors so serious that he or she was not functioning as the "counsel" guaranteed to the defendant by the 6th Amendment of the federal constitution. *Strickland, supra*, at 686, 2064. That is, counsel's deficient performance will only be considered to have prejudiced the defendant if the defendant shows that the errors were so serious that he was deprived of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 693, 2068.

See also State v. Crawford, 2002-2048 (La. App. 4 Cir. 2/12/03), 848 So. 2d 615.

Here, the appellant points to some sort of response trial counsel made in connection with a formal complaint the appellant must have filed against her. He also points to errors he alleges she made by failing to introduce a photograph of the scene, failing to cross-examine the officers effectively, and failing to object to his absence in the jury room when the court re-

instructed the jury. However, the record before this court is insufficient to address the merits of these claims on appeal. Thus, we decline to address the merits of this assignment of error on appeal, reserving the appellant's right to raise these claims in an application for post conviction relief from which an evidentiary hearing can be held in the trial court.

For these reasons, we hereby affirm the appellant's conviction and sentence.

AFFIRMED