STATE OF LOUISIANA	*	**NO. 2015-KA-0820**
VERSUS	*	**COURT OF APPEAL**
VINCENT COOPER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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LOBRANO, J., CONCURS IN PART, DISSENTS IN PART, AND ASSIGNS REASONS.

I respectfully concur in part and dissent in part from the majority opinion. I concur in the majority's finding and reasoning that there is sufficient evidence for the convictions of Vincent Cooper ("Defendant"). However, I must dissent from the majority's reversal of those convictions on the basis of an insufficient record. Defendant has failed to show that the record is deficient such that his constitutional right to judicial review has been compromised. Defendant also fails to argue any other meritorious assignment of error. Accordingly, I would affirm Defendant's convictions and sentence.

The majority erred in finding that "given the presumption of prejudice caused by the presence of an alternate juror…the present record appears insufficient to evaluate the removal of the jurors and what role the thirteenth 'alternate' juror played during the deliberation process." The majority's finding of an insufficient record arises from two alleged instances of jury irregularity. First, a juror was dismissed over lunch, yet the record contains no transcription of that dismissal. Second, an unsworn individual entered the jury room when the jury retired to deliberate and the district court did not conduct a hearing on the record to determine if deliberations had begun during that thirteenth person's presence in the jury room. Due to these omissions, the majority concludes that the record is so

deficient that the interests of justice require Defendant to have a new and fully recorded trial. *See State v. Johnson*, 2001-1909, p. 1 (La. App. 4 Cir. 1/23/02), 807 So.2d 1071, 1072 (finding that "[w]here appellate counsel was not counsel at trial and the court reporter cannot provide a transcript of the testimony at trial, as in this case, the right of appellate review is rendered meaningless ... and the interests of justice require that a defendant be afforded a new, fully-recorded trial") (citations and internal quotation marks omitted).

To address the error inherent in the majority's finding, two issues that the majority merges to reach their conclusion must be separately discussed. Along with his argument that the record is insufficient, Defendant argues that he is entitled to a presumption of prejudice because of the brief presence of a thirteenth person in the jury room. A logical problem arises because the majority uses Defendant's argument that he is entitled to a presumption of prejudice due to the brief presence of the thirteenth person in the jury room to support its conclusion that Defendant's convictions should be reversed ("given the presumption of prejudice caused by the presence of an alternate juror …") while also asserting that the record is insufficient to adequately evaluate the merits of that supporting argument. Whether the record is sufficient for appellate review is a separate issue from whether Defendant is entitled to a presumption of prejudice.

Where the evidentiary portions of a transcript are contained in the record on appeal, but voir dire transcripts and other non-evidentiary portions of the record are missing, a defendant's right to full appellate review has not been compromised. *See* La. Const. Art. I, § 19 (stating, "No 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."); *State v. Thomas*, 92-1428 (La. App. 4 Cir. 5/26/94), 637 So.2d 1272, 1274 (La. App. 4th Cir. 1994). Because the record

before this Court contains all evidentiary portions of the trial, I would find that Defendant has not been deprived of his constitutional right to judicial review.[1]

Additionally, where a review of the record "does not reveal a discernible impact on the proceedings" caused by the omission, nor does it establish that the defendant suffered any "specific prejudice" as a result of it, an incomplete record should not serve as the basis for relief. *See Campbell*, 2006-0286 at p. 100, 983 So.2d at 873. In *State v. Campbell*, the Louisiana Supreme Court found that when a defendant raises only "unsupported speculations" about what may be contained within missing portions of the record, he has failed to prove that he has been specifically prejudiced by the record omissions. *Id.*, 2006-0286 at p. 101, 983 So.2d at 874. Like the *Campbell* defendant, Defendant has only speculated that the district court may have improperly dismissed the juror during lunch or that deliberations may have begun before the thirteenth juror left the room. These unsupported speculations "cannot stand as the basis for relief." *Id*. For these reasons, I find that Defendant is not entitled to a new trial due to an incomplete appellate record.

As to Defendant's argument that he is entitled to a new trial because of the brief presence of a thirteenth person in the jury room, the majority incorrectly asserts that a presumption of prejudice is "caused by the presence of an alternate juror…." Rather, "[p]articipation by alternates in deliberations is an extraneous influence on the jury representing a *prima facie* case of prejudice requiring reversal." *State v. Barber*, 97-2749, p. 1 (La. 4/24/98), 708 So.2d 1054 (citing La.

[1] It should be noted that courts have consistently held that a complete appellate review of a defendant's conviction and sentence can be accomplished even when there are missing portions of the trial record. *See*, *e.g.*, *State v. Brown*, 2000-2120, p. 4 (La. App. 4 Cir. 12/19/01), 804 So.2d 863, 865; *State v. Cooley*, 98-0576 (La. App. 4 Cir. 11/17/99), 747 So.2d 1182, 1188; *Thomas*, 92-1428, 637 So.2d at 1274. Unless Defendant makes a showing of specific prejudice based on the missing portion of the record, an incomplete record does not entitle him to relief. *State v. Campbell*, 2006-0286, p. 99 (La. 5/21/08), 983 So.2d 810, 873 (finding that despite the fact that the transcript omitted certain bench conferences and portions of voir dire proceedings, the defendant was not entitled to a new trial).

C.E. art. 606(B)) (per curiam). Nothing in the record before this Court indicates that the thirteenth person who entered the jury room participated in deliberations.

Upon discovery of the thirteenth person's presence, Defendant moved for a mistrial, and the State responded by moving for a hearing to determine whether or not deliberations had begun.[2] Instead of granting the State's motion for a hearing or Defendant's motion for a mistrial, the district court found that it had adequate information to rule, stating:

> …when the jurors went upstairs there were thirteen jurors that went upstairs. Before they started to deliberate, we were informed of that fact. The thirteenth juror was then brought downstairs before any deliberations started, and the thirteenth juror is seated over there.

Where there is no evidence to the contrary, the presumption of regularity in judicial proceedings must apply. *See State v. Leon*, 93-2511, 638 So.2d 220, 222 (La. 1994). Accordingly, this Court should not assume that the district court's characterization of its conversation with the thirteenth person is inaccurate. If the district court erred by failing to conduct a hearing, "the error here appears of such an inadvertent nature that it provides no basis for supposing that the court did not comply with its duty…." *Id.* Because Defendant offers nothing more than speculation that the juror may have participated in deliberations, he is not entitled to the presumption of prejudice that the majority uses to bolster its finding that the record is insufficient.

Given that I would find sufficient evidence for both of Defendant's convictions and that Defendant was not prejudiced by omissions in the record, I would address Defendant's other assignments of error as follows. Defendant argues that the district court erred by allowing Dr. Mehta, an expert witness, to

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[2] Any argument that the State's motion for a hearing to determine the thirteenth person's interaction with the jury is persuasive in determining that Defendant should receive a new trial is without merit. Crediting such an argument would create a perverse incentive that would motivate attorneys not to move for additional hearings, lest their cautiousness be used against them. Using cautiousness against attorneys harms the truth-seeking process and undermines the administration of justice.

testify as to the ultimate issue in the case in violation of La. C.E. art. 704. The gist of Dr. Mehta's testimony was that, in her opinion, A.S.'s burns were consistent with being held in a seated position in scalding water for a considerable period of time. La. C.E. art. 704 provides:

> Testimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact. However, in a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused.

Defendant argues that Dr. Mehta gave her opinion as to his guilt or innocence when answering two specific questions. First, the prosecutor asked Dr. Mehta, "[i]n your expert opinion, Doctor, having spoken with [A.S.],[3] and having evaluated [A.S.], and having witnessed the forensic interview, is there any evidence that this was an accident?" Dr. Mehta responded, "[n]o." Later, the prosecutor asked Dr. Mehta if the injuries appeared intentional, or if the injuries were characteristic of intentional mistreatment. Dr. Mehta responded affirmatively.

Defendant's counsel failed to object to the first question, and only objected to the second question as "asked and answered." Louisiana law provides that in order to preserve an argument for appellate review, a party must make a timely objection stating the specific grounds for the objection. La. C.E. art. 103(A)(1). "The contemporaneous objection rule has two purposes: (1) to put the trial judge on notice of the alleged irregularity so that he may cure the problem and (2) to prevent a defendant from gambling for a favorable verdict and then resorting to appeal on errors that might easily have been corrected by objection." *State v. Thomas*, 427 So.2d 428, 433 (La. 1982), *on reh'g* (2/23/1983); *see also State v. Knott*, 2005-2252, p. 2 (La. 5/5/06), 928 So.2d 534, 535. Defendant's lack of objection to the first question and objection on different grounds to the second

[3] The victim's first name was used at this point in the transcript. In this quote, the victim's initials have been substituted for her name. *See* La. R.S. 46:1844(W)(1)(a) (prohibiting the disclosure of the name of minors who are victims of crimes).

question failed to put the district court on notice of the alleged error. Because Defendant failed to properly preserve this argument for appellate review, I would not consider it.

Even if Defendant had properly preserved this argument for appellate review, his assignment of error lacks merit. The two questions at issue did not seek an expert opinion as to Defendant's guilt, but rather sought an expert opinion on the nature of A.S.'s injuries. Dr. Mehta's answers relate only to the severity and magnitude of A.S.'s burns and the instinctual reaction of a normal person when exposed to the conditions necessary to cause A.S.'s injuries. The way the question was posed did not ask Dr. Mehta to draw a legal conclusion as to Defendant's guilt or innocence. *Compare State v. Bancroft*, 620 So.2d 482, 486-487 (La. App. 4 Cir. 1993) (finding that asking a witness if the defendant "had the specific intent to kill or to inflict great bodily harm on anybody" required the witness to draw a legal conclusion as to the defendant's guilt or innocence).

Moreover, if such an error had occurred, the relevant inquiry is whether or not the error was harmless. *See State v. Code*, 627 So.2d 1373, 1384 (La. 1993). To find harmless error, the reviewing court must find that the verdict was "surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993). Even if Dr. Mehta's two answers could be construed as giving an opinion on Defendant's guilt or innocence, that construction is so far removed from their apparent meaning that the verdict was surely unattributable to this error, especially considering the evidence presented as to the circumstances surrounding A.S.'s injuries.

Defendant next argues that his sentence is excessive. In so arguing, he asserts that the district court failed to adequately consider the sentencing guidelines set forth in La. C.Cr.P. art. 894.1. An excessive sentence is one which "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing

more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *State v. Telsee*, 425 So.2d 1251, 1253 (La. 1983); *See also State v. George*, 2015-1189, pp. 17-18 (La. App. 4 Cir. 11/9/16), 204 So.3d 704, 715. A sentence is grossly out of proportion to the severity of the crime if, when the crime and punishment are considered in light of the harm done to society; it shocks the sense of justice. *Id.*, 2015-1189 at p. 18, 204 So.3d at 715 (citing *State v. Vargas-Alcerreca*, 2012-1070, p. 25 (La. App. 4 Cir. 10/2/13), 126 So.3d 569).

An appellate court's review of a sentence for excessiveness is two-fold: First, the Court must determine from the record that the district court considered the sentencing criteria established by La. C.Cr.P. art. 894.1. *State v. Ellis*, 2014-1170, p. 25 (La. App. 4 Cir. 3/2/16), 190 So.3d 354, 370-371 (citations omitted). Then, "a reviewing court must determine whether the sentence imposed is too severe in light of this particular defendant and the circumstances of his case, keeping in mind that "maximum sentences are reserved for cases involving the most serious violations of the charged offense and for the worst kind of offender." *Id.*, 2014-1170 at p. 26, 190 So.3d at 371.

As discussed *supra*, Defendant was convicted of one count of second degree cruelty to a juvenile and one count of cruelty to a juvenile. Second degree cruelty to a juvenile carries a penalty of imprisonment at hard labor for up to forty years,[4] and cruelty to a juvenile carries a penalty of imprisonment at hard labor for up to ten years.[5] Defendant was sentenced to seven years at hard labor for each conviction, to be served concurrently. Defendant filed a motion to reconsider sentence, which was originally heard on June 20, 2016. At the June 20, 2016 hearing, Defendant testified that he was suffering from deteriorating eyesight and

[4] La. R.S. 14:93.2.3.

[5] La. R.S. 14:93.

renal failure. The district court held the hearing open to allow Defendant to present evidence of his renal failure. The hearing resumed on October 21, 2016, at which time Defendant testified as to his ongoing dialysis treatment.[6]

First, we consider whether the district court adequately considered the sentencing factors set forth by La. C.Cr.P. art. 894.1. The purpose of La. C.Cr.P. art. 894.1 is to ensure that there is a factual basis for the sentence imposed. *State v. Batiste*, 2006-0875, p. 18 (La. App. 4 Cir. 12/20/06), 947 So.2d 810, 820. The United States Supreme Court has emphasized that possession of the fullest information possible about a defendant's life and characteristics is essential to proper sentencing. *Pepper v. U.S.*, 562 U.S. 476, 487, 131 S.Ct. 1229, 1240, 179 L.Ed.2d 196 (2011) (citations omitted). However, in the case *sub judice*, Defendant, through counsel, waived a pre-sentence investigation report ("PSI").

Despite the lack of a PSI, the record indicates that the district court adequately considered the La. C.Cr.P. art. 894.1 sentencing factors when sentencing Defendant. The district court's comments during sentencing evidence that the court thought that the victim was particularly vulnerable due to her youth, and considered this offense to be a deliberate imposition of cruelty upon a child. *See* La. C.Cr.P. art. 894.1(B). Moreover, the district court allowed Defendant two opportunities to present mitigating evidence regarding his health.

Next, we consider whether the sentence imposed is too severe in light of "this particular defendant and the circumstances of his case." *Ellis*, 2014-1170 at p. 26, 190 So.3d at 371. Defendant argues that, in light of his deteriorating health, seven years is tantamount to a "death sentence." However, despite being provided

[6] Defendant allegedly proffered some documentation of his condition, which the district court did not accept into evidence. Defendant argues that because the proffered exhibit is absent from the appellate record, he has been denied full appellate review of his sentence. This argument lacks merit. The record makes clear that the district court was well aware that Defendant was on dialysis, and considered this fact when sentencing Defendant. Accordingly, Defendant has failed to show a "specific prejudice" arising from this omission, and is not entitled to relief. *See Campbell*, 2006-0286 at p. 99, 983 So.2d at 873

two opportunities to present evidence at the district court, the record contains no evidence other than Defendant's own testimony that Defendant's death is imminent, that he is likely to die before completing his sentence, or even that his condition has worsened as a result of incarceration. Considering that Defendant failed to present evidence other than his own testimony that his failing health should result in a shorter sentence, and the sentence rendered is well below the statutory maximum for each count, the sentence is not too severe given Defendant's particular circumstances.

Lastly, Defendant argues that his trial counsel was ineffective because trial counsel failed to submit sufficient evidence in support of Defendant's motion for reconsideration of sentence. Generally, ineffective assistance of counsel claims are properly raised in an application for post-conviction relief, where the district court can conduct a full evidentiary hearing on the matter. *State v. Paulson*, 2015-0454, p. 9 (La. App. 4 Cir. 9/30/15), 177 So.3d 360, 367 (citations omitted). However, a claim of ineffective assistance of counsel during sentencing proceedings is not cognizable in post-conviction review when, as in the case *sub judice*, the sentence imposed is within the statutorily authorized range. *Id.*; *see also* La. C.Cr.P. art. 930.3. Accordingly, this assignment of error is properly before this Court.

Under *Strickland v. Washington*, a defendant arguing ineffective assistance of counsel bears the following burden of proof: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *see also Paulson*, 2015-0454 at p. 11, 177 So.3d at 367 (applying this test to ineffective assistance of counsel at sentencing claims). Second, the defendant must show that the counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result. *Id.*

In the case *sub judice*, Defendant argues that his counsel was ineffective because he failed to introduce adequate information about Defendant's health conditions at the hearings on Defendant's motion to reconsider sentence. However, according to Defendant, his counsel did proffer evidence of Defendant's ongoing dialysis treatment. *See supra* fn. 14. Because Defendant alleges that his trial counsel attempted to introduce the very evidence Defendant alleges he was ineffective by not introducing, this assignment of error lacks merit. For these reasons, I would affirm Defendant's convictions and sentences.