STATE OF LOUISIANA	*	**NO. 2015-KA-0820**
VERSUS	*	
		COURT OF APPEAL
VINCENT COOPER	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 519-463, SECTION "D"
Honorable Calvin Johnson, Judge
* * * * * *
Judge Regina Bartholomew Woods
* * * * * *
(Court composed of Judge Joy Cossich Lobrano,
Judge Regina Bartholomew-Woods, Judge Paula A. Brown)

LOBRANO, J., CONCURS IN PART, DISSENTS IN PART, AND ASSIGNS REASONS.

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REVERSED AND REMANDED
September 13, 2017

On April 17, 2015, at the conclusion of a three (3) day jury trial, Defendant, Vincent Cooper, was convicted of second degree cruelty to a juvenile, as well as the responsive offense of cruelty to a juvenile.[1] He was sentenced to two concurrent terms of seven years at hard labor, with credit for all time served. *See* La. R.S. 14:93.2.3.[2] He now appeals, arguing, *inter alia*, insufficiency of the evidence to support his convictions and that jury irregularity occurred, such that his

[1] The bill of information initially listed Defendant's name as Vincent Cooper; however, his name is Vincent Copper. Rather than amend the bill of information upon discovery of this error, the State of Louisiana added the correct version of Defendant's name as an a/k/a. Because all the pleadings and the caption of this case reflect "Vincent Cooper," this opinion, for consistency's sake, will refer to Appellant/Defendant as Vincent Cooper, as opposed to Vincent Copper.

[2] La. R.S. 14:93.2.3 states:

> A. (1) Second degree cruelty to juveniles is the intentional or criminally negligent mistreatment or neglect by anyone over the age of seventeen to any child under the age of seventeen which causes serious bodily injury or neurological impairment to that child.
>
> (2) For purposes of this Section, "serious bodily injury" means bodily injury involving protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or substantial risk of death.
>
> B. The providing of treatment by a parent or tutor in accordance with the tenets of a well-recognized religious method of healing, in lieu of medical treatment, shall not for that reason alone be considered to be intentional or criminally negligent mistreatment or neglect and shall be an affirmative defense to a prosecution under this Section.
>
> C. Whoever commits the crime of second degree cruelty to juveniles shall be imprisoned at hard labor for not more than forty years.

convictions should be overturned. For the reasons that follow, we reverse Defendant's convictions and remand for further proceedings.

FACTUAL BACKGROUND

On the morning of February 4, 2014, Defendant's nine-year old daughter, A.S.[3] complained, at school, that her feet hurt. At trial, a teacher testified that she was asked by another teacher to come and look at A.S.'s feet. When the teacher arrived, A.S. had already removed her tights, socks, and shoes. The teacher observed that A.S.'s feet were swollen and blistered. The teacher testified that rather than calling A.S.'s parents, she dialed 911 because she believed that A.S. needed medical treatment and that her injuries were a result of child abuse or neglect.[4] When EMS personnel arrived at the school, they sedated A.S. and transported her to Children's Hospital. The medical team informed the teacher that A.S. would receive medical attention at Children's Hospital rather than at the burn unit because the injuries were not severe or extensive. The teacher further testified that when A.S.'s dress was removed, doctors discovered more blisters around her buttocks area. According to the teacher, when the medical team discovered the additional injuries around A.S.'s buttocks area, A.S. was taken to the burn unit in Baton Rouge, where she remained from February 4, 2014, through the beginning of March, 2014.

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[3] In this opinion, the initials, rather than the full name, of the minor child are used to protect and maintain the privacy of the minor child involved in this proceeding. *See* Uniform Rules, Courts of Appeal, Rule 5-1 and Rule 5-2.

[4] The teacher testified that, to her knowledge, A.S. had not previously complained about injuries, abuse, or neglect.

Marcia Willis-Watson, a detective with the New Orleans Police Department Child Abuse Division (hereinafter "Detective Watson") testified that she was dispatched to Children's Hospital to interview A.S., who had sustained second-degree burns to her feet and genital area. Detective Watson recalled that A.S. stated that she burned her feet when Defendant "made" her get into a hot bath. According to Detective Watson, A.S. explained that after she had placed one foot into the bathtub, she told Defendant that the water was too hot, so he came into the bathroom and checked the bathwater. A.S. stated that although she told Defendant that the water was too hot, he instructed her to take the bath anyway. A.S. told Detective Watson that Defendant helped her bathe. According to Detective Watson, A.S. stated that she got into the bath and the water was so hot that she almost cried.

In addition to interviewing A.S., Detective Watson also interviewed Defendant. Detective Watson testified that when asked whether he knew how A.S. sustained her injuries, Defendant admitted that she may have burned her feet in the bath the night before. During the interview, Defendant explained that earlier that night he had helped A.S. with her homework and that it had taken her approximately four and one-half hours for her to complete the homework. After A.S. completed her homework at approximately 11:30 p.m., Defendant drew A.S.'s bath, added bubble bath, and tested the water with his hands to gauge its temperature. According to Defendant, the water felt warm, but not hot. Defendant further stated that during the bath, A.S. never told him that the water was too hot,

and she did not show him the bumps that had formed on her feet until approximately thirty minutes after she had finished her bath. Defendant explained that while A.S. was in the bathtub, she stood up in the water and said it was hot. Defendant recounted that he tested the water with his hand and the water did not feel hot to him. Defendant stated that after he left the bathroom, A.S. rinsed off and he could hear the water running. Defendant explained that A.S. took a bath, got dressed, and came and told him she had bumps on her feet. Because he thought the bumps were ant bites, Defendant offered to put alcohol on A.S.'s bumps and instructed her to put socks on. Further, Defendant told Detective Watson that on the morning following the bath he had already left for work by the time A.S. had gotten up and dressed for school.

At trial, Detective Watson testified that she had obtained a search warrant to test the water temperature at Defendant's residence, which, at its hottest, was 156 degrees Fahrenheit. She explained that she filled the bathtub with three inches of the hottest water and found the temperature to be 140 degrees Fahrenheit.

Ms. Tracy Brunetti, a child forensic interviewer from the Child Advocacy Center of Children's Hospital, testified that she interviewed A.S. sometime in March, 2014, approximately five weeks after A.S. sustained her injuries. A.S. told Ms. Brunetti that after Defendant checked her homework and found one problem wrong, he "hit [her] upside [her] head" three times with a backscratcher. Afterwards, Defendant drew her bathwater. She further told Ms. Brunetti that after her water was drawn, Defendant pushed her down the hallway into the bathroom,

pushed her into the tub of hot water and bathed her. She stated that she thought Defendant was "trying to cook [her]." A.S. further explained to Ms. Brunetti that after she had taken the bath her feet began to hurt. She noticed bumps on her feet and showed them to her aunt with whom she shared a room. Her aunt told her to show the bumps to Defendant. When A.S. showed Defendant her feet, he said he could either put alcohol on the bumps or she could wear socks. A.S. chose to wear socks, but said they were uncomfortable because they were squeezing her feet and by then, the bumps had spread to the tops of her feet.

At trial, during cross-examination, A.S. testified that the last time she had seen Defendant was the night he gave her the bath. Then the questioning turned to what occurred the following morning. A.S. explained that when she woke up, the first and only person she showed her feet to was her stepmother, who told A.S. to get ready for school, which she did. A.S. testified that she neither spoke to nor saw Defendant that following morning, but she could hear him in the bathroom at some point.[5]

Next, Dr. Neha Mehta, the medical director of the Audrey Hepburn Care Center Program at Children's Hospital, who is certified in child abuse pediatrics, testified that she had observed A.S.'s forensic interview and reviewed A.S.'s medical history, as well as physically examined A.S. after she had been released from the hospital. Dr. Mehta testified that it was difficult to ascertain the degree of the burns A.S. suffered by only having seen photographs of the injuries, but A.S.'s

[5] During the forensic interview, A.S. told Ms. Brunetti a different version. A.S. told her that she had, in fact, seen and spoken to Defendant the following morning.

injuries would have been at least second-degree burns and that blistering would appear within hours of the burn event. She explained that the skin on the soles of the feet is thicker and thus would not have exhibited the same types of injuries as more tender skin. Dr. Mehta further explained that the photos indicate where the water line was on A.S.'s feet because her toes were not injured, suggesting that A.S.'s toes were sticking out above the water, which the doctor stated was consistent with being forcefully held down under the water in a seated position. Dr. Mehta further testified that the blisters in a ring-shaped pattern around A.S.'s buttocks indicated that she was seated, as the skin that was touching the bottom of the tub would not otherwise have been exposed to the hot water. She explained that the hotter the water, the less time it would take to burn, but humans have reflexes to pull away from hot water. She stated that at approximately 113 degrees Fahrenheit, a human would decide the water was too hot but would not sustain second or third degree burns unless submerged in a minimum of 120 degrees for at least ten minutes. However, it would be physically impossible to withstand the pain of 120 degree water for ten minutes. However, if the temperature were closer to 150 or 160 degrees, similar injuries could result instantly. Noting that the maximum temperature of the three-inch-deep water that the crime lab had tested in Defendant's bathtub was140 degrees, the doctor testified that it would take twenty seconds to establish similar injuries in water of that temperature. It would be impossible for humans to voluntarily withstand that temperature for that length of time, and they would reflexively pull back. She then testified that the location of

the burns on A.S.'s feet indicated that she would have had to have been sitting in only a couple inches of water and the burn pattern around A.S.'s buttocks indicated that she had not been allowed to move from a seated position.

Dr. Mehta then testified that, although she was neither an expert nor trained in forensic interviewing, she was vaguely familiar with the methods used in the interview with A.S. She then testified that, after viewing the forensic interview and viewing the photos of the injuries, there was no evidence that this was an accident.

On cross-examination, Dr. Mehta admitted that A.S. never said she was held down in the water. However, she concluded that must have been the cause of the injuries, based on the injuries depicted. She further testified that because human instinct would be to jump out of water that could cause those types of injuries, she did not believe that A.S. got into the tub voluntarily and that she would have been crying and screaming. Dr. Mehta testified that although she was not an expert in burn treatment or burn surgery, in her opinion, the only way the pattern of injuries A.S. suffered could have been sustained was if she had been forcibly held down in the water, unable to move, for an extended period of time. Dr. Mehta could not say with medical certainty either the temperature of the water, or the length of time A.S. remained submerged in the water.

Defendant's sister, who resided with Defendant and A.S. at the time of the injury, testified that she was home on the evening of the bath. She also testified that A.S. never told her about her injuries. She only learned of A.S.'s injuries once the school called the following morning. She also stated that she could not be

certain whether Defendant was home when A.S. left for school because she had been asleep all morning.

Defendant's girlfriend, who resided with Defendant and A.S., testified that when A.S. told Defendant that the bathwater was too hot, he entered the bathroom and added cold water to the bathtub; then, A.S. was able to take her bath. She stated that she saw A.S. the next morning, but A.S. did not complain of any injuries. She did not learn about A.S.'s injuries until Defendant called her later that morning from the hospital. She further testified that Defendant went to work at six o'clock the next morning and had already left the house by the time A.S. awoke. She also testified that she never heard A.S. scream at any point the night of the bath. On cross-examination, Defendant's girlfriend admitted that A.S. showed both Defendant and her a bump on her foot, but did not recall Defendant suggesting that she treat the injury with rubbing alcohol.

At trial, Defendant testified that when A.S. finished her homework, he drew her bathwater. He further stated that shortly after A.S. went into the bathroom, she emerged complaining that the bathwater was too hot. Defendant stated that he went into the bathroom, tested the water, adjusted the temperature by adding some cold water, gave A.S. bathing instructions, and then went to lie down in his bedroom. According to Defendant, A.S. came into his bedroom half an hour after her bath and showed him some bumps on her legs. He asked her if she wanted him to put alcohol on the bumps, but she did not; so he told her to put on a pair of socks and go to bed. Defendant stated that he did not intend to cause any injury and A.S.

never told him she had been injured or burned. Defendant testified that the bumps he observed on A.S.'s feet resembled ant bites and he thought she had been bitten when she was playing outside at school. Defendant testified that A.S. had not screamed or cried at any point. When shown photographs of A.S.'s feet while she was in the hospital, Defendant stated that A.S. did show him her feet after her bath, but her feet did not look anything like the photographs. Defendant stated that if the bumps would have looked the way they did in the photographs, he would have immediately taken her to an emergency room. Defendant testified that at no point did he ever hold A.S. down in her bathwater. Other than the doctor's testimony at trial, no one accused Defendant of holding A.S. down, nor did the child say that she had been forcibly submerged in the water. Also, Defendant stated that A.S. was still asleep at the time he left for work.

PROCEDURAL HISTORY

On February 24, 2014, Defendant was arrested and charged with two (2) counts of second degree cruelty to a juvenile in violation of La. R.S. 14:93.2.3.[6] On March 25, 2014, Defendant appeared for arraignment and entered pleas of not guilty. On April 17, 2015, at the conclusion of a three-day jury trial, Defendant was found guilty as charged on count one of second degree cruelty to a juvenile. As to count two, Defendant was found guilty of the responsive offense of cruelty to a juvenile. On April 23, 2015, the Defendant filed a Motion for New Trial based on

[6] Defendant's first count was based on his bathing A.S. in water hot enough to cause second-degree burns to her feet and buttocks. Defendant's second count was based on his failure to seek medical treatment for A.S. the day after her bath.

an errant person being allowed in the jury deliberation room. On the same date, the district court denied the motion. On April 27, 2015, Defendant was sentenced to two concurrent terms of seven years at hard labor. On May 28, 2015, Defendant filed a Motion to Reconsider Sentence based on it being excessive pursuant to La. C.Cr.P. art. 881.1. On June 20, 2016, the district court held a hearing on Defendant's Motion to Reconsider Sentence. This hearing was continued to October 21, 2016, wherein the district court ultimately denied Defendant's Motion to Reconsider Sentence.

DISCUSSION

We have reviewed the record for errors patent and found none.[7]

Defendant designated numerous assignments of error. In light of our ultimate ruling, we address only assignments of error numbers one and two, to wit:

(1) Whether the evidence was sufficient to sustain the verdicts; and,

(2) Whether the district court erred when it dismissed alternate jurors without a transcribed basis for the ruling; and whether the district court erred in failing to conduct a hearing and/or granting a mistrial when an unidentified person was included with the jury when the jury was sent to the jury deliberation room to deliberate.

STANDARD OF REVIEW

We consider the first assignment of error, sufficiency of the evidence, in light of the well-settled jurisprudence that "[w]hen issues are raised on appeal as to

[7] In accordance with La.C.Cr.P. art. 920, all appeals are reviewed for errors patent on the face of the record." *State v. Anderson*, 08-962 p. 2 (La. App. 3 Cir. 2/4/09), 2 So.3d 622, 624.

the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence." *State v. Miner*, 14-0939, p. 5 (La. App. 4 Cir. 3/11/15, 163 So.3d 132, 135 (quoting *State v. Hearold*, 603 So.2d 731, 734 (La. 1992)). The United States Supreme Court, in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), provided the standard for review of a claim of insufficiency of the evidence:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. (Emphasis in original).

"Under the *Jackson* standard, the rational credibility determinations of the trier of fact are not to be second-guessed by a reviewing court." *State v. Williams*, 2011-0414 p. 18 (La. App. 4 Cir. 2/29/12); 85 So.3d 759, 771. Further, "a factfinder's credibility determination is entitled to great weight and should not be disturbed unless it is contrary to the evidence." *Id*. But where there is no direct evidence presented proving one or more of the elements of the offense, La. R.S. 15:438 governs circumstantial evidence and provides "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every

reasonable hypothesis of innocence." "Stated differently, the reviewer as a matter of law, can affirm the conviction only if the reasonable hypothesis is the one favorable to the state and there is no extant reasonable hypothesis of innocence." *State v. Green*, 449 So.2d 141, 144 (La. App. 4 Cir. 1984), citing *State v. Shapiro*, 431 So.2d 372 (La. 1983). "This test is not separate from the *Jackson* standard; rather it simply requires that 'all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt.'" *State v. Hoang*, 2016-0479, p. 3 (La. App. 4 Cir. 12/21/16), 207 So.3d 473, 475, quoting *State v. Ortiz*, 1996–1609, p. 12 (La. 10/21/97), 701 So.2d 922, 930. Further, the reviewing court may not disregard its duty to consider whether the evidence is constitutionally sufficient simply because the record contains evidence that tends to support each element of the crime. *State v. Mussall*, 523 So.2d 1305, 1311 (La. 1988). In its review, "[t]he court must consider not only the evidence most favorable to the prosecution, but also the entire record since a rational trier of fact would do the same." *Mussall,* 523 So.2d at 1310. "The standard does not require the court to determine whether it believes the evidence at trial proves guilt beyond a reasonable doubt, but rather whether any rational trier of fact interpreting all of the evidence could have found the elements beyond a reasonable doubt." *Id.* at 1309.

A. Sufficiency of Evidence Regarding Second Degree Cruelty to a Juvenile

Defendant was convicted of one count of second degree cruelty to a juvenile in violation of La. R.S. 14:93.2.3, which provides:

> A. (1) Second degree cruelty to juveniles is the intentional or criminally negligent mistreatment or neglect by anyone over the age of seventeen to any child under the age of seventeen which causes serious bodily injury or neurological impairment to that child.
>
> (2) For purposes of this Section, "serious bodily injury" means bodily injury involving protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or substantial risk of death.

The State presented evidence that A.S. was nine years old at the time of the offense. Although the State did not present evidence of Defendant's age, during the defense's case-in-chief, Defendant testified that he was fifty-four years old.

The statute also requires that the State prove Defendant acted with intent or criminally negligent mistreatment or neglect. "'Intentional,' as used in the aforementioned statute pertaining to cruelty to a juvenile, refers to general criminal intent, present whenever there is specific intent and also when circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act." *State v. Green*, 449 So.2d 141, 144 (La. App. 4 Cir. 1984). Criminal negligence is defined as "such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances." *Id*.

In this case, the State's expert witness, Dr. Mehta, testified that, in her opinion, the child was forcibly and intentionally held down in a seated position in

scalding water. Although she was not present when it happened, she was able to formulate this opinion from her work as medical director of the Audrey Hepburn Care Center, which specializes in the triage, intake and interviews of child-victims of abuse. Further, she reviewed photographs of A.S.'s injuries and was able to observe the pattern and significance of the injuries to ascertain that they were second-degree burns. She further opined that a human would not be able to tolerate such extreme temperatures for any length of time that would give rise to such injuries, but for being forcibly held against their will.

Similar cases in which appellate courts have found sufficient evidence involved victims who were infants or toddlers and could not have gotten in or out of the bathtub on their own volition, substantiating a finding of the defendant's criminal negligence.[8] In this case, A.S. was nine years old when she was injured and Defendant was older and stronger and able to restrain her in the hot bathwater as described by Dr. Mehta during her testimony. Because Dr. Mehta testified that A.S.'s significant injuries could not have resulted from her voluntarily remaining in the tub, then it was reasonable for the jury to find Dr. Mehta's testimony credible. A jury's credibility determination should not be second-guessed. Moreover, even if some of the evidence may be susceptible to innocent explanations, under the standard espoused in *Jackson, supra*, if rational triers of fact could disagree as to the interpretation of the evidence, then the rational fact

[8] See *State v. Sumler*, 395 So.2d 766 (La. 1981); *State v. Vance*, 2003-1946 (La. App. 4 Cir. 6/30/04), 879 So.2d 862; *State v. Green*, 449 So.2d 141, 144 (La. App. 4 Cir. 1984); *State v. Morrison*, 582 So.2d 295 (La. App. 1 Cir. 1991).

finder's view of all of the evidence most favorable to the prosecution must be adopted. *See State v. Ellis*, 2014-1511, p. 4 (La. 10/14/15), 179 So.3d 586, 589.

Thus, viewing the totality of the evidence for the conviction of second degree cruelty to juveniles in the light most favorable to the prosecution, there was sufficient evidence to convict Defendant of second degree cruelty to a juvenile.

B. Sufficiency of the Evidence for Conviction of Lesser Included Offense of Cruelty to a Juvenile

The State charged Defendant with a second count of second degree cruelty to a juvenile for his failure to provide timely medical treatment to A.S. for the second-degree burns she suffered to her feet and buttocks. After finding Defendant guilty as charged as to the first count of the indictment, second degree cruelty to a juvenile, the jury was unable to return a verdict on the second charged offense. Conversely, the jury returned a verdict of guilty as to the lesser included offense of cruelty to a juvenile pursuant to Louisiana Revised Statute 14:93, which provides, in pertinent part, as follows:

> (1) The intentional or criminally negligent mistreatment or neglect by anyone seventeen years of age or older of any child under the age of seventeen whereby unjustifiable pain or suffering is caused to said child. Lack of knowledge of the child's age shall not be a defense.

The evidence the State presented that tended to prove the elements of this lesser included offense was A.S.'s unsworn statement during the forensic interview with Ms. Brunetti, A.S.'s testimony during the trial of this matter, and the testimony of Dr. Mehta.

In spite of the aforementioned, Defendant maintained that he did not believe A.S. suffered harm in such a way that required medical treatment. In support of his assertion, Defendant stated that when he viewed the bumps on A.S. the night of her bath, the bumps were small and resembled ant bites. He further called witnesses, the adults who resided in the home with A.S. and he, all of whom testified that the bumps were small and apparently unassuming the night of the bath and during the next morning, when the bumps were more pronounced, Defendant had left for work, prior to A.S. awakening from her nighttime slumber.

A rational jury could reasonably have found that Defendant's claim that he thought the bumps were ant bites lacked credibility because Defendant claims that he reached this conclusion after A.S. showed him the burns on the same night he gave her a bath in water that A.S. told him was too hot. *See State v. Strother,* 2009-2357, p. 10 (La. 10/22/10), 49 So.3d 372, 378 (stating that "an appellate court may impinge on the fact finder's discretion and its role in determining credibility only to the extent necessary to guarantee the fundamental due process of law") (citations and internal quotation marks omitted).

The appearance of the injuries at the time Defendant saw them is largely insignificant when one considers that Defendant knew the burns on A.S.'s feet were not ant bites. In fact, when he was interviewed at Children's Hospital he admitted that A.S. may have burned her feet in the bath the night before. Given that Defendant made the aforementioned assumption, it is unreasonable to find that Defendant believed the burns on A.S.'s feet were ant bits when he saw them after

the bath. For this reason alone, a reasonable jury could have found that Defendant, "in the ordinary course of human experience, must have averted to the prescribed criminal consequences" when he failed to obtain medical treatment or at least so disregarded A.S.'s interests in failing to do so such that his conduct grossly deviated below that of a reasonable person.[9]

Thus, viewing the totality of the evidence for the conviction of cruelty to a juvenile in the light most favorable to the prosecution, there was sufficient evidence to convict Defendant of the lesser included charge of cruelty to a juvenile.

C. Jury Irregularity

Defendant's second assignment of error asserts that the district court erred when it dismissed alternate jurors without a transcribed basis for the ruling and when it failed to conduct a hearing and/or granting a mistrial when an unidentified person was included with the jury when the jury was sent to the jury room to deliberate.

The district court minutes from April 15, 2015, reveal that jury selection began at 10:57 am. The only record of prospective juror challenges is contained in these minutes and reveals that the State excused six jurors, defense excused four jurors, three jurors were excused by consent, and five jurors were struck for cause.

[9] *See State v. Sumler,* 395 So.2d 766, 769 (La. 1981) (citing La.R.S. 14:10(2)) (discussing the meaning of the word "intentional" in the cruelty to juveniles statute, La. R.S. 14:93. The *Sumler* court found that the word "intentional" as used in La. R.S. 14:93 refers to general criminal intent, which is present "whenever there is specific intent and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have averted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.") It should be noted that a violation of La. R.S. 14:93 can occur when defendants commit either intentional or criminally negligent acts.

According to the trial transcripts, twelve jurors were selected along with two alternates. After these jurors were chosen, the court recessed for lunch. Following this recess the transcript reads, "[t]welve jurors and the ***one*** alternate juror enter the courtroom and are duly sworn to serve as a juror on this case by the minute clerk." (Emphasis added). Although fourteen jurors (twelve jurors and two alternates) were initially accepted, only the names of the thirteen sworn jurors are listed in the minutes; presumably one juror was excused during the lunch recess. However, there is no record of a juror being excused before trial.

During trial, a juror addressed the judge asserting that she did not know if she could be fair after she discovered Defendant resided in her neighborhood. This juror did not explain why she could not be fair, only that it made her uncomfortable. The judge excused her from the jury for cause, noting the defense's objection. At that conference, defense counsel noted it was the first time he had observed that two (seated) jurors had been dismissed. The court replied,

> That is a fact. I have now since [sic] we started with fourteen and now we are at twelve. And, one was dismissed, again, because of what he said yesterday before the Jury Trial started, and the other is dismisses [sic] now because of what she said. But I note your objection for the record.

The only reference in the record to the first juror who was dismissed prior to trial was "because of what he said yesterday." There is absolutely no indication of what the juror said, how the court became aware of the juror's remarks, whether the juror was challenged for cause by either party, dismissed by the judge *sua sponte*, or whether either party had objected. Defendant argues that without a record of the

pre-trial dismissal of the juror, there can be no appellate review of whether the court may have erred in dismissing the juror. The present record suggests there were only twelve jurors, and no alternates, remaining after the second juror was excused. Even though her dismissal is on the record, there is no transcription of whether the district court tried to rehabilitate her, whether the State or Defendant had an opportunity to question her prior to her being dismissed for cause by the district court.

On April 17, 2015, at 3:12 pm, the jury retired to deliberate. A reporter's note in the transcript reveals that thirteen "jurors" entered the jury room. Upon discovery of the thirteenth individual, he was removed from the jury deliberation room and then apparently the district court was informed that deliberations had not commenced. The individual was never identified and did not make a statement under oath. Whatever conversation took place between the "juror" and the district court was not transcribed in the record. Because there were only twelve jurors remaining halfway through trial, it seems impossible that this extra person was a sworn juror. Nevertheless, the court stated for the record, the following:

> Now, our twelve jurors are also here, and this is also for the record, that 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.

It is not clear whether the extraneous "juror" sat in the jury box, took recesses with the jury, ate lunches with the jury, or once the jury retired to

deliberate, if the "juror" spoke with the other jurors about his impressions of the case. What is contained in the record is the trial judge's statement indicating deliberations had not yet begun when the individual was removed from the jury room and that the juror had only been in the room for a minute. However, that is contradicted by the record. After the thirteenth "juror" is brought back to the courtroom, the trial judge is informed that the jurors have a request for the district court to define something. It is implausible that deliberations had not yet begun when the transcript indicates that the jury, almost immediately after retiring, had a question regarding a definition.

Furthermore, after the jury retired for a second time, Defendant moved for a mistrial based on this errant juror. In response to the oral motion, the State requested that the district court poll the members of the jury to ascertain whether deliberations had or had not begun. The trial judge summarily denied both requests and reiterated that the thirteenth "juror" had only been in the deliberation room for a minute while the other members were getting "lunches straight." The record is devoid of any testimony regarding whether there were any discussions of the merits of the case during this time period among any of the jurors.

Furthermore, after the district court repeated the charges to jury, it returned to the jury room to deliberate. The district court announced it was "having the alternate juror remain just in case we need the alternate juror." The State then clarified for the record that "the juror in question was not technically—it was an extra juror who was not technically selected in any way, shape or form. And, he

was sworn without objection by Defense Counsel or the State." The district court again referred to the individual as "an alternate juror" and the state responded, "Correct."

Because no hearing was held and no evidence was taken on the matter, it is impossible to know the precise circumstances precipitating the "alternate juror's" presence in the jury room. Both the State's and the district court's assertions seem to suggest that the extra person may have been the alternate who was excused from the jury before trial. However, the record also suggests that that alternate had been dismissed earlier and the minutes reflect that only thirteen jurors were sworn after lunch (after which a female juror was excused, leaving twelve jurors). The court reporter issued a Certificate of Unavailability of Transcripts indicating that nothing was placed in the record regarding the dismissal of a juror following the lunch recess on April 15, 2015, or on April 17, 2015, or the discovery and/or removal of the thirteenth juror who went into deliberations with the jury.[10]

The Louisiana Supreme Court set forth the law concerning the review of an incomplete record in *State v. Boatner*, 2003-0485, pp. 4-5 (La. 12/3/03), 861 So.2d 149, 152–53 as follows:

> Both this court and the United States Supreme Court have made clear that a criminal defendant has a right to a complete transcript of the trial proceedings, particularly where appellate counsel was not counsel at trial. *State v. Deruise*, 98-0541, p. 11 (La.4/3/01), 802 So.2d 1224, 1234, citing *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964) and *State v. Robinson*,

[10] There was an entry made in the transcripts as a reporter's note regarding the extra juror's removal from deliberations, however no colloquy was placed on the record.

> 387 So.2d 1143 (La.1980). The Louisiana State Constitution guarantees 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. Const. art. I § 19. Additionally, in all felony cases, the clerk or court stenographer shall record all of 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. La. C.Cr.P. art. 843. The court reporter shall record all portions of the proceedings required by law and shall transcribe those portions of the trial proceedings required. La. R.S. 13:961(C).
>
> Material omissions from the transcript of the proceedings at trial bearing on the merits of an appeal require reversal. *State v. Landry*, 97-0499 (La.6/29/99), 751 So.2d 214; Robinson, 387 So.2d at 1144. Although this court has found reversible error when material portions of the trial record were unavailable or incomplete, a "slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal" does not require reversal of a conviction. *State v. Brumfield*, 96-2667, p. 14-16 (La.10/28/98), 737 So.2d 660, 669; *State v. Parker*, 361 So.2d 226, 227 (La.1978). A defendant is not entitled to relief because of an incomplete record absent a showing of prejudice based on the missing portions of the transcript. *State v. Castleberry*, 98-1388, p. 29 (La.4/13/99), 758 So.2d 749, 773; *State v. Hawkins*, 96-0766, p. 8 (La.1/14/97), 688 So.2d 473, 480.

"The materiality of a given omission is measured by the prejudicial effect of the omission on the defendant in accessing the full scope of appellate review." *State v. Parnell*, 2013-0180, p. 12 (La. App. 4 Cir. 10/2/13), 127 So.3d 18, 28.

In *State v. Landry*, 1997-0499, p. 3-4 (La. 6/29/99), 751 So.2d 214, 216, the Louisiana Supreme Court found that audio recording problems rendered the record

grossly incomplete in several respects, including the failure to record peremptory strikes and challenges for cause made at the bench, requiring reversal of the defendant's sentence and conviction and remand for a new trial. *See also State v. Pinion*, 2006-2346, p. 10 (La. 10/26/07), 968 So.2d 131, 136 (holding that the failure to record bench conferences during *voir dire* created uncertainty on review with respect to how many challenges for cause the defense made unsuccessfully, and, combined with the absence of contemporaneous records accounting for the selection process, *e.g.* adequate minutes or jury strike sheets, required reversal of the defendant's conviction and sentence.)

In this case, the record is devoid of any information concerning which party excused which jurors and for what reason. The record also implies that a selected juror was dismissed for cause, but no further information can be adduced on the current record. Due to the incomplete record, Defendant could not assign as error any of the rulings on the challenges to jurors or prospective jurors. There is no indication that either party was even aware of the alternate juror's dismissal before the jury was sworn. Moreover, because of the incomplete record, it is impossible to determine the identity of the extra "juror" who went to deliberate with the jury.

The presence of a thirteenth juror in the jury room is problematic. "Participation by alternates in deliberation is an extraneous influence on the jury representing a *prima facie* case of prejudice requiring reversal." *State v. Barber*, 1997-2749 (La. 4/24/98), 708 So.2d 1054, 1054. While the presumption of prejudice is not conclusive, the "burden rests heavily on the State to establish, after

notice to and hearing of defendant, that such contact…was harmless." *State v. Clark*, 1997-1757, p. 9, (La. App. 4 Cir. 4/7/99), 732 So.2d 138, 143.

In *Clark*, a person chosen for the jury had mistakenly been excused and a person who had been excused had been seated, had heard the evidence, and was present in the jury room. *Clark*, 732 So.2d at 143-144. Further,

> "[T]he incorrect juror who was seated was a juror who was excused by the State. When the defendant moved for a mistrial, the State argued that there was no prejudice to the defendant because the juror had been excused by the State and was acceptable to the defense. Defense counsel, however, pointed out that he did not have an opportunity to object to that prospective juror because the State had already excused her.
>
> The record does not indicate how long after the jury retired that it discovered the discrepancy. The minute entry indicates only that the jury retired at 4:30 p.m. and returned with a verdict at 5:20 p.m. It does not reflect that a juror was replaced. The record does not show that the incorrectly seated juror did not participate in the deliberations until the error was found. The outside influence of the incorrectly seated juror on the jury is presumed to establish a *prima facie* case of prejudice to the defendant. However, the State may rebut the presumption by showing the defendant was not harmed. Under the circumstances, the State failed to meet its burden of proving that there was no outside influence of the incorrect juror on the jury during deliberations, and that any outside influence was not prejudicial to the defendant.
>
> Further, when the incorrect juror was replaced by the alternate juror, the record does not establish that the trial court ordered the jury to begin the deliberations **anew** as mandated by La.C.Cr.P. art. 789. The only reference in the trial transcript is the statement by the court to the sheriff that he was to replace Ms. Brown with the alternate juror, and once the alternate juror was in place, "then you can tell the jurors to commence deliberations."

> Accordingly, the defendant's conviction and sentence are reversed. The case is remanded for a new trial.

Id. Similarly, in *State v. Brown*, 2005-1100, p. 12 (La. App. 4 Cir. 11/2/06), 943 So.2d 614, 620, this Court reversed the defendant's conviction and remanded for a new trial holding that the district court erred in failing to sequester the jurors after they were charged as required by La. C.Cr.P. art. 791(C); failing to question each juror on the record as to whether they were influenced extraneously; and failing to give sufficient instruction to the jury after a juror was removed from deliberations and replaced with an alternate.[11]

Notwithstanding the district court's assertion that deliberations had not yet begun, given the presumption of prejudice caused by the presence of the alternate juror (and that the verdict in this case was 10-2), the present record fails to support the circumstances surrounding the removal of the jurors and what role the thirteenth "alternate" juror played during the deliberation process.

For the aforementioned reasons, we reverse Defendant's convictions and remand for a new trial.

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[11] Conversely, in *State v. Compton*, 2011-68, p. 26 (La. App. 3 Cir. 6/1/11), 66 So.3d 619, 639, the court held that the presence of an alternate juror in the deliberation room was harmless error. In this case, the district court questioned, on the record, the jurors and each individual juror affirmed that neither their deliberation nor verdict was affected in any way by the presence of the alternate juror. Similarly, in *State v. Anderson*, 08-962, p. 20 (La. App. 3 Cir. 2/4/09), 2 So.3d 622, 635, the court held that "the presence of the alternate juror and the fact that she asked a question during jury deliberation trigger[ed] the presumption of prejudice; however, [the court found] that said presumption was adequately rebutted at trial." On the record, the district court addressed the alternate juror's participation in the jury's discussion and questioned each juror and confirmed the extent of the alternate juror's participation. The jurors denied that the alternate juror's presence and participation had any effect on how they voted.

DECREE

For the foregoing reasons, we remand this matter for a new trial.

REVERSED AND REMANDED