

STATE OF LOUISIANA

*

NO. 2017-KA-0255

VERSUS

*

COURT OF APPEAL

OLIVER LEWIS

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 522-142, SECTION "A"
Honorable Laurie A. White, Judge

* * * * *

Judge Terri F. Love

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(Court composed of Judge Terri F. Love, Judge Joy Cossich Lobrano, Judge
Dennis R. Bagneris, Pro Tempore)

LOBRANO, J., CONCURS IN THE RESULT

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REMANDED

FEBRUARY 7, 2018

Oliver Lewis was convicted of aggravated rape and unauthorized entry of an inhabited dwelling. On appeal, Mr. Lewis contends he cannot receive adequate appellate review without being able to review all of the jury challenges. After reviewing, we find that numerous challenges for cause were exercised off-the-record. To ensure Mr. Lewis meaningful appellate review, we remand the matter to determine whether any documentation created contemporaneous to the trial court's rulings excusing the jurors exists.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The evidence underlying Mr. Lewis' convictions is not relevant to the present appeal.

Following his indictment on charges of aggravated rape and aggravated burglary, Mr. Lewis entered not guilty pleas, but a jury found him guilty of aggravated rape and returned the responsive verdict of unauthorized entry of an inhabited dwelling on the burglary count. The trial court denied Mr. Lewis' ensuing motion for new trial and imposed consecutive terms of life imprisonment at hard labor without benefit of parole, probation or suspension of sentence and six years imprisonment at hard labor. The trial court granted Mr. Lewis' motion for an out-of-time appeal.

ERRORS PATENT

Mr. Lewis filed a pro se, handwritten, motion for new trial, upon which the trial court failed to rule before imposing his sentence. However, before the trial court sentenced Mr. Lewis, it inquired whether there existed "any other motions outstanding" and Mr. Lewis' counsel responded in the negative. Mr. Lewis then interrupted and verbally protested his innocence, while making no reference to the

pending motion. Under these circumstances, the technical failure to comply with La. C.Cr.P. art. 853 does not warrant intervention.

There are no other errors patent.

VOIR DIRE

Mr. Lewis maintains that the absence of a transcript of portions of the *voir dire*, which occurred off-the-record, including multiple rulings excusing jurors, denied him meaningful appellate review and requires that this Court reverse his convictions and remand the case for a new trial.

The instant case presents an issue similar to that encountered in *State v. Handy*, 16-1071 (La. App. 4 Cir. 9/13/17), 226 So. 3d 1182, in which this Court reversed the defendant's convictions and sentences based on the incomplete record of *voir dire*.¹ In *Handy*, this Court considered a case in which the court reporter

¹ This Court set out the substantive law relating to incomplete records as follows in *Handy*:

La. Const. art. I § 19 guarantees defendants a right of appeal “based upon a complete record of all evidence upon which the judgment is based.” Additionally, La. C.Cr.P. art. 843 provides in pertinent part:

In 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.

Nonetheless, an incomplete record may be adequate for full appellate review. *State v. Thomas*, 92-1428, 93-2083 (La. App. 4 Cir. 5/26/94), 637 So. 2d 1272, 1274.

The Louisiana Supreme Court enunciated a three-part standard for reviewing incomplete record claims. *State v. Frank*, 99-0553, pp. 20-21 (La. 1/17/01), 803 So. 2d 1, 19-20. First, “[m]aterial omissions from the transcript of the proceedings at trial bearing on the merits of an appeal will require reversal.” *id.*, 99-0553, p. 20-21, 803 So.2d at 19-20 (citing *State v. Robinson*, 387 So.2d 1143 (La. 1980) (finding omissions material as substantial portions of the record were missing, including the testimony of four state witnesses, *voir dire* examination of prospective jurors, and the prosecutor's opening statements)); *See also State v. Diggs*, 93-0324 (La. App. 4 Cir. 6/29/95), 657 So.2d 1104 (finding unavailability of witness testimony required a new trial because it could not be determined whether the missing testimony was substantial or inconsequential).

Second, “inconsequential omissions or slight inaccuracies do not require

could not provide a transcript of an in-chambers proceeding during which peremptory and cause challenges had been exercised because her computer had malfunctioned. The defendant's trial counsel certified that the defense had exhausted its peremptory challenges. The record reflected that the defense challenged potential juror 20 for cause and the trial court denied the cause challenge; in addition, the State challenged potential juror 21 for cause, which the trial court granted over defense objection.

This Court reversed the conviction and remanded the case for a new trial, observing:

that the discussions of the jury challenges are not available and the record does not contain any documentation, i.e., minute entries, jury strike sheet—from which it can be determined whether there was a basis for the challenge for cause that the defense brought and was improperly denied by the trial court, thereby causing the defense to exercise a peremptory challenge against a juror. The record does not contain enough information for defendant to effectively challenge the denial of his challenge for cause. *Id.*, 16-1071, p. 9, 226 So. 3d at 1190.

Following this Court's disposition in *Handy*, the State sought rehearing to supplement the record with the trial court's jury panel sheet, which was submitted with a *per curiam* after this Court's decision, and a full transcript of the *voir dire* conducted on May 19, 2011. This Court denied rehearing.

reversal." *Frank*, 99-0553, p. 21, 803 So.2d at 20 (citing *State v. Goodbier*, 367 So.2d 356, 357 (La. 1979) (declining to reverse when record did not include *voir dire* examination transcript and the court reporter's affidavit indicated that no objections were made by the attorneys during *voir dire*); *See also State v. Lyons*, 597 So.2d 593 (La. App. 4th Cir. 1992).

Third, "a defendant is not entitled to relief because of an incomplete record absent a showing of prejudice based on the missing portions of the transcripts. *Frank*, 99-0553, p. 21, 803 So.2d at 20 (citing *State v. Castleberry*, 98-1388, p. 29 (La. 4/13/99), 758 So.2d 749, 773). "Prejudice is presumed when a defendant's challenge for cause is erroneously denied by a trial court and that defendant exhausts his peremptory challenges." *State v. Thomas*, 14-0510, p. 17 (La. App. 4 Cir. 5/20/15), 171 So.3d 959, 971 (citing *State v. Odenbaugh*, 10-0268, p. 24 (La. 12/6/11), 82 So.3d 215, 237).

However, the Supreme Court granted writs in *Handy* with the following order:

This matter is remanded to the court of appeal for supplementation of the record with the full transcript of the voir dire proceedings, the per curiam of the district court and the juror strike sheets, and for briefing, argument and opinion on defendant's assignments of error regarding voir dire in light of the newly supplemented material.

State v. Handy, 17-1823, p. 1 (La. 12/15/17), ___ So. 3d ___, ___, 2017 WL 6422411, *1.

Similar to *Handy*, the parties here do not dispute that Mr. Lewis exhausted his peremptory challenges² and the present record does not include a basis for the trial court's rulings excusing eleven potential jurors.³ Although the State argues that the defense was required to lodge an on-the-record objection to any adverse rulings excusing a juror to preserve the issue for review, the off-the-record nature of the *voir dire* examination renders it impossible to ascertain whether the defense objected. The trial court questioned the jurors before excusing them. Thus, presumably they were not removed pursuant to a joint motion.

Given these facts, the Supreme Court's recent holding in *Handy*, and to afford Mr. Lewis meaningful appellate review, we remand the matter to the trial court to determine whether any documentation created contemporaneous to the trial court's rulings excusing the jurors exists. Mr. Lewis' "assignments of error are preserved for future appellate review." *State v. Mahogany*, 15-0818, p. 8 (La. App. 4 Cir. 3/16/16), 191 So. 3d 615, 620. *See also State v. Burse*, 16-0826 (La.

² "Prejudice is presumed when a defendant's challenge for cause is erroneously denied by a trial court and that defendant exhausts his peremptory challenges." *State v. Thomas*, 14-0510, p. 17 (La. App. 4 Cir. 5/20/15), 171 So. 3d 959, 971.

³ The court reporter certified "that all peremptory and cause challenges during voir dire, in Section 'A' for case number 522-142, STATE OF LOUISIANA vs. OLIVER LEWIS on June 2, 2015, were conducted in side bar or off the record with the Judge."

App. 4 Cir. 10/11/17), ___ So. 3d ___, 2017 WL 4534216; *State v. Hickerson*, 17-0093, p. 2 (La. App. 4 Cir. 9/25/17), 228 So. 3d 251, 252.

DECREE

Due to the lack of evidence in the record regarding eleven potential jurors who were dismissed for cause, Mr. Lewis' matter is remanded to the trial court for an evidentiary hearing to determine whether any documentation exists including the trial court's rulings excusing the potential jurors.

REMANDED