05/01/2017 "See News Release 024 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 16-KH-0031

STATE EX REL. JOSEPH LEMOINE

v.

STATE OF LOUISIANA

ON SUPERVISORY WRITS TO THE TWENTY-SECOND JUDICIAL DISTRICT COURT, PARISH OF WASHINGTON

PER CURIAM:

Denied. Relator fails to show he received ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As to the remaining claims, relator fails to satisfy his post-conviction burden of proof. La.C.Cr.P. art. 930.2. We attach hereto and make a part hereof the District Court's written reasons denying relator's application.

Relator has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, *see* 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the Legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Relator's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive

application applies, relator has exhausted his right to state collateral review. The District Court is ordered to record a minute entry consistent with this per curiam.

STATE EX REL. JOSEPH LEMOINE

VERSUS

N. BURL CAIN

FILED:_____

NO. 09-CR5-106083 "B"

22ND JUDICIAL DISTRICT COURT

PARISH OF WASHINGTON

STATE OF LOUISIANA

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DEPUTY CLERK

JUDGMENT ON POST-CONVICTION WITH INCORPORATED REASONS

On July 6, 2015, petitioner Joseph Lemoine filed a timely application for Post-Conviction Relief. After considering the application and the applicable law, the Court finds the application may be dismissed upon the pleadings pursuant to La. C.Cr.P. art. 928.

The record shows Lemoine was charged by grand jury indictment with aggravated rape, a violation of La. R.S. 14:42. Following a jury trial, Lemoine was found guilty as charged. After post-verdict motions were denied, Lemoine was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. Lemoine's conviction and sentence were affirmed on appeal in an unpublished opinion; writs were denied at the Louisiana Supreme Court. *State v. Lemoine*, 2013-0141 (La. App. 1 Cir. 11/1/13); 2013 WL 5915144 (not reported); *writ denied*, 2013-2740 (La. 4/25/14); 138 So.3d 644 (Mem.).

Lemoine files a timely application for post-conviction relief, raising six claims: (1) he was denied due process and a full, fair appellate review due to the court reporter's failure to transcribe the side bar conferences during voir dire; (2) there was insufficient evidence to support the conviction; (3) he was afforded ineffective assistance of counsel; (4) the state improperly introduced expert testimony; (5) he was denied due process due to the state's intentional misconduct during closing argument; and (6) the cumulative effect of the errors denied him a fair trial.

The court notes initially that there was no objection made by trial counsel with regard to the factual circumstances underlying these claims; in addition, none of these claims were raised by appellate counsel in the direct appeal of this matter. In his post-conviction application, Lemoine claims these issues were not previously raised because he had not yet had a chance to review the record. However, Lemoine's ***counsel*** had an opportunity to do so and failed to object during the trial or to include these issues on direct appeal. The court finds these claims are

procedurally defaulted. Nevertheless, and notwithstanding the provisions of La. C.Cr.P. art. 930.4(F), the court will briefly address the merits of the claims to foreclose any doubt regarding the merit of petitioner's claims.

Transcription of side-bar conferences

Lemoine contends the voir dire side bar conferences, during which the attorneys presented their arguments to the court, were not transcribed, denying him due process and a full, fair appellate review of the record. He points to two pages in the record where side bar conferences were held but were not transcribed. The record shows that at page 230 of the record, the first incident raised by Lemoine, there was an un-transcribed side bar discussion. Thereafter, the court asked counsel to approach for jury selection. A transcribed discussion then followed, wherein the judge indicated that counsel had already discussed two prospective jurors, Jessie Warren and Shirley Brumfield, and the court was dismissing them for cause. Thereafter, the court asked counsel for their juror challenge sheets. From the sheets, the court then noted when challenges were made and kept a running tally of the number of challenges for the defense and state. As was the normal custom for the court, when both the state and the defense challenged the same juror, the challenge was recorded for both the state and the defense. No objection was made by defense counsel as to the jurors excused for cause, as to any other jurors for which he requested a cause challenge but was denied, or as to the court's method of jury selection.

The second incident raised by Lemoine occurs at page 270 of the record. The record shows there was a transcribed side bar conference. The court begins by stating counsel had talked about excusing another prospective juror, Ms. Baker, for cause, presumably at the earlier un-transcribed side bar conference. The court indicated its agreement in striking this prospective juror. Thereafter, the state exercised some back strikes. The court then referred again to counsels' juror challenge sheets and continued the tally of peremptory challenges.

Lemoine argues that the failure to include the transcription of the cause challenge side bar conference should result in the vacation of his conviction and sentence and the granting of a new trial under the reasoning of *State v. Pinion*, 2006-2346 (La. 10/26/07); 968 So.2d 131. In *Pinion*, the Court stated it had "never articulated a per se rule either requiring the recording of bench conferences or exempting them from the scope of La. C.Cr.P. art. 843, which requires in felony cases the recording not only of the evidentiary portions of trial but also of the examination of

prospective jurors ... and objections, questions, statements, and arguments of counsel." *Id.*, 2006-2346, p. 7; 968 So.2d at 134.

Instead, the Court has conducted case-specific inquiries to determine whether the failure to record the conferences results in actual prejudice to the defendant's appeal. *Id.* "As a general rule, the failure of the record to reflect the argument of counsel on objections, even when made in open court, does not affect a defendant's appeal because it does not hinder adequate review of the trial court's ruling. *Id.* Consequently, "the failure to record bench conferences will ordinarily not affect the direct review process when the record suggests that the unrecorded bench conferences had no discernible impact on the proceedings and did not result in any specific prejudice to the defendant." *Id.*, 2006-2346, p. 7-8; 968 So.2d at 134-135; *citing State v. Deruise*, 1998-0541, p. 9-15 (La. 4/3/01); 802 So.2d 1224, 1233-1237 (failure to record bench conferences in which the prosecutor and defense counsel made their peremptory and cause challenges did not prejudice the appeal when the jury strike sheet was available for review and detailed the exercise of peremptory challenges by both sides and when the transcript of the voir dire revealed a substantial basis for denying a defense cause to the juror, even assuming that the challenge had been made but not preserved in the record; remaining unrecorded bench conferences involved evidentiary matters that were otherwise addressed in the appeal, or involved matters of no discernible impact for which the defendant failed to demonstrate prejudice).

In *Pinion*, the Court found the bench conferences were a material part of the proceedings for purposes of La. C.Cr.P. art. 843, and by operation of La. C.Cr.P. art. 795(B)(2). In that particular case, "the omission of the bench conferences, given the reasonable likelihood that counsel exhausted his peremptory challenges, the uncertainty with respect to how many cause challenges the defense made unsuccessfully, and the absence of other contemporaneous records accounting for the selection process, *e.g.*, adequate minutes or jury strike sheets, required reversal of the defendant's conviction and sentence." *Id.*, 2006-2346, p. 10; 968 So.2d at 136.

The circumstances of this case are not the same as those in *Pinion*. After reviewing the record for the purposes of ruling on this post-conviction application, the court ordered the transcript to be supplemented with transcriptions of the bench conferences, if such records were available. The record has been supplemented and a copy of the supplement will be mailed to the

petitioner along with the court's ruling. Thus, the court does not have to speculate about what occurred at the bench conferences, but may, instead, rule on the merits of the issue raised, aided by the actual transcription of the formerly un-transcribed bench conferences during voir dire.

In addition to the two instances raised by petitioner, the record has been supplemented by transcripts of other bench conferences which were not transcribed. The supplement to page 134 of the record contains the questioning of prospective juror Warren. The transcript shows defense counsel's agreement with the court's ruling that Mr. Warren did not meet the requirement of a juror. *See* Supp.Tr. p. 134A-134E. The supplement to page 137 of the record shows prospective juror Moorhouse asking the court some questions regarding his qualifications to serve. *See* Supp. Tr. p. 137A-137C. The supplement to page 161 of the record shows the questioning of a prospective juror whose close family member was raped. *See* Supp. Tr. p. 161A-161E.

The supplement to page 230, the first instance raised by petitioner, shows Lemoine waived his right to be present for the jury challenges at the bench conferences. At that time, the court indicated Mr. Warren was already excused for cause, based on the earlier bench conference where that prospective juror's qualifications were discussed. The state then raised a cause challenge to Ms. Brumfield, who had indicated during questioning that she would not be able to convict for any reason. After some discussion, the court granted this cause challenge. *See* Supp. Tr., p. 230A-230C. Thereafter, the defense raised cause challenges to three prospective jurors who each had a family member who had been raped. For each of these prospective jurors, the court denied the cause challenge on the basis that these people had clearly stated their deliberation in this case would not be affected by their family members' experiences. *See* Supp. Tr., p. 230C-230E. Thereafter, defense counsel raised a cause challenge to prospective juror Moorhouse. The court ruled that although the questions asked by Moorhouse had been peculiar, the prospective juror had otherwise indicated he could follow instructions and was not biased or prejudiced in any way that would affect the defendant. *See* Supp. Tr. p. 230E-230F.

The supplement to page 270, the second instance raised by petitioner, shows the state and defense jointly raised a cause challenge for a particular prospective juror. The defense indicated it had no further cause challenges. *See* Supp. Tr. p. 270A-270B.

Insofar as Lemoine could have argued on appeal that he was prejudiced by the court's denial of any of his counsel's cause challenges, the supplemental transcript shows that claim to

be meritless. The supplemental transcript shows defense counsel failed to object to the court's ruling. La. C.Cr.P. art. 800(A) states "A defendant may not assign as error a ruling refusing to sustain a challenge for cause made by him, unless an objection thereto is made at the time of the ruling. The nature of the objection and grounds therefor shall be stated at the time of objection." Counsel's failure to object to the denial of the cause challenge would have precluded this issue from being raised on appeal.

Even if reviewed under the merits, the law on this issue is clear:

> Louisiana Const. art. I, § 17(A) guarantees to a defendant the "right to full voir dire examination of prospective jurors and to challenge jurors peremptorily." ... This court has long recognized that when a defendant is forced to utilize a peremptory challenge to correct an error in denying a challenge for cause and thereafter exercises all available peremptory challenges on other prospective jurors, a substantial right of the defendant, guaranteed by the Louisiana constitution, is affected. *See State v. Monroe,* 366 So.2d 1345, 1347 (La.1978). In such instances, prejudice is presumed and automatic reversal of the conviction results. *See also Id.; State v. Campbell,* 06–0286, p. 70 (La.5/21/08), 983 So.2d 810, 856, *citing State v. Robertson,* 92–2660, p. 3 (La.1/14/94), 630 So.2d 1278, 1280, and *State v. Ross,* 623 So.2d 643, 644 (La.1993).

State v. Mickelson, 2012-2539, p. 9-10 (La. 9/3/14); 149 So.3d 178, 184-185. *Mickelson* reiterated that a criminal defendant need make only two showings to establish error warranting reversal of a conviction and sentence: "(1) the district court erred in refusing to sustain a challenge for cause; and (2) the defendant exhausted his peremptory challenges." *Id.*, 2012-2539, p. 11; 149 So.3d at 185-186. In this case, the record shows Lemoine exhausted all of his peremptory challenges. Accordingly, the sole issue that could have been presented on appeal with regard to the information contained in the formerly un-transcribed bench conferences was whether the district court erred in denying the defense's challenges for cause.

La. C.Cr.P. art. 797(2) provides that a defendant may challenge a prospective juror for cause on the ground that the juror is not impartial, whatever the cause of his partiality. The law affords a trial court broad discretion in ruing on challenges for cause and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *State v. Lucky*, 1996-1687, p. 5 (La. 4/13/99); 755 So.2d 845, 850. The voir dire record, now supplemented, shows there was no abuse of the trial court's vast discretion in denying the defense cause challenges.

Defense counsel challenged three prospective jurors for cause because each had a close family member who had been raped. The defense presumably was concerned that such a fact

might prejudice these prospective jurors against the defendant, who was charged with aggravated rape. Defense counsel challenged an additional prospective juror for cause because he had raised some odd questions. The Louisiana Supreme Court has stated that "[a] trial court's refusal to excuse a prospective juror for cause is not an abuse of discretion, even when the juror has voiced an opinion seemingly prejudicial to the defense, if the juror, on further inquiry or instruction, demonstrates a willingness and ability to decide the case impartially according to the law and evidence." *Lucky*, 1996-1687, p. 6; 755 So.2d at 850.

The voir dire record shows that each of the three prospective jurors whose family members had been raped informed the court that their personal family experiences would not impair their duty as impartial jurors. The additional prospective juror, other than the oddity of the questions raised in a bench conference, revealed nothing that might have prejudiced him against the defendant. The entirety of their voir dire responses fail to show any impairment that would have prevented them from being impartial jurors. Consequently, the record as supplemented affirmatively shows there was no abuse of the trial court's vast discretion in denying defense counsel's cause challenges for these four prospective jurors. If this issue had been raised on appeal, the record would have shown there was no merit to this claim. Thus, Lemoine was not denied due process and a full and fair appellate review of the record.

Sufficiency of the evidence

Lemoine asserts the evidence was insufficient to support his conviction. Specifically, the petitioner argues there were inconsistencies in the victim's story, there was evidence of "coaching" of the victim by her mother, the police failed to examine the petitioner's genital area in order to confirm whether the victim's description was accurate, and the police failed to corroborate a statement allegedly made by the petitioner in front of the victim's mother and grandmother. The record shows that each of these points was raised by defense counsel in his examination of witnesses and in closing argument to the jury. *See* Tr. p. 537-549. Consequently, the jury was aware of the specific areas in which the defense felt the prosecution fell short. The jury rejected the defense's argument in favor of the state's case.

Aggravated rape in this context was committed when the anal, oral, or vaginal sexual intercourse was deemed to be without lawful consent of the victim when the victim is under the age of thirteen years. La. R.S. 14:42(A)(4). The record shows that the testimony of the victim

was clear and unambiguous. The victim testified that when she was six years old, her uncle, the petitioner, licked her vagina and made her lick his penis. A victim's testimony alone is usually sufficient to support the verdict. *State v. Dorsey*, 2010-0216, p. 43 (La. 9/7/11); 74 So.3d 603, 634. There is no merit to petitioner's claim.

Ineffective assistance of counsel

Lemoine contends his first attorney failed to investigate the victim's claim, made in her CAC interview, that he had a bleeding sore on his penis at the time he forced the victim to engage in oral sex. Lemoine argues this failure to document his assertion that he did not have a bleeding sore on his penis constituted ineffective assistance of counsel.

Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a petitioner claiming ineffective assistance of counsel must show that (1) counsel's performance was deficient, falling below an "effective standard of reasonableness," and (2) the deficient performance prejudiced the petitioner. *Id.*, 466 U.S. at 687-688, 104 S.Ct. at 2065. In order to show prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068.

Lemoine's claim fails to establish either deficient performance on the part of his attorney or that the alleged deficient performance of counsel prejudiced his case. The victim in this matter did not report the aggravated rape until sometime after the event occurred. Consequently, whatever was the physical state of the petitioner's genitalia at the time he was arrested for the offense and was appointed counsel was irrelevant to the case. Even if Lemoine's counsel could have documented that he was free from the bleeding sore described by the victim at the time Lemoine was arrested for the offense, that information would not support his claim that he did not commit the charged offenses, as the condition observed by the victim could have healed by the time the crime was reported. This claim has no merit.

Improper introduction of expert witness testimony

Lemoine contends the state erred in introducing, and the court erred in allowing, evidence from an expert witness to the effect that the victim's symptoms were "consistent with" sexual abuse. Lemoine argues that such testimony is the functional equivalent of a direct opinion on abuse, the ultimate issue of fact which had to be found by the jury. Lemoine argues this

testimony was presented as substantive evidence and invaded the province of the jury.

A review of the record shows that Lemoine is factually inaccurate in his claim. The expert witness, Dr. Danica Head, testified that the lack of objective evidence, i.e. vaginal tearing or redness, was consistent with the victim's testimony about what types of sexual acts occurred. Tr. p. 439-440. Dr. Head explained that she would not expect to see objective signs of sexual abuse when the evidence was that the offender used his tongue or finger to touch the victim's vagina. Thus, Dr. Head was not testifying that there were objective findings *consistent with* abuse, but rather that she would not expect there to be objective evidence from the type of sexual acts described. In this way, the state presented evidence that the lack of objective physical findings did not mean the events described by the victim did not occur. However, the defense was able to, and did, argue that the lack of evidence also supported the defendant's claim that no sexual abuse occurred. This claim has no merit.[1]

Prosecutor's closing argument

Lemoine contends prosecutorial misconduct occurred during the rebuttal closing argument when the assistant district attorney described him as a "pervert," "child molester," and "rapist." A prosecutor has wide latitude in making closing arguments. *State v. Harris*, 2001-2730, p. 26 (La. 1/19/05); 892 So.2d 1238, 1256. Before a reviewing court will hold that an improper argument rises to the level of reversible error, that court "must be thoroughly convinced the remark influenced the jury and contributed to its verdict." *Id.* (internal citations omitted).

In this criminal case, the petitioner was charged with the aggravated rape of a young child, his niece. The court finds the assistant district attorney was acting within the wide latitude granted to prosecutors to argue that the evidence showed the petitioner, the victim's uncle, was guilty of the crime of aggravated rape. Someone who commits aggravated rape is a rapist. Someone who commits sexual abuse of a child is a child molester. Someone who commits sexual abuse of a small child who is a family member would be committing a perverted act. The court finds nothing in the state's characterization that was not based on the law and facts of the case. Even if this characterization of the evidence exceeded the latitude granted to prosecutors in closing arguments, the court is not convinced that the remarks improperly influenced the jury or

[1] The other expert witness who testified, Jo Beth Rickels, conducted the forensic interview with the victim. Her testimony was entirely fact-based and did not include the type of testimony challenged by the petitioner in this assignment of error.

contributed to its verdict in light of the evidence presented. This claim has no merit.

Cumulative error

Lemoine argues the cumulative error in this case requires reversal. This court has carefully examined the merits of each of the errors assigned in this post-conviction matter, even though the claims raised are procedurally defaulted. This court cannot say that the cumulative effect of assignments of error lacking in merit warrants reversal of a conviction or sentence. *State v. Strickland*, 94-0025, p. 51-52 (La. 11/1/96); 683 So.2d 218, 239. The petitioner was not entitled to a perfect trial, only a fair one. *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968) (citation omitted); *State v. Martin*, 550 So.2d 568 (La. 1989). The record reflects that Lemoine received a constitutionally fair trial.

None of the grounds raised by petitioner have merit.

Accordingly, the Court denies and dismisses petitioner Joseph Lemoine's Application for Post-Conviction Relief in its entirety.

Franklinton, Louisiana, this 21st day of September, 2015.

Hon. August J. Hand, Judge
22nd Judicial District Court, Division B