NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 0997

STATE OF LOUISIANA

VERSUS

JESSE BROWN, JR.

Judgment Rendered: February 13, 2009

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Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne, Louisiana
Case No. 464,852

The Honorable John R. Walker, Judge Presiding

* * * * * * * *

Joseph L. Waitz, Jr. District Attorney Ellen Daigle Doskey Assistant District Attorney Houma, Louisiana	Counsel for Appellee State of Louisiana
Frank Sloan Mandeville, Louisiana	Counsel for Defendant/Appellant Jesse Brown, Jr.
Jesse Brown, Jr. Angola, Louisiana	Defendant/Appellant In Proper Person

* * * * * * * *

BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

Guidry, J. dissents and assigns reasons.

GAIDRY, J.

The defendant, Jesse Brown, Jr., was charged by bill of information with attempted second degree murder, a violation of La. R.S. 14:30.1 and La. R.S. 14:27. He pled not guilty and, following a jury trial, he was found guilty of the responsive offense of attempted manslaughter, a violation of La. R.S. 14:31 and 14:27. The State filed a habitual offender bill of information, and, following a hearing on the matter, the defendant was adjudicated a fourth felony habitual offender and sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating five counseled assignments of error and one pro se assignment of error. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

Willette Morgan was in a relationship with the defendant for about a year. They lived together in Willette's house in Houma. They broke up, and Willette and her eleven-month old son, Cameron, moved into room 220 at Lake Houmas Inn Motel. The defendant occasionally visited her there.

Willette testified at trial. According to her testimony, on March 4, 2006, the defendant entered Willette's room. Willette wanted nothing to do with him, and told him to leave. The defendant left her room. Moments later, Willette, with Cameron in her arms, left her room, turned the corner and encountered the defendant. He ordered her back into her room. She refused. The defendant told her to put Cameron down. When she put Cameron on the ground, the defendant punched her and began stabbing her. She was stabbed in several parts of her body, including her shoulder, back, chin, head, and near her eye. After struggling, Willette managed to escape

the attack and run to a neighbor's room. She called the police and, when they arrived, she told them the defendant attacked her.

Willette was taken to Terrebonne General Medical Center for treatment of her injuries. Subsequently, she was taken to Chabert Medical Center, where she underwent surgery for the injury near her eye. She received stitches and staples for the various cuts on her body.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in refusing to consider his wish to terminate his appointed counsel. Specifically, the defendant contends the trial court should have determined if he intended to represent himself at trial.

On the first day of trial, prior to jury selection, the defendant informed the trial court that he terminated his attorney. The trial court pointed out to the defendant that he was being represented by a court-appointed attorney and, as such, he did not have a choice as to who his court-appointed counsel would be. The trial court then informed the defendant it would be better if he was dressed in civilian clothes for trial. He asked the defendant if he was going to come to trial dressed out sitting next to his lawyer. The defendant responded in the negative, and further added that he refused to go to trial. Upon the trial court explaining to the defendant that it would not be in his best interest to refuse to go to trial, the following colloquy between the defendant and the trial court took place:

> Mr. Brown: My attorney understand [sic] I'm not even trying to go to trial.
> The Court: Well, I understand that, but you don't have that choice.
> Mr. Brown: That's it. Well, y'all go without me.
> The Court: All right. So you do not want to come to trial?
> Mr. Brown: I am not going to trial. I ain't trying to go to trial.

The Court: All right. Then this is what we're going to do. Okay, just listen, Jesse. You're going to go back up to jail, --
Mr. Brown: And I'm going to sleep.
The Court: -- you're going to be -- well, but if you change your mind, let us know.
Mr. Brown: I won't.
The Court: We're going to start picking the jury, --
Mr. Brown: Y'all can do what y'all got to do. I ain't trying to go to trial.
The Court: We're going to start picking the jury, and we're going to check with you to see if you want to participate in these proceedings.
Mr. Brown: I won't.
The Court: And if you change your mind, --
Mr. Brown: I won't.
The Court: -- you need to let the deputies know, and we'll have them checking with you. Okay?
Mr. Brown: I promise you I won't.
The Court: Well, but that's not -- we're going to ask you anyway, Jesse.
Mr. Brown: All right. No, I won't be ready. So you can just save it.

Initially, we note the trial court was correct in informing the defendant that he did not have the right to choose his court-appointed attorney. As a general proposition a person accused in a criminal trial has the right to counsel of his choice. If a defendant is indigent he has the right to court-appointed counsel. See La. Code Crim. P. arts. 511 & 513. An indigent defendant does not have the right to have a particular attorney appointed to represent him. An indigent's right to choose his counsel only extends so far as to allow the accused to retain the attorney of his choice, if he can manage to do so, but that right is not absolute and cannot be manipulated so as to obstruct orderly procedure in courts and cannot be used to thwart the administration of justice. *State v. Harper*, 381 So.2d 468, 470-71 (La. 1980). The trial court cannot be called upon to appoint other counsel than the one originally appointed merely to please the desires of the indigent accused, in the absence of an adequate showing that the court-appointed attorney is inept or incompetent to represent the accused. *State v. O'Neal*,

501 So.2d 920, 928 (La. App. 2d Cir.), writ denied, 505 So.2d 1139 (La. 1987).

There has been no showing that the defendant's court-appointed attorney was inept or incompetent to represent him. In fact, just prior to jury selection, the trial court commended defense counsel on the job he had done thus far:

> In connection with this matter, first of all, the Court would like to compliment defense counsel on the work he has done at this point. Mr. Brown has not been cooperative from the outset. This is not the first time Mr. Brown has said he's not going to trial and he does not want to be with us.

An accused has the right to choose between the right to counsel, guaranteed in the state and federal constitutions, and the right to self-representation. However, the choice to represent oneself must be clear and unequivocal. Requests which vacillate between self-representation and representation by counsel are equivocal. Whether a defendant has knowingly, intelligently, and unequivocally asserted the right to self-representation must be determined on a case-by-case basis, considering the facts and circumstances of each. *State v. Leger*, 2005-0011, pp. 43, 53 (La. 7/10/06), 936 So.2d 108, 142, 147-48, cert. denied, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007). See *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

In the instant matter, the defendant, at no time, requested to represent himself. As illustrated by the colloquy above, the defendant made it clear he was not going to participate in any way at his own trial. As such, the defendant's assertion in his brief that the trial court should have determined whether defense counsel's ostensible firing meant the defendant intended to represent himself is not supported by the record. Even had the defendant's firing of his attorney been viewed as suggestive of his desire to represent

himself, the record clearly establishes the defendant at no time unequivocally asserted the right to represent himself. See *Leger*, 2005-0011 at p. 53, 936 So.2d at 147-48. Moreover, we find that the defendant's firing of his attorney on the day of trial, his refusal to participate in his own trial, and his continued recalcitrance toward the trial court, if not the entire judicial process, were more attempts to manipulate the system through dilatory tactics rather than any genuine desire to waive his right to counsel. See *State v. Bridgewater*, 2000-1529, p. 19 (La. 1/15/02), 823 So.2d 877, 895, cert. denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003); *Leger*, 2005-0011 at p. 57, 936 So.2d at 150. See also *State v. Hegwood*, 345 So.2d 1179, 1181-82 (La. 1977).

The defendant refused to be present at his own trial. While he did not want the court-appointed defense counsel representing him, he clearly, through his words and actions, did not wish to represent himself. Accordingly, the defendant was not deprived of his right to self-representation. This assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 2 AND 3

We address these interrelated assignments of error together. In his second assignment of error, the defendant argues the trial court abused its discretion in failing to determine whether he was competent to stand trial. Specifically, the defendant contends the trial court should have considered that his "oppositional attitude" could have been the product of a psychiatric problem and, as such, should have, on its own motion, ordered a competency evaluation of him. In his third assignment of error, the defendant argues the trial court abused its discretion in having the defendant bound and gagged for identification purposes. We address these issues together because it was the defendant's defiant attitude toward the trial court which led to the

decision by the trial court to have the defendant bound and gagged. Much of the dialogue between the trial court and the defendant is relevant to both issues.

In Louisiana, "[m]ental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." La. Code Crim. P. art. 641. Our law also imposes a legal presumption that a defendant is sane and competent to proceed. La. R.S. 15:432. Accordingly, the defendant has the burden of proving by a preponderance of the evidence his incapacity to stand trial. A reviewing court owes the trial court's determinations as to the defendant's competency great weight, and the trial court's ruling thereon will not be disturbed on appeal absent a clear abuse of discretion. Specifically, the appointment of a sanity commission is not a perfunctory matter, a ministerial duty of the trial court, or a matter of right. It is not guaranteed to every defendant in every case, but is one of those matters committed to the sound discretion of the court. The Louisiana Code of Criminal Procedure provides that a court shall order a mental examination of a defendant and accordingly appoint a sanity commission when it "has reasonable ground to doubt the defendant's mental capacity to proceed." La. Code Crim. P. art. 643. Reasonable ground in this context refers to information which, objectively considered, should reasonably raise a doubt about the defendant's competency and alert the court to the possibility that the defendant can neither understand the proceedings, appreciate the proceedings' significance, nor rationally aid his attorney in his defense. *State v. Carmouche*, 2001-0405, pp. 30-31 (La. 5/14/02), 872 So.2d 1020, 1041-42.

The trial court alone has the ultimate decision on the defendant's competence, and that decision is committed to the court's discretion. See La. Code Crim. P. art. 647. See also *Carmouche*, 2001-0405 at pp. 29-30, 872 So.2d at 1041-42. Thus, in order to determine whether the trial court in this case abused its discretion for failing to order a competency evaluation of the defendant on its own, we must determine whether the defendant's actions raised the possibility that the defendant could neither (1) understand the proceedings against him, (2) appreciate the significance of the proceedings, or (3) rationally aid his attorney in his defense. *State v. Campbell*, 2006-0286, pp. 59-60 (La. 5/21/08), 983 So.2d 810, 849-50.

We note at the outset that neither the defendant nor defense counsel moved, orally or in writing, for a sanity commission. Further, the issue of the defendant's competence was never raised by defense counsel before or during trial. The defendant, for the first time on appeal, suggests the trial court should have considered the likelihood that his uncooperative behavior toward the tribunal was "the product of irrational mental processes that should have been evaluated by competent mental health professionals."

The behavior that the defendant claims was suggestive of a "mental defect" occurred on the second day of trial after several witnesses had testified. As the identification of the defendant was central to the State's proving its case, the trial court required the defendant's presence in the courtroom. Since the defendant refused to be present on the first day of trial, the trial court inquired if the defendant had changed his mind regarding his presence at trial. Following are the relevant portions of the colloquy between the trial court and the defendant:

> The Court: Okay. Just show that the jury is not present at this time; that the jury is not present at this time; . . . Mr. Brown, yesterday before the jury selection and trial started, we asked

you some questions and you told us that you did not want to be present for your trial. Is that correct?
Mr. Brown: No.
The Court: No?
Mr. Brown: I told you I refused to go to trial.
The Court: All right. Well, okay, you refuse to go to trial.
Mr. Brown: Yeah.

* * * * *

The Court: I understand. So you don't want to be in this courtroom --
Mr. Brown: That's what I said, and that's what I meant.
The Court: So we're clear, you do not want to be in this courtroom during this trial?
Mr. Brown: It's clear I don't want to go to trial.
The Court: All right. But that's not -- but we're having a trial. --
Mr. Brown: Y'all go ahead and have a trial, but have it without me.
The Court: And you don't want to be present, correct?
Mr. Brown: I'm not going to be present. I refuse to go to trial.

* * * * *

The Court: Then what's correct, Jesse?
Mr. Brown: What's correct? I told you -- like I told you yesterday, I refuse to go to trial. I refuse to be railroaded. Forced to go to trial, you know what I'm saying? For the State to get a conviction and try to throw me away.

* * * * *

The Court: Okay. So you say you don't want to go to trial?
Mr. Brown: I don't want to go to trial.

* * * * *

Mr. Brown: I just said I'm not attending trial. I'm not going to trial. I'm not trying to go to trial.
The Court: All right. So you say you just don't want to attend trial.
Mr. Brown: I'm saying I refuse to just to cooperate and be railroaded. That's what I mean.
The Court: Okay. All right. Now, you're in the red prison outfit. Yesterday I made a request that when you come downstairs for these proceedings that you put your street clothes on. And I understand you have refused to put a different shirt or different clothes on.
Mr. Brown: Well, with all due respect, Your Honor, what's the purpose of putting that on if I'm not going to go to trial? I'm not going to trial.
The Court: Well, because what is happening, we're having a trial. I realize you don't want to participate in the process . . . however, there are certain parts of these proceedings that require you to be present at least for . . . identification purposes.
Mr. Brown: (Witness shaking head negatively).
The Court: I prefer you not to be dressed in that red jail outfit. Now, whether you want to or not, you are going to be required to at least for a minimum period of time be here in the presence of a few witnesses and the jury so they can see your face for

identification purposes. All right. And what I'm asking you to do is go change your clothes and put a different shirt on.
Mr. Brown: I ain't going to do that either.
The Court: All right. So you refuse to do that.
Mr. Brown: I refuse everything.
The Court: So you understand, that the jury is going to see you in that red outfit.
Mr. Brown: Jury going to see a major disruption is what they going to see.
The Court: Well, and you understand that --
Mr. Brown: Do whatever.
The Court: -- if you do that, that [sic] I'm going to --
Mr. Brown: Do what you got to do.
The Court: -- hold you in contempt of court. You understand that?
Mr. Brown: Everyday you bring me here to my trial forcing me to go to trial there's going to be a major disruption. Because that's what I'm going to do. I refuse to let y'all railroad me.
The Court: And you understand you've got the shock belt. So if they hit you with the shock belt, --
Mr. Brown: Change the batteries on this mother f---er all day long, I don't care.
The Court: All right. And you understand I don't want to do it this way. --
Mr. Brown: Do it how you want to do with them.
The Court: I understand --
Mr. Brown: You think I'm going to sit here and let y'all railroad me? Y'all done killed two people -- there's two people done got killed in Houma. Y'all gave one fifteen years and one thirteen. I ain't killed no f---ing body. , Why didn't you offer me no plea bargain?
The Court: That's not the issue.
Mr. Brown: I know. --
The Court: These are different cases.
Mr. Brown: I know. Y'all want to railroad me in a trial to force a f---ing felony conviction to try to give me twenty to life. --
The Court: All right.
Mr. Brown: -- I know what the f--- y'all are trying to do.
The Court: Okay.
Mr. Brown: F--- that.
The Court: All right.
Mr. Brown: That's why I'm carrying on like this, because I refuse to let y'all force a conviction on me to try to throw me away. I got kids out there; I got a 16 year old and a 14 year old daughter I'm trying to get back. I ain't asking you to cut me scot-free, but, god damn, don't throw me away.

* * * * *

The Court: Jesse, I --
Mr. Brown: -- Y'all trying to throw me away with the sentencing guidelines.

* * * * *

The Court: If I order that you be present for identification, --

Mr. Brown: I'm not going to be here.
The Court: -- that you're not -- are you going to be disruptive?
Mr. Brown: I'm going to do some major disruption.

Based on the foregoing exchange, we find the trial court did not abuse its discretion in not ordering on its own a competency evaluation of the defendant. The defendant clearly understood the proceedings against him and appreciated the significance of the proceedings. His concerns revolved around what he viewed as efforts by the attorneys and the trial court to manipulate, or "railroad," him. We find noteworthy the defendant's comment to the trial court where, with reflective, lucid self-awareness, he explained his motivation for "carrying on like this." The defendant understood the charge against him and the consequences of that charge. He felt he should have been given a plea bargain. He also knew a felony conviction would expose him to a sentence of twenty years to life, as a fourth felony habitual offender. His decision not to aid his attorney by refusing to attend his own trial was indicative more of frustration with not getting what he felt he deserved, rather than of mental incapacity. The record before us amply demonstrates the defendant was competent to stand trial. See *Campbell*, 2006-0286 at p. 62, 983 So.2d at 851.

We also find the trial court did not abuse its discretion in instructing that the defendant be bound and gagged for identification purposes in the courtroom. The theory put forth by the defense was the defendant did not attack Willette, but that Willette's injuries may have been self-inflicted or caused by someone else. Part of the State's case in proving the defendant's identity was to play a videotape which purportedly captured part of the attack, and to have the victim and an eyewitness identify the defendant in open court. Accordingly, the defendant's presence was necessary in the courtroom. As noted by the trial court, "This is part of the State's case that

is an issue," and "the State is entitled to present their evidence." See *Schmerber v. State of California*, 384 U.S. 757, 763-764. 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908 (1966).

The trial court continually expressed to the defendant the importance of being present at his trial. However, the defendant made clear, in no uncertain terms, that he would not attend his own trial, including only briefly for identification purposes. As illustrated by the exchange above, the defendant repeatedly insisted he would be disruptive if he were brought into the courtroom. On the first day of trial, prior to voir dire, the defendant was equally adamant about refusing to attend his trial. As noted by the trial court:

> My only concern is that if he decides to be disruptive, we need -- and it's been indicated to me from the jail personnel that he intends to be disruptive; he does not intend to facilitate this trial. What has been -- the information that's been conveyed to me is that he is a tremendous security risk to all people and the jury.

Following selection of the jury, the trial court stated, "Court is being informed that the defendant has indicated that he will fight the deputies to be brought back."

Given the defendant's defiant, aggressive attitude toward the trial court and his threats to be disruptive and to fight the deputies if forced to be at his trial, the trial court was left with no alternative but to instruct that the defendant be bound and gagged during his brief presence in the courtroom. In *Illinois v. Allen*, 397 U.S. 337, 343-44, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970), the United States Supreme Court stated:

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants

> must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

After the defendant was bound and gagged and brought into the courtroom, the jury was brought back in. The trial court instructed the jury not to infer anything from the condition of the defendant and that it was not evidence of guilt. There has been no showing that use of restraints prejudicially affected the defendant. Further, nothing in the record suggests the jurors were influenced by seeing the defendant in restraints. See *State v. Smith*, 504 So.2d 1070, 1077-78 (La. App. 1st Cir. 1987). As noted by the trial court at the posttrial motions hearing:

> [T]he jury . . . asked the Court to give them a jury instruction on the law. The Court reread the law as far as attempted second-degree murder and the responsive verdicts. The jury retired back again to deliberate and ultimately returned with a responsive verdict, which in my opinion means that the jurors listened very carefully to the law. They deliberated the issues and facts in this particular case. They were very conscientious about their duties and what they needed to do. And the fact that they returned with a responsive verdict means that they listened to the law and the evidence and the testimony in this case.

The use of restraining devices, including manacles, is within the sound discretion of the trial court. In the absence of a clear showing of abuse of discretion on the part of the trial court, a conviction will not be disturbed on appeal because of the restraint imposed upon the defendant. *State v. Burnette*, 337 So.2d 1096, 1099 (La. 1976). In this case, the defendant's uncooperative, contentious conduct toward the trial court and others reflected a flagrant disregard for elementary standards of decorum. We find the trial court acted well within the range of discretion vested in it. See *Burnette*, 337 So.2d at 1100.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 4

In his fourth assignment of error, the defendant argues the trial court erred in denying his cause challenge of prospective juror Julie Derouen. Specifically, the defendant contends that Ms. Derouen's experiences as a battered spouse precluded her from being fair and impartial.

Defense counsel challenged Ms. Derouen for cause, but the trial court denied the challenge finding that she indicated she could be fair and impartial in this matter. The defendant objected to the trial court's ruling. Ms. Derouen was peremptorily struck and, therefore, never served on the jury.

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination and to the exercise of peremptory challenges. La. Const. art. I, § 17(A). The purpose of voir dire examination is to determine prospective jurors' qualifications by testing their competency and impartiality and discovering bases for the intelligent exercise of cause and peremptory challenges. *State v. Burton*, 464 So.2d 421, 425 (La. App. 1st Cir.), writ denied, 468 So.2d 570 (La. 1985). A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to law may be reasonably implied. A trial court is accorded great discretion in determining whether to seat or reject a juror for cause, and such rulings will not be disturbed unless a review of the voir dire as a whole indicates an abuse of that discretion. *State v. Martin*, 558 So.2d 654, 658 (La. App. 1st Cir.), writ denied, 564 So.2d 318 (La. 1990).

A defendant must object at the time of the ruling on the refusal to sustain a challenge for cause of a prospective juror. La. Code Crim. P. art. 800(A). Prejudice is presumed when a challenge for cause is erroneously denied by a trial court and the defendant has exhausted his peremptory challenges. To prove there has been reversible error warranting reversal of the conviction, defendant need only show (1) the erroneous denial of a challenge for cause; and (2) the use of all his peremptory challenges. *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So.2d 1278, 1280-81. It is undisputed that defense counsel exhausted all of his peremptory challenges before the selection of the twelfth juror. Therefore, we need only determine the issue of whether the trial court erred in denying the defendant's cause challenge of Ms. Derouen.

Louisiana Code of Criminal Procedure article 797, states in pertinent part:

> The state or the defendant may challenge a juror for cause on the ground that:
>
> * * * * *
>
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence; . . .

During voir dire, the prosecutor asked the panel, which included Ms. Derouen, if any of them or family members had been arrested for assault or battery. Ms. Derouen responded that she was a battered wife about ten years ago, but no charges were filed against her husband because he knew a lot of the police. Instead she just left the parish. The prosecutor subsequently asked the same panel if each of them could return a verdict of guilty if the State had proven beyond a reasonable doubt that the defendant had

committed the crime of attempted second degree murder against Willette Morgan. According to the record, "Everyone responded affirmatively."

Later during voir dire, defense counsel questioned Ms. Derouen about being battered. She explained that her second husband had battered her ten years ago. When asked if these experiences still came to mind, she responded in the affirmative. When asked if it ever escalated into something violent enough to where the police were called, she responded in the affirmative. She pressed charges twice, but dropped them. Her husband did not have a restraining order against him. The following exchange then took place:

> Mr. Graffagnino [defense counsel]: Your experience with reference to that, is it -- do you believe you could put it aside? If there was evidence in this case that was introduced with reference to some sort of domestic encounter, would you be able to put aside your experience and listen to the evidence here without putting in your own situation?
>
> Ms. Derouen: That would be hard to say because I've been put in a situation like that, where I had guns pulled on me; so it's a touchy situation.
>
> Mr. Graffagnino: Now, in this situation there is -- there will be no evidence about a gun. What we expect is that there may be evidence about a knife.
>
> Ms. Derouen: Sounded uh-huh (indicating yes).
>
> Mr. Graffagnino: All right? So do you believe that that still wouldn't matter to you? Would that make any difference?
>
> Ms. Derouen: I don't think it would make any difference.

During the bench conference, defense counsel challenged Ms. Derouen for cause because it appeared she still had an issue with being a battered wife. Since the case might have some evidence about domestic violence, defense counsel did not see how she could be fair and impartial given her similar experience with domestic violence. The State objected and offered, "Though she did testify that she was the victim of her husband in a

battery situation, she said that she still could be fair and impartial, and that she could listen to the evidence and make a decision based upon the evidence." The trial court denied the challenge for cause and stated, "She indicated she could be fair and impartial in this matter." Our review of the voir dire transcript reveals the State and the trial court were mistaken about Ms. Derouen's indicating she could be fair and impartial. The issue of being fair and impartial was never raised during the questioning of Ms. Derouen, so the record is lacking in that regard.

The line-drawing in many cases is difficult. Accordingly, the trial judge must determine the challenge on the basis of the entire voir dire, and on the judge's personal observations of the potential jurors during the questioning. Moreover, the reviewing court should accord great deference to the trial judge's determination and should not attempt to reconstruct the voir dire by a microscopic dissection of the transcript in search of magic words or phrases that automatically signify the jurors' qualification or disqualification. *State v. Miller*, 99-0192, p. 14 (La. 9/6/00), 776 So.2d 396, 405-06, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).

While Ms. Derouen was not clear whether she could put aside her experience as a battered wife while deliberating as a juror, we do not find that her overall responses suggested she would be unable to render an impartial verdict according to the law and the evidence. Although Ms. Derouen did not offer any responses about being fair and impartial, she was never *asked* about being fair and impartial. Nevertheless, the trial court was in the best position to determine whether she would discharge her duties as a juror in that regard. Upon reviewing the voir dire in its entirety, we cannot

say that the trial court abused its discretion in denying defense counsel's cause challenge of Ms. Derouen.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 5

In his fifth assignment of error, the defendant argues he was denied his constitutional right to present a defense. Specifically, the defendant contends the trial court abused its discretion in preventing defense counsel from effectively cross-examining the victim.

Following selection of the jury and prior to opening statements, defense counsel informed the trial court that he spoke with Willette and someone purporting to be the defendant's sister. According to defense counsel, the defendant's sister told him that Willette told her that she wanted to have the charge dismissed, and she did not want the defendant to go to jail. Defense counsel requested to be allowed to inform the jury in his opening statement, or through questioning Willette, that Willette wished to have the charge dismissed and did not want the defendant to go to jail. The trial court denied the request, finding that the prosecution of a case is at the discretion of the District Attorney, not the victim:

> First of all, any input that the victim wishes to give for sentencing purposes, at that time if there is a conviction will be allowed. But as far as the presence -- or in the presence of the jury, the district attorney's office, they prosecute these cases; and, by law, they determine the proper charge that would go forward. Whether the victim wants to pursue the matter or not, that is the position of the district attorney's office.

We agree with the trial court. That Willette may have had a change of heart regarding the defendant being incarcerated had no bearing on the defendant's guilt or her credibility as a witness. Moreover, despite the trial court's ruling precluding him from questioning Willette about her change of heart, defense counsel was, in no way, prevented from effectively cross-

examining Willette. To the contrary, his cross-examination was effective and thorough. We note, further, that the alleged statements made by Willette, which were spoken to defense counsel by the defendant's sister, would have been hearsay at trial. See *State v. Joseph*, 2002-1370, pp. 11-12 (La. App. 3d Cir. 4/17/03), 854 So.2d 914, 922. The trial court did not abuse its discretion in denying this last-minute request by defense counsel.

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR

In his pro se assignment of error, the defendant argues he was denied effective assistance of counsel. Specifically, the defendant contends that defense counsel failed to investigate and to interview witnesses and the victim.

In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> 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. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *State v. Morgan*, 472 So.2d 934, 937 (La. App. 1st Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *State v. Robinson*, 471 So.2d 1035, 1038-39 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

A claim of ineffective assistance of counsel is more properly raised by an application for postconviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. *State v. Carter*, 96-0337, p. 10 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438.

In the instant matter, the allegations of ineffective assistance of counsel cannot be sufficiently investigated from an inspection of the record alone. The defendant contends, "it will almost always be useful for defense counsel to speak, before trial, with readily-available victim(s) and witnesses whose non-cumulative testimony would directly corroborate the defense's theory of important disputes." However, decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond what is contained in the instant record, could these allegations be sufficiently investigated.[1] Accordingly, these allegations are not subject to appellate review. See *State v. Albert*, 96-1991, p. 11 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1363-64. See also *State v. Johnson*, 2006-1235, p. 15 (La. App. 1st Cir. 12/28/06), 951 So.2d 294, 304.

DECREE

The defendant's conviction, habitual offender adjudication, and sentence are affirmed.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

[1] The defendant would have to satisfy the requirements of La. Code Crim. P. art. 924, et seq., in order to receive such a hearing.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 0997

STATE OF LOUISIANA

VERSUS

JESSE BROWN JR.

GUIDRY, J., dissents and assigns reasons.

GUIDRY, J., dissenting.

I believe the trial court was mistaken in its belief that Ms. Derouen "indicated she could be fair and impartial in this matter." The trial court's overruling of the challenge for cause was an abuse of its discretion.

A refusal to disqualify a venireman on grounds that he is biased does not constitute reversible error or an abuse of discretion if, *after further examination or rehabilitation*, the juror demonstrates a willingness and ability to decide the case fairly according to the law and evidence. State v. Campbell, 06-0286, p. 73 (La. 5/21/08), 983 So. 2d 810, 858 (emphasis added). In this case, there was no further examination or rehabilitation of Ms. Derouen after the following exchange:

> Mr. Graffagnino [defense counsel]: Your experience with reference to that, is it -- do you believe you could put it aside? If there was evidence in this case that was introduced with reference to some sort of domestic encounter, would you be able to put aside your experience and listen to the evidence here without putting in your own situation?
>
> Ms. Derouen: That would be hard to say because I've been put in a situation like that, where I had guns pulled on me; so it's a touchy situation.
>
> Mr. Graffagnino: Now, in this situation there is -- there will be no evidence about a gun. What we expect is that there may be evidence about a knife.

Ms. Derouen: Sounded uh-huh (indicating yes).

Mr. Graffagnino: All right? So do you believe that that still wouldn't matter to you? Would that make any difference?

Ms. Derouen: I don't think it would make any difference.

Nor do I find the general questioning of the jury by the trial court sufficient to rehabilitate Ms. Derouen regarding a bias that she disclosed during the more specific and penetrating questioning by defense counsel (related above), because the questioning by the trial court occurred *prior* to the individual questioning of jurors by counsel. Prejudice is presumed when a challenge for cause is denied erroneously by a trial court and the defendant exhausts his peremptory challenges. Campbell, 06-0286 at 70, 983 So. 2d at 856. A trial court's erroneous ruling that deprives a defendant of a peremptory challenge substantially violates that defendant's rights. State v. Ross, 623 So. 2d 643 (La. 1993). See also State v. Jacobs, 99-1659 (La. 6/29/01), 789 So. 2d 1280; State v. Gustave, 04-2103 (La. App. 1st Cir. 4/5/06), 934 So. 2d 784.

In this case, I believe such prejudicial error was shown, and as such, the error requires this court to reverse the jury's verdict and remand this matter for a new trial. In absence of such a ruling in this appeal, I respectfully dissent.