NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 2189

STATE OF LOUISIANA

VERSUS

JOSEPH PINION

Judgment Rendered: May 8, 2009

Appealed from the
Twenty-First Judicial District Court
in and for the Parish of Tangipahoa, State of Louisiana
Trial Court Number 99597

Honorable Bruce C. Bennett, Judge Presiding

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Scott M. Perrilloux **Patricia Parker** **Amite, LA**	**Attorneys for Appellee,** **State of Louisiana**
Frank Sloan **Mandeville, LA**	**Attorney for Defendant/Appellant,** **Joseph Pinion**

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

WHIPPLE, J.

The defendant, Joseph Pinion, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. He pled not guilty and not guilty by reason of insanity. Following a jury trial in March of 2005, he was found guilty as charged. He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant appealed, arguing, *inter alia*, that the transcript of the jury selection was too incomplete for this court to make a meaningful review because portions of the transcript were inaudible, and the bench conferences were not transcribed. This court found no merit in the defendant's argument and affirmed the conviction and sentence. See State v. Pinion, 2005-1954 (La. App. 1st Cir. 6/9/06), 931 So. 2d 565 (unpublished opinion). The Louisiana Supreme Court found that the bench conferences were a material part of the proceedings and that their omission from the case, given the reasonable likelihood that counsel exhausted his peremptory challenges and the uncertainty of how many cause challenges the defense made unsuccessfully, required reversal of the defendant's conviction and sentence. See State v. Pinion, 2006-2346 (La. 10/26/07), 968 So. 2d 131, 136 (per curiam).

The defendant was re-arraigned on the charge of second degree murder and pled not guilty. For the second time, he was tried by a jury and found guilty as charged. He was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

On August 19, 2001, Sergeant David Bryant with the Ponchatoula Police Department was on patrol when he responded to a call about a cutting or stabbing incident at a trailer at Tate's Trailer Park on La. Highway 22 in Ponchatoula, Tangipahoa Parish. When Sergeant Bryant entered the trailer, he observed

overturned furniture and large amounts of blood throughout the residence. He proceeded to the bedroom, where he saw the victim, Lisa Ladew, and the defendant sitting next to each other on the bed. The victim, had a large, deep cut across her throat. The defendant was holding what appeared to be a towel over the victim's throat in an apparent attempt to control the bleeding. Sergeant Bryant observed a large opened pocketknife on the end of the bed. Sergeant Bryant left the trailer momentarily to retrieve gloves to assist in providing medical attention to the victim. However, when he returned, the knife had been removed from the bed. The knife was subsequently found on a washing machine in the hall. The victim and the defendant were the only two people in the trailer.

The defendant was physically removed from the trailer, placed on the ground, and handcuffed. Sergeant Bryant attended to the victim who was still able to speak. The victim told Sergeant Bryant that the defendant cut her, and that she could not believe he had done that to her. Paul Pevey, an EMT with the Ponchatoula Fire Department, was called to the scene to administer emergency treatment. Shortly thereafter, an ambulance arrived, and Pevey rode with the victim in the ambulance. The victim told Pevey that the defendant had cut her. The victim was transported to the hospital and died shortly thereafter. Dr. Glenn Rudner, a forensic pathologist, performed an autopsy on the victim. According to the autopsy report, the cause of death was a sharp-force injury of the neck, and the manner of death was homicide.

Sherman Mack, an attorney, was the only witness to testify for the defense. Mack was representing the defendant on a fourth offense DWI charge. Mack testified that shortly before the day the victim was killed, he informed the defendant that he would likely receive a ten-year sentence. The defendant became very upset. He was afraid he would lose the "really good job" he had.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues his conviction is the result of defense counsel's ineffective assistance of counsel. Specifically, the defendant contends defense counsel abandoned the insanity defense for a manslaughter defense.

In support of a manslaughter theory, defense counsel in his closing argument stated, "I can't think of a better example of hot-blooded emotion than the depression and the despair and the hopelessness, possibly the drunkenness that he must have felt that evening facing losing his job, losing his friends, his family and going away to jail for 10 years." In his brief, the defendant asserts the manslaughter defense "made no sense under the law" because depression, despair, and hopelessness are not the types of provocation that reduce a second degree murder to manslaughter. According to the defendant, this manslaughter defense was actually an insanity defense improperly urged without the benefit of expert testimony regarding his psychiatric problems.

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. The allegation of ineffectiveness, as contained in the brief herein relating to the choice made by counsel to pursue one line of defense as opposed to another, constitutes an attack upon a strategy decision made by trial counsel.[1]

This court, in State v. Martin, 607 So. 2d 775, 788 (La. App. 1st Cir. 1992), held that the investigation of strategy decisions requires an evidentiary hearing and, therefore, could not possibly be reviewed on appeal.[2] Accordingly, the claim of ineffectiveness, regarding defense counsel's choice of defense theories, is not subject to appellate review. See State v. Allen, 94-1941, p. 8 (La. App. 1st Cir. 11/9/95), 664 So. 2d 1264, 1271, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. See also State v. Albert, 96-1991, p. 11 (La. App. 1st Cir. 6/20/97), 697 So.

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[1]Defense counsel's strategy in arguing (in closing argument) a manslaughter defense, despite little support for such a defense from the record, may have been a tacit suggestion to the jury to return a compromise verdict of manslaughter. The jury could have returned the legislatively-approved responsive verdict of manslaughter, even where there was not sufficient evidence of "heat of blood" or "sudden passion" to support such a verdict, provided that the evidence was sufficient to support the charged offense of second degree murder. See State v. Jones, 593 So. 2d 1301, 1312-13 (La. App. 1st Cir. 1991), writ denied, 620 So. 2d 868 (La. 1993). See also State ex rel. Elaire v. Blackburn, 424 So. 2d 246. 249 (La. 1982), cert. denied, 461 U.S. 959, 103 S. Ct. 2432, 77 L. Ed. 2d 1318 (1983). We also note that defense counsel from the defendant's first trial (who was not the same as present defense counsel) argued the insanity defense, which failed, when the defendant was convicted of second degree murder. At the motion-for-new-trial hearing following the defendant's first trial, defense counsel actually argued the testimony should have proved that the defendant was insane and could not distinguish between right and wrong at the time of the commission of the offense. This argument was rejected when the motion for new trial was denied.

[2]Moreover, the defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924, *et seq.*, in order to receive such a hearing.

2d 1355, 1363-64; State v. Johnson, 2006-1235, p. 12 (La. App. 1st Cir. 12/28/06), 951 So. 2d 294, 302. Accordingly, we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.