NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0102

STATE OF LOUISIANA

VERSUS

JUAN VERRETTE

Judgment Rendered: June 11, 2010 .

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On Appeal from the
17th Judicial District Court,
in and for the Parish of Lafourche
State of Louisiana
District Court No. 437136

The Honorable Ashley Bruce Simpson, Judge Presiding

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In Proper Person

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BEFORE: CARTER, C.J., GUIDRY AND PETTIGREW, JJ.

CARTER, C.J.

The defendant, Juan Verrette, was charged by bill of information with possession with intent to distribute cocaine (count one), distribution of cocaine (count two), and possession of hydrocodone (count three), in violation of La. R.S. 40:967 and involving Schedule II controlled dangerous substances, pursuant to La R.S. 40:964. The defendant entered a plea of not guilty. After a sanity hearing consisting of testimony from two expert witnesses, the trial court found the defendant competent to stand trial. A jury found the defendant was guilty as charged on all three counts. On counts one and two, the defendant was sentenced to twenty-eight years imprisonment at hard labor, with the first two years to be served without the benefit of parole. On count three, the defendant was sentenced to five years imprisonment at hard labor. The trial court ordered that the sentences be served concurrently.

The defendant now appeals, assigning error to the trial court finding him competent to stand trial. In a pro se brief, the defendant challenges the competency ruling and additionally assigns as error the denial of an expert witness, the denial of conflict-free counsel, the trial court's failure to consider pro se motions, and the denial of effective assistance of counsel. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

On or about September 26, 2006, members of the Lafourche Parish Drug Task Force and Thibodaux Police Department conducted a "buy-bust operation" wherein the officers used a confidential police informant, Penny Griffin, to perform a drug transaction with the defendant that resulted in his

arrest. Sergeant John Champagne and Agent Robert Mason of the Lafourche Parish Sheriff's Office supervised the operation. Griffin met with the officers prior to the transaction and was given a sum of serialized Task Force funds and equipped with a transmitter listening device that allowed the officers to contemporaneously hear the transaction from a nearby location. The defendant and Griffin, who knew each other prior to the transaction, met at a predetermined location next to Lady of the Sea Hospital in Lafourche Parish. Griffin purchased approximately 1.2 grams of crack cocaine from the defendant.

After the transaction was complete, the officers immediately proceeded to the area to arrest the defendant. Two police cars with activated lights and sirens approached the defendant's vehicle at a stop sign, instructed him to exit the vehicle, and told him he was under arrest. The defendant refused to exit his vehicle and locked his doors so Agent Ronald Methvin, also of the Lafourche Parish Sheriff's Office, had to use a baton to break the glass of the driver's door. Sergeant Methvin pulled the defendant from the vehicle and secured him on the ground. Sergeant Robert McGuire of the Lafourche Parish Sheriff's Office approached the scene, assisted the other officers in securing the defendant, and collected the sum of money that fell to the ground as the defendant was secured. The funds were identified as the Task Force funds used by Griffin in the transaction.

Trooper Keith Gros, Jr. of the Louisiana State Police supervised a K-9 search of the vehicle, which was registered in the defendant's name. After the dog alerted the officer as to the possible presence of drugs, agents

conducted a search of the vehicle and recovered several baggies of crack and powdered cocaine, hydrocodone pills, and additional funds.

COUNSELED ASSIGNMENT OF ERROR AND PRO SE ASSIGNMENTS OF ERROR NUMBERS ONE, SIX, AND SEVEN

In the sole counseled assignment of error, the defendant contends that the trial court erred in finding him competent to stand trial. The defendant notes that he informed doctors and others that he did not remember the instant incident. The defendant specifically contends that he suffered from amnesia and could not remember the event. The defendant further contends that his lack of memory prevented him from fully assisting in his defense. The defendant notes that he was never treated or examined by a neurologist to see if he had an organic brain injury caused by an earlier prison beating that required head surgery. The defendant also notes that while he was "very active" in his case, he was unaware of what the charges against him were.

The defendant further contends that Dr. Maria Braud is a psychiatrist as opposed to a neurologist and, based on a one-hour interview and a brief telephone conversation, could not rule out that traumatic brain injury caused the defendant to have amnesia. The defendant offers that Dr. Salcedo admitted he could not rule out amnesia as a possibility and recommended the defendant be remanded to the Eastern Louisiana Mental Health System Forensic Division and monitored. The defendant concludes that the trial court should have found him incompetent to proceed at trial.

In pro se assignment of error number one, the defendant contends the trial court erred in denying him access to an independent expert witness in determining his competency to stand trial. The defendant argues the trial

court erroneously and arbitrarily ruled that a private neurologist was not necessary for the court to determine competency to proceed. In a combined argument, labeled pro se assignments of error numbers six and seven, the defendant argues that the trial court's competency ruling violated his rights to due process and a fair trial in light of the criteria set forth in **State v. Bennett**, 345 So.2d 1129, 1138 (La. 1977) (on rehearing).

A criminal defendant has a constitutional right not to be tried while legally incompetent. The state must observe procedures adequate to protect a defendant's right not to be tried while incompetent, and its failure to do so deprives the defendant of his due-process right to a fair trial. **State v. Campbell**, 2006-0286 (La. 5/21/08), 983 So.2d 810, 848, cert. denied, ___ U.S. ___, 129 S.Ct. 607, 172 L.Ed.2d 471 (2008); **State v. Carmouche**, 2001-0405 (La. 5/14/02), 872 So.2d 1020, 1041. Pursuant to La. Code Crim. P. art. 641, mental incapacity to proceed exists when, as a result of a mental disease or defect, a defendant lacks the capacity to understand the proceedings against him or to assist in his defense. A defendant's inability to remember the time period surrounding the alleged offense does not, per se, render him incompetent to proceed. La. Code Crim. P. art. 645A(2). Louisiana law also imposes a legal presumption that a defendant is sane and competent to proceed. La. R.S. 15:432; **Carmouche**, 872 So.2d at 1041. Accordingly, the defendant has the burden of proving by a preponderance of the evidence his incapacity to stand trial. **Carmouche**, 872 So.2d at 1041.

In evaluating the legal capacity of the criminally accused, the supreme court has stated that the considerations in determining whether the defendant is fully aware of the nature of the proceedings include: whether he

understands the nature of the charge and can appreciate its seriousness; whether he understands what defenses are available; whether he can distinguish a guilty plea from a not guilty plea and understand the consequences of each; whether he has an awareness of his legal rights; and whether he understands the range of possible verdicts and the consequences of conviction. **Bennett**, 345 So.2d at 1138. The supreme court has stated that the facts to consider in determining the defendant's ability to assist in his defense include: whether he is able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial. **Campbell**, 983 So.2d at 850.

Prior to its 2009 amendment, Article 644A of the Louisiana Code of Criminal Procedure provided in pertinent part that the sanity commission:

> ... shall consist of at least two and not more than three members who are licensed to practice medicine in Louisiana, who have been in the actual practice of medicine for not less than three consecutive years immediately preceding the appointment, and who are qualified by training or experience in forensic evaluations. The court may appoint, in lieu of one physician, a clinical psychologist who is licensed to practice psychology in Louisiana, who has been engaged in the practice of clinical or counseling psychology for not less than three consecutive years immediately preceding the appointment, and who is qualified by training or experience in forensic evaluations. Every sanity commission shall have at least one

> psychiatrist as a member of the commission, unless one is not reasonably available, in which case, the commission shall have at least one clinical psychologist as a member of the commission....

In accordance with Article 646 of the Code of Criminal Procedure, the court order for a mental examination shall not deprive the defendant of the right to an independent mental examination by a physician of his choice. However, this article does not afford a defendant the right to have the State pay for an independent psychiatric examination. **State v. Stuart**, 344 So.2d 1006, 1008 (La. 1977); **State v. Thomas**, 310 So.2d 517, 522 (La. 1975). Moreover, selection of qualified physicians to serve on a sanity commission rests within the sound discretion of the trial judge. **State v. Vince**, 305 So.2d 916, 919 (La. 1974). Nonetheless, if a defendant is indigent, and forced to rely exclusively upon findings of a court-appointed sanity commission rather than a private physician of his own choice, he is entitled to a thorough examination. **State v. Holmes**, 393 So.2d 670, 673 (La. 1981).

While a thorough mental examination is necessary, the final determination of a defendant's competency to stand trial must rest in a judicial authority; it is a legal, rather than a medical, issue. **State v. Harris**, 518 So.2d 590, 597 (La. App. 1st Cir. 1987), writ denied, 521 So.2d 1184 (La. 1988). The trial judge should not rely so heavily upon the medical testimony that he commits the ultimate decision of competency to the physician. **Harris**, 518 So.2d at 597. The trial court's ruling will not be disturbed on appeal absent a clear abuse of discretion. **Campbell**, 983 So.2d at 849.

In **Wilson v. United States**, 391 F.2d 460 (D.C. Cir. 1968), the defendant was severely injured in a car accident following a high-speed chase. The purported co-perpetrator was killed in the same accident. The defendant's physical injuries caused amnesia regarding events preceding the alleged crimes and the weeks following. Apart from this amnesia and residual partial paralysis, the defendant had no mental or physical defects. His motion to be declared incompetent to stand trial was denied. On appeal, the court remanded the case to the trial court for a hearing at which the trial court was directed to make additional findings on whether the defendant's memory loss deprived him of a fair trial and the effective assistance of counsel. On remand, the trial court was instructed to consider the following factors: (1) the extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer; (2) the extent to which the amnesia affected the defendant's ability to testify on his own behalf; (3) the extent to which the evidence could be extrinsically reconstructed in view of the defendant's amnesia (including evidence relating to the crime itself, as well as any reasonably possible alibi); (4) the extent to which the government assisted the defendant and his counsel in that reconstruction; (5) the strength of the prosecution's case (including an assessment of whether the government's case is such as to negate all reasonable hypotheses of innocence and the presumption that the defendant would have been able to establish an alibi or other defense if there is any substantial possibility that the accused could, but for his amnesia); and (6) any other facts and circumstances that would indicate whether the defendant had a fair trial. **Wilson**, 391 F.2d at 463-464.

In **United States v. Rinchack**, 820 F.2d 1557, 1569 (11th Cir. 1987), the defendant suffered a head injury three years after the alleged crime; however, the prosecution for drug distribution had not yet been instituted at the time of the injury. The court applied the first five **Wilson** factors. In concluding that the defendant had not been denied a fair trial, the court considered that two of the defendant's co-perpetrators already had been tried (although acquitted), enabling the defendant to reconstruct the alleged crime; that another witness testified on the defendant's behalf explaining, in an exculpatory manner, his presence during the crime and his arrest; and that the evidence against the defendant was overwhelming. The court in **Rinchack** also found there was no indication that the amnesia was "locking in" exculpatory information:

> There is no prolonged period of time around the time of the crime where Rinchack was alone and his whereabouts and activities are entirely unexplained, nor is there any suggestion that Rinchack's link to the other defendants or the incriminating circumstantial evidence in this case has an innocent explanation.

Rinchack, 820 F.2d at 1570.

The **Wilson** factors also were cited in **United States v. Swanson**, 572 F.2d 523 (5th Cir.), cert. denied, 439 U.S. 849, 99 S.Ct. 152, 58 L.Ed.2d 152 (1978), wherein the defendant's amnesia was diagnosed as "hysterical". The **Swanson** court first declined to hold that amnesia per se constitutes incompetency to stand trial. Then, prior to applying the factors listed in **Wilson**, the **Swanson** court stated that an important factor is whether a continuance is likely to do any good. The **Swanson** court further stated:

> If the amnesiac condition is unlikely to abate, the judge may question whether the defendant will ever be in any better position to stand trial ... [A] presently competent defendant

> whose amnesia seems permanent would not benefit from a continuance; moreover, because the continuance would delay the trial the recall of other witnesses would decrease, making it more difficult to give the amnesiac defendant a fair trial.

Swanson, 572 F.2d at 526-527. Ultimately, the court concluded that the defendant was correctly judged competent to proceed because he had been able to testify, he may have been feigning, the purported defense was insupportable regardless of whether the defendant had suffered selective memory loss, and a continuance would not have further assisted him in preparing a defense. **Swanson**, 572 F.2d at 527.

By contrast, in **State v. Peabody**, 611 A.2d 826 (R.I. 1992), the Rhode Island Supreme Court refused to adopt the **Wilson** factors. After reviewing jurisprudence from several other state jurisdictions, the court found that discovery provisions adequately protected the defendant's right to governmental assistance in reconstructing the crime. The court further found that the fifth and sixth **Wilson** factors were simply a restatement of the question of whether the State had proven its case beyond a reasonable doubt. The first factor was, in the court's view, no more than the Rhode Island statutory definition of competency. The court then declined to extend the statutory definition to encompass "the ability to remember the circumstances out of which criminal charges arose." **Peabody**, 611 A.2d at 832. The court cited, with approval, the Arizona Supreme Court's holding that "limited amnesia does not totally incapacitate the defense and the defendant is free to assist counsel in numerous ways. We believe that a defendant is entitled to a fair trial, but not necessarily to a perfect trial." **Peabody**, 611 A.2d at 833 (citing **State v. McClendon**, 103 Ariz. 105, 109, 437 P.2d 421, 425 (1968)).

In **State v. Dixon**, 95-0269 (La. App. 4 Cir. 1/19/96), 668 So.2d 388, writ denied, 96-0332 (La. 5/17/96), 673 So.2d 608, cert. denied, 519 U.S. 983, 117 S.Ct. 438, 136 L.Ed.2d 335 (1996), the court considered the above jurisprudence in finding that a defendant charged with attempted armed robbery, and unable to remember his actions at the time of the alleged offense due to amnesia caused by a gunshot wound, was not incompetent to stand trial. The court noted that, although ample evidence indicated that the defendant would never be able to recall the events surrounding the incident, a continuance would not assist the defendant in preparing a defense, as his memory loss was permanent and did not stop his counsel from cross-examining the victim. **Dixon**, 668 So.2d at 394.

During the first portion of the sanity hearing in this case, psychiatrist Dr. Maria Braud testified that she took neurology rotations during her residency and that she is a board-certified psychiatrist. She further stated that amnesia is addressed in the realm of neurology, psychiatry, and neuropsychology and noted that a psychiatrist has some neurologic training. Dr. Braud specifically added that her eight-week training period as a medical student included neurology rotations. She further stated that her eight-week residency entailed training with a neurology team and working as a neurologist. Also, one-third of the content of her testing for board certification was in the field of neurology. Dr. Braud testified that she had not previously evaluated anyone for competency to stand trial based on a claim of amnesia disorder. However, in her private practice, she treated "a host of patients" for amnesia disorder based on a traumatic brain injury.

After her total of sixteen weeks formal training in neurology, Dr. Braud continued to educate herself in the field in clinical practice.

Dr. Braud also testified that part of her job as a psychiatrist is to rule out physical or neurological problems. She specifically stated,

> In psychiatry, part of the discipline of psychiatry, because we are medical doctors, and [sic] is to be able to distinguish medical causes of psychiatric illness. That's a big distinction between psychologists who have no medical training and psychiatrists who have medical and neurologic training. That's key to my training and my practice is the ability to rule in or rule out organic causes for behavior disturbances.

Dr. Braud clarified that she is not, however, a neurologist. The trial court accepted Dr. Braud as an expert in the field of psychiatry, noting that her appointment as a psychiatrist satisfied the requirement of Article 644 and that, based upon her training, she had the necessary skills to provide the court with information to make a decision.

Dr. Braud testified that she evaluated the defendant on September 21, 2007, to assess whether he had the capacity to understand the proceedings against him and to assist in his defense. She met with the defendant for approximately one hour, briefly spoke with the Rayburn Correctional Institute medical personnel, and reviewed the following documents: Lafourche Parish Detention Center medical records; L.S.U. Health Science Center, Shreveport, Louisiana, radiological findings, operative records, and discharge summaries; as well as emergency-department records. Other reviewed materials included the motion for appointment of a sanity commission, arrest reports, an affidavit by Officer Nicole Boura, the arrest warrant, drug-task-force violations detailed by Officer Robert McGuire, and the Louisiana Justice Network Rap Sheet on the defendant.

The defendant provided Dr. Braud with an account of his personal and social history, including his New Orleans upbringing solely by his mother and the fact that he did not know his father. The defendant denied any sexual, mental, or physical abuse as a child. The defendant informed her that he could not recall whether he was married and that he did not know if he had children, as he had trouble remembering since his head injury. Regarding the head injury, the defendant explained that it was sustained during a period of incarceration before the instant offenses took place. Dr. Braud estimated the time of occurrence of the injury as March 2006, about six months before the instant offenses. Although the defendant denied any memory of the traumatic event, he stated that he was hit in the back of the head numerous times by another inmate with a metal gardening hoe. The defendant reported that he had surgery after the incident, but had difficulty describing it. Regarding his medical history, the defendant informed Dr. Braud that he had a seizure disorder, hypertension, and asthma. The defendant stated that he was taking Dilantin, an anti-seizure medication; Lopressor, a blood-pressure medication; and a meter dose inhaler of Albuterol for asthma.

The defendant also informed Dr. Braud of his educational and employment history, including his attainment of his G.E.D., and denied having any behavioral, learning, or reading disabilities. The defendant stated that he had worked at Seaport as a materials coordinator for three years but was vague regarding any prior employment. The defendant denied any prior psychiatric history, diagnoses, medications, hospitalizations, or substance-abuse history and could not remember if he ever had substance-

abuse treatment. He denied use of alcohol, cocaine, PCP, speed, or any other mood-altering chemicals.

Regarding his criminal history, the defendant informed Dr. Braud that he had been arrested and convicted of carnal knowledge of a juvenile and felt he was being brought to trial for the same charge twice or for failure to register as a sex offender, although he claimed he had done so. He stated that he was being charged with possession of crack cocaine and intent to distribute either in 2003 or 2004.

Dr. Braud noted that the defendant was calm, conversant, and attentive, although he often interjected complaints of memory loss throughout the evaluation. She noted that the defendant's major complaint was that he did not have a memory of the circumstances surrounding the instant charges. He stated that he had gone to court before and that he knew the role of a judge, a jury, and a prosecutor. In Dr. Braud's opinion, the defendant clearly had the ability to understand the proceedings against him and would be able to assist in his defense.

Dr. Braud also concluded that the defendant "was exaggerating his symptoms," noting that his memory loss was very inconsistent and that in conversation he would often reach the point of divulging information but, at other points in conversation, would complain of memory loss in response to some direct questions. In elaborating on this conclusion, Dr. Braud noted that the defendant remembered that he worked at Seaport but could not remember if he was married; that the defendant remembered that Hillary Clinton ran for the Democratic candidacy for Presidency but could not recall whether he had children; and that he remembered going to court but could

not remember where he went to school. She added that commonly in traumatic brain disorder cases there is consistent memory loss surrounding the event, anterograde memory loss (the inability to form new memories), or retrograde memory loss (the inability to remember things that happened in the past). The defendant, however, exhibited inconsistent memory loss including anterograde and retrograde amnesia and anterograde and retrograde memories. Dr. Braud recommended further neuropsychological testing in a controlled environment in the event that the trial court had difficulty making a decision despite her evaluation and her finding that the defendant's injury had no bearing on his ability to proceed.

Dr. Raphael Salcedo, accepted as an expert in forensic psychology as stipulated, testified during the second portion of the sanity hearing. Dr. Salcedo also evaluated the defendant, noting that he "appeared to have a somewhat unusual clinical presentation from the standpoint of claiming to have a lot of significant memory problems, initially." As an example, Dr. Salcedo noted that the defendant was unable to give his middle name or date of birth and attributed memory loss to an alleged head injury in which he was struck several times with a hoe. Dr. Salcedo described in his September 18, 2007, report that the defendant's clinical presentation was suspect for malingering as a result of his claiming not to be able to know basic things that even significantly impaired individuals are able to recall as a part of their long-term memory. Dr. Salcedo further noted that the defendant could provide, at the same time, the names of medications he was taking. Dr. Salcedo stated that in true post-traumatic amnesia secondary to a head injury long-term information (such as the name of your sixth grade teacher, your

age, and your date of birth) typically is retained. However, the defendant manifested the opposite pattern by recalling anterograde information (information acquired after the head injury). Dr. Salcedo could not rule out neuropsychological disorder but stated that he strongly suspected that, if the defendant had any memory deficits, he was grossly exaggerating those deficits. Dr. Salcedo was not persuaded that the defendant's complaints were legitimate. He also testified that the only patients he treated that had both anterograde and retrograde amnesia were severely impaired and in a near vegetative state.

Dr. Salcedo, however, was unable to determine whether the defendant met the **Bennett** criteria for competency to proceed, noting that when he questioned the defendant regarding the **Bennett** factors, such as his charges and possible pleas, the defendant gave the following responses: "I don't know," and "I don't remember." While Dr. Salcedo was "very suspicious" of the defendant, he noted that memory loss such as he complained of, if legitimate, could certainly provide the basis for questioning his competency to proceed. Dr. Salcedo added that "out of an abundance of caution," he recommended that the defendant be found incompetent to proceed to trial and remanded to the Eastern Louisiana Mental Health System Forensic Division for controlled monitoring. Dr. Salcedo reiterated that he was fairly certain that if the defendant had a memory problem or amnesia of some sort, it was "atypical," and he was "obviously exaggerating it." Dr. Salcedo concluded that the defendant did not show any signs or symptoms of any other psychiatric disorder that would impair his ability to meet the **Bennett** criteria. Dr. Salcedo added, "So it's up to the Court whether that is – what I

presented is sufficient for a finding of incompetency; or if the Court decides that it's insufficient, then that the presumption of competency remains[.]" Dr. Salcedo reiterated that his recommendation was out of an abundance of caution based on a "slight possibility" (later described as one percent and he was ninety-nine percent sure of its absence) of a disorder. Dr. Salcedo also noted that he requested, but never received, documentation confirming the existence of a head injury.

As noted, the defendant did not have the right to have the State pay for an independent psychiatric examination. **Stuart**, 344 So.2d at 1008. At any rate, we find that the defendant was afforded a very thorough examination. Both experts were unable to conclude that the defendant lacked the capacity to understand the proceedings against him or assist in his defense. While Dr. Salcedo could not affirmatively rule out the possibility of a disorder, he highly suspected that the defendant was exaggerating any suffered memory loss and recommended further monitoring out of an abundance of caution. Dr. Braud found with certainty that the defendant was competent to stand trial. We further note that the State presented overwhelming evidence that recreated the offenses, including an audiotape of the defendant's conversation with Griffin moments before the transaction took place, Griffin's testimony regarding the transaction, and photographs of the evidence and the interior of the defendant's vehicle. Although the defendant stated he was assisted in doing so, he filed several pro se motions, and defense counsel was able to fully cross-examine the witnesses. Thus, in agreeing with the trial court, we are considering not only the thorough

evaluations presented to the court but also the overwhelming strength of the State's case against the defendant.

Under our jurisprudence, the trial court's determination of mental capacity to assist at trial is entitled to great weight, especially where the evaluation of credibility or the resolution of conflicting well-founded medical testimony is concerned. **State v. Brooks**, 541 So.2d 801, 807 (La. 1989). Here the trial court evaluated the evidence and determined the defendant was competent to proceed. As the defendant failed to meet the burden of establishing incompetency to stand trial, we find that the trial court did not abuse its discretion, and the trial court's ruling will not be disturbed. See **Brooks**, 541 So.2d at 807. Thus, the counseled assignment of error and pro se assignments of error numbers one, six, and seven are without merit.

PRO SE ASSIGNMENTS OF ERROR NUMBERS TWO, THREE, AND FOUR

In the second pro se assignment of error, the defendant argues that the trial court denied him a fair trial by refusing to appoint conflict-free counsel or to make a determination that no conflict existed. The defendant notes that several pro se motions to appoint conflict-free and/or effective counsel were filed prior to a judge recusal hearing and further notes that a hearing was not held on the motions. The defendant also states that his motion for new trial based on trial counsel's performance was denied.

In the third pro se assignment of error, the defendant argues that the trial court and his court-appointed counsel denied him a fair trial. The defendant specifically states that he was forced to represent himself on pro se motions despite requests for conflict-free counsel. The defendant

contends that his right to the assistance of counsel was violated. In the fourth pro se assignment of error, the defendant argues that the trial court refused to consider several pro se motions and to hear and decide an amended motion for new trial and continuance on September 23, 2009.

The Sixth Amendment to the United States Constitution and Louisiana Constitution article 1, section 13 guarantee that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. See **State v. Cisco**, 2001-2732 (La. 12/3/03), 861 So.2d 118, 129, cert. denied, 541 U.S. 1005, 124 S.Ct. 2023, 158 L.Ed.2d 522 (2004). If a defendant is indigent, he has the right to court-appointed counsel. **State v. Reeves**, 2006-2419 (La. 5/5/09), 11 So.3d 1031, 1057. The right of a defendant to counsel of his choice has been implemented by La. Code Crim. P. art. 515, which provides in pertinent part that, "Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned by the court." An indigent defendant does not have the right to have a particular attorney appointed to represent him. **Reeves**, 11 So.3d at 1057. An indigent's right to choose his counsel only extends to allowing 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. **Reeves**, 11 So.3d at 1057.

The right to counsel secured under the Sixth Amendment includes the right to conflict-free representation. See **Holloway v. Arkansas**, 435 U.S. 475, 482, 98 S.Ct. 1173, 1177, 55 L.Ed.2d 426 (1978). An actual conflict of

interest is established when the defendant proves that his attorney was placed in a situation inherently conducive to divided loyalties. **State v. Carmouche**, 508 So.2d 792, 797 (La. 1987). Actual conflicts of interest that adversely affect counsel's performance must be established by specific instances in the record, and the mere possibility of divided loyalties is insufficient proof of actual conflict. **State v. Castaneda**, 94-1118 (La. App. 1 Cir. 6/23/95), 658 So.2d 297, 305. The question of withdrawal or substitution of counsel largely rests within the discretion of the trial judge, and his ruling will not be disturbed in the absence of a clear showing of an abuse of discretion. See **State v. Leger**, 2005-0011 (La. 7/10/06), 936 So.2d 108, 142, cert. denied, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007).

The record reflects that several pro se motions were considered and ruled upon below. During a December 14, 2007, proceeding wherein the sanity hearing was continued, the defendant's then defense counsel, indigent defender Beau Brooks, noted that the defendant filed a motion to appoint private counsel, alleging that Brooks was in conspiracy with the trial judge and the district attorney. The trial court stayed the proceedings as to this and other matters pending resolution on the issue of competency. At the hearing on the defendant's pro se motion entitled, "A Writ of Habeas Corpus," the trial court noted that the defendant's motion raised issues of excessive bail, whether a probable cause affidavit was filed within forty-eight hours of his arrest, speedy trial, and medical treatment by the Sheriff of Lafourche Parish. The trial court further noted that another division denied the defendant's motion because it was a pro se motion filed by a defendant

represented by counsel. However, the trial court specifically added that it believed the defendant was entitled to a hearing regardless of whether the filing was pro se or through counsel. After a hearing, the trial court denied the defendant's motion for reduction of bail. The trial court noted that there were several other outstanding pro se motions and that they were to be scheduled subsequent to the sanity hearing.

At the time of the commencement of the sanity hearing, November 14, 2008, the defendant was no longer being represented by Brooks, and conflict indigent defender Robert Louque was appointed to represent the defendant. After the competency ruling, Louque noted that the defendant filed motions claiming that Louque was ineffective. Subsequent to the sanity hearing, the trial court considered an abundance of outstanding pro se motions on January 22, 2009. The defendant stated that he did not have the ability to argue the motions. The defendant did, however, submit that he had filed a complaint against Brooks before Louque was appointed, that Louque discussed a plea bargain with him before the sanity determination, and that Louque discussed his case with Brooks outside of the defendant's presence when Brooks was no longer representing the defendant. In response, Louque stated that he did not discuss a specific agreement with the defendant but only made an assessment regarding the defendant's willingness to consider plea negotiations. The State argued that the defendant was being counterproductive and obstructive in filing the motions. The State further noted that the appointment of counsel for the defendant went beyond the public defender's office to a conflict attorney because of the defendant's prior complaints. The defendant argued that Louque's

willingness to discuss a plea bargain with the defendant before a competency ruling indicated that he did not believe that the defendant had a memory lapse and was incompetent to stand trial and that he did not represent the defendant's best interests. The trial court denied the relevant motions, noting that there was no evidence of impropriety, prejudice, conflict, or ineffective assistance of counsel and no requirement that the defendant be present during routine discussions regarding his case between the indigent defender board and his newly-appointed conflict counsel. After argument and the trial court ruled, defense counsel stated that there were no further outstanding motions.

Another pretrial hearing took place on August 24, 2009, the day before the trial. At the time of this hearing and the trial, the defendant was represented by indigent defender Michael Billiot. During the hearing, the trial court noted that the defendant mailed a pro se motion entitled "Motion to vacate and set aside judgment" to the judge's office. The trial court allowed the motion to be filed into the record and dismissed the motion as untimely. The trial court noted that the motion was repetitive as it raised issues that the trial court previously ruled on more than once. The defendant noted that he had another motion that he wished to file, a pro se motion asking for a continuance of trial and the appointment of different counsel. After allowing the State and Billiot to review the motion, the trial court noted that the motion was being filed the day before jury selection and denied the motion as untimely.

In his pro se motion for new trial, the defendant, in pertinent part, argued that his trial counsel was ineffective "by representing an actual

conflict of interest by being part of the Indigent Defender's Office that former counsel Robert Louque was who withdrew due to conflict and complaint filed with La. Bar Association." On September 23, 2009, the trial court allowed the defendant to file a pro se amended motion for new trial, along with a motion for continuance, and conducted a hearing. The defendant stated that he was not qualified to argue his motion and asked the trial court to appoint conflict-free counsel. The trial court stated that it would not appoint another attorney and gave the defendant an opportunity to argue his motion. The trial court noted that the defendant previously raised and argued issues regarding the appointment of conflict-free counsel. The trial court further noted that it did not perceive any conflict of interest on the part of Billiot with the exception of ineffective assistance of counsel claims that the trial court believed would more properly be addressed in an application for post conviction relief. The trial court denied the defendant's amended pro se motion for new trial and the pro se motion for continuance.

The record reflects that after the defendant filed his initial pro se motion to appoint conflict-free counsel there were several substitutions of counsel. Although the defendant claims that a hearing was not held on his pro se motions, the record reflects otherwise. Defense counsel was present and available for consultation. The trial court appropriately inquired further into the issues raised in the defendant's pro se motions, including the issue of whether a conflict of interest actually existed, and found no conflict of interest. On appeal, the defendant fails to present a specific argument in support of his claim or to establish the existence of a conflict of interest, nor does the record support such a finding. The defendant has not shown that

his counsel was placed in a situation conducive to divided loyalties or that defense counsel owed a duty to a party whose interests were adverse to those of the defendant. Despite substitutions of counsel, the defendant continued to raise conflict of interest claims without any specified basis in an apparent, manipulative attempt to obstruct orderly procedure and thwart the administration of justice. Based on these circumstances, we further find that the trial court was within its sound discretion in denying the motion for continuance. See **State v. Castleberry**, 98-1388 (La. 4/13/99), 758 So.2d 749, 755, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999); **State v. Strickland**, 94-0025 (La. 11/1/96), 683 So.2d 218, 229 (Generally, the denial of a motion for continuance is not reversible absent a showing of specific prejudice); **State v. Simon**, 607 So.2d 793, 798 (La. App. 1st Cir. 1992), writ denied, 612 So.2d 77 (La. 1993). Considering the foregoing, we find that pro se assignments of error numbers two, three, and four lack merit.

PRO SE ASSIGNMENT OF ERROR NUMBER FIVE

In pro se assignment of error number five, the defendant raises an ineffective assistance of counsel claim regarding his competency. The defendant notes that his counsel was aware of his amnesia and inability to assist in the trial, post-trial hearings, and sentencing and suggests that his counsel failed to fully investigate his condition as a defense. The defendant notes that his counsel's failure to fully investigate the effects of his amnesia was not a tactical decision, adding that tactical decisions must be made in the context of reasonable investigation. The defendant specifically states that a decision not to investigate is rarely reasonable after counsel has notice

of his client's history of mental, drug, and alcohol problems and fails to perfect his only plausible defense.

A claim of ineffective assistance of counsel is generally relegated to post-conviction proceedings unless the record permits definitive resolution on appeal. **State v. Miller**, 99-0192 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001). A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. **Strickland**, 466 U.S. at 687, 104 S.Ct. at 2064. Secondly, the defendant must prove that the deficient performance prejudiced the defense; this element requires a showing that the errors were so serious that the defendant was deprived of a fair trial. **Strickland**, 466 U.S. at 687, 104 S.Ct. at 2064. The defendant must prove actual prejudice before relief will be granted. **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068. It is not sufficient for the defendant to show that the error had some conceivable effect on the outcome of the proceeding. **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068. Rather, he must show that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068; **State v. Felder**, 2000-2887 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 369-70, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. Further, it

is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 859-860 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

This court has found no merit in the defendant's arguments regarding his competency to stand trial and to assist with his defense. Thus, to the extent the defendant's ineffective assistance of counsel claim rests on his assertion that he was not competent to stand trial, it fails; there is no showing of a deficiency in his counsel's performance in that regard. Although the defendant argues otherwise, we find that the ineffective assistance of counsel claims in the pro se brief are not subject to further appellate review to the extent that they involve strategy. Allegations of ineffectiveness relating to the choice made by counsel to pursue one line of defense as opposed to another constitute an attack upon a strategy decision made by trial counsel. **State v. Allen**, 94-1941 (La. App. 1 Cir. 11/9/95), 664 So.2d 1264, 1271, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. Decisions relating to investigation, preparation, and strategy require an evidentiary hearing and cannot possibly be reviewed on appeal.[1] **State v. Lockhart**, 629 So.2d 1195, 1208 (La. App. 1st Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132. Further, under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, that must be made before and during trial rests with an accused and his

[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.

attorney. Finally, the fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Folse**, 623 So.2d 59, 71 (La. App. 1st Cir. 1993). This assignment of error is without merit or otherwise not subject to review on appeal.

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Price**, 2005-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (*en banc*), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTIONS AND SENTENCES AFFIRMED.