NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1839

STATE OF LOUISIANA

VERSUS

KEVIN W. KAIGLER

Judgment Rendered: JUN 10 2011

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 439243-1

Honorable Martin E. Coady, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

Defendant, Kevin W. "Dreads" Kaigler, was charged by indictment with four counts of first degree murder, violations of LSA-R.S. 14:30. James A. Bishop and Frank N. Knight were charged in the same indictment with the same offenses. Defendant pled not guilty. Subsequently, the indictment was amended to reduce the charges against Knight to accessory after the fact to first degree murder, a violation of LSA-R.S. 14:25, and to add a charge of distribution of cocaine, a violation of LSA-R.S. 40:967, and he pled guilty to those charges. The state elected not to seek the death penalty against defendant and Bishop in the instant case. After a joint trial by jury, at which time they were represented by separate counsel, defendant and Bishop were each found guilty as charged on all counts. The trial court subsequently sentenced them each to a term of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence, on each of their four convictions of first degree murder, to be served concurrently. Defendant now appeals, raising four assignments of error.[1] For the following reasons, we affirm defendant's convictions and sentences.

ASSIGNMENTS OF ERROR

1. The evidence was constitutionally insufficient to prove beyond a reasonable doubt that the defendant had anything to do with the homicides in question.

2. The mandatory life sentences, without parole, are unconstitutionally excessive.

3. The non-unanimous provisions for a jury verdict in a case involving a mandatory life sentence without parole are unconstitutional under the Sixth Amendment to the United States Constitution.

4. The non-unanimous provisions for a jury verdict in a capital, but life sentence, case violates Louisiana law and jurisprudence.

FACTS

On the evening of June 27, 2006, J.A., who was nine years old at the time, and her mother, Victoria, were living in a trailer with Victoria's sister, Roxanne Agoglia, in Slidell, Louisiana. Roxanne's fiancé, Eric Perreand, her

[1] Bishop has also appealed, and that matter is before this Court under docket number 2010 KA 1840, also decided this date.

sixteen-year-old daughter, Erica Agoglia, and Andrew Perreand, Eric's fifteen-year-old nephew, were also living in the trailer. At that time, Roxanne was involved both in selling and using illegal drugs. In fact, all of the trailer's occupants, with the exception of J.A., were using illegal drugs.

At approximately 8:15 to 8:30 p.m., J.A. and Andrew were in the living room watching television when there was a knock on the door. Andrew opened the door and admitted two black men, who entered and sat down. J.A. glanced at the men, but did not look at their faces. According to J.A., one of the men had dreadlocks in his hair, which was in a ponytail. She described the other man as having "regular" hair. J.A. also thought one of the men might have had a tattoo on his right arm.

At one point, J.A.'s mother, Victoria, walked through the living room past the two men, who appeared to her to be just visiting. As she walked past, she did not look directly into the men's faces. However, she did notice that one of them had dreadlocks in his hair, which was pulled into a ponytail.

Shortly thereafter, J.A. accompanied her mother to the bathroom located at the rear of the trailer off of Roxanne and Eric's bedroom. The plan was for J.A. and her mother to take a bath, because J.A. was supposed to accompany Victoria to her evening job at a gas station/convenience store. While they were in the bathtub together, with the water running, J.A. heard gunshots. After J.A. brought this to her mother's attention, they both heard additional gunshots. Victoria turned off the water and hurriedly got herself and J.A. out of the bathtub. After waiting for a period of time without hearing anything, Victoria cracked the bathroom door open and saw Eric slumped on the bed. She removed the cell phone from his pocket, returned to the bathroom, and called 911.

When the police arrived, they discovered all four of the remaining occupants in the trailer had been shot dead. There were no signs of a struggle having occurred. Erica was found on the couch in the living room with a single gunshot wound to the head. Andrew was lying nearby on the floor with two

gunshot wounds -- one to the chest and the other to the head. The bodies of Eric and Roxanne were found in their bedroom. Eric was slumped face down on the bed, with one gunshot wound to his jaw and another to the back of his neck. Next to him was an open tin container that appeared to be empty, except for a few coins. Roxanne was lying on the floor next to a freestanding safe, with a single gunshot wound to her head. There was a key inserted in the lock of the safe. Further, the top of the tin container and a few scattered coins were on the floor near her body. While the victims sustained a total of six gunshot wounds, only five bullets were recovered by the police. Subsequent testing established that all the bullets were fired from the same gun, which was either a .38 or .357 caliber.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that he was involved in the perpetration of the four murders for which he was convicted. Specifically, he argues that the testimony of his alleged co-perpetrator Frank Knight, who provided the key evidence relied upon by the state to establish defendant's guilt, was highly suspect, because it lacked detail, was inconsistent with prior statements Knight gave to the police, and was directly contradicted by a substantial amount of other eyewitness testimony and physical evidence collected by the police.

The standard of review for the sufficiency of evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime and the defendant's identity beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Lofton**, 96-1429, p. 4 (La.App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. See also LSA-C.Cr.P. art. 821. The **Jackson** standard of review incorporated in LSA-C.Cr.P. art. 821 is an objective standard for testing the

overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the trier of fact must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Riley**, 91-2132, p. 8 (La.App. 1 Cir. 5/20/94), 637 So.2d 758, 762. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La.App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

In the instant case, defendant conceded during closing arguments that the evidence presented by the state was sufficient to establish the essential elements of first degree murder. Nevertheless, defendant argues that the state's evidence was insufficient to establish his identity as one of the two perpetrators of the murders. Where the key issue raised by the defense is the defendant's identity as the perpetrator, rather than whether or not the crime was committed, the state is required to negate any reasonable probability of misidentification. **State v. Johnson**, 99-2114, p. 4 (La.App. 1 Cir. 12/18/00), 800 So.2d 886, 888, writ denied, 01-0197 (La. 12/7/01), 802 So.2d 641. Positive identification by only one witness is sufficient to support a conviction. **State v. Davis**, 01-3033, p. 3 (La.App. 1 Cir. 6/21/02), 822 So.2d 161, 163. Moreover, it is the jury who weighs the respective credibility of the witnesses, and this Court generally will not second-guess those determinations. See **State v. Hughes**, 05-0992, p. 6 (La. 11/29/06), 943 So.2d 1047, 1051.

To prove defendant's identity as one of the perpetrators of the instant offenses, the state presented the testimony of Frank Knight, who originally was charged with the instant offenses in the same indictment as defendant and Bishop. In exchange for his cooperation, the state agreed to amend the indictment and allow Knight to plead guilty to the reduced charge of accessory after the fact to first degree murder, as well as to the additional charge of distribution of cocaine. It was agreed that he would be sentenced to a minimum

of fifteen years at hard labor and up to the maximum sentences permissible, which was five years for the accessory after the fact conviction and thirty years for the distribution conviction, consecutive to any other sentences he was serving. See LSA-R.S. 14:25 & 40:967B(4)(b). Additionally, the state agreed that Knight would not be billed as a multiple offender. The jury was fully apprised of the details of Knight's plea agreement with the state.

Knight gave the following account of what occurred. He testified that on the evening of June 27, 2006, he and defendant, who was known by the street name, "Dreads," were with Bishop at the latter's FEMA trailer in Slidell. According to Knight, they all knew each other from the streets, and defendant had even stayed at Knight's trailer on several occasions. At approximately 7:00 to 8:00 p.m., the three men proceeded in Bishop's vehicle to Roxanne's FEMA trailer, in order to collect on a drug debt she allegedly owed Bishop. Defendant drove Bishop's car. As they left Bishop's trailer, Knight saw a revolver in the waistband of Bishop's pants. On the drive to Roxanne's trailer, Bishop stated that, if he failed to collect the money, "he would kill the ... [b]itch." Once at Roxanne's trailer park, defendant parked the car behind a trailer. Knight remained in the car, while defendant and Bishop walked off, cutting in between trailers. A few minutes later, Knight heard four to six gunshots, and defendant and Bishop ran back to the car. At that time, Knight again saw a gun in Bishop's waistband. Knight did not observe any blood on either defendant or Bishop.

The three men then drove to a FEMA trailer in Waveland, Mississippi, where they remained for several hours. The trailer was occupied by a woman who Knight could not identify. Other than the fact that she had blonde hair, he was unable to recall anything about her. Knight admitted that he was using drugs after the men left Louisiana.

According to Knight, while the three men were in Waveland, he asked defendant what had occurred. Defendant indicated he had gone inside the trailer, and had "just got the door open." Knight did not explain what door the defendant was referring to. At Bishop's suggestion, it was agreed that they

should say they had been in Mississippi, if questioned by the police. At approximately 3:00 to 4:00 a.m., the three men returned to Louisiana.

To further establish defendant's participation in the offenses, the state also presented the testimony of Chattel Suprene, who testified as follows. She knew Roxanne, and had purchased cocaine from her on numerous occasions. She also knew defendant, and had done drugs with him. Suprene entered a drug rehabilitation program on June 18, 2006. According to her testimony, approximately one month before that date, she suggested to the defendant and another friend, Creston Mills, that it would be easy to rob Roxanne. To encourage them to do so, she told them Roxanne had a lot of cocaine, which they could use to make money, and that it should be easy, because Roxanne did not have any guns and was always "high." One night she drove defendant and Mills to Roxanne's trailer park so that they could view Roxanne's trailer. They asked Suprene questions such as whether Roxanne had guns and how many people were there at a time. They also asked whether Suprene knew where the drugs were. Although she did not know for certain, she thought they were somewhere in Roxanne's bedroom.

Additionally, the state also presented the testimony of James Arons, who was incarcerated in parish jail at the same time as Bishop. According to Arons, after they discovered having a mutual acquaintance, Bishop told him that he had been arrested for a quadruple murder and planned to use his wife as an alibi witness. Arons further testified that Bishop admitted his participation involved collection of an unpaid drug debt.

At trial, Gustave Bethea, who was the lead investigator for the St. Tammany Parish Sheriff's Office (STPSO), testified that defendant admitted in his initial statement to the police that he owned a .38 caliber pistol.[2] However, when questioned by Bethea shortly after his arrest, he denied owning a gun. According to Bethea, when defendant was confronted with his earlier admission

[2] At the time of trial, Bethea was no longer employed by the STPSO, but instead was a trooper with the Louisiana State Police.

that he owed a gun, he claimed he had sold the gun. When Bethea asked to whom he sold it, defendant indicated he gave the gun away, rather than selling it. Bethea then asked to whom he gave it. In response, defendant told him he never actually owned the gun, but had only considered obtaining it and had decided against doing so. As previously noted, the state presented forensic evidence establishing that the victims were shot with either a .38 or .357 caliber firearm. That weapon was never recovered by the police.

Both at trial and on appeal, defendant strenuously attacks the credibility of Knight's account of what occurred on the night of the murders. He points out that Knight admitted at trial that he lied to the police in the initial statements he made regarding his involvement in the murders, and about details such as the color of the car the three men allegedly used and the time they arrived at Roxanne's trailer. Defendant also notes Knight's prior criminal history and history of illegal drug use, which includes selling drugs. Defendant further suggests that Knight's uncorroborated testimony is less than credible, because it was self-serving testimony given in exchange for a plea bargain that allowed him to plead guilty to charges of accessory after the fact to first degree murder and distribution of cocaine, which carried potential maximum sentences totaling thirty-years, rather than facing a charge of first degree murder, which carried a potential death penalty.

Similarly, defendant implies that the testimony of Suprene that she suggested to defendant that he rob Roxanne also was unreliable, since she was a self-confessed drug addict so desperate for cocaine at the time in question that she resorted to prostitution, selling drugs, and renting her car out in exchange for crack cocaine. Moreover, Suprene admitted at trial that she initially lied to the police about whether she had ever been inside Roxanne's trailer.

We note that the arguments regarding the credibility of Knight and Suprene go to the weight of the evidence, rather than its sufficiency. As previously observed, it is the jury who weighs the respective credibility of the

witnesses, and this Court generally will not second-guess those determinations. See **Hughes**, 05-0992 at p. 6, 943 So.2d at 1051.

Additionally, contrary to defendant's assertions in brief, the fact that Knight did not see defendant with a gun, entering Roxanne's trailer, or splattered with blood, as well as the fact that there was no physical evidence such as fingerprints or DNA linking him to the murders, does not necessarily mean the state's evidence against him was insufficient. Based on his examination of the victim's wounds, Dr. Michael Defatta, the chief deputy coroner, testified that even the shooter would not necessarily have gotten blood splatter on his hands or body in the present case. Also, the fact that the victims apparently did not struggle with the perpetrators may have contributed to the absence of physical evidence against the perpetrators.

Furthermore, "[a]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals." LSA-R.S. 14:24. According to Knight's testimony, defendant drove to Roxanne's trailer park with Knight and Bishop. Defendant parked the car and accompanied Bishop, who was armed with a gun and had just made a statement that he would "kill the ... [b]itch" if he did not get the money she owed him. A few minutes later, Knight heard gunshots and defendant and Bishop ran back to the car. Moreover, when Knight questioned defendant about what had occurred, defendant admitted that he had gone inside the trailer and "got the door open." Although it was not clearly stated what door he was referring to, the jury reasonably could have concluded that he was referring to the door of the safe next to which Roxanne's body was found. Thus, if accepted by the jury, Knight's testimony, together with the other evidence presented by the state, was sufficient to establish defendant's participation as a principal in the instant offenses.

In further support of his sufficiency argument, defendant points out that neither J.A. nor Victoria could positively identify him as one of the men they saw

in the living room immediately prior to the murders, either in photographic lineups or at trial. Further, J.A. thought the man who had dreadlocks might also have a tattoo, and it was shown at trial that defendant has no tattoos. In fact, J.A. tentatively selected another man in a pretrial photographic lineup. However, she indicated that she was focusing primarily on the subject's hairstyle when she selected the man's photograph. Additionally, J.A. testified she only glanced at the two perpetrators while she was in the living room, and did not really look at their faces. Similarly, Victoria also indicated she did not get a good look at the men, because she did not look directly into their faces, but merely walked past them on her way through the living room. However, both J.A. and Victoria testified that one of the men wore his hair in dreadlocks, and there was testimony at trial that defendant wore his hair in that manner.

In support of his claim that he was not involved in the murders, defendant also relies on the testimony of Anthony Schwankhart, who testified as a defense witness. Schwankhart resided in the same trailer park as Roxanne. At trial, he testified that he observed a car with three men arrive at Roxanne's trailer on the date of the murders. According to his testimony, two of the men entered the trailer, while the third leaned against the car watching the trailer. Schwankhart claimed he heard gunshots, and then saw Calvin Doss exiting the trailer with a gun in his hand. Doss was a friend of Roxanne who also was one of her drug suppliers. Schwankhart claimed that Doss telephoned him and threatened him after Schwankhart gave a statement to the police. Schwankhart denied seeing either defendant or Bishop in the area on the night of the murders.

A review of Schwankhart's trial testimony reveals that he initially denied knowing Doss, but he later testified that he had met Doss frequently at Roxanne's trailer, and had known him for a while. Furthermore, although Schwankhart denied having any history of mental problems, the state introduced a 2002 coroner's order for his involuntary hospitalization. The order was based on allegations that he was suicidal and had held the police at bay with a high-powered rifle. At trial, Schwankhart absolutely denied that the 2002 incident had

ever occurred. Further, he admitted he was not taking his prescribed medications in 2006.

Moreover, contrary to defendant's assertion in brief that Schwankhart immediately told the police that he saw Doss exiting the trailer with a gun, a review of the initial statement he gave to the police indicates otherwise. In the initial statement, which was given on June 28, 2006, he indicated he observed two black males, whom he had never before seen in the neighborhood, enter Roxanne's trailer. However, in a videotaped statement he gave to the police on July 18, 2006, he identified Doss as one of the men he saw going into and out of Roxanne's trailer on the night of the murders. On cross-examination, he claimed he did not initially tell the police that he saw Doss at the trailer on the night of the murders because Doss had threatened him in a telephone call.

The state presented evidence that the police treated this alleged threat seriously, and set up surveillance when Schwankhart told them that Doss had arranged a meeting with him. The police kept Schwankhart under surveillance for several hours at the purported meeting place, but Doss never appeared. Later, the police discovered that the telephone number Schwankhart provided to them as being the source of the call from Doss was a telephone number listed to one of Schwankhart's friends. Upon being confronted with this fact, Schwankhart told the police that he had a mental defect that caused him to make things up, and he did not know any of the details of the instant case, but had fabricated the entire story to gain attention.

Defendant also seeks to rely on alibi evidence he presented at trial. Specifically, he contends in brief that he gave a statement to the police that he was with his friend, Vincent Navarre, at the time of the murders, and that the police confirmed his alibi with Navarre. Based on the time of the 911 call made by Victoria, the murders occurred at approximately 8:15 to 8:30 p.m. In the statement he gave to the police shortly after his arrest, the defendant told Detective Bethea he spent the day of the murders with Navarre drinking alcohol and smoking crack. He stated they went to Winn Dixie at approximately 8:30

p.m. to purchase more alcohol. Defendant claimed that his ex-girlfriend, Alicia Munez, telephoned him sometime after they returned to Navarre's house, and asked him if he had anything to do with the murders, to which he replied "no." According to defendant, Munez asked him to spend some time with her, and he agreed. He claims he then proceeded to Munez's house where he remained until approximately 2:00 a.m. Additionally, defendant denied that he had ever been to Roxanne's trailer park.

Contrary to defendant's contention, Bethea testified that the police were unable to corroborate defendant's alleged alibi. When questioned by the police, Navarre was able to verify only that he remembered defendant being present at his trailer, but was unable to state with any certainty the time that defendant was present, or even that it was on the date of the murders. Further, although defendant's ex-girlfriend testified on his behalf at trial, she could only confirm that he visited her on the evening of the murders. She testified that he arrived at her home at approximately 8:00 or 9:00 p.m. However, she later admitted that she did not know the exact time that defendant came to her house and that she previously told the police it was at approximately 7:00 p.m. Moreover, she stated that he visited with her for approximately thirty to forty-five minutes, and did not stay at her house until 2:00 a.m. She also testified that her home was only about five to ten minutes away from where Roxanne's trailer park was located.

Lastly, defendant argues that the evidence was insufficient because there were other individuals identified by eyewitnesses in this case, as well as other persons of interest, who better matched the physical descriptions given by the survivors. He notes that the DNA and fingerprints of some of these individuals was never compared to the physical evidence retrieved from the crime scene, including an unknown DNA profile obtained from a soda can inside the trailer. However, it was not shown that either of the two perpetrators touched the soda can or that it had any connection with the instant offenses.

Based on our careful review of the evidence, we conclude that a rational trier of fact could have found the state negated any reasonable probability of misidentification in this case. At trial, the jury heard all of the testimony and viewed all of the evidence presented to it, including the testimony of Knight specifically identifying defendant as one of the perpetrators of the instant offenses. Defense counsel had an opportunity to fully cross-examine Knight and all other state witnesses on all aspects of their testimony and credibility and did so thoroughly. Defendant also presented evidence seeking to establish that he had an alibi for the time of the murders and that other individuals better met the survivor's descriptions of the perpetrators and were not properly eliminated as suspects by the police. After hearing all of the testimony and viewing the evidence, the jury found defendant guilty of the instant offenses. In doing so, it is clear that the jury accepted the testimony of the state's witnesses and rejected that of the defense witnesses seeking to establish that defendant did not participate in the instant offenses.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. An appellate court will not assess the credibility of witnesses or reweigh the evidence to overturn a jury's determination of guilt. **Lofton**, 96-1429 at p. 5, 691 So.2d at 1368. The reviewing court is not permitted to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Marcantel**, 00-1629, p. 9 (La. 4/3/02), 815 So.2d 50, 56. This Court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83.

The evidence presented in the instant case supports the guilty verdicts. If accepted as true, Knight's testimony established the identity of defendant as one of the perpetrators of the instant offenses. Further, the state presented

testimony from one of defendant's drug buddies that, shortly before the murders, she suggested to him and another man that robbing Roxanne would be easy and profitable. Defendant displayed sufficient interest in her suggestion to have her drive him by Roxanne's trailer to view it, while he and the other man asked questions about how many people would be present, whether Roxanne had guns, and where she kept the drugs. Furthermore, when defendant was questioned shortly after his arrest about a .38 caliber firearm he had earlier admitted he owned, he denied owning such a weapon. When confronted with his earlier statement, he gave evasive and inconsistent answers as to what had become of the weapon.

As previously noted, the guilty verdicts returned in this case indicate the jury accepted the testimony of the state witnesses and rejected the testimony of the defense witnesses seeking to establish that defendant was not involved in the victims' murders. See **State v. Andrews**, 94-0842, p. 7 (La.App. 1 Cir. 5/5/95), 655 So.2d 448, 453. We cannot say that the jury's verdicts were irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the jury and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected, by the jury. See **State v. Calloway**, 07-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Accordingly, we are convinced that viewing all of the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the instant offenses.

This assignment of error lacks merit.

EXCESSIVE SENTENCE

In his second assignment of error, defendant argues that the imposition of mandatory life sentences, without the possibility of parole, for his first degree murder convictions was unconstitutionally excessive under the Eighth

Amendment to the United States Constitution. He further contends the sentences are excessive under Article I, § 20 of the Louisiana Constitution because they are disproportionate, serve no meaningful sentencing goal, and eliminate the possibility of rehabilitation.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. This Court has specifically held that the imposition of a mandatory sentence of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for a first degree murder conviction does not violate U.S. Const. amend. VIII. See **State v. Craig**, 05-2323, p. 5 (La.App. 1 Cir. 10/25/06), 944 So.2d 660, 662, writ denied, 06-2782 (La. 6/29/07), 959 So.2d 518, cert. denied, 552 U.S. 1062, 128 S.Ct. 714, 169 L.Ed.2d 554 (2007). However, under LSA-Const. Art. I, § 20, even when a sentence is within statutory limits, it may be unconstitutionally excessive. See **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered unconstitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks the sense of justice. **Andrews**, 94-0842 at p. 8, 655 So.2d at 454. A trial court has wide, although not unbridled, discretion in imposing a sentence within statutory limits. **State v. Trahan**, 93-1116, p. 25 (La.App. 1 Cir. 5/20/94), 637 So.2d 694, 708. The sentence imposed will not be disturbed absent a showing of manifest abuse of the trial court's wide discretion. **Andrews**, 94-0842 at p. 9, 655 So.2d at 454.

In the instant case, defendant originally was exposed to a penalty for first degree murder of either death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. See LSA-R.S. 14:30C. However, since the state opted not to pursue the death penalty herein, defendant was exposed at trial to a mandatory penalty of life imprisonment at

hard labor without the benefit of parole, probation, or suspension of sentence on each of the charged offenses.

A mandatory minimum sentence may be unconstitutionally excessive if the sentence makes no measurable contribution to acceptable goals of punishment and amounts to the purposeful imposition of pain and suffering and is grossly disproportionate to the crime. In such instances, the trial court is duty bound to reduce the sentence to one that would not be constitutionally excessive. See **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993). However, it is the legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies, and courts are charged with imposing these punishments, unless they are found to be unconstitutional. **Dorthey**, 623 So.2d at 1278. In order to rebut the presumption that a mandatory minimum sentence is constitutional, defendant must carry the burden to show clearly and convincingly that he is exceptional. **State v. Johnson**, 97-1906, p. 8 (La. 3/4/98), 709 So.2d 672, 676. Specifically, the defendant must show that, due to unusual circumstances, he is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense and the circumstances of the case. **Johnson**, 97-1906 at p. 8, 709 So.2d at 676.[3]

The instant case involves four victims being shot execution style at close range. Two of the victims were defenseless teenagers. The record reveals no reason for the trial court to deviate from the mandatory sentences of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Defendant did not present any particular facts regarding his personal history or any special circumstances that would support a deviation from the mandatory life sentences. Based on the record before us, we find that defendant has failed to show that he is exceptional or that the mandatory life

[3] While both **Dorthey** and **Johnson** involve mandatory minimum sentences imposed under the Habitual Offender Law, the Louisiana Supreme Court has held that the sentencing review principles espoused in **Dorthey** are not restricted in application to the penalties provided by the Habitual Offender Law. See **State v. Fobbs**, 99-1024 (La. 9/24/99), 744 So.2d 1274, 1275 (per curiam).

sentences were not meaningfully tailored to his culpability, the gravity of the offenses, and the circumstances of the case. Accordingly, we do not find that a downward departure from the mandatory life sentences was required in this case. The sentences imposed were not unconstitutionally excessive and were not grossly disproportionate to the severity of the offenses.

This assignment of error lacks merit.

NON-UNANIMOUS VERDICTS

In his third and fourth assignments of error, defendant contends that unanimous jury verdicts were required in this case, and that the statutory provisions permitting his conviction by non-unanimous verdicts are unconstitutional. A polling of the jurors in this case indicated that defendant was convicted on each count by a vote of eleven to one.

Louisiana Constitution Article I, § 17(A) provides, in pertinent part, that:

> A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict.

Louisiana Code of Criminal Procedure Article 782A provides as follows:

> Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.

In the instant case, defendant was tried pursuant to LSA-R.S. 14:30C, which was amended by 2007 La. Acts No. 125, § 1, effective August 15, 2007, to provide as follows:

> (1) If the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. Art[.] 782 relative to cases in which punishment may be capital shall apply.
>
> (2) **If the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation or suspension of**

> **sentence. The provisions of C.Cr.P. Art[.] 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.** (Emphasis added.)

Prior to its amendment in 2007, LSA-R.S. 14:30C merely provided that the penalty for first degree murder was "death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury." No reference was made to Article 782, and the district attorney was not given the option of seeking a non-capital verdict, which option allows a verdict to be rendered upon the concurrence of ten of twelve jurors under Article 782A. Hence, if LSA-R.S. 14:30C(2), as amended by Act 125, is applicable in this case, the non-unanimous verdicts rendered by the jury were proper under Article 782A, since the state did not seek capital verdicts herein.

The amendment to LSA-R.S. 14:30C became effective after the instant offenses were committed, but prior to defendant's indictment and trial. Defendant contends that a determination of whether the amendment is applicable to this case hinges upon whether it is procedural or substantive in nature. If substantive, he asserts his convictions must be reversed based upon the improper jury verdicts. This issue was raised in a motion for new trial, which the trial court denied on the basis that the amendment to LSA-R.S. 14:30C was procedural in nature and, therefore, retroactive.[4] Appellate courts may review the grant or denial of a motion for new trial only for errors of law. See LSA-C.Cr.P. art. 858.

In **State v. Goodley**, 398 So.2d 1068, 1070-71 (La. 1981), the supreme court held that a unanimous verdict was required to convict a defendant charged with a capital offense, even when the state stipulated that it would not seek the death penalty. In reaching this decision, the supreme court stated:

> The Legislature, in enacting the controlling provision herein, relied on the severity of the punishment provided for a crime as the basis for its classification scheme in providing the number of jurors which must compose a jury and the number of jurors which must

[4] The motion for new trial on this ground actually was filed by Bishop's defense counsel, but was adopted by counsel for Kaigler.

> concur to render a verdict. As stated above, La. Const. of 1974 Art. I, § 17 and C.Cr.P. art. 782 provide in pertinent part:
>
> "A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict."
>
> Thus, the Legislature determined that for crimes that were so serious as to validly carry the death penalty, certain special **procedural rules** were additionally required, **among which was the requirement of a unanimous jury to render a verdict**. This determination is not based on an after the fact examination of what crime the defendant may eventually be convicted of, nor is it based on an after the fact examination of what sentence he receives. Rather, the scheme is based on a determination by the Legislature that certain crimes are so serious that they require more strict **procedural safeguards** than other less serious crimes. It was determined that in charged capital offenses a unanimous verdict for conviction, not just sentencing, is necessary and **there is no attendant provision giving the state the authority to alter that scheme on its own motion by simply stipulating that the death penalty will not be sought in a certain case**.

Goodley, 398 So.2d at 1070-71. (Emphasis added.)

As noted by the supreme court, at the time that **Goodley** was decided, no authority existed for the state to alter the legislative scheme established with regard to capital cases. However, by the 2007 amendment to LSA-R.S. 14:30C(2), the legislature created a hybrid capital/non-capital statute that granted authority to the state to designate a case as non-capital by opting to forego the possibility of a death penalty. Therefore, since LSA-R.S. 14:30C(2), as amended, created the "attendant provision" referred to in **Goodley** that granted discretion to the state to prosecute first degree murder as a non-capital offense, unanimous verdicts would not be required herein if the amended statute can be applied retroactively to this case.

In **State v. Washington**, 02-2196, pp. 2-3 (La. 9/13/02), 830 So.2d 288, 290 (per curiam), the Louisiana Supreme Court delineated the two-fold inquiry necessary to determine whether a law should be applied retroactively as follows:

> First, it must be ascertained whether the enactment expresses legislative intent regarding retrospective or prospective application. If such intent is expressed, the inquiry ends.... [T]he second step is to classify the enactment as either substantive, procedural or interpretive.

> Substantive laws are laws that impose new duties, obligations or responsibilities upon parties, or laws that establish new rules, rights and duties or change existing ones. Interpretive laws are those which clarify the meaning of a statute and are deemed to relate back to the time that the law was originally enacted. Procedural laws prescribe a method for enforcing a substantive right and relate to the form of the proceeding or the operation of laws.
>
> Laws that are procedural or interpretive may be applied retroactively. (Citations omitted.)

In the instant case, Act 125 contains nothing to indicate legislative intent with regard to its application. Therefore, the next step is to classify the legislation as substantive, procedural or interpretative.[5] The supreme court has consistently held that changes in procedural rules made after the commission of the offense, but before the commencement of trial, may be employed at a defendant's trial. See **State v. Loyd**, 96-1805, pp. 12-13 (La. 2/13/97), 689 So.2d 1321, 1328; **State v. Sepulvado**, 342 So.2d 630, 635-36 (La. 1977), abrogated on other grounds, **State ex rel. Olivieri v. State**, 00-0172, 00-1767 (La. 2/21/01), 779 So.2d 735.[6]

A review of the reported jurisprudence reveals no cases addressing the retroactivity of the amendment to LSA-R.S. 14:30C with respect to the non-unanimous verdict issue. However, in **State v. Lewis**, 09-846, pp. 6-11 (La.App. 3 Cir. 4/7/10), 33 So.3d 1046, 1053-55, writ denied, 10-0967 (La. 11/24/10), 50 So.3d 825, the third circuit considered the retroactive application of this exact amendment in a slightly different context. In **Lewis,** the defendant was tried after the effective date of the 2007 amendment to LSA-R.S. 14:30C on two counts of first degree murder that occurred in 2004. After the state indicated it would not seek the death penalty, the defendant waived his right to

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[5] Although LSA-R.S. 1:2 provides that "[n]o Section of the Revised Statutes is retroactive unless it is expressly so stated," this provision has been held to apply only to substantive and not to procedural or interpretative legislation. See **Manuel v. Louisiana Sheriff's Risk Management Fund**, 95-0406, p. 8 (La. 11/27/95), 664 So.2d 81, 86.

[6] Prior to **Olivieri**, the test utilized by the Louisiana Supreme Court in analyzing whether a law fell within the ambit of the ex post facto clause was whether or not the law altered the situation of the defendant to his disadvantage. See **Sepulvado**, 342 So.2d at 635; **Olivieri**, 00-0172, 00-1767 at p. 14, 779 So.2d at 743. In **Olivieri**, the supreme court disavowed this test in favor of a much narrower analysis that determines "whether the change alters the definition of criminal conduct or increases the penalty." **Olivieri**, 00-0172, 00-1767 at pp. 15-16, 779 So.2d at 744.

a jury trial. On appeal, the defendant argued the waiver of a jury trial was invalid because his case must be treated as a capital case, regardless of whether the state was seeking the death penalty. Under LSA-Const. Art. I, § 17(A) and LSA-C.Cr.P. arts. 780A and 782B, a defendant may not waive his right to a jury trial in a capital case. The third circuit rejected the defendant's contention, concluding that the 2007 amendment to LSA-R.S. 14:30C, together with the state's decision not to seek the death penalty, removed the case from the realm of capital cases, thereby allowing a valid waiver of the defendant's right to a jury trial. **Lewis**, 09-846 at p. 11, 33 So.3d at 1055. Thus, the third circuit retroactively applied the amendment to LSA-R.S. 14:30C to the defendant's trial, even though it was not in effect when the offenses were committed.

Further, in **State v. Kinsel**, 00-1610, p. 12 (La.App. 5 Cir. 3/28/01), 783 So.2d 532, 539, writ denied, 01-1230 (La. 3/28/02), 812 So.2d 641, the fifth circuit considered a 1997 amendment to LSA-R.S. 14:42D that created a hybrid capital/non-capital statute for the crime of aggravated rape of a child below the age of twelve. Under the amendment, if the state opted to seek a penalty of life imprisonment, rather than a capital verdict, only ten of twelve jurors were required to concur in the verdict. Even though the state did not seek the death penalty in **Kinsel**, the defendant therein argued a unanimous verdict nevertheless was required, since the 1997 amendment was not in effect when the crime was committed. The fifth circuit rejected this argument, explaining its holding as follows:

> Although LSA-R.S. 14:42 D(2)(b) was not in effect at the time that defendant committed the alleged offenses, it had been enacted prior to the time of defendant's trial. We find this procedural provision applicable to the instant case. As a result, the provisions of C.Cr.P. art. 782 were properly triggered when the state did not seek the death penalty. Accordingly, we find that the trial court did not err in failing to require a unanimous verdict for defendant's aggravated rape conviction.

Kinsel, 00-1610 at pp. 12-13, 783 So.2d at 539. We agree with this rationale.

The requirement of a unanimous verdict in capital cases is a procedural rule. See **Goodley**, 398 So.2d at 1070. Moreover, the supreme court has held

that changes in procedural rules effective after the commission of the offense, but before the commencement of trial, may be applied at a defendant's trial. See **Loyd**, 96-1805 at pp. 12-13, 689 So.2d at 1328; **Sepulvado**, 342 So.2d at 635-36. Accordingly, based on our review of the law and jurisprudence, particularly the conclusions reached by the courts in **Lewis** and **Kinsel**, we find that the amendment to LSA-R.S. 14:30C granting the state the option of not seeking a capital verdict in first degree murder cases was procedural in nature and, therefore, applicable to the trial of the instant matter. See **Loyd**, 96-1805 at pp. 12-13, 689 So.2d at 1328; **Sepulvado**, 342 So.2d at 635-36.

We are aware that the third circuit reached an apparently contrary conclusion in **State v. Breaux**, 08-1061 (La.App. 3 Cir. 4/1/09), 6 So.3d 982. In **Breaux**, the third circuit held that the procedural rules applicable to capital cases, including unanimous verdicts, were required in a situation where the death penalty was applicable when most of the offenses were committed, even though the death penalty could not be carried out at the time of the defendant's 2008 trial because of rulings of the United States Supreme Court. See **Breaux**, 08-1061 at p. 8, 6 So.3d at 988. However, because we find the analysis expressed in the **Lewis** and **Kinsel** cases more persuasive, the holding of **Breaux** does not affect the conclusion we have reached in the present case. Significantly, in **Lewis**, the third circuit apparently did not find its earlier decision in **Breaux** to be any impediment to its conclusion that the amendment to LSA-R.S. 14:30C should be applied retroactively.

Lastly, defendant argues that the provisions of LSA-Const. Art. I, § 17(A) and LSA-C.Cr.P. art. 782A allowing non-unanimous jury verdicts in felony cases violate the Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment to the United States Constitution. Initially, we note that this argument has been repeatedly rejected by the courts of this state. See **State v. Bertrand**, 08-2215, p. 6 (La. 3/17/09), 6 So.3d 738, 742; **State v. Smith**, 06-0820, p. 24 (La.App. 1 Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 07-0211 (La. 9/28/07), 964 So.2d 352.

Nevertheless, while defendant concedes that **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), stands for the proposition that non-unanimous verdicts are permissible under the Sixth Amendment, he asserts the Supreme Court's recent decision in **McDonald v. City of Chicago**, ___ U.S. ___, 130 S.Ct. 3020, 3035, 177 L.Ed.2d 894 (2010), effectively overruled **Apodaca**. In support of this contention, he quotes language from **McDonald** to the effect that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" Thus, defendant argues the issue of jury unanimity is ripe for reconsideration.

Defendant's contention is meritless. In **McDonald**, the Supreme Court recognized that most, but not all, of the protections of the Bill of Rights have been incorporated to the states through the Fourteenth Amendment. **McDonald**, 130 S.Ct. at 3034-35. Furthermore, citing **Apodaca** in support of the proposition, the Supreme Court specifically stated in **McDonald** that, although the Sixth Amendment requires unanimous jury verdicts in federal criminal trials, it does not require unanimous jury verdicts in state criminal trials. **McDonald**, 130 S.Ct. at 3035 n.14. Therefore, in **McDonald** the Supreme Court actually reaffirmed the holding of **Apodaca**, rather than overruling it.

For the above reasons, the trial court did not err in denying the motion for new trial on the basis that the non-unanimous verdicts were invalid. These assignments of error lack merit.

REVIEW FOR ERROR

Defendant requested this Court review the record for error pursuant to LSA-C.Cr.P. art. 920(2). Such a request is unnecessary, since this Court routinely reviews records for such errors. In any event, our review reveals that the trial court sentenced defendant without waiting at least twenty-four hours after denying his supplemental motion for new trial, as required by LSA-C.Cr.P. art. 873. In cases where the defendant either contests his sentence or complains of the absence of a 24-hour delay, the failure of the trial court to observe the delay

or to obtain a waiver thereof normally would require the sentence to be vacated and the case to be remanded for resentencing. See **State v. Augustine**, 555 So.2d 1331, 1333-35 (La. 1990). In the instant case, defendant challenges his sentences as being excessive. However, Louisiana jurisprudence has recognized exceptions to the requirement that the sentence be vacated in cases where the failure to observe the delay is harmless. One instance in which the trial court's failure to observe the 24-hour delay has been found to be harmless is where the sentence imposed is mandatory in nature. See **State v. Seals**, 95-0305, p. 17 (La. 11/25/96), 684 So.2d 368, 380, cert. denied, 520 U.S. 1199, 117 S.Ct. 1558, 137 L.Ed.2d 705 (1997). Thus, since the life sentences imposed in the instant case were mandatory under LSA-R.S. 14:30C(2), the trial court's failure to observe the statutory 24-hour delay was harmless error.

CONVICTIONS AND SENTENCES AFFIRMED.