NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

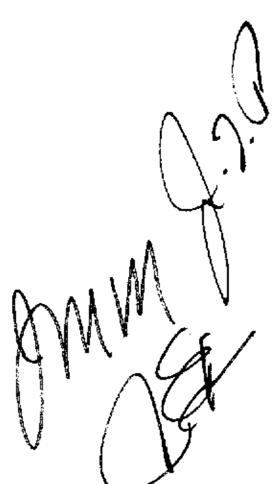
FIRST CIRCUIT

NO. 2012 KA 1391

STATE OF LOUISIANA

VERSUS

BRANDON C. DAVIS



Judgment rendered MAR 2 5 2013

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 445529-1
Honorable William J. Burris, Judge

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BRANDON C. DAVIS

* * * * * *

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

PETTIGREW, J.

The defendant, Brandon C. Davis, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. He pled not guilty and, following a jury trial, was found guilty as charged.[1] The defendant filed motions for new trial and postverdict judgment of acquittal, which were denied. He was sentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence. He now appeals, designating two assignments of error. We affirm the conviction and affirm the sentence, as amended.

FACTS

On November 26, 2007, Annette Gordon and Eric Frick were at their home on East Second Street in Covington. After 9:00 p.m. that evening, Frick was working on the side of the house building a drawer. When Frick went back into the house to retrieve something, two men, who Gordon later identified as the defendant and Hammond, approached the house. Gordon testified at trial that Hammond walked up a few steps toward the front door and asked Gordon if he could use her phone because his truck had broken down. Gordon handed Hammond her cell phone and observed that the defendant stayed on the sidewalk behind Hammond. Frick motioned for Gordon to go inside to take care of one of the children in the house. As Gordon made her way through the house to get Pull-Ups, she heard what she thought was a firecracker. She went to the front door and saw Frick lying on the steps. Frick died shortly thereafter from a bullet wound. She closed the door and locked it. Gordon's granddaughter told Gordon that she, Gordon, was bleeding. Gordon then realized she had been shot in her hand. The bullet that hit Gordon had come through the side window of the house, and lodged in a blue rubber tub. The defendant and Hammond left the scene. Gordon did not see who shot Frick or who shot through her window, and she did not see either the defendant or Hammond with a gun.

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[1] Co-defendant Shawn Hammond was tried in a joint trial with the defendant. Hammond was also found guilty as charged. Hammond's appeal is pending with this court. See **State v. Hammond**, 2012-1559 (La. App. 1 Cir. 3/22/13), ___ So.3d ___.

The following day, Donald Burch, a Louisiana DOTD employee, was driving to work when he found a Rossi .357 magnum revolver in the middle of La. Hwy. 36. The gun contained three .38 live rounds and two fired .38 cartridge cases. Burch later turned the gun over to the police. Two days after that, on November 29, Kathy Barton, an ATF special agent, found a Smith & Wesson (S&W) .357 magnum revolver near a mailbox just off of La. Hwy. 36. The gun contained five .357 live rounds and one fired .357 magnum cartridge case. The guns were found in close proximity to each other and less than a mile from Frick's house. Earl Washington testified at trial the Rossi .357 found by Burch was stolen from his home in Baker in November 2005. The guns were tested for DNA evidence. Burch's DNA was found on the Rossi .357, and Frick's DNA was found on the S&W .357. The defendant's DNA and Hammond's DNA was not found on either gun.

Meredith Acosta, with the New Orleans Police Department Crime Lab and an expert in firearms identification, testified at trial that she test-fired the guns found near Frick's house. It was determined that the bullet that struck the blue rubber tub was fired from the Rossi .357; and the bullet that struck and killed Frick was fired from the S&W .357. Dr. Michael DeFatta, who performed the autopsy on Frick, testified at trial that Frick had been shot in the right shoulder. The bullet traveled through the top of his right lung and into the lower lobe of his left lung. According to Dr. DeFatta, the stippling found on the right upper eyebrow and eyelid of Frick indicated that the gun was 36 to 43 inches away from his body when he was shot.

Marguerite Tyson, who was sick prior to trial, testified at a preliminary examination hearing for purposes of perpetuating her testimony for trial. According to Tyson, who lives in Covington, Hammond was her nephew. Hammond lived in Baton Rouge and went to Covington about twice a year. On the day Frick was shot, Hammond had gone to Tyson's house at about 6:30 p.m. to get money "to get his car out." Hammond asked Kendrick Gordon ("Kengie"), Annette Gordon's son, for the money, but Kengie did not have the money. Hammond also asked Tyson's sister for money, but she, too, did not have money. Hammond left Tyson's home at about 7:30 p.m. or 8:00 p.m. in a dark-colored pickup truck.

Juan Banks, who was in jail during trial, also testified at the preliminary examination hearing, for purposes of perpetuating his testimony for trial. According to Banks, the defendant lived on Avenue J in Baton Rouge. Banks also knew Hammond. In late 2007, Banks loaned his cell phone to the defendant. Phone records showed that in a 36-hour period, from November 25, 2007 to November 27, 2007, more than 30 calls were made between Banks's loaned phone (to the defendant) and Hammond's phone. However, there was no way to tell where the phones were located when these calls were made. Banks stated that he would not have made or received that many phone calls. Banks further stated that he would lend his phone out to other people.

Denise Hossley testified at trial that when she had gotten off of work on the evening of November 26, 2007, she went to the Quick Stop Snack Shop (Quick Stop) in Covington. She saw Hammond, who she knew of but did not know personally, at the store. Hammond was with someone, who Hossley later identified as the defendant. Hossley testified that Hammond and the defendant were in a blue or dark-colored Chevy pickup truck.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the evidence was insufficient to support his conviction. Specifically, the defendant contends that his identity as the shooter was not established, and that there was no physical evidence to suggest that he, or Hammond, was involved in the shooting.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-1309 (La. 1988). The **Jackson** standard of

review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, p. 5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144. Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the fact finder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 2005-0992, pp. 5-6 (La. 11/29/06), 943 So.2d 1047, 1051; **State v. Davis**, 2001-3033, p. 3 (La. App. 1 Cir. 6/21/02), 822 So.2d 161, 163-164.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. See La. R.S. 14:30.1(A)(1). Specific intent is that state of mind that exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503, p. 13 (La. 11/25/96), 684 So.2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982). The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. **State v. McCue**, 484 So.2d 889, 892 (La. App. 1 Cir. 1986). Deliberately pointing and firing a deadly weapon at close range indicates specific intent to kill. See **State v. Robinson**, 2002-1869, p. 8 (La. 4/14/04), 874 So.2d 66, 74, cert. denied, 543 U.S. 1023, 125 S.Ct. 658, 160 L.Ed.2d 499 (2004).

Parties to crimes are classified as principals and accessories after the fact. La. R.S. 14:23. Principals are all 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. La. R.S. 14:24. Only those persons who knowingly participate in the planning or execution of a crime are principals. An individual may be convicted as a principal only for those crimes for which he personally has the requisite mental state. See **State v. Pierre**, 93-0893 (La. 2/3/94), 631 So.2d 427, 428 (per curiam). The State may prove a defendant guilty by showing that he served as a principal to the crime by aiding and abetting another. **State v. Arnold**, 2007-0362, p. 7 (La. App. 1 Cir. 9/19/07), 970 So.2d 1067, 1072, writ denied, 2007-2088 (La. 3/7/08), 977 So.2d 904. Thus, a general principle of accessorial liability is that when two or more persons embark on a concerted course of action, each person becomes responsible for not only his own acts but also for the acts of the other. **State v. Smith**, 2007-2028, p. 8 (La. 10/20/09), 23 So.3d 291, 296 (per curiam).

The defendant contends the State's evidence was insufficient to establish his identity as the shooter. Specifically, the defendant asserts that no one established that he was in Covington with Hammond during the shooting. According to the defendant, Hossley's testimony was not credible in establishing his presence in Covington, and Gordon's testimony established that she saw the silhouette, but not the faces, of the men who approached the house. The defendant also points out that his DNA or fingerprints were not found on either gun. The defendant further asserts that the prosecutor's prejudicial remarks during voir dire and closing argument "skewed the jury's credibility determinations."

Natasha Powe, an expert in the field of forensic DNA with the St. Tammany Parish Coroner's Office, testified that the guns found near Frick's house were tested for DNA and that the defendant's and Hammond's DNA was not found on either gun. According to Powe, Burch's DNA, likely in the form of skin cells, was on the Rossi .357 that Burch had found on La. Hwy 36, and Frick's DNA, in the form of presumptive blood, was on the S&W .357 that the police had found just off of the highway. The S&W .357 was the gun used to shoot Frick, and his DNA was found on the barrel, the front of the trigger guard, and the cylinder of that gun. Dried blood was still on the barrel. Powe explained that DNA from skin cells can be wiped away easily if it's on a "varnished" non-porous surface. She

further explained that depending on how much the object has been handled after the depositing of the original DNA sample, getting a profile versus not getting a profile is equally as likely.

Regarding Gordon's testimony, the defendant asserts that she could only give a height and size description of the men she saw at her front door. This assertion is inaccurate. While Gordon did not personally know the defendant or Hammond, she clearly identified them as the persons last seen with Frick shortly before he was shot. Gordon described the man she lent her cell phone to, later identified as Hammond, as black, tall, and wearing a jacket with a hood. Hammond told her he needed to use her phone because his truck had broken down, which she saw parked on the side of the house. She described the person standing behind Hammond, later identified as the defendant, as lighter skinned and stocky. She described her source of light, which came from her porch light and a streetlight, as very good. She said the two men were in her view for about five minutes, and that she got a "good view" of the defendant's face. She further stated she got a "very good view" of the defendant because of his lighter skin. She subsequently identified both the defendant and Hammond in six-person photographic lineups as the men at her house when Frick was killed. She provided an in-court identification of the defendant, and when asked on redirect examination if she was absolutely certain that the defendant and Hammond were the two men who showed up on her porch the night Frick was shot, Gordon replied, "Yes."

Hossley testified at trial that on the evening Frick was shot, she was at the Quick Stop in Covington. As she left the store, she saw two men get out of a dark-colored two-door Chevy truck and go into the store. They were wearing black hooded jackets and blue jeans. She recognized Hammond. She did not recognize the person Hammond was with, but described him as "light" and kind of muscular. Hossley subsequently identified the defendant in a six-person photographic lineup as the person Hammond was with that night.

The defendant asserts that Hossley was impeached at trial by his defense counsel. According to the defendant, while Hossley did not know him, she was willing to say the

other person she saw with Hammond was the defendant "because she wanted to do a favor for Annette Gordon," whom Hossley knew. On cross-examination, defense counsel for the defendant attacked Hossley's identification of the defendant by playing excerpts at trial of an interview Hossley gave, over four years after Frick was killed, to John Hogue, Hammond's defense counsel. Hogue went to Hossley's house in March 2012 to ask her questions about the shooting. Hossley stated that she was preparing for her cousin's wedding and had wedding guests in her yard that day when Hogue came over unannounced. In the recorded interview, Hossley stated that she saw Hammond at the store, but did not know what vehicle he was in. She also said in the interview that the defendant had braids. At trial, Hossley was able to identify the truck and stated that the defendant did not have braids. The defendant contends that Hossley lied about seeing the defendant because Annette Gordon's son, Kengie, asked Hossley to help him out for his mother. Hossley explained at trial that she was very busy when Hogue came to her house asking questions about a matter she wanted no involvement in; she was not sure she was supposed to even be talking to Hogue; and that Kengie never told her what to say, but only asked that she tell the police what she saw because the shooting happened at his mother's house.

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 which raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987). The jury's verdict reflected the reasonable conclusion that, based on the physical evidence and the eyewitness testimony, the defendant either personally shot and killed Frick, or was a principal to the killing and shooting of Frick. While it was not established beyond a reasonable doubt that the defendant was the actual shooter, the defendant was nevertheless clearly a principal in the second degree murder of Frick. Through plan and preparation, the defendant and Hammond met and drove together out of town to Frick's house. When they approached the house, they used subterfuge in the form of a broken down vehicle to gain the trust of Frick and Gordon. Shortly thereafter,

while Gordon was inside, Frick was shot and killed. When Gordon went outside, she found Frick dying on his steps. The defendant and Hammond were gone, along with her cell phone.

Clearly, the defendant knowingly participated in the planning or execution of the shooting. Moreover, Gordon was shot by a second gun and, therefore, a second shooter (assuming that one shooter did not fire at Frick with one gun, and then run to the side of the house and fire through the window with the other gun). Thus, it was the defendant who shot at either Frick or Gordon. See **State v. Sonnier**, 380 So.2d 1, 4 (La. 1979) (where the court found there was evidence of each essential element of first degree murder since Sonnier could properly be considered a principal to the offense even if he did not perform the actual shooting). See also **State v. Mitchell**, 39,305, pp. 20-22 (La. App. 2 Cir. 2/17/05), 894 So.2d 1240, 1251-1252, writ denied, 2005-0741 (La. 6/3/05), 903 So.2d 457.

In finding the defendant guilty, the jury clearly rejected the defense's theory of misidentification. See **State v. Andrews**, 94-0842, p. 7 (La. App. 1 Cir. 5/5/95), 655 So.2d 448, 453. The jury heard the testimony and viewed the evidence presented to it at trial and found the defendant guilty as charged. The defendant did not testify and presented no rebuttal testimony. See **Moten**, 510 So.2d at 61-62. Hossley's testimony placed the defendant and Hammond at the Quick Stop in Covington on the night of the shooting. Gordon's testimony placed the defendant and Hammond at Frick's house in Covington in the presence of Frick moments before Frick was shot and killed. Whether the jury believed some or all of the testimony of Hossley and Gordon cannot be ascertained from the verdict. Regardless, in the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003-1980, p. 6 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

Moreover, the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The trier of fact's determination of the weight to be given

evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932. We are 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 fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1 Cir. 1985).

We note as well that a fact finder could have reasonably concluded that certain conditions could have contributed to the lack of the defendant's DNA on either gun. For example, it was pointed out during Powe's testimony that extreme temperatures could cause DNA to "denigrate more rapidly" when out in the open. Also, it appears that whatever DNA may have existed on the Rossi .357 prior to being found was likely wiped away by, or covered with, Burch's DNA when Burch found and handled the gun. Similarly, it appears that whatever DNA may have existed on the S&W .357 was displaced by Frick's DNA when Frick, as the evidence would suggest, grabbed the gun. Frick's DNA was found on the barrel, the front part of the trigger guard and the cylinder -- all parts of a gun that would be touched by Frick if he were grabbing a gun that was being pointed at him.

After a thorough review of the record, we find that the evidence negates any reasonable probability of misidentification and supports the jury's verdict. We are convinced that, viewing 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 the hypotheses of innocence suggested by the defense at trial, that the defendant was guilty of the second degree murder of Eric Frick. See **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

Finally, notwithstanding that these issues are improperly raised under a sufficiency argument, we address the defendant's arguments that the prosecutor's prejudicial remarks during voir dire and closing argument "skewed the jury's credibility

determinations." During voir dire, the prosecutor was discussing with a prospective juror about the sufficiency of testimony from a single witness to establish guilt. The prospective juror, in what appeared to be a reference to the two defendants, stated, "If these gentlemen were to get on the stand and tell me that, I would believe them. That's an example." The prosecutor responded, "Well, they are not the male versions of the Mother Teresa, so - ." Both defense counsel objected. The objections were sustained, and the trial court admonished the prospective jurors that the prosecutor's comment was improper and to "[t]ake it out of your mind entirely."

In his closing argument, the prosecutor noted that a lack of forensic evidence should not preclude a conviction and that if it did, the State could never convict anyone on eyewitness testimony. The prosecutor added, "If that's the case, then it will make my job easy. I'll have a lot fewer cases and there will be a lot more criminals running wild." Both defense counsel objected, and the objections were overruled.

We do not find that the "Mother Teresa" comment could have reasonably contributed to the defendant's conviction. See **State v. Williams**, 615 So.2d 1009, 1017 (La. App. 1 Cir.), writ denied, 619 So.2d 543 (La. 1993). Moreover, the trial court properly admonished the prospective jurors to disregard the comment. See **State v. Hoffman**, 98-3118, p. 44 (La. 4/11/00), 768 So.2d 542, 582, cert. denied, 531 U.S. 946, 121 S.Ct. 345, 148 L.Ed.2d 277 (2000).

Prosecutors are allowed wide latitude in choosing closing argument tactics. Louisiana Code of Criminal Procedure article 774 confines the scope of argument to "evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." The trial judge has broad discretion in controlling the scope of closing argument. Even if the prosecutor exceeds these bounds, we will not reverse a conviction if not thoroughly convinced that the argument influenced the jury and contributed to the verdict. **State v. Frank**, 99-0553, p. 26 (La. 5/22/07), 957 So.2d 724, 741, cert. denied, 552 U.S. 1189, 128 S.Ct. 1220, 170 L.Ed.2d 75 (2008). Furthermore, the trial court instructed the jury that closing arguments were not evidence. Thus, considering the jury instructions and the evidence

presented in the case, we are thoroughly convinced that the complained of remark by the prosecutor did not contribute to the verdict. See **Hoffman**, 93-3118 at 46, 768 So.2d at 583. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues he was convicted of second degree murder by a ten to two non-unanimous verdict in violation of the United States and Louisiana Constitutions. Specifically, the defendant contends that the non-unanimous verdict had been applied in a racially discriminatory manner.

The defendant relies on the argument made by Hammond's defense counsel in his motion for a new trial, wherein he argued that the non-unanimous verdict violates equal protection because the law was racially discriminatory in intent and nature since "you have less blacks on a jury now [sic] days." The unfounded assertion aside, and notwithstanding a lack of reference by either defense counsel or the defendant in brief to the actual racial makeup of the jury in this case, the argument is baseless.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor. See La. R.S. 14:30.1(B). Louisiana Constitution article I, § 17(A) and La. Code Crim. P. art. 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**, 406 U.S. 404, 406, 92 S.Ct. 1628, 1630, 32 L.Ed.2d 184 (1972); **State v. Belgard**, 410 So.2d 720, 726 (La. 1982); **State v. Shanks**, 97-1885, pp. 15-16 (La. App. 1 Cir. 6/29/98), 715 So.2d 157, 164-165.

The defendant's argument has been repeatedly rejected by this court. See **State v. Smith**, 2006-0820, pp. 23-24 (La. App. 1 Cir. 12/28/06), 952 So.2d 1, 15-16, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352; **State v. Caples**, 2005-2517, pp. 15-16 (La. App. 1 Cir. 6/9/06), 938 So.2d 147, 156-57, writ denied, 2006-2466 (La. 4/27/07),

955 So.2d 684. Moreover, our supreme court in **State v. Bertrand**, 2008-2215 (La. 3/17/09), 6 So.3d 738, has rejected the argument raised by the defendant in this assignment of error. In **Bertrand**, the Louisiana Supreme Court specifically found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments. Moreover, the **Bertrand** court rejected the argument that non-unanimous jury verdicts have an insidious racial component and pointed out that a majority of the United Supreme Court also rejected that argument in **Apodaca. Bertrand**, 2008-2215 at 6-7, 6 So.3d at 742-743.

Accordingly, this assignment of error is without merit.

SENTENCING ERROR

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. La. R.S. 14:30.1(B). In sentencing the defendant, the trial court failed to provide that the sentence was to be served at hard labor.[2] Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the proceedings without inspection of the evidence, La. Code Crim. P. art. 920(2) authorizes consideration of such an error on appeal. Further, La. Code Crim. P. art. 882(A) authorizes correction by the appellate court.[3] We find that correction of this illegally lenient sentence does not involve the exercise of sentencing discretion and, as such, there is no reason why this court should not simply amend the sentence. See **State v. Price**, 2005-2514, p. 22 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 124 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277. Accordingly, because a sentence at hard labor was the only sentence that could be imposed, we correct the sentence by providing that it be served at hard labor.

CONVICTION AFFIRMED; SENTENCE AMENDED TO PROVIDE THAT IT BE SERVED AT HARD LABOR, AFFIRMED AS AMENDED.

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[2] The minutes reflect the trial court sentenced the defendant to hard labor. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

[3] An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. La. Code Crim. P. art. 882(A).