NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 KA 0746

STATE OF LOUISIANA

VERSUS

JACE CREHAN

Judgment Rendered: NOV 05 2018

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On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 09-15-0123

The Honorable Anthony J. Marabella, Jr. Judge Presiding

* * * * *

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* * * * *

BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

Guidry, J. Concurs in the result, and assigns reasons

PENZATO, J.

Defendant, Jace Crehan, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1.[1] He pled not guilty. After a trial by jury, defendant was found guilty as charged by eleven of twelve jurors. Defendant filed a motion for new trial, which was denied by the trial court. Immediately following the denial,[2] the trial court imposed a term of life imprisonment at hard labor, to be served without the benefit of probation, parole, or suspension of sentence. Defendant now timely appeals raising three assignments of error. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On the afternoon of July 4, 2015, the Zachary Police Department ("ZPD") was notified by Delmonico Noce that he had found a large amount of blood in his brother's residence. Delmonico had stopped by his brother Robert's trailer to return some borrowed lawn equipment when he noticed a large amount of water pouring out of the residence. After entering and seeing blood, Delmonico immediately left the trailer and called ZPD.

During the initial ZPD walk-through, officers discovered a blue 55-gallon barrel in the kitchen. As a result, detectives were called in and the East Baton Rouge Sheriff's Office ("EBRSO") assumed the lead in the investigation. Police determined the residence belonged to Robert Noce, Jr. ("Noce").

During their investigation, police noticed a window-unit air conditioner next to the trailer under an open window. Police also observed a large amount of water pouring from the trailer, coming from at least one purposefully stopped-up sink.

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[1] Co-defendant Brittany Monk was also charged with second degree murder, but later pled guilty to manslaughter in exchange for her testimony in defendant's trial. The appeal from that case is also currently in this court. *See State v. Monk*, 2018 KA 0747 (La. App. 1 Cir. __/__/__).

[2] The trial court erred in failing to observe the twenty-four hour delay required by La. Code Crim. P. art. 873, and there is no indication in the record defense counsel waived the delay. An indepth discussion of this error appears at the end of this report.

Further investigation revealed a body in a blue barrel, along with used latex gloves. Near the barrel, in the center of the adjacent master bedroom, was a portion of carpet saturated with blood. There was also blood spatter on several objects in the room. A can of Axe deodorant spray and a wallet were found on the bed.

Later forensic examination of Noce's body revealed that a black leather belt had been wrapped around his neck. Though the body was assumed to be that of Noce, DNA and fingerprint samples later confirmed this. An expert forensic witness testified Noce died from multiple stab wounds and strangulation.

Twelve days before his death, and after having been indicted for aggravated rape, Noce pled no contest to felony carnal knowledge of a juvenile for the sexual abuse between the ages of four and twelve of Brittany Monk ("Brittany"), the daughter of Noce's former live-in girlfriend, Margaret Dixon. For that offense, as part of a negotiated plea, Noce had been sentenced to ten years imprisonment at hard labor, which the trial court suspended, five years active probation, and he was required to register as a sex offender.[3]

Police developed Brittany and defendant, her then-boyfriend, as suspects in Noce's death, and the forensic evidence eventually confirmed their involvement. DNA from the latex gloves was matched to a DNA sample taken from Brittany, and a latent fingerprint taken from the bedpost was matched to defendant. Police also learned the pair had purchased batteries and blue nitrile gloves from Walmart during the early morning hours of July 4, 2015.

At trial, Brittany explained she and defendant had begun to discuss confronting Noce "about two weeks" after the guilty plea, which is when Brittany claimed to have just learned Noce was not going to spend any time in prison. She said defendant did not want to move out of the house in which they were living,

[3] Of note, Brittany testified at defendant's trial that she had told Noce's prosecutor that she did not wish to testify against him, and wanted the case dismissed. This was corroborated by the prosecutor at Noce's June 22, 2015 sentencing for felony carnal knowledge of a juvenile.

but that Brittany did not feel safe there with Noce not incarcerated. She admitted Noce had not posed any threats to her, and that neither she nor defendant had any contact with him between when he was arrested in 2012 until July 4, 2015, the day of his death. Brittany testified that defendant was "ok with" the case against Noce being dismissed because he "didn't believe there would be enough evidence to convict" Noce. She explained because defendant did not want to move, she and defendant discussed over several occasions that they would scare Noce so he would stay away from them. Specifically, Brittany testified that defendant talked about tying Noce to a chair and beating him and "making sure that he knows why we are there." Brittany also testified that she had told defendant that Noce had raped her, but she never told defendant specifics about the abuse.

Those discussions between Brittany and defendant culminated on the night of July 3, 2015. Brittany testified defendant had the idea of getting batteries for their walkie-talkies and gloves to prevent them from leaving fingerprints or DNA at the scene. The pair went to Walmart, where they purchased batteries and gloves. They returned home, removing one pair of gloves from the box and leaving the rest there. She believed it was defendant's idea for both of them to wear dark clothes. Defendant looked up Noce's address on the sex offender registry as neither he nor Brittany knew exactly where he lived. The trip to Noce's trailer took between forty-five minutes and one hour, with defendant driving from their residence in Walker to Noce's trailer in Zachary, with one stop for Brittany to use the bathroom. Brittany testified she wanted to be there and that defendant asked her about this several times. On the way, defendant asked Brittany if anyone else lived at Noce's trailer, and she replied there should not be.

Upon their arrival at Noce's trailer, defendant removed the air conditioner from the window with a screwdriver. Defendant climbed in first, and then helped

the seven-month-pregnant Brittany up through the window into the trailer. Navigating through the trailer with a cell phone light, the pair made their way toward the master bedroom. Brittany explained she saw a blue barrel in the kitchen that she knew Noce used to make wine. Both removed their shoes, and defendant removed his watch. She explained that he did so in order to prevent it from getting lost in a struggle, and that she put her hair up to keep it from getting in the way. Defendant handed Brittany a can of Axe spray with the instructions to defend herself with it should the need arise.

Defendant then opened the door to the master bedroom, turned on the light, and ran to the side of Noce's bed. Noce immediately began screaming and pulling the covers back. First remaining near the door, Brittany then moved toward the bed as defendant and Noce began to struggle. Defendant grabbed Noce and tried to pull him onto the floor. As defendant did this, Brittany sprayed Noce in the face with the Axe spray. Defendant then got Noce into a chokehold, and they both dropped to the floor on their knees, with defendant behind Noce. Noce attempted to strike defendant in the head with a cordless drill battery pack. According to Brittany, defendant then said that Noce "chose to do this the hard way." Brittany testified she screamed at Noce that he ruined her life, and eventually he began to beg forgiveness. She punched Noce "ten or fifteen" times, while defendant continued to choke him. After some time, as Noce lay motionless, defendant told Brittany to go get a knife. Brittany went to the kitchen and selected a knife, believing defendant was about to kill Noce. Brittany dropped the knife onto the ground by defendant and left for the master bathroom. Unable to see the two men, Brittany described hearing a "crunching sound" as defendant stabbed Noce in the head and neck. When she walked out of the bathroom, she saw blood squirting out of Noce's body, covering the floor. Defendant told Brittany to get something with which to tie up the body, and she again left the room to retrieve a belt and ties from

the closet in another bedroom. Defendant wrapped the belt around Noce's neck, placed his foot on Noce's back, and pulled the belt for "probably a minute." After the pair moved the barrel into the bedroom and pushed the body in it, defendant moved the barrel back into the kitchen. They then attempted to clean up the blood, and defendant clogged the sink drains to flood the trailer with the intention of destroying evidence. The pair then put their shoes back on, and defendant retrieved his watch. Defendant told Brittany to put her gloves in the barrel, and the lid was put back on. They took a tablet computer with the intention of selling it for money because Noce's wallet contained no cash. Defendant later destroyed the tablet because he was concerned it could be electronically traced back to them. Brittany estimated the entire transaction at the trailer lasted about two hours.

The defendant and Brittany then returned to their house in Walker, where they placed all of their clothing and all of the remaining gloves in a trash bag. They then threw the trash bag away at a nearby car wash, and defendant threw the knife in a water retention pond across the street from the car wash. Later, they went to a nearby hospital so defendant could get a doctor's note in order to skip work the next day. They then went to a family barbeque, feeling it would appear suspicious if they did not.

That night, Brittany received a text message from the East Baton Rouge Parish assistant district attorney who had prosecuted Noce for the sexual abuse asking for defendant's phone number. Defendant told her to give the number to the assistant district attorney, explaining they did not wish to appear to be acting strangely. Brittany said defendant told her that if any detectives came, they would just have to ask for a lawyer. A few hours later, after EBRSO called, they both voluntarily went to a Louisiana State Police building after being asked to appear, where they spoke with detectives in the violent crimes unit. While testifying at the defendant's trial, Brittany admitted she lied to investigators during her interview,

but did consent to a DNA swab. Upon hearing of the swabbing and upset with this, defendant began searching "different types of murder charges." The pair also began clearing out their house and selling items in anticipation of moving in with defendant's mother before what they believed was their imminent arrest. They were arrested two or three days later.

At trial, the State introduced into evidence letters written between defendant and Brittany through the parish jail "farm mail" system. Brittany read from several of them. In them, defendant made several statements calculated to coordinate their responses to police questioning and to explain his strategy that would result in their exonerations, but which also claimed responsibility for the homicide. Among other things, defendant wrote, "He didn't deserve the life I took from him, and I just took the life that he stole from you." While he claimed in one letter that Noce attacked Brittany and that defendant "blacked out" and did not realize what he had done, she confirmed this was not the case. The State also used Brittany to highlight inconsistencies in letters defendant sent to, and were published in part by, The Baton Rouge Advocate regarding the killing and his justifications.

On cross-examination, Brittany admitted she began "pushing" defendant to move after learning Noce was not going to prison. Later, she again admitted she had the opportunity not to go to Noce's trailer, but wanted to see him suffer.

Louisiana State Police Lieutenant Leonardo Moore testified regarding his role in the investigation, most notably his recorded interviews with both the defendant and Brittany. Portions of defendant's recorded statements were played for the jury, and in them he first claimed he blacked out and woke up on top of Noce already having stabbed him multiple times, but without Brittany present. Defendant admitted to placing the body into the barrel. Later, defendant claimed he pulled the sleeping Noce out of the bed and strangled and stabbed him, but with Brittany present. Defendant claimed he was simply trying to tie Noce up when he

"woke up" and began to get up toward Brittany. In order to stop this, defendant said he stabbed Noce multiple times in the head with a knife Brittany had already given him to aid in the restraining.

The State's final witness was EBRSO Sergeant Scott Henning. Sergeant Henning described how defendant showed officers where he disposed of the electronic device and murder weapon. Through Sergeant Henning, the State played audio from the car ride taken with defendant as they drove with Lieutenant Moore. Sergeant Henning also testified that he was able to identify defendant and Brittany in a Walmart security video as they purchased batteries and nitrile gloves the night of the murder. That video was played for the jury. Sergeant Henning explained to the jury that during the car ride, defendant said they had already had the gloves and did not stop at Walmart the night of the homicide. Finally, jail calls from defendant were played to the jury in which defendant gives another version of events to family members, and asked them to contact Brittany to instruct her not to cooperate with the police.

ASSIGNMENT OF ERROR 2: INSUFFICIENT EVIDENCE

In cases where a defendant has raised issues on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should preliminarily determine the sufficiency of the evidence before discussing the other issues raised on appeal. When the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must review the assignments of error to determine whether the accused is entitled to a new trial. *State v. Hearold*, 603 So.2d 731, 734 (La. 1992); *State v. Smith*, 2003-0917 (La. App. 1 Cir. 12/31/03), 868 So.2d 794, 798. Accordingly, we will first address defendant's second assignment of error, which challenges the sufficiency of the State's evidence.

Defendant contends the State merely proved manslaughter beyond a reasonable doubt where he initially did not intend to kill Noce, but only to scare him. In defendant's view, it was sudden heat of blood that caused him to repeatedly stab Noce and choke him.

In response, the State argues that defendant knew of Brittany's sexual abuse long before Noce's guilty plea, much less the night of the murder. Moreover, while defendant may arguably not have accepted the resolution of the case, it was Brittany's choice to make. In either case, the State claims the circumstances were not such to cause a similarly situated person to lose control, and that the chain of events leading to the ambush death of Noce do not belie a sudden heat of passion. Thus, the State asserts, in a light most favorable to the prosecution the jury properly rejected defendant's version of events and found him guilty of second degree murder. The State also cites several cases describing the public policy interest in not condoning vigilantism, echoing the State's argument to the jury below.

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 or not, 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 also* La. Code Crim. P. art. 821(B); *State v. Ordodi*, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; *State v. Mussall*, 523 So.2d 1305, 1308-09 (La. 1988). The *Jackson* standard of review, incorporated in La. Code Crim. P. art. 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 factfinder must be satisfied the overall

evidence excludes every reasonable hypothesis of innocence. *See State v. Patorno*, 2001-2585 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

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). Guilty of manslaughter is a proper responsive verdict for a charge of second degree murder. *See* La. Code Crim. P. art. 814(A)(3). Louisiana Revised Statute 14:31(A)(1) defines manslaughter as a homicide which would be either first degree murder or second degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the factfinder finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed. The existence of "sudden passion" and "heat of blood" are not elements of the offense but, rather, are factors in the nature of mitigating circumstances that may reduce the grade of homicide. *State v. Maddox*, 522 So.2d 579, 582 (La. App. 1 Cir. 1988). Manslaughter requires the presence of specific intent to kill or inflict great bodily harm. *See State v. Hilburn*, 512 So.2d 497, 504 (La. App. 1 Cir.), *writ denied*, 515 So.2d 444 (La. 1987).

Specific intent is that state of mind which 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 (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).

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, are principals. La. R.S. 14:24. Mere presence at the scene of a crime does not make one a principal to the crime. Only those persons who knowingly participate in the planning or execution of a crime are principals to that crime. An individual may only be convicted as a principal 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). Accordingly, the mental state of one defendant may not be imputed to another defendant. *State v. Bean*, 2004-1527 (La. App. 1 Cir. 3/24/05), 899 So.2d 702, 707.

Defendant in brief does not deny that he killed Noce. He instead argues the State did not prove he committed second degree murder because he established provocation and heat of passion, so that his crime constituted only manslaughter. It is the defendant who must establish by a preponderance of the evidence the mitigating factors of sudden passion or heat of blood to reduce a homicide to manslaughter. *See State ex rel. Lawrence v. Smith*, 571 So.2d 133, 136 (La. 1990); *State v. LeBoeuf*, 2006-0153 (La. App. 1 Cir. 9/15/06), 943 So.2d 1134, 1138, *writ denied*, 2006-2621 (La. 8/15/07), 961 So.2d 1158; *see also Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Further, a killing committed in sudden passion or heat of blood must be immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. *State v. Roberson*, 2013-2010 (La. App. 1 Cir. 5/2/14) 2014 WL 3843863 (unpublished), *writ denied*, 2014-1159 (La. 1/9/15), 157 So.3d 598. Thus, the evidence at trial had to establish that the provocation was such that it would have deprived an average person of his self-control and cool reflection. *Id.*

Defendant suggests in brief he was provoked into killing Noce because the plea deal given to Noce was not what he believed it should be, and that he was afraid of what Noce would do to Brittany, their unborn child, or Brittany's half-sister if Noce were not in custody. Of note, on appeal, defendant does not appear to claim he was provoked into "sudden" loss of cool reflection at the scene of the murder, but in the days leading up to it. Though defendant at one point of the investigation claimed Noce "launched himself" at Brittany, this was not borne out by any testimony at trial. In fact, Brittany testified Noce was subdued after a struggle, and was defenseless during most of the confrontation. Unless there is internal contradiction or irreconcilable conflict with the physical evidence, the testimony of a single witness, if believed by the fact finder, is sufficient to support a factual conclusion. *State v. Marshall*, 2004-3139 (La. 11/29/06), 943 So.2d 362, 369, *cert. denied*, 552 U.S. 905, 128 S.Ct. 239, 169 L.Ed.2d 179 (2007).

As elucidated at trial, after first dressing for stealth, defendant and Brittany went to Walmart to purchase nitrile gloves and batteries for walkie-talkies, drove the remaining distance of the 45 minute-long journey to get to Noce's residence, snuck in through a window after quietly removing an air conditioner, chose to walk past an exit to get into his bedroom, surprised him while sleeping in bed, pulled him out of bed and beat him unconscious. Defendant then asked Brittany (a principal) to get him a knife. Once armed with the knife, the defendant proceeded to stab the defenseless Noce in the head five or six times, tied a belt around his neck and pulled so hard he used Noce's back for leverage, finished tying him up, and stuffed the body in a 55-gallon barrel. Defendant claims Noce cried out an admission of guilt and asked forgiveness, a statement somewhat consistent with Brittany's testimony. Considering the fact defendant already knew of Noce's guilt, defendant's assertion hardly rises to the level of provocation sufficient to rob him of cool reflection.

Whatever provocation there may have been as a result of Noce's sentencing, defendant has not shown how killing Noce was caused by any immediate provocation by Noce. *See* La. R.S. 14:30.1; *State v. Richardson*, 2008-2086 (La. App. 1 Cir. 3/27/09), 2009 WL 839519 (unpublished), *writ denied*, 2009-1109 (La. 1/8/10), 24 So.3d 861; *State v. Gachot*, 609 So.2d 269, 276 (La. App. 3 Cir. 1992), *writ denied*, 617 So.2d 1180 (La. 1993) ("The provocation discussed in the manslaughter statute must occur immediately before the offense.") (emphasis in original). Instead, it appears at a minimum that the jury could have reasonably believed defendant formed the specific intent to kill the unconscious Noce in the instant he asked Brittany for a knife. To find defendant reasonably deprived of cool reflection weeks after the "provoking" event, and years after Brittany's last communication or contact with Noce, would set a very dangerous precedent and would be contrary to the jurisprudence of similar situations. *State v. Leger*, 2005-0011 (La. 7/10/06), 936 So.2d 108, 172, *cert. denied*, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007) (defendant's actions in the weeks preceding the shooting demonstrate pattern of menacing behavior and threats directed toward intended victim, such that his actions on night of killing were more a culmination of a slow and steadily increasing anger rather than a sudden passion or heat of blood); *State v. Lagarrigue*, 2016-0203 (La. App. 1 Cir. 9/16/16), 2016 WL 4942430 (unpublished) (where defendant already knew victim had been seeing other men, "defendant's actions leading up to [victim's] killing suggested anything but a loss of cool reflection or self-control; rather, they indicated planning and calculation."); *State v. Lawson*, 2008-0123 (La. App. 5 Cir. 11/12/08), 1 So.3d 516, 523 (evidence did not demonstrate sufficient provocation to support claim that defendant shot victim in sudden passion or heat of blood to warrant conviction for manslaughter; evidence showed defendant and victim ended relationship a month before shooting and that he was angry at her in part for her alleged infidelity, that

defendant purchased gun three weeks later, that defendant loaded gun and placed it on top of entertainment center, that defendant had been lying on sofa when victim stopped by unannounced for her mail, that defendant was not angry when victim arrived, and that shooting occurred within a minute or two of victim's arrival); *State v. Corley*, 97-235 (La. App. 3d Cir. 10/8/97), 703 So.2d 653, 663, *writ denied*, 97-2845 (La. 3/13/98), 712 So.2d 875 (motion in limine properly granted preventing a jury instruction on manslaughter where "no evidence was introduced that the alleged provocation, i.e., the defendant's knowledge of his wife's prior sexual encounter, occurred shortly before the murder."); *Gachot*, 609 So.2d at 276 ("[S]ome of the utterances and actions by defendant's father which defendant claims were sufficient provocation did not occur shortly before the murders, but weeks and months earlier. Defendant's blood had an opportunity to cool.").

Further, until he realized law enforcement could affirmatively tie him and Brittany to Noce's trailer, defendant repeatedly lied during the investigation of the crime. A finding of purposeful misrepresentation reasonably raises the inference of a "guilty mind," as in the case of flight following an offense or the case of material misrepresentation of facts by the defendant following an offense. *See State v. Davenport*, 445 So.2d 1190, 1196 (La. 1984). Lying has been recognized as indicative of an awareness of wrongdoing. *See State v. Rault*, 445 So.2d 1203, 1212-14 (La. 1984), *cert. denied*, 469 U.S. 873, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984).

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. 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

factfinder's determination of guilt. *State v. Taylor*, 97-2261 (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 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which 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). Here, defendant failed to establish by a preponderance of the evidence the mitigating factors of sudden passion or heat of blood. The guilty verdict in this case indicates the jury concluded this was a case of second degree murder and rejected the possibility of a manslaughter verdict. *See State v. Ducre*, 596 So.2d 1372, 1382-84 (La. App. 1 Cir.), *writ denied*, 600 So.2d 637 (La. 1992).

After a thorough review of the record, we find that the evidence supports the guilty 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 every reasonable hypothesis of innocence, that the defendant was guilty of second degree murder, and that the mitigatory factors of manslaughter were not established by a preponderance of the evidence. *See State v. Calloway*, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam); *Ducre*, 596 So.2d at 1384. The jury rejected defendant's assertion that essentially he was "forced" to kill Noce because of a "failure of the judicial system," and that his vigilante justice was somehow justified as a result. This assignment of error is without merit.

ASSIGNMENT OF ERROR 1: MOTION TO RECUSE

In his first assignment of error, defendant contends the trial court erred when it denied his motion to recuse the East Baton Rouge Parish District Attorney's Office (District Attorney's Office) from the case. In the instant filing, defendant

argues the District Attorney's Office should have been recused from the prosecution where it was "compromised by its interest in protecting itself from scrutiny for the extremely favorable and unwarranted plea bargain" given to Noce. Defendant filed a pre-trial motion to recuse the District Attorney's Office on May 12, 2016, that was supplemented on June 29, 2016, which was denied on November 4, 2016 following a hearing. Trial counsel was concerned that the State would call the assistant district attorney from Noce's prosecution to explain that both Brittany and defendant had approved of the plea bargain.[4] Moreover, defendant believed the State had already done so in the grand jury proceedings. As a result, trial counsel wanted to subpoena the assistant district attorney to question her in advance of being called as a possible rebuttal witness by the State. However, trial counsel did concede during the hearing the assistant district attorney in question did not have any involvement in the prosecutorial decisions made in the instant case. In the discussion leading to the denial of the motion, the trial court stated it could not see the relevance of the prior prosecution as to whether or not defendant committed second degree murder.

The State argues in response that defendant failed to show any evidence there was a personal interest in the prosecution on the part of the District Attorney's Office that conflicted with the fair and impartial administration of justice. At the hearing, the State contended defendant was attempting to defeat the secrecy of the grand jury process for no legitimate reason.

Generally, the district attorney has charge of every criminal prosecution by the State in his district. La. Const. art. V, § 26. *See also* La. Code Crim. P. art. 61. The district attorney determines whom, when, and how he shall prosecute. La. Code Crim. P. art. 61. Nonetheless, it has long been the rule in Louisiana that the district attorney, as a quasi-judicial officer, must be fair and impartial, and

[4] The assistant district attorney was never called by the State.

animated by a sense of public duty rather than stimulated by a hope of private gain. *State v. Tate*, 185 La. 1006, 1019, 171 So. 108, 112 (1936).

Louisiana Code of Criminal Procedure article 680 provides the grounds for recusation of a district attorney. That Article states that a district attorney shall be recused when he:

> (1) Has a personal interest in the cause or grand jury proceeding which is in conflict with fair and impartial administration of justice;
>
> (2) Is related to the party accused or to the party injured, or to the spouse of the accused or party injured, or to a party who is a focus of a grand jury investigation, to such an extent that it may appreciably influence him in the performance of the duties of his office; or
>
> (3) Has been employed or consulted in the case as attorney for the defendant before his election or appointment as district attorney.

A defendant attempting to recuse a district attorney on the basis of a personal interest in the cause which is in conflict with fair and impartial administration of justice has the burden of proving this ground for recusal by a preponderance of the evidence. *State v. King*, 2006-2383 (La. 4/27/07), 956 So.2d 562, 565. Louisiana Code of Criminal Procedure article 680(1) embodies a policy requiring a district attorney's recusal when the situation presented raises questions as to whether the district attorney's ability to fairly and impartially perform his duties has been impaired, even unconsciously and despite his earnest assertions to the contrary. This provision does not envision a subjective determination as to whether the district attorney would, in fact, be unfair. Rather, it employs an objective decision as to whether a reasonable person would believe the facts at issue regarding the district attorney's personal interest in the cause would impair his ability to act fairly and impartially in conducting the defendant's prosecution. *See King*, 956 So.2d at 567.

In cases where this issue has arisen, it is rare to find a level of personal interest necessitating recusal of a district attorney's office. *See* e.g., *State v. Kitts*

2017-0777 (La. App. 1 Cir. 5/10/18), 2018 WL 2172726 (unpublished) (where involvement of trial judge and prosecutor in "ongoing Judiciary Commission proceeding" did not rise to level requiring recusal of District Attorney's Office); *State v. Magee*, 2016-1674 (La. App. 1 Cir. 6/13/17) 2017 WL 2558330 (unpublished), *writ denied*, 2017-1226 (La. 10/27/17), 228 So.3d 1234 (where grant of motion to recuse was improper where federal lawsuit brought by defendant did not name the district attorney, but instead named assistants who were not involved in the prosecution and there was no indication case was singled out for "any reason unrelated to the duties and responsibilities of a prosecutor.") (quoting *King*, 956 So.2d at 571 (Weimer, J., concurring)); *State v. Stalbert*, 2016-1218 (La. App. 4 Cir. 2/15/17), 212 So.3d 619, 621, *writ denied*, 2017-0440 (La. 4/24/17), 219 So.3d 1099 (recusal not proper for prosecution involving check forged on the account of a witness advocate employed by District Attorney's Office); *State v. Tucker*, 49,950 (La. App. 2d Cir. 7/8/15), 170 So.3d 394, 419 (where assistant district attorney had previously prosecuted defendant for first degree murder, defendant failed to prove "any personal interest in [the] matter which would have conflicted with the fair and impartial administration of justice."); *State v. Gatewood*, 2012-281 (La. App. 5 Cir. 10/30/12), 103 So.3d 627, 637 (no recusal warranted where assistant district attorney had obtained a material witness warrant for the victim); *State v. Marinello*, 2009-1260 (La. App. 3 Cir. 10/6/10), 49 So.3d 488, 505, *writs denied*, 2010-2494, 2010-2534 (La. 3/25/11), 61 So.3d 660, 661 (where defendant had prior dealings with the district attorney's office due to allegations his wife's ex-husband was harassing them, "knowledge the assistant district attorneys acquired in their professional roles did not indicate a personal interest of the district attorney. Also, the trial court disqualified and restricted the participation of those assistants who had contact with the defendant.").

In the instant case, defendant fails to demonstrate any personal interest the District Attorney's Office had in the prosecution of this case that would conflict with the fair and impartial administration of justice. At most, defendant alleges some unspecified interest in convicting defendant due to some "embarrassment" arising from the resolution of the prior case against Noce. As noted below at the hearing on the motion to recuse, in criminal prosecution it is not uncommon for victims to become defendants, and vice versa. To recuse a district attorney from subsequent interactions with those whom it has previously dealt, because the outcome may have been imperfect, is clearly unreasonable. Even with his low burden of proof, considering the above, there is simply no evidence to support a conclusion that the District Attorney or his Office has "indulge[d] his personal animosity such that professional judgment [was] affected." *See King*, 956 So.2d at 572 (Weimer, J., concurring). This assignment of error is meritless.

ASSIGNMENT OF ERROR 3: NON-UNANIMOUS JURY

In his last assignment of error, defendant makes a pro forma challenge to the constitutionality of his non-unanimous guilty verdict. The State urges that defendant makes no claims warranting a reexamination of Louisiana jurisprudence upholding the validity of non-unanimous jury verdicts.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor. La. R.S. 14:30.1. Louisiana Constitution article I, § 17(A) and Louisiana Code of Criminal Procedure article 782(A) provide that in cases where punishment is necessarily confinement 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 (La. App. 1 Cir. 6/29/98), 715 So.2d 157, 164-65.

In *State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So.3d 738, the Louisiana Supreme Court held non-unanimous jury verdicts were not unconstitutional. It noted that La. Code Crim. P. art. 782 "withstands constitutional scrutiny." As further noted, the Court was "not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12 person jury verdicts are constitutional may someday be overturned." *Bertrand*, 6 So.3d at 743. Relying on *Bertrand*, the Fourth Circuit Court of Appeal upheld the constitutionality of non-unanimous jury verdicts in non-capital felony cases in *State v. Barbour*, 2009-1258 (La. App. 4 Cir. 3/24/10), 35 So.3d 1142, *writ denied*, 2010-0934 (La. 11/19/10), 49 So.3d 396, *cert. denied*, 562 U.S. 1217, 131 S.Ct. 1477, 179 L.Ed.2d 302 (2011). *See also Belgard*, 410 So.2d at 726; *State v. Smith*, 2006-0820 (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 (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; *Shanks*, 715 So.2d at 164-65.

In his brief, counsel concedes it is out of "an abundance of caution" that the assignment of error is made, and submits no new jurisprudence lending support to his overall contention that non-unanimous jury verdicts are unconstitutional. While *Apodaca* was a plurality rather than a majority decision, the United States Supreme Court, as well as other courts, has cited or discussed the opinion various times since its issuance and, on each of these occasions, it is apparent that its holding as to non-unanimous jury verdicts represents well-settled law. *Bertrand*, 6 So.3d at 742. Louisiana Constitution article I, § 17(A) and Louisiana Code of Criminal Procedure article 782(A) are not unconstitutional and, therefore, not in violation of defendant's constitutional rights. *See State v. Hammond*, 2012-1559

(La. App. 1 Cir. 3/25/13), 115 So.3d 513, 515, *writ denied*, 2013-0887 (La. 11/8/13), 125 So.3d 442, *cert. denied*, 572 U.S. 1090, 134 S.Ct. 1939, 188 L.Ed.2d 965 (2014).

PATENT ERROR

This court has conducted an independent review of the entire record in this matter, including a review for error under La. Code Crim. P. art. 920(2). Our review has revealed the existence of a patent sentencing error in this case. Defendant filed a motion for new trial on the date previously set for sentencing and the trial court denied the motion, without delay, just prior to the imposition of the sentence. Louisiana Code of Criminal Procedure article 873 mandates, in relevant part that "[i]f a motion for a new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is overruled." Herein, the trial court erred by sentencing defendant immediately after ruling on the motion for new trial. Moreover, analysis of the record struggles to locate even an implicit waiver of the sentencing delay by defense counsel. At most, counsel did not contest moving on to sentencing immediately following the denials of his motion for new trial. *State v. Kisack*, 2016-0797 (La. 10/18/17), 236 So.3d 1201, 1205 (per curiam), *cert. denied, Kisack v. Louisiana*, ___ U.S. ___, 138 S.Ct. 1175, 200 L.Ed.2d 322 (2018) ("implicit waiver . . . runs afoul of the plain language of La. Code Crim. P. art. 873 that requires that the waiver be expressly made.").

Nevertheless, in *State v. Augustine*, 555 So.2d 1331, 1333-34 (La. 1990), the Louisiana Supreme Court indicated that a failure to observe the twenty-four hour delay provided in La. Code Crim. P. art. 873 will be considered harmless error where the defendant could not show that he suffered prejudice from the violation, and sentencing is not raised on appeal. *See State v. White*, 404 So.2d 1202, 1204-05 (La. 1981). Assuming arguendo the defendant is contesting his sentence by raising a sufficiency claim below asserting he is only guilty of manslaughter, or by

filing a post-trial motion seeking to add parole eligibility to his sentence, failure to observe the twenty-four hour delay can still be determined not to be reversible error though the sentence is challenged. In *State v. Seals*, 95-0305 (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), the Louisiana Supreme Court noted that the mandatory nature of the sentence distinguished the case from *Augustine*, and found that the reversal of the sentence for failure to wait twenty-four hours between the denial of the motion and imposition of sentence was not warranted in the absence of prejudice. *State v. Sam*, 99-0300 (La. App. 4th Cir. 4/19/00), 761 So.2d 72, 77-78, *writ denied*, 2000-1890 (La. 9/14/01), 796 So.2d 672. Defendant received a mandatory sentence of life imprisonment at hard labor. *See* La. R.S. 14:30.1. Accordingly, any error in the trial court's failure to observe the twenty-four hour delay is harmless beyond a reasonable doubt and does not require a remand for resentencing. *See Seals*, 684 So.2d at 380 ("Delay or no delay, the sentence the judge was required to impose would have been the same. Thus, no prejudice could possibly have resulted from the failure of the court to comply with the delay.").

CONVICTION AND SENTENCE AFFIRMED.

STATE OF LOUISIANA

COURT OF APPPEAL

FIRST CIRCUIT

NUMBER 2018 KA 0746

STATE OF LOUISIANA

VERSUS

JACE CREHAN

GUIDRY, J., concurs in the result and assigns reasons.

GUIDRY, J., concurring.

Regarding the constitutionality of the non-unanimous jury verdict in Louisiana, I concur in the result of this case, because for now the law on the issue is well-settled. However, though State v. Bertrand, 08-2215 (La. 3/17/09), 6 So. 3d 738, continues to be the law in Louisiana, its validity has recently been put into question. As an initial matter, the Louisiana Legislature has placed before the voters of Louisiana an opportunity to amend the State constitution to require unanimous jury verdicts in all felony cases, indicating their discomfort with the *status quo*. See 2018 La. Acts 722. Moreover, in State v. Maxie, 72,522 (La. 11th JDC 10/11/18), the Sabine Parish district court granted a motion for new trial on the basis that the defendant's right to equal protection under the United States Constitution had been infringed. U.S. Const. Amend. 14. Evidence demonstrating the discriminatory intent of La. Const. art. I § 17(a) and La. C.Cr.P. art. 782, first promulgated in Reconstruction Louisiana in 1898, was submitted to that court. Finding that split-verdict results disproportionately affected African-American defendants, the court ordered that defendant would receive a new trial, and generally that all non-unanimous verdicts are per-se unconstitutional.

That the defendant in the instant case is a white male is of no moment. Cf. Campbell v. Louisiana, 523 U.S. 392, 401, 118 S.Ct. 1419, 1424-25, 140 L.Ed.2d 551 (1998) (white criminal defendant alleging discriminatory exclusion of blacks from grand jury has standing to litigate whether his conviction was procured by means or procedures which contravene due process); Powers v. Ohio, 499 U.S. 400, 415, 111 S.Ct. 1364, 1373, 113 L.Ed.2d 411 (1991) (under equal protection clause, defendant has standing to object to race-based exclusions of jurors through peremptory challenges whether or not defendant and excluded jurors share same race); State v. Fleming, 02-1700 (La. App. 4th Cir. 4/16/03), 846 So. 2d 114, 131 (no merit in State argument that defendant lacks standing to bring equal protection claim where race is a factor). A jury verdict violating due process does so regardless of the class membership of the subject defendant. Given an intent by the defense bar of Louisiana to pursue the issue in other venues, it is only a matter of time before this persuasive and newly collected data is presented to this court or the supreme court. See, Gordon Russell, Sabine Parish judge rules Louisiana's split-jury law unconstitutional, citing Advocate research; impact unclear, Baton Rouge Advocate, Oct. 18, 2018, https://www.theadvocate.com/baton_rouge/news/courts/article_ca65d8fa-d276-11e8-a43a-e75014a9ccfb.html.