STATE OF LOUISIANA	*	**NO. 2001-KA-1618**
VERSUS	*	**COURT OF APPEAL**
JOSEPH J. ROUSSELL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-724, SECTION "I"
HONORABLE RAYMOND C. BIGELOW, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Miriam G. Waltzer, Judge Michael E. Kirby)

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STATEMENT OF THE CASE

Defendant Joseph J. Roussell was charged by grand jury indictment on September 14, 2000 with second degree murder, a violation of La. R.S. 14:30.1. Defendant pleaded not guilty at his September 20, 2000 arraignment. The trial court denied defendant's motions to suppress the evidence and identification on October 30, 2000. On November 13, 2000, the trial court denied defendant's motion seeking to bar cross examination of defendant as to his juvenile record. On December 12, 2000, at the conclusion of a two-day trial, defendant was found guilty of manslaughter. On April 20, 2001, the trial court denied defendant's motion for new trial, adjudicated him a second-felony habitual offender, and sentenced him to forty years at hard labor. The trial court denied defendant's motion to reconsider sentence, and granted his motion for appeal.

FACTS

New Orleans Police Detective Carlos Belou testified that on June 13, 2000, he was at his residence at approximately 1:00 a.m. when he heard three shots fired outside from one gun in rapid succession. He looked out of a front window and saw a dark-colored Suburban driving on N. Derbigny

Street, headed toward St. Bernard Ave. To his right, Det. Belou observed a Camaro (it was actually a Firebird) with the driver's door open and the lights on. He called 911 and went to the scene, no more than five or six houses away. The victim, Paul Wilson, was lying in the street near the vehicle. A young child said that his "step-daddy" killed the victim.

New Orleans Police Officer Keith Jerome responded to the shooting, which occurred in the 1400 block of N. Derbigny Street. The engine of the victim's car was running, and the driver's side door was open. He said the children at the scene were crying and distraught, as was the victim's wife. The children, ages six and ten, said their mother's boyfriend had shot their father.

New Orleans Police Homicide Det. Eduardo Colmenero testified that Warren Jordan, the nephew of defendant's girlfriend (and the victim's ex-wife), had been in the front seat of the victim's car. The detective spoke to Mr. Jordan, Qiana Muse Wilson, Willie Kelly, and Javon and James Muse, the victim's sons. The detective thought that they were eleven and twelve years old. The murder weapon was eventually recovered under a mattress at 1920 Frenchman Street, pursuant to a search conducted with the consent of residents Dora and Willie Kelly. It was Det. Colmenero's understanding that one of those two was at the scene of the murder. After speaking with

that person, police recovered a black or gray Suburban in the 1800 block of N. Prieur Street. That vehicle was registered to the victim and his wife, Qiana Muse Wilson. Det. Colmenero later prepared a search warrant for defendant's residence at 1427 ½ N. Derbigny Street, and found a live 7.62 x 39 mm cartridge there, the same caliber as the murder weapon. Det. Colmenero responded in the negative when asked if he ever found out if there was another firearm at the scene, and responded affirmatively when asked whether that information would have been important.

When asked whether he interviewed anyone in the neighborhood concerning whether Warren Jordan removed a gun from the scene, Det. Colmenero said he conducted a canvass of the neighborhood. Det. Colmenero was told by a detective that a witness had telephoned and said something about someone taking a gun from the scene. However, when Det. Colmenero later spoke with that witness, she would not answer his questions. He indicated on redirect examination that this witness was Qiana Muse Wilson. Det. Colmenero had spoken with her on the night of the shooting, but she did not indicate to him that there had been another gun at the scene. Det. Colmenero said he never interviewed two of her children who were at the scene, Joshua and Joseph. He asked Qiana Wilson if he could interview them, and she told him that he could not. Det. Colmenero

replied in the negative when asked whether anyone told him that the victim had a gun that night or that Warren Jordan had taken the gun that night. Det. Colmenero said he asked Mr. Jordan about it, and also Willie Kelly, but never felt it necessary to obtain a search warrant for the victim's residence.

Homicide Det. Randy Greenup testified that when he arrived at the murder scene he found Warren Jordan walking around very upset, and attempted to calm him down. He said Mr. Jordan was "freaking out." He learned that defendant was driving a black and gray Suburban that night. Several days later, the officers located what they believed to be the car. It was registered to the victim and his wife. Det. Greenup confirmed that he never had any information about a second gun, and that he could not have told Det. Colmenero about it. Det. Greenup said on redirect examination that the victim's wife telephoned him several times, and he informed Det. Colmenero that she had called.

Dr. William Newman III, qualified by stipulation as an expert in forensic pathology, autopsied the victim. The victim died of a single gunshot wound to the head. Death was almost instantaneous. The bullet entered behind the left ear lobe and exited above the right eyebrow. The wound caused extensive damage to brain tissue and distortion of the head, meaning that the bones were fractured. Because of the physical damage, Dr.

Newman opined that the murder weapon may have been powerful, and may have had a lot of gunpowder propelling the bullet. Dr. Newman said on cross examination that it was his opinion, based on the forensic evidence, that the gun was fired from more than two and one-half to three feet away. He said it was possible that the bullet passed through a piece of glass, but could not say that this occurred. The victim's blood alcohol content was .02, what he described as a very small amount.

Ann Lee, the victim's mother in law, testified that the victim was twenty-six years old at the time of his death.

Warren Jordan, the victim's eighteen-year-old nephew, admitted to juvenile convictions for battery and burglary. Mr. Jordan stated that on the night of the murder the victim drove his son, seven-year-old Joel Wilson, to Qiana Wilson's home at 1427 ½ N. Derbigny Street. Joel lived with Qiana. Mr. Jordan was in the front passenger seat. Upon arriving at the N. Derbigny Street residence, defendant and a man named Will were fighting over the gun that defendant subsequently used to shoot the victim. Defendant was Qiana's boyfriend at the time, and lived at the residence with Qiana. Mr. Jordan identified the murder weapon, which he said defendant wrestled away from the man named Will. Mr. Jordan said that he and the victim exited the car, and Mr. Jordan asked defendant what he was doing,

noting that there were children in the victim's car. Mr. Jordan said at that point defendant, walking forward, fired two shots in the victim's direction. The victim had said nothing to defendant, and defendant said nothing to the victim. Mr. Jordan said there were some children on the Suburban, which was parked nearby. When asked whether the victim had a gun, Mr. Jordan said he did not remember seeing one.

Mr. Jordan said on cross examination that he lived at 1427 ½ N. Derbigny Street with defendant, Qiana and Qiana's children. Mr. Jordan admitted that he was on probation for a battery conviction. He admitted a conviction for drugs, and when asked if he had any convictions which he could not remember, he gave an affirmative response, saying that he had a lot of them. Mr. Jordan admitted that he had a pretty good relationship with defendant, who helped him out with money and things he needed. Mr. Jordan said that after the shooting, defendant said, apparently to the downed victim, "I'm sorry, bro, I'm sorry, bro." Mr. Jordan said he was not "freaking out" at the scene, that he was "blank." Mr. Jordan replied in the negative when asked whether the victim had a gun that night.

Crime Lab Officer Kenneth Leary was qualified by stipulation as an expert in the field of firearms examination. He examined the murder weapon, a Norinco Model MAK-90 Sporter, 7.62 x 39 mm semiautomatic

rifle, and found it to be functional. Officer Leary described the gun as a high-velocity firearm, and indicated that at close quarters it could cause devastating injury to a person. Officer Leary was shown the 7.62 x 39 mm cartridge recovered from defendant's residence, and he said it was the same type of cartridge as those found in the magazine of the murder weapon when it was seized by police. Officer Leary responded in the negative when asked whether he had submitted the gun for fingerprinting.

James Muse testified that the victim was his father. James, who was in the sixth grade, was present when his father was killed. He went outside and found his mother and defendant arguing. The victim subsequently drove up with Joel Wilson and Warren Jordan. James said he was near the Suburban with Javon, his brother. Will attempted to stop defendant, but defendant shot several times. When asked if he had seen his father with a gun, James Muse replied in the negative. James confirmed on cross examination that he told police that the first shot went into the air, and then he heard another shot. He indicated by his responses that the first shot was fired before his father exited the car. He confirmed that he did not actually see his father get shot, but that after the shooting he did not see the victim. James confirmed on redirect examination that defendant walked toward the victim. James saw the gun that defendant had, and said that "Willie" took it

away in a car after the shooting stopped. Defendant left in the Suburban.

Qiana Muse Wilson testified that at the time of the murder she was separated from the victim and was seeking a divorce. Defendant was her boyfriend. He lived with her and her five children. Two of her children, seven-year-old twins Joel and Joshua, were fathered by the victim. On the night of the murder, defendant had come to pick her up after she got off work. They argued, and she drove home alone in the Suburban. She rounded up her children and was preparing to take them with her to pick up her son Joel. Defendant drove up with Willie, and went into the house. He came out with a bag, planning to spend the night at his mother's home. The gun was in the bag. The victim drove up with Warren Jordan. Defendant and the victim argued. The victim was behind his car door. Defendant fired one shot into the air, then another into the car window. Qiana said she ran and grabbed the gun, and it discharged a shot into the ground. Defendant ran to the victim's car, and she heard defendant say "Warren, help me," and also say that he was sorry. Qiana Wilson said Warren Jordan picked up a gun and pointed it at the Suburban as defendant drove off in it. She said Warren Jordan ran around the corner with the gun to the residence of the victim's parents. She said Warren told her that he hid it, but that it was gone when he returned to retrieve it. Qiana said defendant was trying to scare the

victim, and she knew defendant had seen the victim with the gun. She stated that she had a good relationship with Warren Jordan. She claimed to have told a "bunch" of people about the gun, indicating an assistant district attorney named Pittman, and Dets. Greenup and Colmenero. She maintained that she was telling the truth.

Qiana Wilson admitted on cross examination that she told police on the night of the murder that she was inside her residence when it happened. She admitted that she prevented her children from speaking to police as much as possible. She admitted that she did not tell Det. Colmenero about the gun on the night of the murder, saying that she did not talk to him much that night. Qiana Wilson was asked whether she told Robin Pittman, an assistant district attorney, that Warren Jordan had picked up the gun. She replied that she told Ms. Pittman that she did not want to talk to her. Qiana testified that she had seen the gun Warren Jordan picked up before that night, as he had once brought it into her home. She said she could see the victim as he stood by his car, and admitted that she never saw him point a gun at defendant.

Seven-year-old Joel Wilson responded in the negative when asked whether defense counsel, his mother or anyone else had ever told him what to say. He was examined as to whether he knew the difference between

telling the truth and telling a lie. Joel testified that he was in the car with the victim on the night of the shooting. When asked whether the victim had done anything before getting out of the car at the scene, Joel stated that the victim took a gun out from behind his back. Joel said the victim had gotten the gun from under the dashboard. Joel responded in the negative when asked if he had seen a gun being fired that night, but said he heard one bullet. Joel said that defendant had treated him nice and given him stuff. Joel was asked on cross examination what Warren Jordan did after the victim was shot, and Joel said Warren picked up the gun and went to his "auntie's." Joel described the gun as silver with brown at the bottom. When asked on cross examination whether he had talked to his mother about this, Joel responded in the affirmative. When asked if she told him what to say, Joel said no. He responded in the negative when asked whether he spoke with a detective on the night his father was killed.

Cleophus Benson, defendant's uncle, testified that on St. Joseph's Day, 2000, informally referred to as "Super Sunday," when the "Indians" parade, he was with defendant and some others walking under "the bridge," drinking beer, when they encountered Paul Wilson. Mr. Benson recalled that Paul Wilson said something to defendant, and at one point lifted his shirt to display a gun. Mr. Benson said he made defendant detour around

Paul Wilson, and they left the area. Mr. Benson admitted on cross examination a juvenile conviction for armed robbery.

Defendant testified that he and Paul Wilson did not get along, and that Paul had threatened him. Defendant recalled one occasion in particular, when Paul drove alongside of him, as defendant was driving the Suburban, and asked him what he was looking at. Defendant said Paul told him on that occasion that if he caught him anywhere he was going to hurt him. Defendant also recounted details of the incident on St. Joseph's Day. He heard someone griping in the background, turned around to see Paul Wilson, and realized that the griping had been directed toward him. Paul Wilson then cursed, and he and defendant exchanged a few words. Paul Wilson then displayed his gun. Defendant said he knew Paul Wilson had a conviction related to "firing at a cop." Defendant admitted a 1997 conviction for distribution of drugs.

Defendant said on the night of the shooting, he packed his bag with some clothes and his gun. He planned to spend the night at his mother's home, after he and Qiana Wilson argued. He left their residence on N. Derbigny Street and walked to put his bag into the trunk of Willie's car, which was parked in front of the Suburban. Paul Wilson drove up, but defendant said he was not paying attention to him, as by then he was again

arguing with Qiana. However, defendant said he and Paul Wilson subsequently argued. He said Paul Wilson reached down into his car, and stood back up. Defendant said that was when he grabbed the gun from the trunk and fired into the air. He said he was trying to scare off Paul Wilson. Willie then attempted to take the gun away from him, and a second shot went off. Defendant did not know where that shot went. Willie let go of the gun. Qiana Wilson then attempted to grab defendant's hand and the gun, and it discharged a third time, into the ground. Defendant said that when the first two shots went off, Paul Wilson was still by the door of his car. Defendant claimed that after the third shot went off, he looked over and saw Paul Wilson on the ground. Defendant claimed that he never aimed the gun at Paul Wilson. Defendant said he never saw Paul Wilson with a gun. He said he was not paying attention, that he was just concerned with Paul. He told Paul Wilson after shooting him that he was sorry. He told the children that he was sorry and was only trying to scare Paul. Defendant confirmed that he fled, and turned himself in eleven hours later.

Defendant confirmed on cross examination that he put the gun into the trunk of Willie's car after the shooting. Defendant did not recall threatening to bust Paul Wilson's head on St. Joseph's Day, but that he might have said anything after Paul showed him the gun. Defendant identified the gun in

evidence as the one he shot three times that night. He said that on the night of the shooting, while he did not see Paul Wilson with a gun, Paul's actions led him to believe he had one. Defendant conceded that Paul Wilson's body was at the back of the car. Defendant said on redirect examination that the only shot he intentionally fired was the first one, the one he fired into the air. It was stipulated that Paul Wilson pleaded guilty on October 15, 1996 to simple criminal damage and aggravated assault with a firearm on a police officer.

Melanie Wilson, Paul Wilson's sister, testified that on St. Joseph's Day, 2000, she was with Paul Wilson underneath "the bridge." She overheard defendant say that he was going to "bust the 'F' out of the boy" with the headpiece, meaning Paul. She did not know who defendant was at that time, but subsequently her sister told her it was Qiana's boyfriend. Melanie was with her brother the whole day, and did not see him display a gun to anyone. She said he was not carrying a gun that day. She replied in the negative when asked whether Paul Wilson generally carried a gun. Melanie said that her brother had a reputation for being very peaceful, and that he got along with everybody. She replied in the affirmative when asked whether she was aware of her brother's criminal convictions. Melanie Wilson admitted on cross examination that, although she knew Paul Wilson

had tried to shoot a person who had fought with one of his sisters, she did not know that he had shot at police. However, she still maintained that he was a peaceful person.

Det. Colmenero testified that Qiana Wilson initially told him that she was inside of her residence when she heard three shots. She went outside and saw defendant entering the Suburban, then saw Paul Wilson on the street. She mentioned nothing about another gun being at the scene. He never interviewed Joel Wilson because he was never given access to him. On June 22, 2000, when he served a search warrant at 1427 ½ N. Derbigny Street, Qiana Wilson told him that she was loading up the children in the Suburban when defendant and Willie Kelly arrived at the scene. She mentioned nothing on that date about Paul Wilson having a gun, or Warren Jordan pointing a gun toward defendant.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENTS OF ERROR NOS. 1 & 2

In these assignments of error, defendant argues that the verdict is contrary to the law and evidence, i.e., that the evidence is constitutionally

insufficient to support the conviction of manslaughter. Defendant implicitly argues also that, as the verdict is contrary to the law and evidence, the trial court erred in denying his motion for new trial on that ground. See La. C.Cr.P. art. 851(1). Defendant's argument as to these assignments of error is limited to the issue of self-defense.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the

> conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.
>
> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-228.

Defendant argues self defense—justifiable homicide. A homicide is justifiable "[w]hen committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger." La. R.S. 14:20(1). When a defendant asserts self-defense, the State has the burden of establishing beyond a reasonable doubt that he did not act in self-defense. State v. Ross, 98-0283, p. 10 (La. App. 4 Cir. 9/8/99), 743 So. 2d 757, 763; State v. Byes, 97-1876, p. 8 (La. App. 4 Cir. 4/21/99), 735

So. 2d 758, 764.

It is axiomatic that a justifiable homicide committed in self-defense is a homicide committed intentionally. A person committing a justifiable homicide in self-defense intentionally kills another under the reasonable belief that the killing is necessary to save himself from an imminent danger of death or great bodily harm. Defendant testified on direct examination that he never aimed the gun at Paul Wilson. One cannot justifiably shoot and kill someone in self-defense if one does not aim the gun at the person and cause it to fire. Further, defendant was asked by his trial counsel on redirect examination whether any of the three shots he fired from his rifle were purposely fired. Defendant replied: "Just the one in the air." He claimed that he fired that shot into the air, the first shot, to scare defendant. Thus, according to defendant, the only shot he intentionally fired was not even fired at Paul Wilson. Defendant said the second shot was fired in a "tussle" with Willie Kelly, who had grabbed the gun. Qiana Wilson testified on behalf of defendant that the second shot went through the "glass," meaning the windshield of Paul Wilson's car. The evidence establishes that Paul Wilson was not in the car when he was shot. Both defendant and Qiana Wilson testified that the third shot was fired into the ground when she grabbed the gun. Defendant testified that Paul Wilson was still by his car

after the first two shots were fired, indicating that Paul Wilson was still standing at that point. It was not until after the third shot was fired that defendant looked over and saw Paul Wilson on the ground. The testimony of Dr. Newman established that the single gunshot wound to Paul Wilson's head would have caused his death almost instantaneously. Paul Wilson would not have been standing after being shot.

Therefore, according to defendant's own testimony, the only shot he fired intentionally did not strike and kill Paul Wilson. The testimony of defendant and Qiana Wilson negates defendant's claim that he killed Paul Wilson in self-defense, as their testimony, particularly defendant's, is contrary to defendant intentionally shooting and killing Paul Wilson.

Defendant does not address the issue of his own trial testimony, and that of Qiana Wilson, negating his claim of self-defense. Rather, he points to the evidence that Paul Wilson had a prior conviction relating to aggravated assault on a police officer with a firearm, and submits that defendant knew of this. The only evidence that defendant knew of this prior action by Paul Wilson was defendant's own self-serving testimony. Defendant points to evidence that he and Paul Wilson had an encounter on St. Joseph's Day, regardless of which version of the events one believes.

There is conflicting evidence as to whether Paul Wilson was armed

that night. According to Warren Jordan, who was with Paul Wilson that night, Paul did not have a gun. Paul Wilson's seven-year-old son Joel, who was also with his father that night, said his father retrieved a gun from under the dashboard and removed it from his back outside of the car. James Wilson, Paul Wilson's son, who was in the sixth grade, and thus older than Joel, did not see his father with a gun. However, James Wilson was standing near the Suburban, while Joel was in his father's car. Qiana Wilson and defendant both testified that although neither saw Paul Wilson with a gun, each knew he had one. Defendant said he saw Paul Wilson reach into his car while the two were arguing, prompting him to take his rifle out of his bag. However, Warren Jordan testified that defendant was already wrestling over the gun with Willie Kelly when he and Paul Wilson drove up at the scene. One fact is clear amidst the contradictory evidence concerning whether Paul Wilson had a gun—if he did, there is no evidence that he pointed or aimed it at defendant. The best case scenario for defendant was that Paul Wilson was standing by his car with a gun in one hand. Finally, it is undisputed that defendant was in an agitated emotional state before Paul Wilson even came onto the scene. He had argued with Qiana Wilson outside her place of employment when he went to pick her up, and was arguing with her outside of their residence moments before Paul Wilson drove up.

Viewing all of this evidence in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that defendant did not shoot Paul Wilson in self-defense. It would be difficult for a jury to find that defendant intentionally shot and killed Paul Wilson under the reasonable belief that the killing was necessary to save himself from an imminent danger of death or great bodily harm, when defendant's own testimony was that he did not intentionally shoot defendant. As the verdict was not contrary to the law and evidence, the trial court properly denied defendant's motion for new trial based on that ground.

There is no merit to these assignments of error.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error, defendant claims that the trial court erred in adjudicating him a second-felony habitual offender, in that the State used a "preprinted" minute entry form purporting to reflect defendant's July 2, 1997 plea of guilty to possession with intent to distribute cocaine, and did not present a transcript of the Boykin colloquy.

The first issue that must be resolved is whether defendant has preserved this issue for appellate review. In State v. Cossee, 95-2218 (La. App. 4 Cir. 7/24/96), 678 So.2d 72, this court held that the failure to file a

written response to the habitual offender information as required by La. R.S. 15:529.1(D)(1)(b) precluded appellate review of the defendant's claim that the documentary evidence was insufficient to establish one of the prior convictions upon which the defendant was adjudicated a habitual offender. However, an oral objection has been found sufficient to preserve such issues for review. State v. Anderson, 97-2587, p. 3 (La. App. 4 Cir. 11/18/98), 728 So.2d 14, 17.

Neither the record nor the transcript of the habitual offender hearing reflect that defense counsel made any written or oral objection to any documents the State introduced in evidence, or to the sufficiency of the evidence. At the habitual offender hearing, defense counsel—who also represented defendant when he pleaded guilty to the prior offense on July 2, 1997—simply cross examined the fingerprint expert on the issue of how many points of identification he made between defendant's fingerprints taken that day and the bill of information from the prior offense. It was twelve points, and the police officer testified on redirect examination that he had made identifications with ten points of identification. The trial court asked whether the matter was submitted, and defense counsel noted for the record that she had the opportunity to review the "papers that were filed into evidence," meaning the State's exhibits establishing the prior conviction.

Defense counsel did not object to or call into question any of these documents, including the preprinted minute entry. Under these circumstances, defendant has failed to preserve the issue for review.

ASSIGNMENT OF ERROR NO. 4

In his last assignment of error, defendant claims that the trial court erred in denying his motion to reconsider sentence.

La. C.Cr.P. art. 881.1 requires that a motion to reconsider sentence set forth "the specific grounds" on which the motion is based, and that "the failure to include a specific ground upon which a motion to reconsider may be based, including a claim of excessiveness, shall preclude the … defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review." La. C.Cr.P. art. 881.2(A)(1) states that a defendant "may appeal or seek review of a sentence based on any ground asserted in a motion to reconsider sentence."

Defendant filed a written motion to reconsider sentence on the day of sentencing, moving that the court reconsider the sentence "for the following reasons, to-wit: It would be in the best interest of justice." This is not a "specific ground." Rather, it is limitless in its scope. At the sentencing hearing, defense counsel stated that it was filing a motion to reconsider

sentence, and the trial court denied it. Defense counsel then noted an objection.

In his brief on appeal, defendant argues that the trial court erred in denying his motion to reconsider sentence because in sentencing him the court failed to consider mitigating factors and imposed a constitutionally excessive sentence. Although defendant seeks to characterize this assignment of error as directed to the trial court's error in denying his motion to reconsider sentence, he is actually appealing his sentence based on those two specific grounds. The purpose of the "specific ground" requirement of La. C.Cr.P. art. 881.1 is to place the trial court on notice of any alleged deficiency at a point in the proceedings when it is in a position to correct such deficiency. See State v. Mims, 619 So. 2d 1059, 1060 (La. 1993). As defendant in the instant case failed to allege any specific ground in his motion to reconsider sentence, the trial court in the instant case did not have the opportunity to consider these alleged deficiencies.

La. C.Cr.P. art. 881.1 clearly and unambiguously requires that even a bare claim of constitutional excessiveness must be set forth. See Mims, 619 So. 2d at 1059 ("[I]n order to preserve a claim of constitutional excessiveness [under La. C.Cr.P. art. 881.1], the defendant need not allege any more specific ground than that the sentence is excessive."). However, in

both State v. Miller, 2000-0218 (La. App. 4 Cir. 7/25/01), 792 So. 2d 104 and State v. Thompson, 98-0988 (La. App. 4 Cir. 1/26/00), 752 So. 2d 293, this court held that where the defendant made an oral objection to the sentence at the conclusion of the sentencing hearing, he was limited to a review of the bare claim of excessiveness, both cases simply citing Mims for this proposition. Miller, 2000-0218, p. 8, 792 So. 2d at 111; Thompson, 98-0988, p. 7, 752 So. 2d at 297.

These holdings conflict with this court's interpretation of La. C.Cr.P. art. 881.1 and analysis of Mims in State v. Robinson, 98-1606 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, where this court stated:

> The plain language of La.C.Cr.P. art. 881.1 (D) precludes a defendant from urging any ground of objection to a sentence, "including a claim of excessiveness," that was not raised in the motion to reconsider, on appeal or review.
>
> The State cites State v. Mims, 619 So.2d 1059 (La.1993). In Mims, the appellate court refused to review the defendant's excessive sentence claim because, while the defendant had asserted in his motion to reconsider sentence that the sentence was excessive, he had not alleged any reasons why it was allegedly excessive. The Louisiana Supreme Court reversed the appellate court in a per curiam decision, stating:
>
> > The court of appeal correctly observed that one purpose of the motion to reconsider, mandated by La.Code Crim.Proc. art. 881.1, is to allow the defendant to raise any errors that may have occurred in sentencing

while the trial judge still has the jurisdiction to change or correct the sentence. The defendant may point out such errors or deficiencies, or may present argument or evidence not considered in the original sentencing, thereby preventing the necessity of a remand for resentencing.

Under Article 881.1 the defendant must file a motion to reconsider and set forth the "specific grounds" upon which the motion is based in order to raise an objection to the sentence on appeal. However, in order to preserve a claim of constitutional excessiveness, the defendant need not allege any more specific ground than that the sentence is excessive. If the defendant does not allege any specific ground for excessiveness or present any argument or evidence not previously considered by the court at original sentencing, then the defendant does not lose the right to appeal the sentence; the defendant is simply relegated to having the appellate court consider the bare claim of excessiveness. Article 881.1 only precludes the defendant from presenting arguments to the court of appeal which were not presented to the trial court at a point in the proceedings when the trial court was in a position to correct the deficiency.

The court of appeal therefore erred in the present case by refusing to consider the defendant's appeal on the limited ground of excessiveness.

619 So.2d at 1059-60.

Thus, while holding that no specific reason need be given for a claim of excessive sentence in a motion to reconsider, Mims recognized that La.C.Cr.P. 881.1 requires that the specific ground of excessiveness be alleged.

The defendant points to several Fifth Circuit decisions where that court has addressed claims of constitutional excessiveness even where there had been no oral objections at sentencing nor motions to reconsider filed. See State v. Curtis, 97-769 (La.App. 5 Cir. 2/11/98), 707 So.2d 1328; State v. Allen, 93-838 (La.App. 5 Cir. 5/31/94), 638 So.2d 394. The court recognized that under La.C.Cr.P. art. 881.1 the defendants were precluded from raising claims about their sentences on appeal, but went on to review the constitutional excessiveness claims out of "an abundance of caution." The court in Curtis noted that Mims did not address the issue of whether a defendant's failure to file a motion to reconsider precluded "even" a claim of constitutional excessiveness. Curtis 97-769 at p. 4, 707 So.2d at 1330.

The defendant cites State v. Montz, 92-2073, p. 4 (La.App. 4 Cir. 2/11/94), 632 So.2d 822, 825, writ denied, 94-0605 (La.6/3/94), 637 So.2d 499, where this court stated that "[i]t is not entirely clear whether the Supreme Court intends for Mims to apply to cases where no motion to reconsider has been filed by the defendant."

However, this court has held in decisions subsequent to Montz that the failure to object to the sentence as excessive at the time of sentencing or to file a written motion to reconsider sentence precludes appellate review of the claim of excessiveness. State v. Martin, 97-0319, p. 1 (La.App. 4 Cir. 10/1/97), 700 So.2d 1322, 1323; State v. Green, 93-1432, pp. 5-6 (La.App. 4 Cir. 4/17/96), 673 So.2d 262, 265; State v. Salone, 93-1635, p. 4 (La.App. 4 Cir. 12/28/94), 648 So.2d

> 494, 495-96.
>
> The defendant also cites State v. Rayford, 93-1386 (La.App. 4 Cir. 10/27/94), 644 So.2d 1133, writ denied, 95-0854 (La.1/10/97), 685 So.2d 136, where defense counsel made an oral objection at the sentencing, simply stating: "I object." No grounds were asserted. While recognizing that the Louisiana Supreme Court had limited review of such oral objections to the specific grounds asserted, citing Mims, this court nevertheless addressed the excessive sentence claim. Rayford appears to be an anomaly.
>
> In the instant case, the argument or ground that defendant's sentence was constitutionally excessive was not presented to the court. La.C.Cr.P. art. 881.1(D) clearly and unambiguously states that if the specific particular ground of excessiveness is not asserted by oral objection at sentencing or written motion to reconsider, a defendant may not raise the claim on appeal or review. Mims and the jurisprudence in this circuit seem to support this view. Thus, the defendant's claim that his sentence is constitutionally excessive is not subject to review, by appeal or otherwise.

98-1606, pp. 7-10, 744 So. 2d at 124-125.

The First Circuit has correctly cited Mims for the proposition that where the defendant files a motion to reconsider sentence claiming simply that the sentence is excessive, without asserting any specific ground as to why the sentence is excessive, he is limited to appellate review only of “the bare claim of unconstitutional excessiveness.” State v. Morris, 99 3075, pp. 32-33 (La. App. 1 Cir. 11/3/00), 770 So. 2d 908, 929, writ denied, 2000-

3293 (La. 10/12/01), 799 So. 2d 496. Likewise, the First Circuit has correctly cited Mims for the proposition that the defendant's failure to allege any ground, including the specific ground of excessiveness, in either his oral or written motion to reconsider sentence precludes appellate review of a claim of excessiveness. State v. Jones, 97 2521, pp. 1-2 (La. App. 1 Cir. 9/25/98), 720 So. 2d 53, 52-53 (Weimer, J., concurring, criticizing State v. Mitchell, 96 1896, p. 4 (La. App. 1 Cir. 6/20/97), 697 So. 2d 22, 24, and seeking an en banc panel to address the issue). In Mitchell, the First Circuit held that defense counsel's note of "objections for the record" immediately after sentencing "arguably" could be considered "a bare claim of excessiveness" under Mims, 96 1896, p. 4, 697 So. 2d at 24.

The Second, Third and Fifth Circuits continue to cite Mims for the proposition that the failure to allege the specific ground of excessiveness in an oral or written motion to reconsider sentence simply relegates the defendant to review of his sentence for a bare claim of excessiveness. State v. Hopkins, 34,119, p. 11 (La. App. 2 Cir. 12/19/01), 774 So. 2d 1178, 1185 (defendant filed motion to reconsider, but no specific ground); State v. Lawson, 2001-0969, pp. 2-3 (La. App. 3 Cir. 12/12/01), 801 So. 2d 619, 621 (oral motion to reconsider at sentencing, no specific ground); State v. Johnson, 2001-0842 (La. App. 5 Cir. 2/13/02), __ So. 2d __, __, 2002 WL

220570 (general oral objection to sentence, no grounds, no written motion to reconsider).

Mims clearly interprets La. C.Cr.P. art. 881.1 as requiring an oral or written objection on the specific ground of excessiveness in order to preserve that issue for review. As defendant in the instant case failed to allege any specific ground in his motion to reconsider sentence, he is precluded from attacking his sentence on appeal urging the specific grounds that the sentence is constitutionally excessive or that the trial court did not adequately consider mitigating circumstances.

Even assuming defendant has preserved his right to raise these issues on appeal, there is no merit to his arguments.

La. Const. art. I, § 20 explicitly prohibits excessive sentences; State v. Baxley, 94-2982, p. 4, (La. 5/22/95), 656 So. 2d 973, 977. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Brady, 97-1095, p. 17 (La. App. 4 Cir. 2/3/99), 727 So. 2d 1264, 1272, rehearing granted on other grounds, (La. App. 4 Cir. 3/16/99); State v. Francis, 96-2389, p. 6 (La. App. 4 Cir. 4/15/98), 715 So.2d 457, 461. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 94-2984 at p.

10, 656 So.2d at 979, citing State v. Ryans, 513 So. 2d 386, 387 (La. App. 4 Cir. 1987). In addition, the entire Habitual Offender Law has been held constitutional, and, thus, the sentences it imposes upon habitual offenders are also presumed to be constitutional. State v. Johnson, 97-1906, pp. 5-6, (La. 3/4/98), 709 So. 2d 672, 675; see also State v. Young, 94-1636, p. 5 (La. App. 4 Cir. 10/26/95), 663 So. 2d 525, 527. A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Johnson, supra, pp. 6-7, 709 So. 2d at 677; State v. Webster, 98-0807, p. 3 (La. App. 4 Cir. 11/10/99), 746 So. 2d 799, 801, reversed on other grounds, State v. Lindsey, 99-3256 (La. 10/17/00), 770 So. 2d 339, cert. denied, Lindsey v. Louisiana, 532 So. 2d 1010, 121 S.Ct. 1739, 149 L.Ed.2d 663 (2001). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. Baxley, 94-2984 at p. 9, 656 So.2d at 979; State v. Hills, 98-0507, p. 5 (La. App. 4 Cir. 1/20/99), 727 So. 2d 1215, 1217.

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied

with statutory guidelines in La. C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. State v. Trepagnier, 97-2427, p. 11 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181, 189; State v. Robinson, 98-1606, p. 12 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 127. However, in State v. Major, 96-1214 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813, this court stated:

> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. State v. Lanclos, 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La.C.Cr.P. art. 881.4(D).

96-1214 at p. 10, 708 So. 2d at 819.

In State v. Soraporu, 97-1027 (La. 10/13/97), 703 So. 2d 608, the Louisiana Supreme Court stated:

> On appellate review of sentence, the only relevant question is " 'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.' " State v. Cook, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959 (quoting State v. Humphrey, 445 So.2d 1155, 1165 (La.1984)), cert. denied, --- U.S. ----, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20,

> i.e., when it imposes "punishment disproportionate to the offense." State v. Sepulvado, 367 So.2d 762, 767 (La.1979). In cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating circumstances but also factors militating for a less severe sentence, State v. Franks, 373 So.2d 1307, 1308 (La.1979), a remand for resentencing is appropriate only when "there appear[s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha [ve] merit." State v. Wimberly, 414 So.2d 666, 672 (La.1982).

Id.

Before sentencing defendant, the trial court stated that it had reviewed the sentencing factors contained in La. C.Cr.P. art. 894.1. The court said it found no mitigating factors. The record also reflects that the trial court ordered and received a presentence investigation report. It can be presumed that the court reviewed the report. Both the State and defendant presented witnesses at the sentencing hearing. In sentencing defendant, the court emphasized that he shot and killed Paul Wilson with a high-powered rifle, with children present in the car and the nearby driveway.

Defendant was sentenced to forty years at hard labor, as a second-felony habitual offender convicted of manslaughter. Pursuant to La. R.S. 15:529.1(A)(1)(a) and La. R.S. 14:31, defendant was subject to a minimum sentence of twenty years, not less than one-half of the forty-year sentence for

manslaughter, and a maximum sentence of eighty years, twice the forty-year maximum for manslaughter. Defendant's forty-year sentence was twice the possible minimum, but only one-half the possible maximum.

Defendant compares his case to State v. Williams, 587 So. 2d 12 (La. App. 3 Cir. 1991), in which the court on appeal held that the imposition of the maximum sentence for manslaughter was not warranted, where the trial judge gave much weight in imposing sentence to his incorrect belief that the defendant had sharpened his knife with the intent of going out to kill somebody. The defendant eventually stabbed the victim three times, with one wound proving fatal. The court found that the victim had been the aggressor, and that the defendant had tried to break off the confrontation. The evidence showed that the victim had a high blood alcohol level, .26, had cursed and threatened the defendant, and had a walking cane with which one witness testified he had raised as if to strike the defendant.

The instant case is distinguishable from Williams, in that, first of all, defendant in the instant case received only one-half of the maximum sentence, while the defendant in Williams received the maximum sentence. Even assuming that Paul Wilson confronted defendant by pulling up to the scene and getting out of his car, possibly armed with a gun, there was no evidence that defendant attempted to break off the confrontation. Further,

even if it is assumed that Paul Wilson was armed with a gun, defendant admitted that he never saw a gun, much less saw Paul Wilson point a gun in his direction or raise it in a threatening manner. In addition, Paul Wilson was killed in front of his own children. One bullet from the high-powered rifle went through the windshield of Paul Wilson's car, in which Paul's son had been sitting moments earlier. Defendant fired his high-powered rifle three times around children, placing them in danger of being struck by an errant bullet or fragment thereof.

Defendant cites no other case for comparison, other than Williams. In State v. Walker, 99-2868 (La. App. 4 Cir. 10/18/00), 772 So. 2d 218, this court held that an eighty-year sentence imposed on a second-felony habitual offender convicted of manslaughter was not excessive. The defendant strangled a woman with whom he had just smoked crack cocaine and had sexual relations. He claimed that when he told her he had no more money or drugs, she fought with him for thirty minutes and he began to strangle her, intending only to protect himself, not kill her. In sentencing defendant, the trial court noted that the defendant had been arrested and charged with seven assault offenses, although he apparently had only one prior conviction, for a felony theft. The court found that the defendant had displayed a high-risk history with respect to public safety, and noted a presentence investigation

report comment by the defendant's own sister that he had a tendency to fight women and had allegedly confessed to her that he murdered their grandmother.

Defendant in the instant case was twenty-three years old at the time of the homicide. He apparently had only the one prior felony conviction, from July 1997, for possession with intent to distribute cocaine. As the presentence investigation report is not contained in the record, it is unknown whether defendant had any other arrests. Nevertheless, the trial court reasons for sentencing, and its comments to witnesses presented by defendant at the sentencing hearing regarding the children being present, clearly indicate that the court felt that defendant posed a danger to society.

Defendant has failed to show that the mid-range sentence imposed by the trial court in the instant case makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, or is grossly out of proportion to the severity of the crime. Thus, he had failed to show that the sentence is constitutionally excessive.

There is no merit to this assignment of error.

For the foregoing reasons, defendant's conviction and sentence are affirmed.

AFFIRMED.