NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 2044

STATE OF LOUISIANA

VERSUS

CARL J. DAVIS, JR.

Judgment Rendered: DEC 27 2013

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF WASHINGTON
STATE OF LOUISIANA
DOCKET NUMBER 10-CR5-107597
HONORABLE AUGUST J. HAND, JUDGE

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

The defendant, Carl J. Davis, Jr., was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1 and entered a plea of not guilty. Following a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for new trial. The defendant received the mandatory sentence of life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence, and the trial court denied his motion to reconsider sentence. The defendant's counseled appeal assigns error to: (1) the trial court's failure to observe the twenty-four hour delay between the sentencing and the denial of the motion for new trial, and (2) the constitutionality of the sentence. The defendant has filed a pro se brief assigning error to the sufficiency of the evidence to support the conviction, and reassigning error, without additional argument, to the constitutionality of the sentence. For the following reasons, we affirm the defendant's conviction and sentence.

STATEMENT OF FACTS

On the night of December 12, 2009, the twenty-two-year old victim, Brossi Hogan, went to Lem's Bar in Washington Parish. The bar closed about 3:00 a.m. the next morning, and the roadway leading away from the bar became congested as patrons attempted to leave the area. According to witnesses, one vehicle was blocking the road and some patrons from the bar were in the roadway dancing. During the traffic jam, the defendant was observed arguing with Arianna Magee who, according to witnesses, looked more like a male than a female and was in one of the vehicles that was blocking the defendant from leaving. The victim, Ms. Magee's cousin, stepped out of his friend, Stephanie Gaudy's, vehicle to inform the defendant, who was not from the area, that Ms. Magee was not a man and that the defendant was actually arguing with a female. After the victim got back in the

vehicle, the defendant was observed firing several gunshots into the vehicle, striking the victim multiple times. Detective Anthony Stubbs of the Washington Parish Sheriff's Office (WPSO) was dispatched to the scene while other detectives went to Riverside Medical Center and met potential witnesses. The victim suffered three gunshots to the head and died instantly.

PRO SE ASSIGNMENT OF ERROR NUMBER ONE

In pro se assignment of error number one, the defendant challenges the evidence presented in support of his conviction. He specifically attacks the photographic identifications as suggestive and unreliable and argues that the use of a suggestive procedure led to a substantial likelihood of misidentification.[1] On that basis, the defendant argues that the evidence was insufficient to establish his identity as the perpetrator beyond a reasonable doubt. The defendant notes that a period of eighteen months elapsed between the murder and the witnesses' confrontation with him on the day of the trial. The defendant argues the witnesses' recollection may have been derived from the suggestive identification procedure and photograph rather than from the brief nighttime encounter during the crime.

The constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. La. C.Cr.P. art. 821; **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, i.e., "assuming every fact to be proved that the

[1] We note that the defendant challenged the pretrial identifications in a motion to suppress before the trial. After a hearing that included testimony regarding the identification procedure, the trial court denied the defendant's motion to suppress. The defendant has not challenged that ruling on appeal.

evidence tends to prove," in order to convict, it must exclude every reasonable hypothesis of innocence. La. R.S. 15:438; see **State v. Wright**, 98-0601 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 and 2000-0895 (La. 11/17/00), 773 So.2d 732. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987). Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the fact finder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051.

An identification procedure is suggestive if, during the procedure, the witness' attention is unduly focused on the defendant. **State v. Thibodeaux**, 98-1673 (La. 9/8/99), 750 So.2d 916, 932, cert. denied, 529 U.S. 1112, 120 S.Ct. 1969, 146 L.Ed.2d 800 (2000). In determining the likelihood of misidentification of a suspect, a court must look to the "totality of the circumstances" in light of the five factors set forth by the United States Supreme Court in **Neil v. Biggers**, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972). These factors include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Any corrupting effect of a suggestive identification is to be weighed against these

factors. **Manson v. Brathwaite**, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977). Strict identity of physical characteristics among the persons depicted in a photographic array is not required; however, there must be sufficient resemblance to reasonably test the identification. See **State v. Smith**, 430 So.2d 31, 43 (La. 1983). Even if the identification could be considered suggestive, that alone does not indicate a violation of the accused's right to due process. It is the likelihood of misidentification that violates due process, not merely the suggestive identification procedure. **State v. Johnson**, 2000-0680 (La. App. 1 Cir. 12/22/00), 775 So.2d 670, 677, writ denied, 2002-1368 (La. 5/30/03), 845 So.2d 1066; **State v. Reed**, 97-0812 (La. App. 1 Cir. 4/8/98), 712 So.2d 572, 576, writ denied, 98-1266 (La. 11/25/98), 729 So.2d 572. In-court identification may be permissible if there is not a "very substantial likelihood of irreparable misidentification." **State v. Martin**, 595 So.2d 592, 595 (La. 1992), quoting, **Simmons v. U.S.**, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968); see also **State v. Jones**, 94-1098 (La. App. 1 Cir. 6/23/95), 658 So.2d 307, 311, writ denied, 95-2280 (La. 1/12/96), 666 So.2d 320.

Second degree murder is defined, in pertinent part, as the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1(A)(1). Specific criminal 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). Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Thus, specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. **State v. Buchanon**, 95-0625 (La. App. 1 Cir. 5/10/96), 673 So.2d 663,

665, writ denied, 96-1411 (La. 12/6/96), 684 So.2d 923. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. Delco**, 2006-0504 (La. App. 1 Cir. 9/15/06), 943 So.2d 1143, 1146, writ denied, 2006-2636 (La. 8/15/07), 961 So.2d 1160. In this case, the defendant is not contesting the apparent evidence in support of the elements of a second degree murder charge. Thus, the remaining issue is whether the State carried its burden of negating any reasonable probability of misidentification.

The trial took place approximately two years after the shooting. WPSO Detectives Guy Magee, Jim Miller, and Anthony Romano testified at the trial. The detectives went to the hospital after the shooting. Detective Magee remained at the hospital with the victim's friend, Stephanie Gaudy, while other witnesses, including Arianna Magee, Takedra Crumedy, and Jamie Marie, were transported to the sheriff's office in Franklinton by Detective Miller. Detective Miller testified that the witnesses did not show any signs of impairment due to alcohol or drugs. Based upon statements by the witnesses and a photograph that the police obtained from one of the witnesses who was taking photographs while in the bar that night, the police identified the defendant as a suspect. The witnesses informed the police that the defendant lived in Mississippi. The police determined that the defendant came to the bar that night with fellow Mississippi residents Aaron Conerly and Conerly's girlfriend, Mamie Watts. The police located and met with the defendant in Marion County, Mississippi, on December 14, 2009, and he executed a signed waiver of rights form. The defendant positively identified himself in the photograph taken in the bar by one of the witnesses. However, the defendant was not arrested at that time.

Detectives Magee and Miller fully described the photographic identification procedure used in this case.[2] The detectives used six separate color photographs of individuals to develop a photographic lineup that included the defendant. The individual photographs were shown to each witness in a random and varied order and they were not labeled with numbers. The witnesses were required to view all six photographs, one at a time, and the lineups were conducted with each witness separately. Detective Magee described this procedure as the most up-to-date method according to his research and training. While one potential witness was not able to identify the shooter, on December 14, 2009, Ms. Gaudy came to the sheriff's office and positively identified the defendant as the shooter. On December 15, 2009, Detectives Magee and Miller went to the residence of Ms. Maric and Ms. Crumedy in Hammond, and they individually positively identified the defendant as the shooter. The defendant was arrested on January 4, 2010. A few months later, the police were able to contact Arianna Magee who was living in Mississippi at the time. On March 17, 2010, the day of the grand jury indictment, Ms. Magee viewed the lineup and also identified the defendant as the shooter. Regarding the positive identifications, Detectives Magee and Miller further testified that none of the witnesses who identified the defendant asked to see the photographs more than once and that they all "immediately" or "pretty quickly" picked the defendant as the perpetrator. Detective Miller interviewed the defendant who denied involvement in the shooting and denied having a gun that night.

Detective Romano photographed the exterior and interior of Stephanie Gaudy's vehicle. There was a bullet entry in the rear passenger door. Detective Romano could not recall whether the front windshield was broken, but noted that,

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[2] The detectives presented consistent testimony regarding the identification procedure and results at the pretrial hearing on the motion to suppress the identifications.

had there been an obvious projectile hole in the glass, he would have taken pictures and documented it.

Takedra Crumedy, a cousin of the victim and of Ms. Gaudy, was at the bar on the night in question with her friend, Jamie Marie. Ms. Crumedy was taking photographs in the bar when she saw the defendant. Ms. Crumedy testified as follows, "He was in the club, and he was like he had an attitude or whatever, because he got in my picture and put his hand in my face." Ms. Crumedy did not know the defendant and had never seen him before the night in question. Ms. Crumedy further testified, "He happened to be in my picture because he wouldn't move."

Ms. Crumedy saw the defendant again when she was in the parking lot after the bar closed. She testified that the defendant was walking around with a gun. She further stated, "And when I saw the gun, I had all the windows up in my car that I was in, and I was scared." In an attempt to quickly leave the area, Ms. Crumedy drove up to her grandmother's yard (located seconds away from the bar) to turn around but ended up back in the traffic. Just prior to the shooting, the defendant's vehicle was in front of the vehicle occupied by Ms. Crumedy and Ms. Marie. As several vehicles were in the roadway, Ms. Crumedy saw the defendant arguing with Arianna Magee and Travis Guy, passengers in another stopped vehicle. Ms. Crumedy noted that Ms. Magee looked like a male even though she was a female, and further noted that the victim stepped into the roadway to inform the defendant that he was arguing with a female. According to Ms. Crumedy, the defendant still had an attitude and continued to argue with Ms. Magee. When Ms. Crumedy heard gunshots, she observed the defendant walking away from Ms. Gaudy's vehicle. Ms. Crumedy further confirmed that the victim was in Ms. Gaudy's vehicle at the time. Ms. Crumedy saw Ms. Gaudy as she was crying and screaming. Ms. Crumedy testified that she was positive that it was the defendant

who did the shooting, recalled that he was wearing a yellow and green jacket that night, and confirmed her photographic identification of him. After the shooting, Ms. Crumedy gave the photograph showing the defendant in the bar that night to Detective Magee, and the defendant later confirmed his identity as the person shown in the photograph.

During cross examination, Ms. Crumedy testified that she had not been drinking that night and noted that she was under the legal drinking age at the time. Ms. Crumedy was looking at her cell phone seconds before she heard the gunshots. She further explained that the vehicle that she was driving was about two cars behind the defendant's vehicle. On redirect examination, Ms. Crumedy further explained that there were two lanes of vehicles and testified that she had a clear view of the vehicle occupied by Ms. Gaudy and the victim, and that the defendant was the only person by the vehicle when the shots were fired.

Stephanie Gaudy, the victim's friend, also testified during the trial. Ms. Gaudy testified that she was with the victim at the bar that night. After the bar closed, several people were sitting outside listening to music and talking. After observing an individual with a gun, whom she identified as the defendant, she tried to leave but other vehicles were in front of her. At that time, the defendant's vehicle was slightly ahead of and on the side of her vehicle. She further testified that the defendant started "fussing" with the occupants of the vehicle in front of him and tried to make them move their vehicle out of the way. She further stated, "So that's when Brossi [the victim] got out of the car to calm them down. And the passenger side got out, and Carl [the defendant] tried to fight the passenger side, Arianna." When asked to describe Arianna, Ms. Gaudy stated, "Well, she's a girl, but she looks like a boy." She added, "[Brossi] told him that was just a girl. Don't fight her." The defendant and the victim exchanged further words before the defendant walked to his car and the victim got back in Ms. Gaudy's vehicle. Ms.

Gaudy then observed the defendant walk to the front of her vehicle and shoot the victim while he was sitting in the driver's seat. Ms. Gaudy confirmed that she saw the defendant as he shot the victim and further confirmed that, a few days later, she participated in a photographic lineup and selected a photograph of the defendant as the person who shot the victim. Ms. Gaudy testified on cross examination that she had not been taking drugs or drinking alcohol that night though she had just turned twenty-one.

Arianna Magee testified that she was "hanging out" with Travis Guy on the night in question. The victim was her cousin and friend. Ms. Magee, who was twenty-one years old at the time of the trial, testified that she consumed a lot of alcohol that night. She testified that the argument began while she was sitting in her vehicle and the defendant started telling people to move their vehicles. She got out of her vehicle and the defendant pushed her, and she got back in her vehicle. At that point, the victim got out of Ms. Gaudy's vehicle and told the defendant not to hit Ms. Magee because she was a female. The defendant then went back to his vehicle as the victim went back to Ms. Gaudy's vehicle. Ms. Magee further testified, "I was sitting in my car, and when I see [the defendant] running back around, I try to put the window down and tell [the victim]. But by the time I turned around [the defendant] was there and it happened." She specifically confirmed that she saw the defendant shoot her cousin and confirmed her subsequent identification of the defendant in a photographic lineup. On cross examination, Ms. Magee indicated that the vehicle that Ms. Gaudy and the victim occupied was beside her vehicle and the defendant's vehicle was right behind her. She saw the defendant when he approached the vehicle occupied by the victim and when asked if she saw the actual shooting she stated, "I seen him when he shot the gun, you know. He shot the gun through the glass? ... Yeah. I seen that." She further stated, "He missed the first time. The barrel was hitting the car and missed

him. He must have pushed out." On redirect examination, Ms. Magee testified that there was no doubt in her mind and she was certain that the defendant was the shooter.

The defendant did not testify at the trial. The sole defense witness, Sherian Medius, the defendant's older sister, testified that she called WPSO on her brother's behalf after the shooting to inform them that her brother was present at the scene but did not commit the shooting. On cross examination, Ms. Medius confirmed that she was not at the bar that night.

We have reviewed the color photographs used in the photographic lineup in this case. The witnesses were required to look at all of the photographs before making a selection. All of the photographs depict African American males who appear to share a similarity of skin complexion, have short hair, and none have beards. We find that there is no indication that the identification procedure was suggestive in this case and there was no substantial likelihood of misidentification. Several witnesses had an ample opportunity to observe the perpetrator and they positively identified the defendant as the shooter. Most of the photographic identifications took place shortly after the shooting. Further, the defendant confirmed that he was the subject of the photograph taken by one of the witnesses in the bar. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Taylor**, 97-2261 (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 that conflicts with the testimony accepted by a trier of fact does not render the evidence

accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1 Cir. 1985).

Accordingly, we cannot say that the jury's determination was irrational under the facts and circumstances presented to it. See **Ordodi**, 946 So.2d at 662. Furthermore, an appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). We are convinced that any rational trier of fact, viewing the evidence presented at trial in the light most favorable to the State, could have found the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of second degree murder and the defendant's identity as the perpetrator. For the foregoing reasons, defendant's pro se assignment of error number one lacks merit.

COUNSELED ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO AND PRO SE ASSIGNMENT OF ERROR NUMBER TWO

In his first counseled assignment of error, the defendant argues that the trial court erred in imposing the sentence immediately after its denial of his motion for new trial. The defendant notes that the sentence was imposed after "heart-wrenching" impact statements and argues that the delay in sentencing was not waived. Finally, the defendant argues that the failure to observe the delay was not harmless error since he is challenging the constitutionality of the sentence. In assignment of error number two of the counseled brief, the defendant argues that the trial court abused its discretion in sentencing him, specifically noting that the court did not consider his personal history, order a presentence investigation (PSI), or ask him if he wanted to make a statement before imposing sentence. The pro se brief relists this assignment of error without additional argument.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may fall within statutory limits, it may nevertheless violate a defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. See **State v. Reed**, 409 So.2d 266, 267 (La. 1982). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of a manifest abuse of discretion. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982); **State v. Fairley**, 97-1026 (La. App. 1 Cir. 4/8/98), 711 So.2d 349, 352-53.

Louisiana Code of Criminal Procedure article 894.1 sets forth factors that the trial court must consider before imposing sentence. Generally, the trial court need not recite the entire checklist of factors, but the record must reflect that the trial court adequately considered the criteria. **Fairley**, 711 So.2d at 352. However, when imposing a mandatory life sentence, the trial court's failure to articulate reasons for the sentence as set forth in La. C.Cr.P. art. 894 is not an error; articulating reasons or factors would be an exercise in futility since the court has no discretion. **State v. Felder**, 2000-2887 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 371, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

Under La. R.S. 14:30.1(B), a person convicted of second degree murder shall be punished by life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. Courts are charged with applying a statutorily mandated punishment unless it is unconstitutional. **State v. Dorthey**,

623 So.2d 1276, 1278 (La. 1993). In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 676, the Louisiana Supreme Court re-examined the issue of when **Dorthey** permits a downward departure from a mandatory minimum sentence, albeit in the context of the Habitual Offender Law. The Court held that to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

Johnson, 709 So.2d at 676. While both **Dorthey** and **Johnson** involve the mandatory minimum sentences imposed under the Habitual Offender Law, the Louisiana Supreme Court has held that the sentencing review principles espoused in **Dorthey** are not restricted in application to the penalties provided by La. R.S. 15:529.1. See **State v. Fobbs**, 99-1024 (La. 9/24/99), 744 So.2d 1274 (per curiam); see **State v. Henderson**, 99-1945 (La. App. 1 Cir. 6/23/00), 762 So.2d 747, 760 n.5, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235, and **State v. Davis**, 94-2332 (La. App. 1 Cir. 12/15/95), 666 So.2d 400, 408, writ denied, 96-0127 (La. 4/19/96), 671 So.2d 925.

At the outset, we note the defendant did not object to being sentenced without the trial court first ordering a PSI. Further, in his motion to reconsider sentence, the defendant did not raise the issue of the trial court's failure to order a PSI. Thus, La. C.Cr.P. arts. 841 and 881.1(E) preclude the defendant from raising this issue on appeal. Moreover, as the defendant acknowledges in his brief, the trial court has discretion in ordering a PSI; there is no mandate that a PSI be ordered. See La. C.Cr.P. art. 875(A)(1). Such an investigation is an aid to the court and not a right of the accused. The trial court's failure to order a PSI will not

be reversed absent an abuse of discretion. **State v. Wimberly**, 618 So.2d 908, 914 (La. App. 1 Cir.), writ denied, 624 So.2d 1229 (La. 1993).

In this case, the trial court imposed the mandatory sentence for a second degree murder conviction. We find that the defendant failed to rebut the presumption that the mandatory life sentence is constitutional. The defendant has not presented at the trial level or on appeal any particular or special circumstances that would support a deviation from the mandatory life sentence provided in La. R.S. 14:30.1. Based on the record before us, we find that the defendant has failed to show that he is exceptional or that the mandatory life sentence is not meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Thus, we find that a downward departure from the mandatory life sentence was not required in this case. The mandated life sentence imposed is not excessive and counseled and pro se assignments of error number two lack merit.

Regarding the first counseled assignment of error, the defendant correctly notes that the trial court did not wait twenty-four hours after the denial of his post-trial motions before imposing sentence. The defendant was convicted on December 8, 2011, and on that date, the trial court set the sentencing date of December 20, 2011. (R. 19-20). The defendant filed his motion for post-verdict judgment of acquittal and motion for new trial on December 11, 2011, and the hearing was set for the sentencing date. Louisiana Code of Criminal Procedure article 873 requires a twenty-four hour delay in sentencing after denial of a motion for new trial or in arrest of judgment, unless the defendant waives said delays.[3] After the parties presented their argument on the motions, the trial court denied

[3] Article 873 does not explicitly require a twenty-four hour delay in sentencing after a motion for a post-verdict judgment of acquittal has been denied. However, this Court has applied Article 873's twenty-four hour delay to motions for post-verdict judgment of acquittal. See **State v. Coates**, 2000-1013 (La. App. 1 Cir. 12/22/00), 774 So.2d 1223, 1226; **State v. Jones**, 97-2521 (La. App. 1 Cir. 9/25/98), 720 So.2d 52, 53.

both motions and then allowed the victim's parents and sister to give victim impact statements.

After the impact statements, the State indicated that it was ready to proceed. The trial court then asked the defense attorney if there was "[a]nything further" and, after the defense attorney responded negatively, the trial court then imposed sentence. (R. 143-44). The defendant did not object to the sentencing. Thus, it appears that the defendant implicitly waived the twenty-four hour delay for sentencing by failing to enter a contemporaneous objection when the trial court indicated it would sentence him and by indicating a readiness for sentencing. See **State v. Felder**, 809 So.2d at 372; **State v. Hilton**, 99-1239 (La. App. 1 Cir. 3/31/00), 764 So.2d 1027, 1038, writ denied, 2000-0958 (La. 3/9/01), 768 So.2d 113; **State v. Roberts**, 98-1706 (La. App. 1 Cir. 5/14/99), 739 So.2d 821, 829; **State v. Lindsey**, 583 So.2d 1200, 1206 (La. App. 1 Cir. 1991), writ denied, 590 So.2d 588 (La. 1992).

Moreover, we find no prejudice resulting from the trial court's failure to delay sentencing. In **State v. Augustine**, 555 So.2d 1331, 1333-35 (La. 1990), the Louisiana Supreme Court held that the trial court's failure to observe the twenty-four hour delay did not constitute harmless error, even if the defendant did not raise that issue as error on appeal, but where the defendant challenged his sentence on appeal. In **State v. Seals**, 95-0305 (La. 11/25/96), 684 So.2d 368, cert. denied, 520 U.S. 1199, 117 S.Ct. 1558, 137 L.Ed.2d 705 (1997), the Louisiana Supreme Court distinguished **Augustine** because of the mandatory nature of the death sentence in the first degree murder case, and the fact that no prejudice could be shown for the failure to wait twenty-four hours before sentencing. Therein, the Court held: "Absent a showing that prejudice resulted from the failure to afford the statutory delay, reversal of the prematurely imposed sentence is not required." **Seals**, 684 So.2d at 380.

In the instant case, the trial court lacked sentencing discretion given the mandatory sentence applicable to second degree murder. As noted herein, a person convicted of second degree murder "shall be punished by life imprisonment at hard labor[,] without benefit of parole, probation, or suspension of sentence." La. R.S. 14:30.1(B). The defendant received this sentence. The required sentence would have been the same with or without the twenty-four hour delay. Accordingly, even assuming the defendant had not implicitly waived the delay, 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 La. C.Cr.P. art. 921; **Seals**, 684 So.2d at 380; **Felder**, 809 So.2d at 372; and **State v. Bilbo**, 97-2189 (La. App. 1 Cir. 9/25/98), 719 So.2d 1134, 1141, writ denied, 98-2722 (La. 2/5/99), 737 So.2d 747. Counseled assignment of error number one lacks merit.

CONVICTION AND SENTENCE AFFIRMED.