STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 KA 1300

STATE OF LOUISIANA

VERSUS

JONATHAN DAVID TALLEY

Judgment Rendered: MAY 09 2019

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 579741 "G"

Honorable Scott Gardner, Judge Presiding

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Sherry Watters
New Orleans, Louisiana

Counsel for Appellant
Jonathan David Talley

Warren L. Montgomery
District Attorney
Matthew Caplan
Assistant District Attorney
Covington, Louisiana

Counsel for Appellee
State of Louisiana

Colin Clark
J. Taylor Gray
Assistant Attorneys General
Baton Rouge, Louisiana

Counsel for Appellee,
State of Louisiana, through
Jeff Landry, Louisiana Attorney General

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

McCLENDON, J.

The defendant, Jonathan David Talley, was charged by grand jury indictment with second degree murder in violation of LSA-R.S. 14:30.1 (count one), second degree kidnapping in violation of LSA-R.S. 14:44.1 (count two), and possession of a firearm by a convicted felon in violation of LSA-R.S. 14:95.1 (count three). The defendant pled not guilty on each count. After a trial by jury, the defendant was found guilty as charged on all counts. The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for new trial. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on count one; to forty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on count two; and to twenty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence and a $1,000 fine on count three. The trial court ordered that the sentences be served consecutively. The defendant now appeals, assigning error to the sufficiency of the evidence on counts one and two and the constitutionality of the sentences on counts two and three. Additionally, the defendant argues that he is entitled to a new trial as the non-unanimous verdicts do not support the convictions or satisfy due process. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

On July 1, 2016, at approximately 5:00 a.m., Sergeant Donnie Palliser and Deputy Jason Wilson of the St. Tammany Parish Sheriff's Office (STPSO) Criminal Patrol Division, responded to a dispatch for a welfare check at 36469 Ed Yates Road in Pearl River, Louisiana. After no one responded to their knocks on the door and windows, Sergeant Palliser entered the residence through a window and unlocked the door. The officers then conducted a protective sweep of the house, and in the back bedroom, they discovered the body of a deceased female (victim, A.K.), lying in a pool of blood with a head injury.[1]

[1] We reference S.T., the child victim as to count two, and his mother, A.K., the victim as to count one, by initials only. See LSA-R.S. 46:1844(W). S.T.'s date of birth is January 30, 2013.

On the day before A.K.'s body was discovered, June 30, 2016, at approximately 6:00 p.m., the defendant removed a gun from the drawer of his desk at his father's home and showed it to his father, John Stanley Talley. As Mr. John Talley reached for the gun, the defendant pushed him away and stated, "I will hurt you, Daddy. You better leave me alone[.]" Before leaving with the gun, the defendant told his father that he was going to commit suicide, particularly, "suicide by cop."

The next morning at 2:00 a.m., about three hours before Sergeant Palliser and Deputy Wilson discovered A.K.'s body, the defendant arrived in Lucedale, Mississippi at the residence of his mother (Wanda Clark) and stepfather (Beau Clark). The defendant was crying and very upset as he entered the residence. The defendant informed them that he accidentally shot A.K., the mother of his three-year-old son, S.T. After Mrs. Clark asked the defendant about S.T.'s whereabouts, he advised that S.T. was in the car (A.K.'s 2004 Subaru Forester). The defendant then brought S.T. inside, and Mrs. Clark laid S.T. down in a bed. Mr. Clark quietly signaled to Mrs. Clark that he was going to call the police and exited the residence. The defendant told his mother that he went to A.K.'s house to tell A.K. and S.T. goodbye because he intended to commit suicide. He and A.K. wrestled over the gun, and the gun accidentally discharged, striking A.K. in the head. Mrs. Clark did not see blood on the defendant's clothing but observed a gun in his waist band. When Mrs. Clark asked the defendant to put the gun down, he nervously stated, "I can't do that, Momma." The defendant further told his mother that he had only two options, either kill himself or leave the country.

In an attempt to stall the defendant until the police arrived, Mrs. Clark told him that she would take him to an ATM to retrieve cash in order to leave the country. Once the defendant complied with her request to leave the gun in A.K.'s vehicle, Mrs. Clark told the defendant that she would then take him to the ATM in her vehicle. After they exited the driveway and drove a short distance, police officers of the George County Sheriff's Office (GCSO) arrived and surrounded the car. The defendant was immediately handcuffed and escorted to a responding ambulance, at which point a medic determined that he was stable. GCSO deputies contacted STPSO, and the defendant was later extradited to St. Tammany Parish.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number one, the defendant challenges the sufficiency of the evidence on counts one and two. As to count one, second degree murder, the defendant argues that the State failed to prove the element of specific intent to kill or inflict great bodily harm or that the killing happened during the commission of a felony. He claims that he went to A.K.'s house to harm himself on the day in question and points out that he has consistently claimed that the gun discharged during a struggle. Noting he was taller than the victim, the defendant argues that the bullet had an upward trajectory because the gun was fired during the struggle, as he described. To further support his position, the defendant relies on S.T.'s recorded forensic interview, conducted immediately after the shooting, wherein S.T. stated that his mother said that she was going to shoot the defendant. The defendant claims that the State did not refute his account of the shooting.

The defendant also contends that the mitigating factors of sudden passion and heat of blood were established through witness testimony at trial; therefore, the evidence, viewed in the light most favorable to the State, required the entering of a lesser verdict of manslaughter. The defendant contends that witnesses described him as being manic, spinning out of control, and agitated on the afternoon of the shooting. According to the defendant, he was acting under sudden passion and heat of blood at the time of an accidental discharge, as he struggled with A.K. over the gun.

Regarding count two, second degree kidnapping, the defendant argues that the State failed to prove that S.T. was transported by force. The defendant notes that S.T. is his son and was three years old on the date in question. He contends that after the gunfire he was in shock, in a state of panic, and bereft. He asserts that he could not leave his child alone in the house with A.K. and that he brought S.T. with him to seek counsel from his mother, Mrs. Clark. The defendant argues that S.T. was taken out of necessity, panic, and desperation. He claims that he did not use a dangerous weapon to get S.T. to go with him. The defendant specifically avers that the State failed to prove that S.T. was forcibly seized and carried or enticed or persuaded to go to his

grandmother's house or that an aggravating factor occurred. The defendant further avers that none of the responsive verdicts were proven at trial.[2]

General Legal Principles and Standard of Review

Due Process requires that a conviction be based on sufficient evidence. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The constitutional standard for testing the sufficiency of the evidence, enunciated in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 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 charged beyond a reasonable doubt. **State v. Jackson**, 18-0261 (La.App. 1 Cir. 11/2/18), ___ So.3d ___, ___, 2018 WL 5732842, *3. See also LSA-C.Cr.P. art. 821(B); **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 660. The **Jackson** standard of review, incorporated in LSA-C.Cr.P. art. 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 01-2585 (La.App. 1 Cir. 6/21/02), 822 So.2d 141, 144. When a case involves circumstantial evidence and the jury reasonably rejects the hypotheses of innocence presented by the defense, those hypotheses fall, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Morris**, 09-0422 (La.App. 1 Cir. 9/11/09), 22 So.3d 1002, 1011.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Jackson**, 2018 WL 5732842, *6. 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**, 04-3139 (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). Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination

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[2] The defendant is not appealing, and thus we do not address, the sufficiency of the evidence as to count three, possession of a firearm by a convicted felon.

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. Thus, an appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Jackson**, 2018 WL 5732842, *6. Nevertheless, the touchstone of **Jackson v. Virginia** is rationality; therefore, irrational decisions to convict will be overturned, rational decisions to convict will be upheld, and the actual fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. **State v. Ordodi**, 946 So.2d at 660.

Louisiana Revised Statute 14:30.1(A)(1) defines second degree murder as the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. 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. LSA-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. Jackson**, 2018 WL 5732842, *3. Specific intent to kill can be implied by the intentional use of a deadly weapon, such as a knife or a gun. **Id.**

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. "Sudden passion" and "heat of blood" are not elements of the offense of manslaughter; rather, they are mitigatory factors in the nature of a defense which exhibit a degree of culpability less than that present when the homicide is committed without them. **State v. Morris**, 22 So.3d at 1009. The State does not bear the burden of proving the absence of these mitigatory factors. A defendant who establishes by a preponderance

of the evidence that he acted in a "sudden passion" or "heat of blood" is entitled to a manslaughter verdict. **Id.** In reviewing the claim, the court must determine if a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the mitigatory factors were not established by a preponderance of the evidence. **Id.**

Louisiana Revised Statute 14:44.1, in pertinent part, defines second degree kidnapping as the forcible seizing and carrying of any person from one place to another, or enticing or persuading of any person to go from one place to another, when the offender is armed with a dangerous weapon. See LSA-R.S. 14:44.1(A)(5) & (B)(1)-(2). Second degree kidnapping is a general intent crime. **State v. Cerda-Anima**, 12-682 (La.App. 5 Cir. 5/30/13), 119 So.3d 751, 759, writ denied, 13-1487 (La. 1/10/14), 130 So.3d 321. General criminal intent exists "when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act." LSA-R.S. 14:10(2).

Second Degree Murder

At trial, several witnesses, including A.K.'s mother, A.K.'s friends (Judith Grenier and Emlia Moses), and the defendant's parents, testified that the defendant and A.K. had an unstable, confrontational, and violent relationship. For instance, in February 2015, the defendant went to Ms. Grenier's home, brandishing a firearm, asking for A.K., and demanding that Ms. Grenier call A.K. and instruct her to come to Ms. Grenier's home. Ms. Grenier testified that the defendant, who was angry and red-faced, stated that he was going to put his head next to A.K.'s head and "blow her brains out." Ms. Grenier further testified that the defendant then stated that he would instead put S.T. between the two of them and use one bullet to kill himself, A.K., and S.T. The defendant removed the bullets from his gun then reloaded it in front of Ms. Grenier, ensuring that she was aware the gun was loaded. It was established on cross examination that, in her statement to police immediately following her encounter with the defendant, Ms. Grenier mentioned only that the defendant threatened to kill himself, not A.K. or S.T. Ms. Grenier explained that her statement was hurried, as

police feared the defendant was in the area and may return to her home, based on cell phone tracking data. Ms. Grenier was concerned for her safety and that of her children, who were inside the home.

A.K. sought and acquired a protective order against the defendant in March 2015, which remained in effect until September 2016; however, witnesses confirmed that A.K. and the defendant continued to see each other after the order was issued. Additionally, the defendant's parents testified that he had mental health and substance abuse issues and attempted to commit suicide at least six times.[3] Mr. John Talley, a licensed clinical social worker, testified that the defendant had been diagnosed with bipolar disorder, anxiety disorder, and clinical depression but did not consistently take his prescribed medication.

In addition to Mrs. Clark, several other witnesses testified that the defendant consistently stated that he went to A.K.'s residence to kill himself on the date of the victim's death and that A.K. was accidentally shot in the head as they struggled over the gun. For example, GCSO Sergeant Joseph Savage testified that, after he pulled the defendant out of Mrs. Clark's vehicle, the defendant repeatedly stated that it was an accident and that the shooting occurred as they fought over the gun. However, he also stated that he shot A.K. in the head. Noting that the statements were spontaneous, Sergeant Savage interrupted the defendant and verbally informed him of his **Miranda**[4] rights. John Stewart, the George County ambulance driver who responded to the scene of the defendant's arrest, testified that the defendant told him that the gun accidentally went off as he was trying to take it from A.K., and that he checked A.K.'s pulse after she was shot and determined that he could not help her. While being booked in George County, the defendant made consistent, spontaneous statements, claiming the shooting was accidental.

However, the defendant's self-serving claim that the shooting occurred accidently, during a physical struggle for the gun, was contradicted at trial. During a

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[3] Deputy Adam Wager and Deputy Ron Eberts of the STPSO also testified regarding two incidents in 2015 wherein the defendant connected a hose or pipe to the exhaust pipe and through the window/cab of his vehicle.

[4] **Miranda v. Arizona**, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

recorded jailhouse telephone call, the defendant told his father that he chased A.K. into S.T.'s bedroom and that the gun went off when he grabbed the bedroom door, as A.K. attempted to close the door.

S.T., an eye witness to his mother's shooting, also contradicted the defendant's claims. The jury was presented with a video recording of S.T.'s forensic interview conducted the day after the shooting, when S.T. was three years old.[5] During the interview, S.T. stated that his "Mommy" was dead because his "Daddy" killed her with his gun. S.T. stated that the shooting took place at his house and that his mother and the defendant were standing near his bedroom door when the shooting occurred. When asked why the shooting occurred, S.T. stated, "Cause my Mommy was aggravating my Daddy all day." He also said, "My Daddy just poof shoot her in the head." S.T. described seeing blood from his mother's body and stated that the defendant used his gun to shoot his mother. He further replied, in part, that the gun had eyes, when asked to describe it. S.T. stated that he should have had his Spiderman costume on so that he could have punched the defendant. When asked what the defendant said before he fired the gun, S.T. stated, "I'm gonna fuckin' shoot you in your head." S.T. repeated the same sentence when asked what his mother said in response.

Detective Matthew Rowley of the STPSO Criminal Investigations Division testified that A.K. died of a single gunshot that entered through the back base of her neck and exited through her forehead. He further testified that the shooting occurred at an intermediate range, within a distance of three to five feet.

Dr. Yoshi Yuki Kikuchi (of the STPSO Coroner's Office), an expert in forensic pathology, conducted the autopsy of the victim at 1:45 p.m. on July 1, 2016, and confirmed that A.K. died of a single gunshot wound to the head. Dr. Kikuchi confirmed that the bullet entered the victim's left posterior neck and traveled back to front, upward, and left to right, and exited the victim's forehead. Importantly, Dr. Kikuchi testified that there was no stippling or muzzle imprint on the gunshot wound indicating

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[5] S.T., who was five years old at the time of trial, was briefly questioned during trial, via closed circuit broadcast. However, the questioning was quickly discontinued due to technical difficulties.

that the victim was shot from a distance of more than four feet, as opposed to close range.

Deputy Madeline Collins, a forensic scientist and expert in primer gunshot residue analysis, tested the items seized in this case, including the defendant's clothing, S.T.'s clothing, and the gunshot residue kit taken of A.K.'s hands during the autopsy. Based on her testing, particles characteristic of primer gunshot residue were detected from the kit taken of A.K.'s hands and the defendant's clothing, indicating that both the defendant and A.K. either discharged a firearm, were in the area of a discharged firearm, or came into contact with a surface containing the particles which compose primer gunshot residue.

Finally, Tara Bell, the STPSO Coroner's Office DNA analyst and expert in DNA analysis, testified that the defendant's DNA profile was consistent with the major donor profile removed from the grip and slide of the pistol in evidence, and A.K.'s DNA profile was consistent with the minor donor profile removed from the same areas of the gun. The defendant's DNA profile was also consistent with the DNA profile obtained from the trigger and trigger guard of the pistol. A.K. was excluded as a donor of the swab collected from the trigger and trigger guard.

Given the conflicting testimony and evidence, we find that a rational factfinder could have concluded that the defendant had the specific intent to kill. While the defendant repeatedly made self-serving statements indicating that the shooting was accidental, he gave conflicting accounts as to whether the shooting occurred as he struggled with A.K. over the gun or as he grabbed S.T.'s bedroom door after chasing A.K. into S.T.'s bedroom. S.T. simply stated that the defendant was aggravated by his mother and gave no indication there was a struggle or fight over the gun. Instead, S.T. stated that the victim and the defendant were standing near his bedroom door when the shooting occurred. Further, there was no indication that A.K. provoked the defendant in a manner sufficient to deprive an average person of self-control and cool reflection. Shortly before the shooting, the defendant avoided his father's attempt to take the gun by pushing him away and warning that he would hurt him if he tried to take the gun. Instead of killing himself as he claimed he wanted to do, the defendant

went to A.K.'s house armed with a gun and shot the victim in the presence of their child. S.T. specifically stated that just prior to the shooting the defendant told his mother that he was going to shoot her in the head. Regardless of whether A.K. returned the threat, A.K. was the only person who was shot. Finally, the victim was shot in the back of the head and at a distance of at least three feet away, perhaps more than four feet. Thus, we find that the jury reasonably rejected the defendant's hypothesis of innocence that the shooting was accidental.

Second Degree Kidnapping

A rational factfinder could have also concluded that the defendant, while armed with a gun, forcibly seized and carried S.T. from one place to another or, at the very least, that S.T. was enticed or persuaded to go from one place to another. See LSA-R.S. 14:44.1(A)(5) & (B)(1)-(2); see also **State v. Jones**, 18-0211 (La.App. 1 Cir. 10/18/18), 2018 WL 5116277, *4 (unpublished); **State v. McCray**, 44,142 (La.App. 2 Cir. 05/13/09), 12 So.3d 990, 998-99, writ denied, 09–1400 (La. 02/12/10), 27 So.3d 843. S.T. witnessed the defendant shoot his mother and was aware that the defendant was armed with a gun. Despite wishing he could have punched the defendant to protect his mother, three-year-old S.T. had absolutely no choice but to leave with the person whom he had just seen kill his mother. Based on these circumstances, it was not irrational for the jury to conclude that S.T. felt intimidated and forced to go with the defendant. Thus, a rational juror could easily have found the element of a forcible seizing and carrying of the child away and/or enticing or persuading the child to go from one place to another.

Regarding the defendant's argument that he did not use the gun to force S.T. to leave, as noted by the State on appeal, LSA-R.S. 14:44.1 simply requires that the kidnapping occur while the offender is armed with a dangerous weapon and requires no additional use of the weapon. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 946 So.2d at 662.

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 trier of fact. **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). A court of appeal impinges on a fact finder's discretion beyond the extent necessary to guarantee the fundamental protection of due process of law in accepting a hypothesis of innocence that was not unreasonably rejected by the fact finder. See **State v. Mire**, 14-2295 (La. 1/27/16), ___ So.3d ___, ___, 2016 WL 314814, *4 (per curiam). After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of second degree murder and second degree kidnapping. Accordingly, we find no merit in assignment of error number one.

CONSTITUTIONALITY OF SENTENCING

In assignment of error number two, the defendant argues that this case does not involve the most heinous of kidnappings, contending that it was not a kidnapping at all. He argues that S.T. was removed for his protection and without force or physical harm. As to the firearm offense, the defendant notes that the weapon was old and damaged and would fire only one shot. The defendant further contends that he wanted to harm himself only and was not a public risk. The defendant contends that he was employed at the time of the offense, was on medication after years of mental illness, and was maintaining his sobriety. Finally, the defendant contends that he was a recent victim of a crime causing an almost deadly injury near his carotid artery. Based on these mitigating factors, the defendant argues that the maximum sentence on count three, possession of a firearm by a convicted felon, was excessive. Further, the defendant argues that the trial court erred in ordering that the sentences be served consecutively without articulating an adequate basis for overriding the presumption of concurrent sentences.

The record before this court does not contain a copy of a written motion to reconsider sentence. At the time of the sentencing, the defendant orally moved for reconsideration of sentence but did not state any ground for the motion. Louisiana

Code of Criminal Procedure article 881.1(B) and (E) provide that an oral or written motion to reconsider sentence shall set forth the specific grounds on which the motion is based, and the failure to include a specific ground, including a claim of excessiveness, precludes the mover from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review. See **State v. Campbell**, 16-1349 (La.App. 1 Cir. 4/12/17), 217 So.3d 1197, 1198, n.3; **State v. Bickham**, 98-1839 (La.App. 1 Cir. 6/25/99), 739 So.2d 887, 891 (a general objection to a sentence preserves nothing for appellate review); **State v. Jones**, 97-2521 (La.App. 1 Cir. 9/25/98), 720 So.2d 52, 53 (the defendant's failure to urge a claim of excessiveness or any other specific ground for reconsideration of sentence by his oral or written motion precludes our review of his assignment of error). Thus, review of the excessive sentence argument raised in assignment of error number two is procedurally barred.

NON-UNANIMOUS JURY VERDICTS

In the sole assignment of error raised in a supplemental brief, the defendant raises the additional argument that the non-unanimous verdicts on counts one and two, second degree murder and second degree kidnapping, do not support the convictions or satisfy due process. On these counts, eleven of the twelve jurors found the defendant guilty as charged.

The defendant argues that the Fourteenth Amendment to the U.S. Constitution requires that defendants in Louisiana be accorded the same due process as defendants in other states. Relying on **Apprendi v. New Jersey**, 530 U.S. 466, 498, 120 S.Ct. 2348, 2367, 147 L.Ed.2d 435 (2000) (Scalia, J. concurring), the defendant further contends that the Framers of the Federal Constitution would not have allowed him to suffer loss of liberty unless found guilty beyond a reasonable doubt by the unanimous vote of twelve fellow citizens. The defendant notes that in this case the jury twice returned for further instruction during deliberation and argues that the jury struggled to find that the State met its burden of proving all of the elements of the offenses. The defendant argues that if he were allowed his constitutional right to a unanimous verdict, he would not have been convicted on either count based on the evidence presented. The defendant concludes that the U.S. Supreme Court's equal protection jurisprudence

compels this court to reverse his convictions, declare La. Const. art. I, § 17(A) and LSA-C.Cr.P. art. 782 unconstitutional, and remand for a new trial.

It is well settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below. A party must raise the unconstitutionality in the trial court, the unconstitutionality must be specially pleaded, and the grounds outlining the basis of unconstitutionality must be particularized. See **State v. Hatton**, 07-2377 (La. 7/1/08), 985 So.2d 709, 718-19. In the instant case, the defendant failed to raise his challenge to La. Const. art. I, § 17(A) and LSA-C.Cr.P. art. 782 in the trial court. Accordingly, the issue is not properly before this court.[6]

CONCLUSION

For the foregoing reasons, we affirm the defendant's convictions and sentences.

AFFIRMED.

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[6] We note that under the current versions of La. Const. art. I, § 17(A) and LSA-C.Cr.P. art. 782(A), a case for an offense committed prior to January 1, 2019, in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Thus, the verdicts rendered on all three counts in this case are in compliance with the provisions at issue. Moreover, under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's constitutional rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments. See **Apodaca v. Oregon**, 406 U.S. 404, 412-13, 92 S.Ct. 1628, 1634, 32 L.Ed.2d 184 (1972); **State v. Bertrand**, 08-2215 (La. 3/17/09), 6 So.3d 738, 742-43; **State v. Belgard**, 410 So.2d 720, 726 (La. 1982); **State v. Brooks**, 17-1755 (La.App. 1 Cir. 9/24/18), 258 So.3d 944, 952-54; **State v. Shanks**, 97-1885 (La.App. 1 Cir. 6/29/98), 715 So.2d 157, 164-65. Thus, even if the defendant's claims were properly before this court, they would be found meritless.