

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0380

STATE OF LOUISIANA

VERSUS

JARED GRAHAM

Judgment rendered September 14, 2011.



Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 405884
Honorable August J. Hand, Judge

HON. WALTER P. REED
DISTRICT ATTORNEY
COVINGTON, LA
AND
KATHRYN W. LANDRY
SPECIAL APPEALS COUNSEL
BATON ROUGE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

MARY E. ROPER
BATON ROUGE, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
JARED GRAHAM

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

*McClelland, J. concurs.
Welch J. concurs without reasons.*

PETTIGREW, J.

The defendant, Jared Graham, was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1, and pled not guilty and not guilty by reason of insanity. Following a sanity hearing, the court found he had the capacity to stand trial and assist counsel. Thereafter, he withdrew his former plea and pled not guilty. Following a jury trial, he was found guilty as charged. He moved for a new trial, for a post-verdict judgment of acquittal, and to arrest the judgment, but the motions were denied. He was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. He moved for reconsideration of sentence, but the motion was denied. He now appeals, designating the following assignments of error:

1. The trial court erred when it allowed the [S]tate in rebuttal to introduce other crimes and/or character evidence against the defendant.
2. The trial court erred when it did not grant defendant's motion for new trial and post judgment verdict of acquittal as the evidence only demonstrated the defendant was guilty of manslaughter.
3. The trial court erred in not granting defendant's motion to reconsider sentence as life imprisonment without benefit of probation or parole is cruel and unusual punishment. Moreover, the sentence is excessive for a sixteen year old.

For the following reasons, we affirm the conviction and sentence.

FACTS

On December 21, 2005, the defendant shot the victim, Travis Williams, to death on Erindale Drive in St. Tammany Parish. The first telephone call reporting the shooting was received by the police at 6:28 p.m. The victim was twenty-six years old, 5' 11" tall, and weighed 217 pounds. He had a daughter, who was seven or eight years old. He suffered three gunshot wounds to his left arm, a gunshot wound to his right leg, and shotgun wounds to his right forearm, his right wrist, his chest, and his forehead.¹ The absence of gunshot residue on the gunshot wounds indicated that the gunshots fired at the victim

¹ The St. Tammany Parish Chief Deputy Coroner testified that the shotgun wounds suffered by the victim could have resulted from as many as four, or as few as two, shotgun blasts.

came from at least eight feet away. At least one of the shotgun wounds suffered by the victim was from close range. The gunshot wound to the victim's left forearm was consistent with him holding a cell phone to his ear at the time of the injury. The gunshot wound to the victim's right leg shattered his femur. After suffering this wound, he would have been unable to bear any weight on that leg.

Forensic Scientist Carl Fullilove testified at trial. He recovered a .45 caliber casing from the scene, which was compatible with the weapon used by St. Tammany Parish Sheriff's Office Deputy Robert Edwards, the first responder to the scene. He also recovered a .410 shotgun, two fired .410 shotgun shells, and a live shotgun shell from the roadway near the ditch on the north side of Erindale Drive. The shotgun was a single-shot weapon, requiring reloading after each firing. He also recovered a .44 Magnum revolver from the driveway on the south side of Erindale Drive, thirty-two feet and six inches from the victim. The gun contained six fired rounds. The .44 Magnum was a single action weapon, requiring that it be recocked after each firing. Scientific analysis indicated the .44 Magnum fired the four projectiles recovered from the victim's body. Four additional firearms and 178.41 grams of marijuana were found in the defendant's bedroom.

On the evening of the shooting, between 6:00 and 6:30, Deputy Edwards was off-duty and watching a movie at his home on Erindale Drive. He was disturbed by "loud bangs" down the street, and stepped onto his back porch to see if the sounds were fireworks or gunfire. He heard more of the sounds and determined he was hearing gunfire. He went back inside his home, told his children to hide under the bed, and went to investigate, taking his weapon and radio with him. He saw "muzzle flashes" as he approached the area in which he had heard the gunfire. Deputy Edwards stated it was "like a fire bolt [coming] out the end of the barrel" of a gun. Erindale Drive ran east and west, and Deputy Edwards saw a silhouette facing north and standing off the side of the ditch. Deputy Edwards identified himself as a police officer, and told the person to "drop the gun!" The person, however, continued to fire their weapon. Deputy Edwards fired his own weapon, and the gunman fled. Deputy Edwards found the victim lying in the

ditch on the north of Erindale Drive, crying for help. His legs were submerged under water in the ditch, and blood was visible on his upper body. He was not armed, and no weapons were subsequently recovered from the ditch or the surrounding area.² Deputy Edwards indicated, once he was on the scene, no one had an opportunity to remove a weapon from the victim. Deputy Edwards told the victim to control his breathing, and asked him if he knew the gunman. The victim replied, "[the gunman is] in that trailer." Deputy Edwards approached the trailer directly across from the victim, and the defendant exited the trailer and surrendered to him. The defendant had a swollen bottom lip. Based on his experience in handling weapons as a police officer, Deputy Edwards determined that the first shots he heard on the day of the incident were gunshots, while the last two shots he heard were shotgun blasts. The victim's mother's residence was one home down Erindale Drive from the defendant's residence.

Gale Landor, the victim's mother, testified at trial. According to Landor, the victim was on Erindale Drive at the time of the incident because she was going to help him with the paperwork for a new car he had just purchased. Telephone records indicated she spoke to the victim at 5:45 p.m. on the day of the incident. Landor indicated the victim arrived at her house with the paperwork approximately twenty to twenty-five minutes later. Landor sent the victim back to his car to retrieve the vehicle's registration and then heard gunshots.

Jeremy Gabriel Graham, the defendant's brother, also testified at trial. He claimed at the time of the offense, the defendant was sixteen years old, 5' 5" or 5' 6" tall, and weighed between 130 and 140 pounds. Jeremy indicated that on the evening of the incident, at approximately 6:00, the defendant called his cell phone and told him that the victim had punched him six times in the face for nothing and was following him. The defendant was "mad." Jeremy began running home, but was stopped by the victim. According to Jeremy, the victim stated, "I'm going to come to you like a man, and I want to let you know you need to check your brother, check your brother." Jeremy stated,

² The ditch in which the victim was found was searched with a rake.

"And [the victim] didn't come at me violent, but he was kind of ecstatic with his reactions." The victim then drove down the street to his mother's house and went into the house. Jeremy claimed the defendant and Cody Martin arrived home approximately two minutes later. Jeremy claimed that after looking at the injuries to the defendant's face, he suggested that they go over to the victim's mother's house. Jeremy claimed that as he, Martin, and the defendant stepped outside, the victim "was basically walking into our driveway." According to Jeremy, after the defendant armed himself with a handgun, Martin stated, "Jared, man, you don't need to do this." Jeremy claimed the victim was walking up the street using his cell phone. Jeremy claimed he told the victim, "You didn't have to beat up on my brother that way[,]" and the victim replied, "N____r, your brother out here in these streets, he out here in these streets." Jeremy claimed the victim "went into his shirt[,]" and as soon as the shirt went up, he heard a gunshot, and the victim fell to the ground, screaming. Jeremy claimed he ran after the first shot.

The defendant also testified at trial. He indicated he knew the victim as the son of one of his neighbors on Erindale Drive. He claimed he first became aware of the victim after the victim was involved in a fight after school. The defendant claimed the victim sold him approximately two ounces of marijuana two or three weeks prior to the incident. He claimed he paid the victim \$160 for the drugs, but the victim accused him of "shorting him out of twenty dollars." The defendant claimed he paid the victim an extra twenty dollars after the victim threatened to "knock [his] head off" if he did not give him the money.

The defendant claimed on the evening of the incident, he was going out to a movie with Cody Martin. He and Martin traveled to "The Shop," a gas station approximately three to five minutes away from his home. While Martin fueled the car, the defendant went across the street to visit Greg Casnave. When Martin had finished fueling the car, he signaled to the defendant, and he walked back to "The Shop." As the defendant approached Martin's car, he saw the victim sitting in the passenger seat of a car driven by Daven Baptiste, on the other side of the gas pump. The defendant claimed the victim pointed at him, and stated, "Do you think I forgot what you tried to do?" The

defendant claimed he thought the victim was threatening him with a gun. The defendant claimed he argued with the victim, telling him he was crazy and that he (the defendant) had already given him twenty dollars. The defendant claimed the victim told him to go to the car wash, but he refused. The defendant claimed the victim repeated his demand a second time and he again refused. The defendant claimed the third time he refused the victim's demand, the victim began punching him in the face.³

The defendant claimed he struggled with the victim, escaped from him, and ran across the street to Casnave for help. The defendant claimed the victim followed him across the street, and Casnave began arguing with him. The defendant claimed he then returned to Martin's vehicle and told him to take him (the defendant) back home because he thought his jaw was broken. The defendant claimed while he and Martin were driving back to Erindale Drive, Martin began screaming that the victim and Baptiste were chasing them. The defendant claimed that he looked back and saw that the victim and Baptiste were "right behind" them, and told Martin not to turn down any roads. The defendant claimed he thought the victim was about to shoot at him and Martin. The defendant claimed that he and Martin pulled into a fire station, and the victim and Baptiste turned down a side street. The defendant told Martin to go the opposite direction and drive back to Erindale. The defendant claimed he called his brother Jeremy and told him that the victim had beaten him (the defendant) and was chasing him, and that Jeremy should hurry home.

The defendant claimed that as he approached his home, he thought that the victim was parked in front of the defendant's residence. The defendant claimed he told Martin to turn around in a neighbor's yard, and when they came back the victim's car was gone. The defendant claimed that after he went inside his home, Jeremy saw his face, got upset, and told him that they were going to the victim's mother's house. The defendant

³ The State did not dispute that the victim "beat" the defendant on the day of the offense.

stated he armed himself with the .44 Magnum because he was scared to go back outside and thought he might have to defend himself or his brother.

The defendant claimed as he and Jeremy came down the stairs of their home, he saw the victim across from the front of their driveway, using a cell phone. The defendant claimed he thought he was about to die, and that the victim was coming to "shoot up my house or finish [the defendant]." According to the defendant, he shot the victim after Jeremy and the victim began arguing and the victim pulled up his shirt and reached into his pants. The defendant claimed the victim fell after the first shot, but he continued firing until the .44 Magnum would no longer fire. When asked why he continued shooting the victim, the defendant stated, "I don't know. I just kept shooting. I don't even know." The defendant indicated he then ran back inside his home and "got another gun."⁴ When asked why he retrieved another weapon, the defendant stated, "I don't know why I did that. I was just scared that [the victim] was going to kill me, and I knew I had shot him, and I didn't know what else to do. All I did was went and got another gun." The defendant claimed he thought he fired his shotgun only once, and then ran back inside his home.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 2, the defendant argues the jury erred in finding him guilty of second degree murder, rather than manslaughter, because his fight with the victim and the victim chasing him, thereafter, was sufficient provocation to deprive an average person of their self-control and cool reflection. He does not claim self-defense.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states, in part, "assuming every fact to be proved that the evidence

⁴ The State and the defense stipulated that the defendant retrieved the .410 shotgun from his bedroom.

tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601, p. 2 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 98-0601 at 3, 730 So.2d at 487.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. 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. 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. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. Henderson**, 99-1945, p. 3 (La. App. 1 Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

In **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, the Louisiana Supreme Court set forth the following precepts for appellate review of circumstantial evidence in connection with review of the sufficiency of the evidence:

On appeal, the reviewing court "does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events." Rather, the court must evaluate the evidence in a light most favorable to the state and determine whether the possible

alternative hypothesis is sufficiently **reasonable** that a rational juror could not have found proof of guilt beyond a reasonable doubt.

The jury is the ultimate [fact finder] of "whether a defendant proved his condition and whether the state negated that defense." The reviewing court "must not impinge on the jury's [fact finding] prerogative in a criminal case except to the extent necessary to guarantee constitutional due process."

Mitchell, 99-3342 at 7, 772 So.2d at 83 (citations omitted).

Further, the **Mitchell** court cautioned:

"The actual trier of fact's *rational* credibility calls, evidence weighing, and inference drawing are preserved ... by the admonition that the sufficiency inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." The reviewing court is not called upon to determine whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Rather, the court must assure that the jurors did not speculate where the evidence is such that reasonable jurors must have a reasonable doubt. The reviewing court cannot substitute its idea of what the verdict should be for that of the jury. Finally, the "appellate court is constitutionally precluded from acting as a 'thirteenth juror' in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact."

Mitchell, 99-3342 at 8, 772 So.2d at 83 (citations omitted).

Manslaughter is a homicide that would be either first or second degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed. La. R.S. 14:31(A)(1). "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. 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. In reviewing the claim, this 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. **State v. Huls**, 95-0541, p. 27 (La. App. 1 Cir. 5/29/96), 676 So.2d 160, 177, writ denied, 96-1734 (La. 1/6/97), 685 So.2d 126.

After a thorough review of the record, we are convinced that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that 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 of that offense against the victim. Further, any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have also found that the mitigatory factors required to support manslaughter were not established by a preponderance of the evidence. Any rational trier of fact could have concluded that the victim's punching the defendant was insufficient provocation for the shooting, or that the defendant's blood had cooled during the time between the punching and the time he retrieved two guns and repeatedly shot the victim. The verdict rendered indicates the jury accepted the testimony offered against the defendant and rejected his testimony and the testimony offered in his favor. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-0385, p. 9 (La. App. 1 Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332, p. 32 (La. App. 1 Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. Additionally, 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**, 2006-0207, pp. 14-15 (La. 11/29/06), 946 So.2d 654, 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 jury. **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

IMPROPER REBUTTAL

In assignment of error number 1, the defendant argues the trial court erred in allowing the presentation of rebuttal testimony from Kevin Darouse because the defendant admitted he had a prior verbal altercation with Darouse.

Rebuttal evidence is that which is offered to explain, repel, counteract, or disprove facts given in evidence by the adverse party. In criminal cases, such evidence may be used to strengthen the State's original case. La. Code Evid. art. 611(E). Control of evidence presented by the State on rebuttal is within the sound discretion of the trial court, and will not be disturbed except in extreme cases, such as when the evidence was kept back deliberately for the purposes of deceiving and obtaining an undue advantage. Any witness is subject to impeachment by discreditation. La. Code Evid. art. 607. **State v. Williams**, 34,359, p. 16 (La. App. 2 Cir. 5/9/01), 786 So.2d 203, 214, writ denied, 2001-2275 (La. 5/10/02), 815 So.2d 835.

Louisiana Code of Evidence article 607, in pertinent part provides:

D. Attacking credibility extrinsically. Except as otherwise provided by legislation:

(1) Extrinsic evidence to show a witness' bias, interest, corruption, or defect of capacity is admissible to attack the credibility of the witness.

(2) Other extrinsic evidence, including prior inconsistent statements and evidence contradicting the witness' testimony, is admissible when offered solely to attack the credibility of a witness unless the court determines that the probative value of the evidence on the issue of credibility is substantially outweighed by the risks of undue consumption of time, confusion of the issues, or unfair prejudice.

Louisiana Code of Evidence article 613 provides:

Except as the interests of justice otherwise require, extrinsic evidence of bias, interest, or corruption, prior inconsistent statements, conviction of crime, or defects of capacity is admissible after the proponent has first fairly directed the witness' attention to the statement, act, or matter alleged, and the witness has been given the opportunity to admit the fact and has failed distinctly to do so.

At trial, during cross-examination of the defendant, the following exchange occurred:

[State]: You can see that there were all of these options available to you, that you totally ignored, and you used deadly force when you had all of these other options available to you?

[Defendant]: I was never thinking clearly, sir.

[State]: And that might be something that we do agree upon. Because you were not thinking clearly, we have a dead person.

[Defendant]: Well, sir, I was so scared. I was to the point where I let [the victim] intimidate me to the point of feeling like I had no other choice but to fire this weapon when [the victim] was in front of my yard. I didn't feel like there were any other options at that time. [The victim] installed such a fear in me that nobody ever installed. I've never been physically assaulted by a man before, and definitely not from a man of his age. I've never been in any altercations with a grown-up before, physically or verbally. I just never experienced that situation before, sir.

[State]: Well, now that you say that, didn't you, in fact get into a verbal altercation with the principal of your school that resulted in you getting kicked out of school?

[Defendant]: No, sir. I didn't get into a verbal altercation with the principal.

[State]: Well, tell us about the incident with the school principal that led to your expulsion.

[Defendant]: All I know is that the principal of that school said that he was going to recommend me for expulsion.

[State]: Because of you doing what?

[Defendant]: Protesting to my booksack sitting in the hallway, sir.

[State]: And how did you go about protesting that? What did you do?

[Defendant]: I told him I wasn't the one who put my booksack in that location.

[State]: But what did you do that prompted him to call the police on you?

[Defendant]: I didn't do anything that prompted him to call the police on me.

[State]: Well, what did he say that you did?

[Defendant]: I don' know what he said I did. I never spoke with him.

[State]: You never threatened him with a baseball bat?

[Defendant]: No, sir.

[State]: You never called him a honky?

[Defendant]: No, sir.

On rebuttal, the State called Fontainebleau High School Assistant Principal Kevin Darouse. As part of his duties, Darouse was in charge of discipline at the school. In May 2005, Fontainebleau High School Principal John Vitrano and a teacher (Bernard) brought the defendant to Darouse's office after the defendant "had some words" with Vitrano. The defendant was "extremely angry," and Darouse tried to deescalate his anger. While Darouse, Vitrano, and Bernard were in the room with him, the defendant stated, "I'm leaving, you're not going to keep me here. I'm leaving. You can't hold me here." The defendant then picked up "a little souvenir bat," stated "I'm leaving out of this office," and walked toward the door. The teachers "grabbed" the bat away from the defendant and made him sit down.

Thereafter, the defendant threatened to blow up the school, and Darouse warned him that if he continued with his behavior, he would be expelled. The defendant replied, "Look, I just need to get out of this office." In an effort to calm down the defendant, Darouse allowed him to wait in the next office. However, once the defendant was in that office, he began kicking everything off the desk. Darouse told the defendant that he needed to calm down, and that the Sheriff's Department was on the way. The defendant replied, "I don't care about the Sheriff's Department. They can't do anything to me. I don't care about them. They can't hurt me."

After a sheriff's deputy arrived, the defendant "mouthed off" to him, and the deputy warned the defendant that if he was not quiet, he would be handcuffed. The defendant refused to be quiet, and the deputy handcuffed him and removed him from the school. Darouse indicated that during the disciplinary incident, the defendant was not scared, had no fear, and "[made] sure that [the teachers] knew that."

Following conviction, the defense moved for a new trial alleging error, under La. Code Evid. art. 613, in the trial court permitting rebuttal testimony from Darouse. Following a hearing, the court found the State had laid the proper foundation for impeachment for the rebuttal testimony and denied the motion.

Initially we note, the only objection raised by the defense to the testimony of Darouse at trial was in connection with his testifying about what Vitrano had told the

defendant. Accordingly, the defendant failed to preserve his challenge to the testimony of Darouse for improper foundation. See La. Code Evid. art. 103(A)(1) ("Error may not be predicated upon a ruling which admits ... evidence unless a substantial right of the party is affected, and ... a timely objection ... appears of record, stating the specific ground of objection."); La. Code Crim. P. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence.")

Moreover, the trial court properly denied the motion for new trial. Following his testimony that he had "never been in any altercations with a grown-up before, physically or verbally," the State gave the defendant the opportunity to admit to threatening Darouse and other teachers with a bat, but the defendant "failed distinctly to do so."

This assignment of error is without merit.

EXCESSIVE SENTENCE

In assignment of error number 3, the defendant contends the mandatory statutory sentence was excessive in his case because he was only sixteen at the time of the offense, and because the victim assaulted him and chased him prior to the incident.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. La. R.S. 14:30.1(B). The defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.

Article I, § 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. 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. A trial judge 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 manifest abuse of discretion. **State v. Hurst**, 99-2868, pp.

10-11 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

In **State v. Dorthey**, 623 So.2d 1276, 1280-1281 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the Habitual Offender Law makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounts to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime," he is duty bound to reduce the sentence to one that would not be constitutionally excessive.

However, the holding in **Dorthey** was made only after, and in light of, express recognition by the court that, "the determination and definition of acts which are punishable as crimes is purely a legislative function. It is the Legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional." **Dorthey**, 623 So.2d at 1278 (citations omitted).⁵

In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from the mandatory minimum sentences in 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, 97-1906 at 8, 709 So.2d at 676.

Initially we note, imposition of a mandatory sentence of life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence does not violate U.S. Const. amend VIII. See **State v. Lucas**, 99-1524, p. 17 (La. App. 1 Cir. 5/12/00),

⁵ The sentencing review principles espoused in **Dorthey** were not restricted in application to the mandatory minimum penalties provided by La. R.S. 15:529.1. **Henderson**, 99-1945 at 19 n.5, 762 So.2d at 760 n.5.

762 So.2d 717, 728 ("It is well settled that the mandatory imposition of a sentence of life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence for second degree murder does not constitute cruel and unusual punishment.") See also **Graham v. Florida**, ___ U.S. ___, 130 S.Ct. 2011, 2030, 176 L.Ed.2d 825 (2010) ("The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.")

In the instant case, immediately following imposition of sentence, the defense moved for reconsideration of sentence, arguing, a life sentence for a juvenile for second degree murder was facially unconstitutional, and that the court should depart from the mandatory sentence based on the totality of the facts of the case, including: the fact that the defendant was only sixteen at the time of the offense, the fact that he was beaten by the victim prior to the offense, and the fact that the victim followed the defendant to his residence after the beating. The trial court denied the motion, noting:

Well, of course, the Court was present throughout the entirety of the trial and perhaps[,] under different circumstances[,] the Court might agree that [for] a person of 16 years of age a life sentence would be perhaps inappropriate, but given the seriousness of the offense, the nature of the offense, the facts as determined by the Court, the Court doesn't feel that a deviation from the mandatory sentence is prescribed by [s]tatute of [l]ife and would be appropriate and is going to deny the [m]otion.

After a thorough review of the record, we find the trial court was not required to deviate from the mandatory sentence of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in this case. The trial court did not abuse its discretion in finding that the defendant failed to clearly and convincingly show that because of unusual circumstances he was a victim of the legislature's failure to assign sentences that were meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Further, the sentence imposed was not unconstitutionally excessive. It was not grossly disproportionate to the severity of the offense.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.