Judgment rendered September 26, 2007
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 42,536-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA | Appellee

versus

JOSHUA DAN MCGUFFIE | Appellant

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 232,358

Honorable John D. Mosely, Jr., Judge

* * * * *

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* * * * *

Before GASKINS, CARAWAY and DREW, JJ.

NOT DESIGNATED FOR PUBLICATION.
Rule 2-16.3, Uniform Rules, Courts of Appeal.

CARAWAY, J.

Joshua McGuffie was convicted by a unanimous jury of second degree murder. For the conviction, he received a life sentence without benefit of parole, probation or suspension of sentence. McGuffie appeals his conviction and sentence. We affirm.

*Facts*

On the evening of November 23, 2003, the victim, Nathan Floyd, and his seventeen-year old girlfriend, Heather Thrower, visited the home of April Byrd and Joe Willard until 10:30 p.m. While there, Floyd took an undisclosed amount of Xanax. Floyd and Thrower then went to the home of David Mitchell where they "hung out" for a little while. After leaving Mitchell's house, Thrower testified that she and Floyd traveled back to Byrd and Willard's house where they watched television. They departed their friends' home at approximately 1:00 a.m. Thrower drove the couple in her vehicle. The two traveled to a convenience store where they rolled a marijuana joint. They continued to ride around smoking the joint before they planned to go back to Floyd's mother's house for the evening.

According to Thrower during this drive, she and Floyd inadvertently turned on Mustang Circle, a dead end street where McGuffie lived. Floyd and McGuffie grew up together and had a friendly relationship. On the night in question, however, the two were feuding over a Playstation computer game which Floyd was holding until McGuffie paid an undisclosed amount of money to Floyd. Thrower testified that she had received a phone call from McGuffie on her cell phone at 5:00 a.m. the

previous morning. Thrower claimed she called McGuffie back at 2:00 p.m. to ask him what he wanted. Thrower and McGuffie allegedly argued and he threatened to kill her and Floyd. Thrower also claimed that Floyd called McGuffie's girlfriend, Jennifer Ashley Turner, and spoke with her on November 22nd. Thrower recalled that McGuffie called Floyd approximately three or four times the week before the incident, wanting his Playstation back.

Thrower testified that it was necessary for her to travel by McGuffie's house as she drove on Mustang Circle. She claimed she was "cruising along" by McGuffie's residence when she and Floyd observed McGuffie and "some other guys" standing on McGuffie's porch. She recalled that the porch light was on. As Thrower attempted to turn around to leave Mustang Circle, she claimed that McGuffie's girlfriend, Turner, approached Floyd's window and began cursing at him and ordering him to get out of the car. Thrower testified that Floyd called Willard on her cell phone and asked him for assistance because McGuffie wanted to fight with him. Thrower maintained that Floyd got out of the car, still talking on the phone. An individual from the porch grabbed Turner, directing her away from the confrontation. According to Thrower, Floyd got back into the car and spoke with Willard for a minute more as the two attempted to leave. It was then that Turner returned and stood in the middle of the road, forcing Thrower to stop her vehicle. Thrower testified that Turner "dragged" Floyd out of the car yelling that Floyd needed to give McGuffie his Playstation. Floyd eventually exited the vehicle and started walking calmly toward the house.

Thrower claimed that he was unarmed and made no threats toward McGuffie. Turner then attempted to remove Thrower from the car but her door was locked. Turner retreated and walked into the driveway.

At the time of the shooting, Thrower claimed that Turner was still talking to Floyd when she heard gunshots and saw Floyd fall to the ground. She heard a male exclaim, "now look, mother f____" after Floyd fell to the ground. Thrower testified that when the shots were fired, the porch light had been turned off so that the area was completely dark.

Thrower drove away and called Byrd who called police. Thrower traveled to Byrd's house and the two drove to the nearby police station before going to the hospital where Floyd was airlifted. Floyd later died from a gunshot wound to the head. Police discovered a Ruger .22 caliber rifle and a spent cartridge on McGuffie's front porch approximately 50 feet seven inches from Floyd's body. At the time of the incident, police found no other weapons at the scene. At trial, the defense stipulated that McGuffie shot Floyd with the weapon found on the porch. It was also stipulated that Floyd' s autopsy reflected evidence of Xanax, marijuana and cocaine in his system.

McGuffie was charged by grand jury indictment with the second degree murder of Floyd. A unanimous jury convicted him as charged and he received a mandatory life sentence. McGuffie filed post-trial motions for judgment notwithstanding the verdict and new trial.

*Discussion*

In his first assigned error, McGuffie argues that a reasonable juror

would have to conclude that he believed he was in imminent danger of losing his life when he saw Nathan Floyd manhandling Ashley Turner, Turner yelling that Floyd had a gun, and Floyd approaching his home and reaching under his shirt towards his waistband as if he was carrying a weapon. He further contends that it was reasonable to assume that his only choice of avoiding such danger was to use force in self-defense because he had no time to retreat from the situation with Floyd. The defendant contends that if this court determines that he did not act in self defense, a manslaughter verdict is more appropriate.

When issues are raised on appeal both as to the sufficiency of the evidence and one or more trial errors, the reviewing court first reviews the sufficiency claim. This is because the defendant may be entitled to an acquittal under *Hudson v. Louisiana*, 450 U.S. 40, 101 S. Ct. 970, 67 L.Ed.2d 30 (1981), if the evidence is constitutionally insufficient. *State v. Hearold*, 603 So.2d 731 (La. 1992); *State v. Bosley*, 29,253 (La. App. 2d Cir. 4/2/97), 691 So.2d 347, *writ denied*, 97-1203 (La. 10/17/97), 701 So.2d 1333.

The standard for evaluating sufficiency of the evidence is whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find that the state proved all elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Washington*, 597 So.2d 1084 (La. App. 2d Cir. 1992). This standard was legislatively adopted in La. C.Cr.P. art. 821 and applies to cases involving direct and circumstantial evidence.

*State v. Smith*, 441 So.2d. 739 (La. 1983). When the direct evidence is thus viewed, the facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of every essential element of the crime. *State v. Sutton*, 436 So.2d 471 (La. 1983); *State v. Owens*, 30,903 (La. App. 2d Cir. 9/25/98), 719 So.2d 610, *writ denied*, 98-2723 (La. 2/5/99), 737 So.2d 747. It is always the function of the trier of fact to assess credibility and resolve conflicting testimony. *State v. Lee*, 32,272 (La. App. 2d Cir. 8/18/99), 742 So.2d 651, *writ denied,* 99-2730 (La. 3/17/00), 756 So.2d 326; *State v. Thomas*, 609 So.2d 1078 (La. App. 2d Cir. 1992), *writ denied*, 617 So.2d 905 (La. 1993).

This court's authority to review questions of fact in a criminal case is limited to the sufficiency of the evidence evaluation under *Jackson*, *supra*, and does not extend to credibility determinations made by the trier of fact. La. Const. art. 5, § 10(B); *State v. Williams*, 448 So.2d 753 (La. App. 2d Cir. 1984). A reviewing court accords great deference to a judge or jury's decision to accept or reject the testimony of a witness in whole or in part. *State v. Gilliam*, 36,118 (La. App. 2d Cir. 8/30/02), 827 So.2d 508, *writ denied*, 02-3090 (La. 11/14/03), 858 So.2d 422.

In order to convict the defendant of second degree murder, the state had the burden of proving beyond a reasonable doubt that the defendant killed the victim while possessing the specific intent to kill or inflict great bodily harm. La. R.S. 14:30.1; *State v. Thompson*, 27,512 (La. App. 2d Cir. 12/06/95), 665 So.2d 643, *writ denied*, 96-0232 (La. 4/26/96), 672 So.2d

679. 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.

Self-defense is justification for a killing only if the person committing the homicide reasonably believes he is in imminent danger of losing his life or receiving great bodily harm and that deadly force is necessary to save his life. La. R.S. 14:20(1); *State v. Cotton*, 25,940 (La. App. 2d Cir. 3/30/94), 634 So.2d 937. The state has the affirmative duty of proving beyond a reasonable doubt that the killing was not in self-defense. *State v. Arnold*, 30,282 (La. App. 2d Cir. 1/21/98), 706 So.2d 578.

Factors to consider in determining whether a defendant had a reasonable belief that the killing was necessary are the excitement and confusion of the situation, the possibility of using force or violence short of killing, and the defendant's knowledge of the assailant's bad character. *State v. Hardeman*, 467 So.2d 1163 (La. App. 2d Cir. 1985). Although there is no unqualified duty to retreat, the possibility of escape is a factor to consider in determining whether a defendant had a reasonable belief that the use of deadly force was necessary to avoid the danger. *State v. Brown*, 414 So.2d 726 (La. 1982).

At trial, the state presented the testimony of Deputy Gregory Ardoin of the Caddo Parish Sheriff's office. Deputy Ardoin testified that he was dispatched to Mustang Circle after receiving a disturbance call at approximately 2:00 a.m. Upon his arrival at the scene, Deputy Ardoin observed the victim lying face down in the grass in the front yard. Floyd

was still breathing and Deputy Ardoin called for medical personnel. Deputy Ardoin testified that he checked for weapons by doing a full search of the victim's body. He stated that the victim had no weapons or anything that could have been mistaken as a weapon on his person. Deputy Ardoin did recover a Ruger .22 caliber rifle on the defendant's porch and a spent cartridge. He stated that the rifle was located 50 feet from the victim's body. Deputy Ardoin further testified that he was advised by Corporal Douglas that the defendant confessed to the shooting.

Deputy Michael Vaitkus testified that he was dispatched to McGuffie's residence on the afternoon following the shooting because Turner claimed that she had been receiving threatening phone calls. As Deputy Vaitkus walked across the street to another residence to talk to the defendant's mother, Turner returned to McGuffie's residence. When Deputy Vaitkus returned, Turner directed his attention to something in the yard that turned out to be a fluorescent lock blade knife. Turner identified the knife as belonging to Floyd. The officer believed he would have noticed the knife on his initial visit with Turner but secured the scene and dispatched crime scene investigations to retrieve the knife.

Thrower was the only eyewitness to the shooting who testified at trial. Her testimony is summarized in the facts above.

Melissa Cameron, the mother of the defendant's two children, testified that she was of aware of the ongoing feud between Floyd and McGuffie over the Playstation. Cameron testified that on the day before the homicide, McGuffie called her and told her that if he saw her or the victim

on Mustang Circle, he would shoot or kill them.

April Byrd was familiar with Floyd and McGuffie through school. She testified that on the night before the shooting, Turner repeatedly called her and Willard, threatening to shoot her if she did not return the Playstation. Byrd corroborated Thrower's claim that Floyd called her house around the time of the shooting stating that he was near McGuffie's residence and was going to go talk to the defendant. She stated that she could hear Turner hitting and yelling at the victim to get out of the car. She also heard the victim warning Turner to stop hitting him. She testified that soon after the phone call with the victim ended, Thrower called stating that she had heard a shot and saw the victim fall to the ground. Byrd testified that she told Heather to leave the scene and that she called the police.

Willard corroborated that Floyd called his residence, and his wife answered the call on speaker phone. He testified Floyd stated that there were five or six guys in McGuffie's yard. He also stated that he heard a girl yelling at and somebody hitting Floyd. Willard testified that the victim asked for his assistance and told him that there was a girl standing in front of his car who was preventing him from leaving. Willard testified that by the time he was about to leave his house to help the victim, he got a phone call from Thrower describing the shooting. Willard also testified that he had seen Floyd earlier in the evening, and that Floyd did not have any weapons.

The defense presented the testimony of Rhydonia Gullette who testified that on the night before the shooting, she was at a party at Byrd and

Willard's home. She testified that she witnessed Floyd at the party snorting cocaine and shooting guns with several other men. Gullette also testified that she overheard Floyd call someone she believed to be McGuffie and tell him he was going to come to his house and shoot him.

The defense also presented the testimony of two of McGuffie's neighbors who overheard the verbal altercation that took place on Mustang Circle, but who did not witness the shooting. Two other defense witnesses testified that they had seen Floyd with a gun on other occasions unrelated to the present offense.

Dr. Richard Kamm, an expert in forensic medicine, testified regarding the death of Floyd. Dr. Kamm testified that there was no evidence of defensive wounds on Floyd. Dr. Kamm testified that the drugs found in Floyd's system would have affected his thought processes and he probably would have been totally separated from reality and angry. He stated that an individual affected by this combination of drugs could at any moment "just totally blow loose, harm themselves, harm others."

We find this evidence, viewed in the light most favorable to the prosecution, sufficient for a rational trier of fact to conclude beyond a reasonable doubt that McGuffie killed Floyd while possessing the specific intent to kill or inflict great bodily harm to the exclusion of every other reasonable hypothesis of innocence. Despite the continued verbal feud between the two men over a Playstation, no evidence of physical or verbal contact between Floyd and McGuffie was established. Rather, the evidence showed that it was McGuffie who made continued threats of killing various

individuals, including Floyd, on the day before the incident. The mother of McGuffie's children testified that McGuffie had threatened to kill her and Floyd the day before the incident if either individual went near his home. Thrower also testified that McGuffie threatened to kill her and Floyd on the afternoon before the incident. If believed, this testimony is adequate to establish beyond a reasonable doubt that McGuffie had the specific intent to carry out his earlier threats of killing Floyd.

We also find no error in the jury's rejection of McGuffie's self-defense claim. The undisputed physical evidence established that McGuffie was approximately 50 feet away when he shot Floyd. No weapon other than McGuffie's gun was found at the scene at the time of the shooting. Despite McGuffie's argument in brief, the defense presented no eyewitness testimony which placed Floyd at the scene with a gun. Witness testimony which the defense attempted to utilize to establish that Floyd possessed a gun was unrelated in time and space to the crime scene and simply failed to establish that Floyd was armed as he approached McGuffie. Likewise, the alleged statements of Turner that she observed Floyd lift his shirt and yelled to McGuffie that he had a gun were not introduced into evidence and are the mere product of the defense argument in brief. Evidence relating to the discovery of a knife the day after the crime demonstrated suspicious circumstances described by Deputy Vaitkus and could have reasonably been rejected by the jury as a fabrication of evidence by Turner. The contrary eyewitness testimony of Thrower was that Floyd was not armed when he exited the vehicle. If believed, this witness's

testimony was adequate to establish beyond a reasonable doubt that Floyd was an unarmed victim.

The jury could have also reasonably rejected any claim by McGuffie to have feared for his life due to Floyd's alleged manhandling of Turner. Thrower's testimony, which the jury obviously accepted, established that it was Turner who was the aggressor in both altercations that occurred immediately before the shooting. No evidence established that Floyd's actions toward her in any way threatened McGuffie or that his drug use precipitated any extraordinary aggression by Floyd toward McGuffie or Turner. With no evidence that Floyd was armed or posed any threat to McGuffie and the distance that existed between the victim and McGuffie, the jury could have reasonably found beyond a reasonable doubt that McGuffie did not act in self-defense or reasonably believed that he was in imminent danger of losing his life or receiving great bodily harm so that deadly force was necessary to save his life. McGuffie's argument has no merit.

In his second assignment of error, McGuffie argues that the state's reference to statements of Patrick Matthews, an individual incarcerated with McGuffie, in its opening statement and Turner's actions in both opening and closing statements, violated his constitutional right to cross-examine witnesses against him and substantially prejudiced his rights. In the alternative, McGuffie raises a claim of ineffective assistance of counsel due to counsel's failure to raise any objection to the statements until after the trial.

The record shows that in her opening statements, the prosecutor indicated that Patrick Matthews was going to testify that McGuffie laughed and bragged about the shooting and said that he would have shot Thrower if she had exited the vehicle. During trial, the state called Ricky McDonald, investigator for the district attorney's office, to the stand to testify that he had served a subpoena upon Patrick Matthews. McDonald testified that Matthews appeared cooperative at the time and appeared at the district attorney's office. However, on the date that Matthews was to appear in court, he could not be located at his residence. McDonald testified that no one knew where Matthews was located.

No objection to the prosecution's reference to Matthews was made by defense counsel either at any time during trial or in post-trial motions for new trial.

The prosecutor also made references in both her opening and closing statements regarding Turner's actions on the morning of the crime. In the opening statement, the prosecutor referred to Turner's actions berating the victim as witnessed by Thrower. In the closing arguments, three references were made by the state to Turner regarding her showing the knife to Deputy Vaitkus the afternoon after the shooting and her alleged attempts to get Floyd out of the car. While no objection by the defense occurred at the time of the prosecution's statements concerning Turner, counsel filed a motion for new trial relating to Turner's statements which the trial court denied.

Turner was not a witness at trial. Ricky McDonald also testified regarding his attempts to locate Turner using the Shreveport Police and

Sheriff's Office computer system after receiving a subpoena for the witness. He testified that he was unable to locate her after an extensive search.

La. C.Cr.P. art. 774 provides that the state's arguments at trial shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case. La. C.Cr.P. art 766 provides that the opening statement of the state shall explain the nature of the charge, and set forth, in general terms, the nature of the evidence by which the state expects to prove the charge.

The general rule is that absent bad faith on the part of the prosecutor or clear and substantial prejudice, the reference in the opening statement to evidence later ruled inadmissible or not produced is not a ground for a mistrial. *State v. Green*, 343 So.2d 149 (La. 1977); *State v. Bell*, 279 So.2d 164 (La. 1973). Likewise, the prosecutor retains considerable latitude in making closing arguments. *State v. Taylor,* 93-2201 (La. 2/28/96), 669 So.2d 364, *cert denied,* 519 U.S. 860, 117 S.Ct. 162, 136 L.Ed.2d 106 (1996). Before a court will reverse a conviction or sentence due to improper closing argument on the part of the prosecution, it must be convinced the improper remarks influenced the jury and contributed to the verdict. *State v. Taylor, supra; State v. Messer,* 408 So.2d 1354 (La. 1982).

After reviewing the record before us, we find that the prosecutor's references to statements allegedly made by McGuffie in jail to Matthews and the actions of Turner at the scene were within the appropriate sphere of opening statements set forth in La. C.Cr.P. art 766. The prosecutor and trial

court instructed the jury that the statements were not evidence and the information constituted facts through which the state sought to prove its case against McGuffie.

Additionally, at the time of the opening statement it was the state's intention to present the testimony of both Turner and Matthews. When the witnesses were found to be unavailable for trial, the state offered the testimony of McDonald to explain their absence. These facts preclude a finding of bad faith by the prosecutor. Moreover, McGuffie has failed to show clear and substantial prejudice which would entitle him to a new trial. McGuffie stipulated that he killed Floyd with the gun found at the scene. As discussed above, sufficient evidence of McGuffie's specific intent to kill Floyd was elicited by the state through other witnesses and evidence. Thus, we find that the comments as a whole, did not influence the jury or contribute to the verdict.

Nor did the references to Turner's actions by the prosecutor in closing arguments demonstrate prejudice to McGuffie. Facts relating to Turner's actions in showing Detective Vaitkus the knife were legitimately placed into evidence through the eyewitness account of the detective. He was subject to cross examination. Likewise facts relating to Turner's actions on the night of the offense were introduced into evidence through Thrower's eyewitness accounts of the incident. The descriptions of Turner's actions did not violate the hearsay objection and were not subject to any other valid objection concerning admissibility. Thus, the state could refer to this legitimate evidence admitted at trial and make conclusions of fact to be

drawn therefrom without any prejudice to McGuffie's rights. McGuffie's failure to establish prejudice relating to these issues precludes a claim of ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

In his third assigned error, McGuffie argues that the trial court erred in failing to allow the introduction of Floyd's juvenile record into evidence to discredit the alleged nonviolent temper of the victim. McGuffie argues that Floyd's juvenile record was relevant to show his state of mind at the time of the shooting and that his apprehension of danger was reasonable considering Floyd's reputation. McGuffie urges that because the record contained appreciable evidence of a hostile demonstration of Floyd's potential harm and trespass upon McGuffie's property, the provisions of La. C.E. art 404 (A)(2) allow such evidence of a pertinent trait of character.

In an ex parte pretrial motion, McGuffie sought an in camera inspection of Floyd's juvenile records to show the dangerous character of the victim as well as McGuffie's state of mind. Pursuant to the provisions of La. C.Cr.P. art. 609, the state objected to the request arguing that the juvenile records of Floyd were inadmissible. Prior to opening statements, the trial court denied McGuffie's request finding that the juvenile records were inadmissible because Floyd was 21 years old at the time of the offense and the record would serve no relevancy to the case. Defense counsel objected to the ruling.

Evidence of a person's character or trait is generally inadmissible to prove that he acted in conformity therewith on a particular occasion. La.

C.E. art. 404(A). An exception to the rule is set forth in La. C.E. art. 404(A)(2), which allows evidence of a pertinent trait of character, such as a moral quality of the crime victim provided that evidence of a hostile demonstration or an overt act on the part of the victim is shown at the time of the offense charged. As a condition of admissibility, the defendant must produce evidence that at the time of the incident, the victim made a hostile demonstration or committed an overt act against the defendant. *State v. Washington*, 30,043 (La. App. 2d Cir. 1/23/98), 706 So.2d 203. An “overt act” within the meaning of LSA-C.E. art. 404 is “any act of the victim which manifests in the mind of a reasonable person a present intention on his part to kill or do great bodily harm.” *See State v. Scott,* 31,379 (La. App. 2d Cir. 10/28/98), 720 So.2d 415, *writ denied,* 99-0170 (La. 5/14/99), 741 So.2d 664. The overt act must be directed at the accused. *State v. Cavalier*, 421 So.2d 892 (La. 1982); *State v. Jones*, 451 So.2d 1181 (La. App. 1st Cir. 1984).

Before being entitled to present evidence of the victim’s character, the defendant must present “appreciable evidence” of the overt act. *See State v. Woodhead,* 03-1036 (La. App. 5th Cir. 1/27/04), 866 So.2d 995, 1001, *writ denied,* 04-0598 (La. 7/2/04), 877 So.2d 144. Once the defendant has presented appreciable evidence of the overt act, “the trial court cannot exercise its discretion to infringe on the fact-determination function of the jury by disbelieving this defense testimony and thus, deny the accused a defense permitted by law.” *See State v. Woodhead,* 866 So.2d at 1002.

In this case, the trial court correctly determined that the defendant had not made a proper showing of a hostile demonstration or overt act on the victim's part to justify the introduction of the victim's juvenile record into evidence. The only evidence presented by the defense which suggested that Floyd in any way threatened McGuffie was that of Gullette who only guessed that the individual whom Floyd spoke with on the phone earlier in the evening was McGuffie. Such conjecture fails to qualify as appreciable evidence of an overt act. Nor did any evidence of Floyd's actions at the crime scene establish a threat to McGuffie. In fact, Thrower, who witnessed the incident and Byrd and Willard, who overheard it on their telephone, refuted this fact. The only apparent altercation which took place was between Floyd and Turner. Nor was there evidence that Floyd possessed a gun. The simple fact that Floyd trespassed upon McGuffie's property falls short of the proof necessary to establish an overt act which would give a reasonable person the basis to conclude that the victim intended to kill or do great bodily harm. Thus, the trial court committed no error in denying the introduction of Floyd's juvenile record into evidence.

In his fourth assigned error, McGuffie argues that the trial court erred in denying his challenge for cause regarding juror David Leimbrook who admitted to knowing the prosecutor through mutual friends. McGuffie argues that Leimbrook's service as foreman of the jury violated his right to a fair and impartial jury.

The record shows that upon initial voir dire by the state, Leimbrook indicated that he knew the prosecutor through mutual friends. The potential

juror did not know the prosecutor had gotten married and the two agreed that they had not seen each other in a couple of years. The prosecutor stated for the record that she considered the potential juror to be an acquaintance she had seen "out and about on various times." Leimbrook indicated that the relationship would not affect his ability to be fair in the case. Leimbrook also expressed concern over the time restraints required for serving on the jury as he had to be out of town for business the following Tuesday. The defense challenged Leimbrook for cause and conducted further voir dire regarding the relationship. Upon further examination, Leimbrook indicated that he had known the prosecutor for approximately ten years during which time he saw her every now and then. Leimbrook reiterated that his relationship with the prosecutor would not cause him to be biased in her favor. The juror also indicated that he did not want to serve as a juror at first because he was forced to be away from work. Upon questioning by defense counsel, Leimbrook indicated that he had changed his mind because he believed that serving on a jury was his civic duty. The defense maintained the challenge for cause which the trial court denied.

Defendants may always assign as error the trial court's failure to dismiss a potential juror for cause urged by defendant when that denial is erroneous, and the defendant objected to the failure to dismiss at trial. *State v. Fairley*, 25,951 (La. App. 2d Cir. 5/4/94), 645 So.2d 213, *writs denied*, 94-1940 (La. 11/11/94), 645 So.2d 1152, 94-2909 (La. 3/24/95), 651 So.2d 287. In the case of a defendant who has used all of his peremptory challenges, he need only show the erroneous denial of a challenge for cause.

*State v. Ross*, 623 So.2d 643 (La. 1993). Prejudice is presumed when a challenge for cause is erroneously denied, and all of defendant's peremptory challenges are exhausted.

In this case, the defense utilized all twelve of its available peremptory challenges. Therefore, this court must determine whether the trial court erred in denying defendant's challenge for cause as to juror Leimbrook.

La. C.Cr.P. art. 797 provides in pertinent part that the defendant may challenge a juror for cause on the grounds that:

* * * *

> (2) The juror is not impartial, whatever the cause of his impartiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;
>
> (3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict.

* * * *

The trial judge is vested with broad discretion in ruling on challenges for cause, and his ruling will only be reversed when review of the entire voir dire shows the trial judge abused his discretion. *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So.2d 1278, *cert. denied, Robertson v. Louisiana,* 525 U.S. 882, 119 S. Ct. 190, 142 L.Ed.2d 155 (1998).

Although the parties had known each other for ten years, the record shows that the relationship between them was apparently no more than that

of social acquaintances. Moreover, at the time of trial, the contact between Leimbrook and the prosecutor in the immediately preceding years was minimal. Leimbrook unequivocally and credibly assured the court that this relationship would not cause him to be biased or influence his decision in the case. In light of the broad discretion granted to the trial court in ruling on challenges for cause, we find no error in the trial court's denial of McGuffie's challenge to juror Leimbrook. This assignment is therefore without merit.

McGuffie finally argues that the life sentence is constitutionally excessive given the facts of this case and that the sentencing court failed to articulate any justification for his sentence as required by La. C.Cr.P. art 894.1.

Because McGuffie failed to file a motion to reconsider sentence, he is limited on appeal to a bare claim that the imposed sentence is unconstitutionally excessive. *State v. Mims,* 619 So.2d 1059 (La. 1993). Moreover, where there is a constitutional mandatory sentence, there is no need for the trial court to justify, under Article 894.1, a sentence it is legally required to impose. *State v. Koon*, 31,177 (La. App. 2d Cir. 2/24/99), 730 So.2d 503; *State v. Rose*, 606 So.2d 845 (La. App. 2d Cir. 1992).

To rebut the presumption that the mandatory minimum sentence is constitutional, he defendant must 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. *State v. Lindsey*, 99-3302 (La. 10/17/00), 770 So.2d 339.

In the instant case, the facts show that McGuffie shot and killed the unarmed Floyd over a Playstation. He had threatened to kill the young man throughout the day before the crime. These facts fail to qualify McGuffie as the exceptional defendant for which downward departure from the mandatory sentence is justified. Moreover, arguments that the mandatory life sentence for second degree murder is a violation of the prohibition against excessive punishment contained in the Louisiana constitution have been repeatedly rejected. *State v. Parker*, 416 So.2d 545 (La. 1982); *State v. Brooks*, 350 So.2d 1174 (La. 1977); *State v. Thornton*, 36,757 (La. App. 2d Cir. 1/29/03), 836 So.2d 1235, *writ denied*, 03-0861 (La. 10/31/03), 857 So.2d 474. Thus, the sentence imposed is not illegal, grossly disproportionate to the severity of the offense, nor shocking to one's sense of justice. This assignment of error is without merit.

McGuffie's conviction and sentence are affirmed.

**AFFIRMED.**