

STATE OF LOUISIANA

*

NO. 2016-KA-1199

VERSUS

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COURT OF APPEAL

EVANGELISTO RAMOS

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 524-912, SECTION "F"
HONORABLE ROBIN D. PITTMAN, JUDGE

* * * * *

JAMES F. MCKAY III
CHIEF JUDGE

* * * * *

(Court composed of Chief Judge James F. McKay III, Judge Edwin A. Lombard,
Judge Joy Cossich Lobrano)

LOBRANO, J., CONCURS IN THE RESULTS

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AFFIRMED

NOVEMBER 2, 2017

The defendant, Evangelisto Ramon, appeals his conviction and sentence. Finding no error, we affirm his conviction and sentence.

STATEMENT OF CASE

On May 21, 2015, the defendant was indicted on one count of second degree murder. The defendant appeared for arraignment on June 1, 2015 and entered a plea of not guilty. On July 16, 2015, the trial court denied the defendant's motion to suppress the statement.

On March 20, 2016, the trial court granted the defendant's motion for a speedy trial. A pre-trial conference was conducted by the trial court on June 10, 2016. Trial was set for June 20, 2016.

On June 20, 2016, the trial court once again denied the defense motion to exclude the statement. Trial was continued to June 21, 2016.

The defendant's case proceeded to trial by jury on June 21, 2016 and concluded on June 22, 2016. The defendant was found guilty of second degree murder by a ten of twelve jury verdict.

The defendant filed a motion for new trial and a motion for post-verdict judgment of acquittal on July 6, 2016. On July 12, 2016, the defendant appeared for sentencing and his motions for new trial and for post-verdict judgment of acquittal were denied. The defendant waived sentencing delays and was sentenced to life imprisonment at the Louisiana Department of Corrections at hard labor without benefit of parole, probation or suspension of sentence. The defendant filed a motion for appeal on July 12, 2016.

STATEMENT OF FACT

On November 26, 2014, the dead body of a woman, later identified as Trinece Fedison (the “victim”), was found inside a trash can in a wooded area behind 3308 Danneel Street in New Orleans.

Robert Heim (“Mr. Heim”), a code enforcement officer for the City of New Orleans, testified that on the morning of November 26, 2014 between 9:00 and 10:00 a.m., he was inspecting blighted property in the wooded area behind the house located at 3308 Danneel Street. Mr. Heim noticed trash and various discarded items in the overgrown brush area. The woman who resided nearby called his attention to a trash can in the rear of the alley way and asked him to pull it out to the street. The woman said the trash can did not belong to her. When Mr. Heim attempted to move the trash can, he found it was very heavy. Because he was unable to move the trash can, Mr. Heim lifted the lid and discovered the dead body of a woman, later identified as the victim. He immediately called 911. Mr. Heim said it was apparent the victim was a woman and was deceased.

Jerome Fedison (“Jerome”), the victim’s nephew, testified that on the afternoon before his aunt’s body was discovered, he stopped at his cousin’s house at about 3:30 p.m. While waiting for a friend, Jerome called his aunt (the victim)

on the phone. She told him she was sick. About thirty-minutes later, he saw his aunt walking around the corner. He saw two Spanish men he had never seen before standing on the corner near his aunt. One of the men rode off on a bicycle, and the other remained on the corner. Jerome flashed his truck's lights to let his aunt know he was present and waved at her. She waved back. His aunt then went back to talk to the Spanish man and then went inside the house on the corner with the man. Jerome remained outside his cousin's house for approximately 30-40 minutes and then left. During that time, he never saw his aunt come out of the corner house.

On Thanksgiving morning, the morning his aunt's body was found, Jerome looked down the street and saw the a man exiting the Spanish man's house. Knowing that the Spanish man was the last person he saw his aunt with, Jerome approached the man in the street and confronted him. Jerome told the man, "I know what you did. You gonna [sic] feel me partner, for real." The man stood silent for ten minutes "like a damn ghost." Jerome identified the defendant at trial as the Spanish man he had last seen with his aunt.

New Orleans Police Homicide Detective Nicholas Williams ("Detective Williams") testified he assisted in the investigation of the Trinece Fedison murder. He grew up with Trinece and her family. Detective Williams learned from the victim's family that Jerome had information on a possible suspect. He subsequently took a recorded statement from Jerome, which he turned over to Detective Bruce Brueggeman ("Detective Brueggeman"). In his statement, Jerome furnished a description and address of the suspected perpetrator.

Darryl Schuermann testified he was the operations manager for Romeo Pappa Boats, where the defendant worked as an AB seaman. Romeo Pappa Boats'

office was located in Houma, and there was a mobile home located on the property. The trailer was used to lodge outgoing crewmen from out of town for the night before a crew change so that the crewmen did not have to travel in the early morning hours. A retired Coast Guard officer named Gene lived on the property and looked after the property. Gene called Mr. Scheurmann over the weekend and informed him that the defendant had been staying in the trailer for several days.

When Mr. Scheurmann arrived at work on the Monday morning following Thanksgiving, the defendant came into his office and said he needed to talk to him. The defendant told Mr. Scheurmann that he was sexually involved with a prostitute, the victim, and when she was leaving his house, he heard a commotion. The defendant told Mr. Scheurmann he saw a black SUV with two black men, who were harassing her.

The defendant stated that after the victim's body was discovered, one of her family members approached him on the street and threatened to kill him, saying; "I know you did it. I'm going to kill you." The defendant explained that he had been staying in the trailer that weekend because he feared for his life. Mr. Scheurmann advised the defendant to talk to the police. The defendant indicated he was willing to talk to the police. Mr. Scheurmann contacted the lead detective and arranged an interview. When questioned relating to the defendant's previous employment, Mr. Scheurmann stated the defendant had been a butcher in New York.

NOPD Homicide Detective Brueggeman testified he was the lead detective assigned to investigate the the victim's murder. Upon viewing the crime scene, Detective Brueggeman suspected that a sexual assault had occurred, so he requested that a sexual assault kit be completed. He learned that the trash can in which the body was found belonged to a church located across the street from the

crime scene. He surmised that the murder probably happened within the immediate area because the trash would have been too heavy to move with the body of a large woman inside. Detective Brueggeman interviewed a neighbor who lived in an apartment complex next to the wooded lot, who told him that while she was in bed in the early morning hours, she heard a garbage can being rolled across the street and over a curb.

Detective Brueggeman interviewed the victim's boyfriend, who stated that he was with several family members at the time of the murder. Because the alibi was confirmed by his family members, the victim's boyfriend was eliminated as a suspect. Detective Williams furnished Detective Brueggeman with the recorded statement he had taken from the victim's nephew, Jerome.

Detective Brueggeman received a phone call from Darryl Schuermann. The detective immediately drove to Houma to meet with Mr. Scheurmann and the defendant. At that time, Detective Brueggeman did not consider the defendant a suspect in the victim's murder. The defendant told the detective that he had had sex with the victim just prior to her murder. Detective Brueggeman obtained a buccal swab from the defendant.

When Detective Brueggeman received the results of the DNA testing, it revealed a match between the defendant's DNA and the DNA found in the victim's vagina. The defendant's DNA was also found on the handles of the trash can in which the victim's body had been found. The DNA reports were later introduced into evidence.

After receiving the DNA results, Detective Brueggeman obtained a warrant for the defendant's arrest, and the defendant was apprehended. Detective Brueggeman, after providing the defendant with his rights in accordance with

Miranda, obtained a second statement from the defendant. Detective Brueggeman informed the defendant there was some physical evidence. In response to learning the police had physical evidence, the defendant immediately told Detective Brueggeman about his prints being on a garbage can lid. The defendant stated that he had touched the garbage can lid when he placed a bag of garbage in the church garbage can immediately after having sex with the victim. After further questioning, the defendant said the church was located across the street from his house. The defendant told the detective that the last time he saw the victim was when she was leaving his residence. The defendant stated, as the victim was leaving, a black vehicle, possibly a Buick, pulled up, and the men inside called her name. The victim appeared to know the men, immediately got into the vehicle, and the vehicle drove off. The detective noticed that the defendant's account of the victim's encounter with the men in the black vehicle differed from the account he had given to Darryl Schuermann in which he asserted the men were harassing the victim. The defendant was unable to describe the men in the black car.

Suggesting that the defendant had been profiled based on his ethnicity, Detective Brueggeman was asked on cross examination why someone had said, "[I]t was possibly Hispanic due to a knife being involved?" Detective Brueggeman replied: "Some of the people we spoke to like Jerome, some of the people in the black community, they feel as if somebody is a victim of [a] stab wound chances are it's probably from a Mexican. Those aren't my words but they think its Mexican or Hispanic because they like to use knives."

Detective Brueggeman stated he learned during his investigation that the victim had a drug problem; however, only the defendant stated she was a prostitute. Detective Brueggeman reviewed the victim's criminal history and

found nothing to lead him to believe the victim was a prostitute. There were no arrests for prostitution and nothing to suggest the victim was a prostitute.

Dr. Erin O'Sullivan ("Dr. O'Sullivan"), a forensic pathologist for the Orleans Parish Coroner's Office, performed the autopsy on the victim's body on November 28, 2014. Dr. O'Sullivan stated the death was classified as a homicide. Dr. O'Sullivan determined that Trinece had sustained six stab wounds in the abdomen and lower right side of the back. Additionally, the victim sustained an "in size" [sic] wound on the interior of her neck, cutting into her vertebrae. In other words, in colloquial terms, her throat was slit. The victim also had a contusion on her back and her right eye, consistent with a struggle.

Dr. O'Sullivan performed a sexual activity test on the victim at the request of the police. Dr. O'Sullivan determined that the cause of the victim's death were the stab wounds to the abdomen and neck. Based on the rigor state of the victim, Dr. O'Sullivan determined the time of death to be between the night of November 25, 2014 and the morning of November 26, 2014. Dr. O'Sullivan took fingernail clippings, which she preserved for evidence. Dr. O'Sullivan stated the victim had lost a lot of blood internally. Dr. O'Sullivan explained the abdominal wounds would not cause massive external bleeding and the wound to the neck may have had more external bleeding. Dr. O'Sullivan explained the neck wound may not have had much external bleeding if it was the last wound inflicted.

Stacey Williams ("Ms. Williams"), a forensic DNA analyst for the State Police Crime Lab, was accepted as an expert in the field of forensic DNA analysis. Ms. Williams performed the DNA analysis with respect to samples related to the victim murder investigation. The testing revealed that the defendant's DNA was found in the victim's vagina and also on the handles of the trash can in which her

body was found. There were three contributors of contact (touch) DNA on the left handle of the garbage can. The defendant could not be excluded as the major contributor of the DNA, and the victim could not be excluded as the minor contributor. It was also concluded that there were two contributors to the contact DNA found on the right handle of the garbage can. The defendant could not be excluded as a minor contributor, while the victim could not be excluded as a major contributor. Assuming one contributor, the probability of finding the same profile from an unrelated random individual other than the defendant would be one in 18.4 quadrillion, which is two to three times the earth's population. Testing of the victim's fingernail clippings revealed the DNA of the victim's own blood. Further testing revealed the DNA mixture of at least two male individuals, but no profiles could be determined due to the low-level nature of the data.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

ASSIGNMENT OF ERROR NUMBER 1

In the first assignment of error, the defendant (*pro se*) and counsel contend the evidence was insufficient to support his conviction. The defendant asserts the evidence presented at trial was circumstantial and failed to exclude every reasonable hypothesis of innocence.

The defendant was found guilty of second degree murder, a violation of La. R.S. 14:30.1, which provides in relevant part: "A. Second degree murder is the killing of a human being: (1) When the offender has a specific intent to kill or to inflict great bodily harm...."

The standard for review of a claim of insufficiency of the evidence was laid out by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979):

...the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. (Emphasis in original).

“Under the *Jackson* standard, the rational credibility determinations of the trier of fact are not to be second guessed by a reviewing court.” *State v. Williams*, 2011-0414, p. 18 (La. App. 4 Cir. 2/29/12); 85 So.3d 759, 771. Further, “a factfinder's credibility determination is entitled to great weight and should not be disturbed unless it is contrary to the evidence.” *Id.* But, where there is no direct evidence presented proving one or more of the elements of the offense, La. R.S. 15:438 governs circumstantial evidence and provides “assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence.” “Stated differently, the reviewer as a matter of law, can affirm the conviction only if the reasonable hypothesis is the one favorable to the State and there is no extant reasonable hypothesis of innocence.” *State v. Green*, 449 So.2d 141, 144 (La. App. 4 Cir. 1984) citing *State v. Shapiro*, 431 So.2d 372 (La. 1983). “This test is not separate from the *Jackson* standard; rather it simply requires that ‘all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt.’” *State v. Hoang*, 2016-0479, p. 3 (La. App. 4 Cir. 12/21/16), 207 So.3d 473, 475, quoting *State v. Ortiz*, 96–1609, p. 12 (La. 10/21/97), 701 So.2d 922, 930.

In the case *sub judice*, some of the evidence may be susceptible of innocent explanation. However, “under the *Jackson* standard, if rational triers of fact could disagree as to the interpretation of evidence, the rational fact finder's view of all of the evidence most favorable to the prosecution must be adopted.” *State v. Ellis*, 2014-1511, p. 4 (La. 10/14/15), 179 So.3d 586, 589. Therefore, viewing the evidence in the light most favorable to the State, a rational juror could have found that the State proved its case beyond a reasonable doubt.

The defendant asserts that the evidence presented at trial was insufficient to prove his identity as the murderer of the victim. A review of the evidence and testimony presented at trial reflects Jerome saw the victim at approximately 4 p.m. the day before her body was discovered. Jerome had noticed two men on the corner he had never seen before. Jerome thought the two men were Hispanic. Jerome opined the two men were behaving suspiciously and were selling drugs in front of the church. As Jerome saw the victim coming around the corner, he flashed his headlights and waved to her. One of the men left on a bicycle. The victim waved to Jerome but turned around and went back to the man on to the corner. The victim and the man spoke briefly and then went into the corner house. Jerome waited outside the house for thirty-five to forty minutes but never saw the victim exit the house. Jerome identified the defendant as the last person with whom the victim was seen.

DNA testing revealed a match between the defendant's DNA and the DNA found in the victim's vagina. The defendant's DNA was also found on the handles of the trash can in which the victim's body had been found. Ms. Williams believed the high volume of the defendant's DNA found on the handle of the trash can was due to some form of the defendant's sweat or other substance on the handle.

Testimony was also given at trial that the defendant left the area following the murder. In addition, the defendant gave conflicting stories regarding what transpired when the victim left his residence. The defendant could not identify the type of vehicle or give a description of the men in the vehicle. An unopened condom was found with the victim and the defendant's seminal fluid was found in her vagina. Detective Brueggeman testified the condition of the victim when she was found led him to believe a sexual assault had occurred. Pictures of the crime scene, including the body of the victim in the condition in which she was found, were introduced into evidence. The defendant told Detective Brueggeman that he lifted the lid of the trash can to deposit trash, however, the defendant was the major contributor to the DNA found on the handle of the trash can suggesting he moved the trash can rather than simply lift the lid to deposit garbage into it.

The evidence presented by the State including the testimony of the witnesses provided sufficient evidence, when viewed in the light most favorable to the prosecution, to support the jury's verdict of guilty. This claim is without merit.

ASSIGNMENT OF ERROR NUMBER 2

The defendant and counsel contend the State made improper comments during its opening statement and closing arguments asserting that he raped and/or sexually assaulted the victim. The defendant asserts the comments influenced the jury and contributed to the verdict because it undermined his defense that his sexual contact with the victim was consensual.

La. C.Cr.P. art. 774 relates to the scope of argument and provides as follows:

The argument 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.

The argument shall not appeal to prejudice.

The State's rebuttal shall be confined to answering the argument of the defendant.

The Louisiana Supreme Court in *State v. Reed*, 2014-1980 (La. 9/7/16), 200 So.3d 291 summarized the law relevant to alleged improper remarks during argument as follows:

... Louisiana jurisprudence on prosecutorial misconduct allows prosecutors considerable latitude in choosing closing argument tactics. The trial judge has wide discretion in controlling the scope of closing argument. *State v. Prestridge*, 399 So.2d 564, 580 (La. 1981). Even if the prosecutor exceeds these bounds, a reviewing court will not reverse a conviction due to an improper remark during closing argument unless the court is thoroughly convinced the argument influenced the jury and contributed to the verdict, "as much credit should be accorded the good sense and fair mindedness of jurors who have seen the evidence and heard the arguments, and have been instructed repeatedly by the trial judge that arguments of counsel are not evidence." *State v. Martin*, 93- 0285, p. 18 (La. 10/17/94), 645 So.2d 190, 200; see *State v. Jarman*, 445 So.2d 1184, 1188 (La. 1984); *State v. Dupre*, 408 So.2d 1229, 1234 (La. 1982).

Id., at 32, 200 So.3d, p. 315 (emphasis in original).

The defendant asserts he was prejudiced by the following statement made by the prosecutor during opening statements:

When they take her out of the trash can you are going to learn that immediately the initial officers say she was raped. She was half naked. Her underwear shoved down to her knees. Her pants shoved down beside her ankles, a bra shoved up over her breasts, she had two socks on, no shoes and no shirt. And the initial detectives know right away that this woman had been raped and murdered.

The defendant contends he was prejudiced by the State's reference to sexual assault or rape during opening, closing, and rebuttal arguments. However, the defendant admitted sexual contact with the victim during his initial conversation with Detective Brueggeman but asserted it was consensual.

The trial court informed the jury, prior to opening statements, that opening statements were not evidence. Following the defendant's objection to the State's

assertion that the victim was raped prior to her murder, the trial court, outside the presence of the jury, heard argument from the State as well as the defense. The State contended that the sexual assault of the victim was part of a continuing act which resulted in her murder. The trial court ruled that while the defense was entitled to assert the sexual contact was consensual, the State was entitled to argue that the sexual contact was not consensual and was a sexual assault. The trial court cautioned the State to avoid the use of the word “rape” when referring to the sexual assault.

This Court will not reverse a conviction for alleged improper opening, closing, or rebuttal arguments unless it is “thoroughly convinced” that the argument influenced the jury and contributed to the verdict. *State v. Casey* 99-0023, p.17 (La. 1/26/00), 775 So.2d 1022, 1036 (citing *State v. Martin*, 93-0285, p. 17 (La.10/17/94), 645 So.2d 190, 200). The jury in the case *sub judice* was presented with evidence consisting of photographs of the victim as she was found in the trash can. The victim’s clothing was partially removed, the defendant’s seminal fluid was found in her vagina, and she had been stabbed multiple times. From this evidence, the jury reasonably could have found the victim had been sexually assaulted prior to her murder. The trial court did not abuse its discretion in determining that the use of the term “rape” or “sexual assault” by the State in its opening, closing, or rebuttal arguments did not influence the jury or contribute to the verdict. This claim is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER 3

The defendant asserts his conviction was based solely on racial profiling. The defendant asserts that because the victim’s nephew, Jerome, stated during

testimony that when he found out his aunt was stabbed he thought the crime had been committed by a “Spanish guy.” However, Jerome stated: “A Spanish guy had to do it. If [sic] not really that, I really went straight to the last person I saw her with....”

Detective Brueggeman, the lead detective investigating the murder, testified that the defendant was not considered a suspect in the murder at their first meeting. Detective Brueggeman stated the fact that the defendant’s DNA was found on the trash can handles in which the victim was found lead him to suspect the defendant. Detective Brueggeman confirmed that some of the people he spoke to during the investigation of the murder suspected it was committed by a Spanish individual because they believed when someone was stabbed it was probably by a Mexican. Detective Brueggeman stated those were not his words but were the suspicions of some members of the black community. Detective Brueggeman detailed the evidence which lead him to suspect the defendant had committed the murder. Detective Brueggeman concluded the murder was committed by someone who lived nearby because of where the trash can was hidden. It was also determined that the trash can would have been difficult to move due to the weight of the victim’s body inside it. In addition, it was determined that the trash can was originally stored next to a church which was across the street from the defendant’s residence.

A review of the record demonstrates that there was substantial evidence linking the defendant to the murder. The defendant has not established that he was investigated based on racial profiling as he asserts. This claim is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER 4

In his final assignment of error, the defendant contends the trial court erred in denying his motion to require a unanimous jury verdict. The defendant contends that Louisiana's statutory scheme which permits non-unanimous jury verdicts in non-capital felony cases should be declared unconstitutional. In particular, he claims that La. Const. Art. I, Sec. 17 and La. C.Cr.P. art. 782 violate the equal protection Clause.

La. Const. Art. I, Section 17(A) provides that a case "in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict." Additionally, La. C.Cr.P. art. 782(A) provides in part that "[c]ases 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."

In *Apodaca v. Oregon*, 406 U.S. 404, 410-11, 92 S.Ct. 1628, 1632-33, 32 L.Ed.2d 184 (1972), the United States Supreme Court stated:

[T]he purpose of trial by jury is to prevent oppression by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge.' *Duncan v. Louisiana*, 391 U.S. 145 at 156, 88 S.Ct. 1444 at 1451, 20 L.Ed.2d 491 (1968) ... 'Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen ...' *Williams v. Florida*, supra, 399 U.S. 78 at 100, 90 S.Ct. 1893 at 1906, 26 L.Ed.2d 446 (1970). A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment. As we said in *Williams*, a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where non-unanimous juries will convict or

acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

In *State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So.3d 738, the trial court found that La. C.Cr.P. art. 782 (A) violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, relative to the number of jurors needed to concur to render a verdict in cases in which punishment is necessarily confinement at hard labor, the same issue raised by the defendant in the instant case. On direct appeal by the State, the Louisiana Supreme Court reversed, stating in its conclusion:

Due to this Court's prior determinations that Article 782 withstands constitutional scrutiny, and because we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12 person jury verdicts are constitutional may someday be overturned, we find that the trial court erred in ruling that Article 782 violated the Fifth, Sixth, and Fourteenth Amendments. With respect to that ruling, it should go without saying that a trial judge is not at liberty to ignore the controlling jurisprudence of superior courts.

Bertrand, 2008-2215, p. 8, 6 So.3d at 743.

This Court cited and relied on *Bertrand* in *State v. Hickman*, 2015-0807, pp. 13-14 (La. App. 4 Cir. 5/16/16), 194 So.3d 1160, 1168-69, to reject the argument that the trial court had erred in denying the defendant's motion to declare La. C.Cr.P. art. 782(A) unconstitutional as violative of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

As stated by the Louisiana Supreme Court in *Bertrand*, under current jurisprudence from the U.S. Supreme Court, non-unanimous twelve-person jury verdicts are constitutional, and La. C.Cr.P. art. 782(A) is constitutional. Accordingly, there is no merit in this assignment of error.

CONCLUSION

For the above stated reasons, we affirm defendant's conviction and sentence.

AFFIRMED