NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0396

STATE OF LOUISIANA

VS.

RICHARD LEE KING, JR.

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JUDGMENT RENDERED: NOV - 3 2006

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ON APPEAL FROM THE
TWENTY-SECOND JUDICIAL DISTRICT COURT
DOCKET NUMBER 387036, DIVISION A
PARISH OF ST. TAMMANY, STATE OF LOUISIANA

HONORABLE RAYMOND S. CHILDRESS, JUDGE

****

WALTER P. REED
DISTRICT ATTORNEY
COVINGTON, LA
AND
KATHRYN LANDRY
BATON ROUGE, LA

COUNSELS FOR APPELLEE
STATE OF LOUISIANA

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NEW ORLEANS, LA

COUNSEL FOR DEFENDANT/APPELLANT
RICHARD LEE KING, JR.

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

MCDONALD, J.

Defendant, Richard L. King, Jr., was charged by bill of information with two counts of attempted first degree murder, violations of La. R.S. 14:27 and 30 (Counts One and Two), and one count of aggravated flight from an officer, a violation of La. R.S. 14:108.1 (Count Three). Defendant entered a plea of not guilty and was tried before a jury. The jury determined defendant was not guilty of Count One; guilty of the responsive offense of attempted manslaughter on Count Two, a violation of La. R.S. 14:27 and 31, and guilty of aggravated flight from an officer on Count Three. The trial court originally sentenced defendant to twenty years at hard labor for his conviction for attempted manslaughter and two years at hard labor for his conviction for aggravated flight from an officer. The State instituted habitual offender proceedings against defendant. The trial court determined that defendant was a fourth felony habitual offender. The trial court vacated its original sentences on Counts Two and Three and sentenced defendant to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence on each of the charges, to run concurrently.

Defendant appeals. We affirm his convictions, but due to the existence of patent error, we vacate his habitual offender adjudication and sentence and remand the case for further proceedings.

FACTS

On September 28, 2004, the St. Tammany Parish Sheriff's Office was attempting to apprehend defendant on charges unrelated to the present appeal. Following an anonymous tip regarding defendant's whereabouts, Deputies Daniel Ard and Ronnie Plaisance were dispatched to the Pine Cliff Apartments.

When Deputy Ard entered the parking lot of the apartment complex, he observed a white male he believed to be defendant, inside a pickup truck talking to a white male and white female, who were standing outside of the truck. When Deputy Ard approached in his marked police unit, defendant fled from the truck and into a wooded area behind the complex. Deputy Ard pursued defendant, but could not locate him.

Throughout the evening, the Sheriff's Office received numerous conflicting tips regarding defendant's location. Several deputies rotated through the apartment complex parking lot in an effort to keep defendant's vehicle under surveillance. Corporal Darrell Oalmann was conducting surveillance on the parking lot when he observed a man dressed in camouflage walk to defendant's truck, get in, and drive away. Corporal Oalmann radioed this information to the dispatcher.

Deputy Jack Admire was at the Chevron station at the intersection of Louisiana Highways 59 and 1088, when he heard the radio dispatch regarding defendant leaving the apartment complex parking lot. Deputy Admire immediately activated his lights and siren and proceeded to drive the half mile along Hwy. 1088 to the Pine Cliff Apartments. Deputy Chris Booth, who also had activated his unit's lights and siren, followed Deputy Admire.

When Deputy Admire arrived at the complex, he observed defendant attempting to pull onto Hwy. 1088. Deputy Admire pulled his unit across the complex driveway and began to get out of his unit. Suddenly, Deputy Admire heard the sound of defendant's tires squealing. Fearing that defendant was about to hit him with his truck, Deputy Admire turned and got back into his unit.

When he looked up, Deputy Admire saw that the taillights of defendant's truck had passed and that the truck had entered a large ditch parallel to Hwy. 1088. It appeared that defendant had lost control of his vehicle because it was fishtailing in the ditch. Suddenly, the tires of the truck found traction and defendant was able to get out of the ditch and accelerate down Hwy. 1088.

Deputies Admire and Booth gave chase, with their pursuit reaching the speed of 80 mph. As Deputy Admire followed defendant's vehicle, he could see Sergeant Brian Wetzel's unit ahead of them on Hwy. 1088. Sergeant Wetzel's unit was recognizable because it was only equipped with deck lights, which were activated.

Attempting to intercept defendant, Sergeant Wetzel pulled his unit into defendant's lane of travel and stopped. Sergeant Wetzel could see that defendant was accelerating towards him, so he moved back into his travel lane and again stopped his unit. Defendant continued to accelerate towards him and even moved into Sergeant Wetzel's lane. Fearful that defendant was about to hit his unit, Sergeant Wetzel quickly put his unit in reverse and backed off Hwy. 1088 into an adjacent driveway. Defendant's vehicle then passed Sergeant Wetzel at a high rate of speed heading toward the Hwy. 59 intersection.

Sergeant Wetzel joined the pursuit of defendant as the lead unit. When defendant reached the intersection of Hwys. 1088 and 59, he cut through the parking lot of the Chevron gas station at a high rate of speed. Defendant then continued northbound on Hwy. 59, still being pursued by the police. While on Hwy. 59, defendant's vehicle reached a speed in excess of 90 mph.

Defendant soon came upon the intersection of Hwy. 59 and Lonesome Road. Sergeant Wetzel noted that there was a red light in their lane of travel and began to slow down; defendant briefly applied his brakes just before going through the intersection, then made a sharp left turn onto Lonesome Road. Defendant immediately lost control of his vehicle, left the roadway and crashed into a tree.

Within seconds of the crash, Sergeant Wetzel arrived at the scene and exited his unit with his weapon drawn. Sergeant Wetzel ordered defendant to get out of his truck and raise his hands where they could be seen. Defendant did not immediately comply with these repeated orders, but as Deputies Admire and Booth arrived, he got out of his truck.

Defendant ignored Sergeant Wetzel's order to get on the ground and began approaching the police officer, whose weapon was pointed at him. In an effort to subdue defendant, Deputy Booth shot defendant with a Taser gun, administering a five-second electrical shock. After the shock ended, defendant attempted to get up against the orders of the police to lie down. Deputy Booth administered a second five-second shock. Following this shock, defendant lunged at Deputy Admire. A third five-second shock was administered, along with the use of pepper spray. Defendant finally complied with orders to stay on the ground and was handcuffed.

MOTION TO SEVER OFFENSES

In his first assignment of error, defendant argues the trial court abused its discretion in failing to grant defense counsel's motion to sever Counts One and Two (attempted murder charges) from Count Three (aggravated flight) of the bill of information. Specifically, defendant argues that to present a defense on the counts of attempted murder, he would be forced to admit his guilt to the charge of aggravated flight.

A motion to sever is addressed to the sound discretion of the trial court, and the court's ruling should not be disturbed on appeal absent a showing of an abuse of discretion. In ruling on such a motion, the trial court must weigh the possibility of prejudice to the defendant against the important considerations of economical and expedient use of judicial resources. In determining whether joinder will be prejudicial, the court should consider the following: (1) whether the jury would be confused by the various counts; (2) whether the jury would be able to segregate the various charges and evidence; (3) whether the defendant would be confounded in presenting his various defenses; (4) whether the crimes charged would be used by the jury to infer a criminal disposition; and (5) whether, especially considering the nature of the charges, the charging of several crimes would make the jury hostile. However, the fact that evidence of one of the charges would not be admissible under **State v. Prieur**, 277 So.2d 126 (La. 1973), in a separate trial on the joined offense, does not per se prevent the joinder and single trial of both crimes if the joinder is otherwise permissible. Finally, there is no prejudicial effect from the joinder of two offenses when the evidence of each is relatively simple and distinct, so that the jury can easily keep the evidence of each offense separate in its deliberations. **State v. Deruise**, 98-0541, p. 7 (La. 4/3/01), 802 So.2d 1224, 1232, cert. denied, 534 U.S. 926, 122 S.Ct. 283, 151 L.Ed.2d 208 (2001).

In the present case, the charges arise out of the same act. To determine whether joinder of these offenses confounded defendant's ability to present a defense, we must be mindful of the elements necessary to prove each offense. To obtain a conviction for attempted first degree murder, the State had to show defendant performed an act with the specific intent to kill

a peace officer in the performance of his lawful duties. La. R.S. 14:27 & 30(A)(2).

To establish aggravated flight from an officer, the State had to prove defendant intentionally refused to bring his vehicle to a stop under circumstances wherein human life was endangered, knowing that he had been given a visual and audible signal to stop by a police officer when the officer had reasonable grounds to believe that defendant had committed an offense. Emergency lights and a siren on a marked police vehicle constitute a signal to stop. Further, a circumstance wherein human life is endangered is defined as when the operator of the fleeing vehicle commits at least two of the following: (1) leaves the roadway or forces another vehicle to leave the roadway; (2) collides with another vehicle; (3) exceeds the posted speed limit by at least twenty-five miles per hour; (4) travels against the flow of traffic. La. R.S. 14:108.1(C) & (D).

Defendant claims that in defending himself against the charges of attempted first degree murder, if he presented the defense that he was not trying to kill the police officers at issue, but was merely trying to flee, such a defense would have forced him to admit his guilt to the aggravated flight from an officer charge. We disagree.

A defense to attempted first degree murder based on the contention that he was simply trying to get away does not relieve the State of proving that such flight was done under circumstances that would endanger human life. It was for the jury to determine if the State proved these circumstances were present. Accordingly, we do not find defendant was confounded in presenting his defenses to these charges.

Moreover, attempted first degree murder involves an act done with specific intent to kill, while aggravated flight involves certain acts done

without the specific intent to kill. The jury's finding of not guilty of attempted first degree murder of Deputy Admire, and the finding of guilty of the responsive verdict of attempted manslaughter of Sergeant Wetzel, showed the jury had the ability to segregate the various charges and evidence. Finally, since these acts occurred within a short time frame, the joinder did not necessarily provide a basis for the jury to infer a criminal disposition, or unfair hostility towards defendant.

MOTION FOR CONTINUANCE

In his second assignment of error, defendant argues the trial court erred in failing to grant his motion for a continuance. In support of his argument, defendant maintains that the late date at which defense counsel was retained did not afford adequate time to conduct a proper investigation of the charges to prepare an adequate defense.

A motion for continuance, if timely filed, may be granted, in the discretion of the court, in any case, if there is good ground therefor. La. Code Crim. P. art. 712. The trial court's ruling on the motion to continue will not be disturbed on appeal absent a showing of abuse of specific prejudice. **State v. Sensley**, 460 So.2d 692, 698 (La. App. 1st Cir. 1984), writ denied, 464 So.2d 1374 (La. 1985).

In brief, defendant argues that he was represented by an attorney from the St. Tammany Parish Public Defender's Office until a little more than a month prior to his second trial setting of January 10, 2005. Defendant hired private counsel, who filed a written motion to continue on January 10, 2005, which was denied by the trial court. On January 14, 2005, Mr. DeSalvo reurged the motion to continue and made the following comments,

> At the time that it was agreed or tentatively agreed to sign on for the case I told the court that I would do my very best to be prepared and not to cause a continuance in the matter since it

> was clear to me that the court was prepared to proceed and so was the state. I would say, though, Your Honor, that in view of the case we've begun to uncover facts and circumstances which may provide a defense for [defendant]. I can't say at this point that they - they absolutely do, but I believe that the proper representation of him would require that those-those facts be developed, that proper investigation be done so that a decision can be made – properly be made by [defendant] as to whether or not to proceed and to how – and if the decision to proceed is made, then how to proceed.
>
> In denying the motion to continue, the trial court stated,
>
> I have a great recollection of this and at the pre-trial we had this discussion about whether or not you were going to enroll or you were not going to enroll and I made it clear that should you enroll, this is back in December, that the trial was set for this week and that you were one of the priority cases and that if you chose to enroll you needed to go ahead and enroll and get prepared because this case – and – and so you had the option to not enroll or to enroll and you chose to enroll. And as I appreciate it, the discovery had been filed into the record previously, so any additional discovery that you wanted was there for your review and it – you took the case knowing it was gonna be a priority case. I understand that you are continuing to work, we've postponed it to give you some additional time which - from Monday to Thursday. We're here. We've got the jury selected. I'm gonna deny the motion for a continuance and we need to proceed with this case right now.

The trial court stated that Mr. DeSalvo discussed the case at length at a pretrial conference held in December 2004, effectively removing the public defender who had been on the case for some ninety days, knowing that the January 10, 2005 trial date existed. Mr. DeSalvo pointed out that his official enrollment in this matter did not occur until January 10, 2005.

In the present case, Mr. DeSalvo chose to enroll even though the trial court had made it clear that a continuance would not be granted. A defendant in a criminal case cannot exercise his right to counsel in a way that will obstruct the orderly procedure of the courts and interfere with the fair administration of justice. A criminal defendant must exercise his right

to counsel of his choice at a reasonable time, in a reasonable manner and at an appropriate stage of the proceedings. **State v. Sensley,** 460 So.2d at 699.

Under the circumstances of this case, we find that the trial court's denial of the motion to continue was not an abuse of discretion and there is no specific showing that the defendant was prejudiced.

FAILURE TO GRANT MISTRIAL

In defendant's third assignment of error, he argues the trial court erred in failing to grant a mistrial based on the prosecutor's reference to inadmissible hearsay in his opening statement. Specifically, defendant points to the following in the prosecutor's opening statement, "The defendant had indicated to the Koonce girls that he was leaving for Florida, that he was leaving behind a pregnant wife, Erica King, and that he was, in fact, taking his girlfriend, Erica Stolz."

This statement by the prosecutor was provided while illustrating for the jury the efforts by law enforcement to apprehend defendant. At one point in the evening, the police had received an anonymous tip that defendant had run from the apartment complex to the house across the street. The Koonce sisters were residents of that house, but were not called to testify at trial.

Defense counsel objected to the reference by the prosecutor and the trial court sustained the objection. Defense counsel never requested an admonishment to the jury, and later asked for a mistrial prior to the first witness being called. Defense counsel's request for mistrial was denied.

The trial judge has wide discretion in controlling the scope and extent of an opening statement. **State v. Kohler**, 434 So.2d 1110, 1124 (La. App. 1st Cir. 1983). The primary function of the prosecutor's opening statement is to set forth in general terms the nature of the charge sufficiently to enable

the jury to follow the proceedings and inform the accused of what acts on his part the State intends to prove. **State v. Kohler**, 434 So.2d at 1123. The prosecutor's opening statement forms no part of the evidence and has no binding force, and is designed only to give general acquaintance with the case enabling the jury to understand and appreciate the witnesses' testimony. **State v. Kreller**, 255 La. 982, 233 So.2d 906, 909 (1970).

Generally, absent bad faith on the part of the prosecutor or clear and substantial prejudice, reference in an opening statement to inadmissible hearsay is not grounds for a mistrial. **State v. Green**, 343 So.2d 149, 151 (La. 1977). Moreover, a conviction will not be set aside for error in the opening statement unless the rights of the accused are plainly violated. **State v. Skinner**, 251 La. 300, 204 So.2d 370, 382 (1967), cert. granted, 391 U.S. 963, 88 S.Ct. 2031, 20 L.Ed. 2d 876, (1968), cert. dismissed, 393 U.S. 473, 89 S.Ct. 704, 21 L.Ed.2d 684 (1969).

In the present case, there was no showing that the prosecutor's statement was in bad faith. When considered in context, the prosecutor's statement, while certainly not flattering for defendant, did not plainly violate his rights. Moreover, we find that the guilty verdicts rendered by the jury were more attributable to the eyewitness testimony of his offenses as opposed to inadmissible hearsay that defendant was leaving his pregnant wife and going to Florida with his girlfriend. Accordingly, we find no error in the trial court's failure to grant a mistrial.

CLOSING ARGUMENT

In his fourth assignment of error, the defendant argues the trial court erred in allowing the prosecutor to improperly discuss principles of law in his closing argument. Defendant points to two instances during the prosecutor's closing argument and rebuttal where he claims the prosecutor

used the incorrect legal standard in discussing elements of attempted murder. A prosecutor's misstatements of the law during voir dire examination, or in his opening and closing remarks, do not require reversal of a defendant's conviction if the court properly charges the jury at the close of the case. **State v. Cavazos**, 610 So.2d 127, 128-29 (La. 1992) (per curiam).

Even if we accept defendant's contention that the prosecutor improperly discussed legal principles in his closing argument, we find this assignment of error is without merit. In its instructions to the jury, the trial court explained the necessary intent to convict defendant of attempted first degree murder as follows:

> Any person who has a specific intent to commit a crime and who does an act for the purpose of and tending directly toward accomplishing his object is guilty of an attempt to commit the crime intended. It is immaterial whether under the circumstances the defendant would have actually accomplished his purpose. Mere preparation to commit a crime is not sufficient to constitute an attempt. Specific criminal intent is that state of mind which exists when the circumstances indicate that the defendant actively desired the prescribed criminal consequences to follow his act or failure to act. Whether criminal intent is present is a question of fact which you must decide in light of all the circumstances involved.

We find the trial court correctly instructed the jury on the applicable elements of attempted first degree murder necessary to convict. At no time did defendant object to the trial court's instructions. Further, the jury acquitted defendant of attempted first degree murder of Deputy Jack Admire and found him guilty of the responsive offense of attempted manslaughter of Sargeant Brian Wetzel. Thus, any errors the prosecutor made in discussing the principles of law in his closing argument would not require reversal of defendant's convictions.

SUFFICIENCY OF THE EVIDENCE

In his fifth assignment of error, defendant argues that the State presented insufficient evidence to support his conviction for the attempted manslaughter of Sergeant Wetzel because there was insufficient evidence to prove defendant intended to kill or cause great bodily harm.[1]

The standard of review for the sufficiency of evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. La. Code Crim. P. art. 821. The **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) standard of review incorporated into Article 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Cummings**, 99-3000, p. 3 (La. App. 1st Cir. 11/3/00), 771 So.2d 874, 876.

Circumstantial evidence is defined as evidence of facts or circumstances from which one might infer or conclude the existence of other connected facts. Circumstantial evidence consists of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. **State v. Lilly**, 468 So.2d 1154, 1158 (La. 1985).

In circumstantial evidence cases, reviewing courts do not determine whether another possible hypothesis suggested by defendant could afford an

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[1] Defendant misunderstands the State's required burden of proof in this matter. In order to prove attempted manslaughter, the State must prove defendant acted with specific intent to kill. The intent to cause great bodily harm is not an element of this crime. See **State v. Brunet**, 95-0340, p. 5 (La. App. 1st Cir. 4/30/96), 674 So.2d 344, 347, writ denied, 96-1406 (La. 11/1/96), 681 So.2d 1258.

exculpatory explanation of events. Rather, the reviewing court must evaluate the evidence in the light most favorable to the prosecution 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 under **Jackson v. Virginia**. **State v. Davis**, 92-1623, p. 11 (La. 5/23/94), 637 So.2d 1012, 1020, cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359 (1994).

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. 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. Robins**, 2004-1953, p. 6 (La. App. 1st Cir. 5/6/05), 915 So.2d 896, 899.

Attempted manslaughter requires the presence of specific intent to kill. See La. R.S. 14:27 & 31; **State v. Brunet**, 95-0340 at p. 5, 674 So.2d at 347. Specific intent is the state of mind that exists when the circumstances indicate the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Specific intent need not be proven as a fact but may be inferred from the circumstances and actions of the accused. The trier of fact determines whether the requisite intent is present in a criminal case. **State v. Brown**, 2003-1076, pp. 9-10 (La. App. 1st Cir. 12/31/03), 868 So.2d 775, 782, writ denied, 2004-0269 (La. 6/4/04), 876 So.2d 76.

In the present case, Sergeant Wetzel testified that he attempted to intercept the defendant by turning on his emergency lights and pulling his unit into the lane of travel in which defendant was approaching. When Sergeant Wetzel realized the defendant was accelerating toward him, he moved back into his own lane of travel, where he remained stationary with

his lights activated. Defendant then moved his vehicle into Sergeant Wetzel's lane of travel as he fled the pursuing police officers. As defendant approached Sergeant Wetzel's unit at a high rate of speed, Sergeant Wetzel backed his unit into a nearby driveway to avoid being struck by defendant.

The jury apparently chose to infer from the circumstances that defendant intended to kill Sergeant Wetzel to achieve his desire to escape apprehension by the police. Defendant argues in brief that there are "alternative explanations for [his] movement aplenty, including his reaction time," and that there is insufficient evidence to suggest he intended to kill Sergeant Wetzel.

There is a reasonable basis for the jury to have concluded that defendant intended to kill Sergeant Wetzel by crashing his own vehicle into Sergeant Wetzel's stationary unit. Defendant contends that he was simply trying to get away from the police. However, his act of remaining in the same lane of travel as Sergeant Wetzel, which was not defendant's proper lane of travel, and approaching him at a high rate of speed belies this explanation. Defendant could still have fled the pursuing police by remaining in his own lane of travel that was clear once Sergeant Wetzel moved.

Based on our review of the record, we find the evidence supports defendant's conviction for attempted manslaughter. Defendant does not complain of the sufficiency of the evidence used to support his conviction for aggravated flight from an officer.

PATENT ERROR

In his final assignment of error, defendant argues that his sentence of life imprisonment without the possibility of parole, probation or suspension of sentence is unconstitutionally excessive. Because we have found the

existence of patent error requiring us to vacate the habitual offender adjudications and sentence, we will not review the merits of this assignment of error. See **State v. Beach**, 610 So.2d 908 (La. App. 1st Cir. 1992), writs denied, 614 So.2d 1252 (La. 1993), & 94-1942 (La. 11/11/94), 644 So.2d 389.

The record reflects that the State filed a multiple offender bill of information on January 18, 2005, seeking to enhance defendant's conviction for aggravated flight from an officer. On February 9, 2005, the State filed an amended bill of information seeking to also enhance the penalty for his conviction for attempted manslaughter. Only one underlying conviction arising out of a multi-count bill of information can be enhanced when the convictions were entered the same day and when the offenses arise out of one criminal episode. **State ex rel. Berry v. State of Louisiana**, 96-0367 (La. 5/16/97), 693 So.2d 787; **State ex rel. Porter v. Butler**, 573 So.2d 1106, 1109 (La. 1991).

In the present case, defendant was convicted on the same date of two separate felonies arising out of one criminal episode. It was error to adjudicate him as a habitual offender and sentence him as such on both convictions. The habitual offender adjudications and sentence are vacated and the matter is remanded to the trial court for further proceedings. We note that habitual offender proceedings are not subject to double jeopardy constraints; therefore, if the State again seeks to enhance a conviction, it must file a new habitual offender bill of information, selecting only one of the instant convictions to enhance. Regardless of whether the State seeks to

enhance one of defendant's convictions, upon resentencing, the trial court must impose two separate sentences.[2]

CONVICTIONS AFFIRMED; HABITUAL OFFENDER ADJUDICATIONS AND SENTENCE VACATED; REMANDED FOR FURTHER PROCEEDINGS.

[2] We also note that the sentencing as an habitual offender was specified to be "without parole". Neither of the underlying counts for which he was convicted nor the multiple offender statute (La. R.S. 15:529.1 G) provide for a sentence without parole.