

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2016-KA-0078**  
**VERSUS** \* **COURT OF APPEAL**  
**SHELLEY D. DAVIS** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**

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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 515-970, SECTION "E"  
Honorable Keva M. Landrum-Johnson, Judge

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**JUDGE SANDRA CABRINA JENKINS**

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(Court composed of Judge Paul A. Bonin,  
Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins)

***BONIN, J., CONCURS IN THE RESULTS.***

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**AFFIRMED**

**DECEMBER 28, 2016**

Defendant, Shelley Davis, was charged by grand jury indictment with second degree murder of Morris “Iceman” Smith on December 12, 2012. Following a four-day jury trial, the jury found defendant guilty as charged. Defendant now appeals her conviction for second degree murder, raising five assignments of error. Upon review of the record in light of the applicable law, we find no merit in defendant's assignments of error. Defendant’s conviction and sentence are affirmed.

### **PROCEDURAL HISTORY**

Defendant, Shelley Davis, was indicted for the second degree murder, La. R.S. 14:30.1, of Morris “Iceman” Smith. The jury found defendant found defendant guilty as charged of second degree murder. Motions for New Trial, to Reconsider Sentence, and in Arrest of Verdict were denied by the trial court. Defendant was sentenced to a term of life imprisonment without benefit of parole, probation or suspension of sentence. Defendant timely appeals her conviction and sentence.

## **FACTS**

On December 12, 2012, Detective Jacob Lundy of the New Orleans Police Department (NOPD) received a call from dispatch concerning a homicide in the 8900 block of Olive Street. Upon arrival, he observed the victim's body on the sidewalk in front of a vacant lot on Olive Street. Multiple gunshot wounds were visible on the victim's body and several live rounds of ammunition and spent bullet casings were found in close proximity to his body.

Investigation of the crime scene led to witnesses to the shooting. The initial eyewitness identified by investigating officers was Bernard Baker. Mr. Baker was personally acquainted with both the victim and the shooter and was actually standing near the victim at the time of the shooting.

Prior to the shooting, Mr. Baker was standing with defendant and Alton cooks in Gail Davis's yard on Olive Street. The victim approached and asked Mr. Baker to drive him to make a "run." At that point, the victim was standing on the left side of Mr. Baker, and the defendant was on his right side. The victim did not speak to the defendant or act in an aggressive manner towards her; however, the defendant pulled a gun from her purse and shot at the victim. At that moment, Mr. Baker was standing between the two. The bullet misfired, giving Mr. Baker time to run to the back yard. Mr. Baker heard several shots as he ran, but he did not look back. He heard the victim calling to him for help, but Mr. Baker was too afraid to render aid because the defendant was armed. When the shooting stopped, Mr. Baker returned to the front yard and found the victim lying face down on the

ground, he observed Mr. Cooks turn the victim onto his back. The victim was unarmed at the time of the shooting.

The police secured a recorded statement from Mr. Baker and conducted a photographic lineup whereby Mr. Baker positively identified the defendant as the shooter. Det. Cochran secured a warrant of arrest for the defendant. Det. Cochran's investigation also led him to a second witness, Jada Fielder. Although Ms. Fielder did not witness the actual shooting, she heard four or five gunshots as she sat on the porch of her house. Ms. Fielder ran to the scene and saw "Iceman" on the ground. She observed the defendant running away from the area with a gun in her hand. Ms. Fielder gave a recorded statement in which she named the defendant as the shooter and made a positive identification of the defendant in a photographic line-up. At trial Ms. Fielder said she often saw the defendant in the neighborhood carrying a gun. Ms. Fielder recounted that five days prior to the shooting, she spoke to "Fresh" while he was incarcerated in Orleans Parish. "Fresh" called her and asked her to place a three-way call to the defendant for him, which she did. The recording of that phone call was played for the jury.<sup>1</sup> In the call, the defendant asked Ms. Fielder to tell her what was going on with the victim in the neighborhood. Ms. Fielder said certain neighbors were angry at "Fresh" for robbing the victim. She added that she followed the defendant on Instagram and recalled that two hours after the shooting, the defendant posted a picture of herself on line with the message "Happy Wednesday." Ms. Fielder advised the defendant to erase the picture, which the defendant did. Finally, Ms. Fielder recalled speaking to the defendant after the shooting while they both were incarcerated. The

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<sup>1</sup> The jury followed along with a redacted version of the call.

defendant told Ms. Fielder to testify that she did not see the defendant shoot the victim.

Through further investigation, Det. Cochran gained access to the defendant's Instagram account. The Instagram postings were offensive rap lyrics and pictures of the defendant holding semi-automatic weaponry with clip components; all of which was displayed to the jury at trial.

At trial, Sabrina Cooks, a second eyewitness, testified she knew the victim because she dated the defendant's brother for a period of time. Ms. Cooks said the victim was known by his nickname, "Iceman," and that she knew both the victim and the defendant for a long time. At the time the victim was shot, Ms. Cooks was in front of the store on Olive Street, approximately two houses from where the victim was shot. Ms. Cooks indicated that just prior to the shooting, the defendant exited the store and spoke with her, and then the defendant walked across the street and into an alley. Shortly after that, Ms. Cooks noticed the victim walk out of the alley, followed by the defendant. According to Ms. Cooks, the victim did not speak to the defendant or show any aggression toward her prior to the shooting. The defendant simply walked up behind the victim and shot him in the leg. After the victim fell to the ground, the defendant shot him several times and then fled the area in the direction of Hollygrove Street. Ms. Cooks remained at the shooting scene to tell the police the defendant shot the victim. However, Ms. Cooks did not give the police a recorded statement.

Alton Cooks recounted that he, the victim, and Atyia Miller were together at Ms. Miller's house the night before the shooting. At that time, Mr. Cooks saw the defendant leaving a store. The defendant asked Mr. Cooks where the victim was. Although the defendant did not tell Mr. Cooks why she was looking for the victim,

Mr. Cooks told the victim of the defendant's inquiry. A short while later, the victim and defendant said hello to one another, and then the victim went inside Ms. Miller's house.

The following day, Mr. Cooks and the victim returned to Ms. Miller's house. That night, Mr. Cooks observed the defendant near the store and the victim and Mr. Baker standing in front of Ms. Davis's house. As Mr. Cooks walked to the back of the house, he heard gunshots. He walked back out to the front, heard more gunshots and ran to the back again. When the shooting stopped, Mr. Cooks saw the victim lying on the ground. Mr. Cooks examined the victim to determine whether he was alive.

Atyia Miller, the State's final lay witness, testified she remembered the day the victim died. She was living in the 8900 block of Olive Street. On the night before the shooting, the victim, Alton Cooks, and the defendant were at Ms. Miller's house. Mr. Cooks had been speaking to the defendant on the front porch and later went inside and told everyone the defendant had plans to kill the victim.

Dr. Cynthia Gardner, a forensic pathologist employed by the Orleans Parish Coroner's Office, performed and documented the autopsy on the victim's body. She determined the entry and exit paths of the bullets indicated that the victim was shot from the back six times. One of the bullets hit the victim's left internal iliac artery – the second largest blood vessel in the body – causing massive internal bleeding. Dr. Gardner opined that the gunshot wounds to the victim's head and iliac artery would have been rapidly fatal. She recounted that she recovered four bullets from the victim's body during the autopsy.

The defense called Det. Michael McCleary, who testified he assisted Det. Cochran in this investigation. Det. McCleary recalled that he and Det. Cochran took a recorded statement from Bernard Baker at police headquarters after the shooting. Further, Det. McCleary verified more than one person identified the defendant as the shooter during a photographic lineup. He also said Mr. Baker told him he (Mr. Baker) was standing near the victim in the front yard at the time of the shooting. Finally, Det. McCleary corrected the testimony he gave during a pre-trial motion hearing concerning the victim grabbing/reaching into the defendant's purse prior to the shooting. He clarified that the victim did not reach into the defendant's purse.

The defendant elected to testify at trial. She explained that she regularly posted "selfies" on Instagram and attached to those pictures lyrics from current gangsta rap songs. The defendant informed the jury that Eric "Fresh" Davis was her brother and that he used to sell drugs. She shared with the jury that she received a three-way call on December 6, 2012, from her brother Eric through Jada Fielder, asking whether the family was working on bonding him out of Orleans Parish Jail. The defendant testified that she knew the victim through her brother Eric and that he sold drugs.

The defendant offered the jury various reasons as to why she feared the defendant and acted in self-defense on the date of the shooting. According to the defendant, the word on the street was that Eric robbed the victim at the London Lodge motel. She also heard that she was in danger from the victim and Mr. Baker. The defendant told the jury that in November 2012, the victim drove to a house the defendant was visiting, jumped from the car, and reached for a weapon.

He grabbed for her purse and attempted to rob her. The next time she saw the victim was on December 12, 2012, as she was standing in Ms. Davis's yard, talking to her friend, Mr. Cooks. Mr. Baker walked into the yard and spoke to Mr. Cooks. The defendant was scared because she knew Mr. Baker was loyal to the victim and carried a gun at all times. Afterward, the victim entered the yard, demanding his money from the defendant. When the defendant told the victim that she did not owe him any money, he reached for her purse. As she struggled with the victim over her purse, the defendant pulled a gun from the back of the purse and shot the victim. She ran because she feared Mr. Baker was running to the back of the house to get his gun. The defendant denied threatening the victim. She did not leave her house for a month after the shooting because she feared retaliation from the victim's friends. The defendant turned herself in on February 20, 2013. She also said that she did not know Ms. Miller or have anything to do with her.

## **ARGUMENT AND ANALYSIS<sup>2</sup>**

### **Insufficiency of Evidence**

The defendant raises five assignments of error. We begin with the well-settled jurisprudential rule that “ ‘[w]hen issues are raised on appeal as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence.’ ” *State v. Miner*, 2014 – 0939, p. 5 (La. App. 4 Cir. 3/11/15), 163 So.3d 132, 135, *quoting State v. Hearold*, 603 So.2d 731, 734 (La. 1992).

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<sup>2</sup> A review for errors patent on the face of the record reveals none.



The defendant argues the evidence presented was insufficient to support her conviction of second degree murder because the State failed to rebut her evidence of self-defense. Instead she claims the killing was justifiable because it was committed under the circumstances described in La. R.S. 14:20. See La. R.S. 14:18(7). "A homicide is justifiable ...[w]hen committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger." La. R.S. 14:20 A(1).

The applicable standard of review for evaluating the sufficiency of evidence in *State v. Ragas*, 98-0011, p. 13 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, 106-07, quoting *State v. Egana*, 97-0318, pp. 5-6 (LA. App. 4 Cir. 12/3/97), 703 So.2d 223, 227-28 as follows:

In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); *State v. Green*, 588 So.2d 757 (La. App. 4 Cir. 1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. *State v. Mussall*, 523 So.2d 1305 (La. 1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *Mussall; Green; supra*. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." *State v. Smith*, 600 So.2d 1319 (La. 1992) at 1324.

In reviewing the record for sufficiency of evidence, conflicting statements as to factual matters relate to the weight of the evidence, not its sufficiency; the

determination of whether the testimony of one witness is to be believed over that of another rests with the trier of fact. *State v. Berniard*, 14-0341, p. 10 (La. App. 4 Cir. 03/04/15), 163 So.3d 71, 80; *State v. James*, 09-1188, p. 4 (La. App. 4 Cir. 02/24/10), 32 So.3d 993, 996. The testimony of a single witness, if believed by the trier of fact, is sufficient to support a factual conclusion. *State v. Wells*, 10-1338, p. 5 (La. App. 4 Cir. 03/30/11), 64 So.3d 303, 306. The trier of fact's decision as to the credibility of witnesses will not be disturbed unless it is clearly contrary to the evidence. *Id.*

All evidence, both direct and circumstantial, must meet the *Jackson* reasonable doubt standard. *Ragas*, 98-0011, p. 14, 744 So.2d at 107. “[W]here circumstantial evidence forms the basis of the conviction, the evidence must exclude every reasonable hypothesis of innocence, ‘assuming every fact to be proved that the evidence tends to prove.’” *Berniard*, 14-0341 at p. 11, 163 So. 3d at 80, quoting *State v. Draughn*, 05-1825, p. 7 (La. 01/17/07), 950 So.2d 583, 592. Ultimately, when a defendant in a homicide prosecution claims self-defense, the burden is on the State to prove beyond a reasonable doubt that the perpetrator did not act in self-defense. *State v. Hunter*, 2015-0306, p. 5 (La. App. 4 Cir. 9/9/15), 176 So.3d 530, 533, citing *State v. Taylor*, 2003-1834, p. 7 (La. 5/25/04), 875 So.2d 58, 63.

In order to prove second degree murder, the State must show the killing of a human being and that the defendant had the specific intent to kill or inflict great bodily harm upon the victim. La. R.S. 14:30.1. Specific intent "exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). "Specific intent may be inferred from the circumstances and the defendant's actions."

*Berniard*, 14-0341 at p. 11, 163 So. 3d at 81, quoting *State v. Everett*, 11-0714, p. 14 (La. 6/13/12), 96 So.3d 605, 619.

In the instant case, the state lacked physical evidence connecting defendant to this crime; the State offered the trial testimony of an eyewitness. Mr. Baker testified that he was standing between the defendant and the victim when the shooting began. Mr. Baker said that neither the victim nor the defendant spoke to one another; nor did the victim attempt to grab the defendant's purse away from her, contrary to what was placed in the police report. The victim was unarmed and in no way threatened the defendant. In fact, the defendant walked up from behind the victim and shot him once in the in the back of the head. As Mr. Baker ran, the victim fell to the ground; and the defendant stood over the victim and fired several more shots into the victim's body.

The State also presented the testimony of Ms. Fielder. Ms. Fielder testified that she did not witness the actual shooting in this case; she heard four or five gunshots as she sat on the porch of her house around the corner from the scene. Ms. Fielder ran to the scene and saw the victim on the ground. She noticed the defendant running away from the area with a gun in her hand.

The evidence at trial revealed that no gun was found on or near the victim at the time he was shot to death. Mr. Baker verified the victim was unarmed when the defendant shot him. Moreover, Ms. Fielder said she often saw the defendant in the neighborhood armed with a gun.

Dr. Cynthia Gardner performed the autopsy on the victim's body and determined that he sustained seven gunshot wounds – two to the head, three to the torso and two to the extremities, none of which was inflicted from close range.

The entry and exit paths of the bullets indicated that the victim was shot from the back six times.

Although the defendant argues that she acted in self-defense, we find that Mr. Baker's testimony established that the defendant did not act in self-defense. The victim's back was toward the defendant when the shooting started. The victim neither saw, spoke to, nor interacted with the defendant in any manner prior to the time he was shot.

Based on our review of the record, we find that the State carried its burden to prove beyond a reasonable doubt the defendant had the specific intent to kill the victim; and she did not act in self-defense. Furthermore, the jury had the opportunity to determine the credibility of all testimony and evidence. A fact finder's decision concerning the credibility of a witness will not be disturbed unless it is clearly contrary to the evidence. *State v. James*, 09-1188, p. 4 (La. App. 4 Cir. 02/24/10), 32 So.3d 993, 996. Thus, the evidence was sufficient to support the defendant's conviction for second degree murder; and this assignment of error is without merit.

#### **Other Crimes Evidence, La. C.E. art. 404(B)**

In her next assignment of error, the defendant argues she was denied a fair trial because of the amount of the evidence of prior bad acts introduced at trial. Specifically, the defendant contends she was prejudiced by the introduction of the evidence of the prison beating of witness Ms. Miller; Instagram photographs of the defendant posted with a display of offensive rap music lyrics next to the photographs; the National Integrated Ballistic Information Network (NIBEN)

Report and testimony which linked the gun in possession of the defendant to another crime committed in Jefferson Parish; and the prosecutor's implication during cross-examination that the defendant and her family hid the weapon used in this incident.<sup>3</sup>

The defendant argues that she was never charged with or convicted of any of the bad acts the State introduced evidence of, and therefore, the reason the State introduced the evidence was to portray her as a person of bad character.

La. C.E. art. 404(B)(1) states:

Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

The State must provide the defendant with notice and a hearing before trial if it intends to offer evidence of other crimes, wrongs, or acts. *State v. Rose*, 2006-0402, pp. 12-13 (La. 2/22/07), 949 So.2d 1236, 1243 (citing *State v. Prieur*, 277 So. 2d 126, 128 (La. 1973)). Even when the defendant's prior bad acts is relevant or otherwise admissible under La. C.E. art. 404(B), the court must balance the probative value of the evidence over its prejudicial effects before the evidence can be admitted. *Id. at 1244*.

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<sup>3</sup> The National Ballistic Information Network is an investigative tool used by law enforcement to determine whether a particular firearm has been used in other crimes.

In the present case, the State filed its notice of intent to offer other crimes evidence pursuant to La. C.E. art. 404(B) on April 8, 2015. The notice informed the defendant that the State intended to introduce the following evidence:

[That] on or about August 16, 2013, the defendant committed a violation of La. R.S. 14:34.1 (second degree battery) on witness [Ms. Miller] while incarcerated. During the commission of the offense, defendant told [Ms. Miller] that she was committing the offense because she thought [Ms. Miller] had given information to the police about the defendant concerning the murder the defendant is presently charged with.

The above incident shows the defendant's motive and intent is to intimidate this witness and prevent her from testifying in the above case.

On direct examination of Ms. Miller at trial, the State elicited testimony that the defendant had beaten Ms. Miller while she and the defendant were housed in the same tent at Orleans Parish Jail. Ms. Miller identified pictures of herself taken after the beating she received at the hands of the defendant, and the jury was permitted to view them. In ruling the evidence admissible, the trial judge reminded defense counsel that at the time of the *Prieur* hearing, the defense advised her it had no objection to the information, and, in fact, wanted the evidence introduced at trial. Moreover, the defense vigorously cross-examined Ms. Miller at trial, obtaining from her the acknowledgement the defendant was not charged with any crime incident to the jail beating. In fact, on direct examination, the jury saw the defendant view the pictures of Ms. Miller and heard her deny knowing or harming Ms. Miller in any manner.

As to the Instagram photographs, the jury heard the defendant testify that she used the photographs purely for the social media craze of keeping up with her friends. As for the rap music lyrics posted with the pictures, the defendant

explained that she did not pen any of the lyrics she quoted, and their meaning was not inflammatory but rather explanatory of the life styles led by some members of her age group.

With regard to the NIBEN Report, the defense was able to show that the State was never able to connect the defendant with the earlier Jefferson Parish crime in which her gun was implicated. The defendant candidly admitted that she purchased the gun from an unknown seller. Denying that she, her family, or both conspired to withhold the murder weapon from the police, the defendant said no one asked her for the weapon, so she left it in her apartment.

Finally, as to the prosecutor's references to the defendant's family making contact with the State's witnesses after their testimony, the defendant denied the allegations; and the prosecutor offered no proof in support of the allegations. In light of the extensive testimony and evidence presented to the jury, particularly the testimony of Mr. Baker, the jury's unanimous verdict of guilt was unattributable to any error in the admission of the foregoing evidence. Accordingly, this assignment is meritless.

### **Motion for New Trial**

In a third assignment of error, the defendant argues that the trial court erred by denying her motion for new trial based on the argument the State failed to prove the shooting was not in self-defense.

La. C.Cr.P. article 851 sets forth the grounds for granting a new trial:

A. The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

B. The court, on motion of the defendant, shall grant a new trial whenever any of the following occur:

- (1) The verdict is contrary to the law and the evidence;
- (2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error;
- (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty;
- (4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment; or
- (5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

The trial judge has broad discretion in ruling on a motion for a new trial and; upon review, the appellate court may only set aside the judgment upon a finding that the trial judge exercised his discretion in an arbitrary manner. *State v. Hammons*, 597 So.2d 990, 994 (La. 1992); *State v. Lewis*, 2005-0973, pp. 3-4 (La. App. 4 Cir. 05/24/06), 943 So.2d 1100, 1102. If the grant or denial of a new trial pursuant to La. C.Cr.P. art. 851(5) is a question of law, then the appellate or supervisory jurisdiction of the appellate courts and Supreme Court is properly invoked. A trial court's ruling on a motion for a new trial to serve the ends of justice is reviewable under an abuse of discretion standard. *State v. Scott*, 2012-1603, pp.8-9 (La. App. 4 Cir. 12/23/13), 131 So.3d 501, 506-07, *writs denied*, 2014-0221, 2014-0222 (La. 08/25/14), 147 So.3d 701.

The discussion of sufficiency of evidence has already established the State bore its burden to prove the defendant did not act in self-defense when she shot and killed the victim. However, her argument in this assignment is that the State failed to rebut Det. McCleary's testimony at trial that on August 29, 2013, he interviewed



Mr. Baker, and in that interview Mr. Baker told Det. McCleary that he (Mr. Baker) saw the victim reach into the defendant's purse immediately prior to the shooting.

When cross-examined at trial about his August 29, 2013, testimony at the suppression hearing concerning what Mr. Baker said during his interview, the following exchange ensued between Det. McCleary and defense counsel:

**Q.** In your statement, do you – do you recall in the interview with Mr. Baker that Mr. Baker revealed to you that before the shooting that the victim, Morris Smith, reached into her purse – reached into [the defendant's] purse at first? And then at that point, after that, at that point [the defendant] reached into her purse and fired the gun after she took it out? Do you recall that?

**A.** I mistakenly said that at the motions hearing, yes.

**Q.** Tell us again what you mistakenly said.

**A.** That [the victim] had reached into [the defendant's] purse first. He never reached into her purse.

**Q.** So on August 29 you're stating when you said that the victim reached into [the defendant's] purse, for some reason, and at that point . . .

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**Q.** So you're saying to this jury that on August 29 when you said that the victim reached into – that Bernard Baker said that the victim reached in [the defendant's] purse –

**Q.** --- that that was a mistake?

\* \* \*

**Q.** So, again, with all due respect, Detective, on August 29 you said, under oath, that the --- first you said the witness --- the witness stated he (the victim) went into the [defendant's] purse. And then you said the victim went into the purse of [the defendant]. What's your response to that?

**A.** That was a mistake.

\* \* \*

**Q.** Okay. And it's August 29, 2013, and now, today, on June 17, is this the first time that you're indicating that that was a mistake?

**A.** Yes.

While Det. McCleary recanted his motions hearing testimony at trial, he gave an understandable explanation for the change – he was not the lead detective on the case; he did not take Mr. Baker’s statement - he just sat in with the lead detective on the case; the number of investigations in his work load; his inability to listen to Mr. Baker’s statement prior to the motions hearing; and his inability to give this case additional investigatory time because of his work load. These circumstances coupled with the testimony of Mr. Baker, who gave an eyewitness account of the shooting, provided sound reasons for the trial judge to deny the motion for new trial as the evidence of this mistake did not impact the jury’s unanimous guilty verdict. There was no abuse of discretion in the trial judge’s denial of the motion for new trial. This assignment of error is without merit.

### **Jury Instruction, La. R.S. 14:20D**

The defendant argues that the trial court erred in denying her requested jury charges.

In *State v. Carter*, 97-2902 (La. App. 4 Cir. 5/10/00), 762 So.2d 662, this Court held:

La. C.Cr.P. art. 803 mandates that the trial court instruct the jury as to the law applicable to each case. La. C.Cr.P. art. 807 provides that the State and the defendant shall have the right before argument to submit to the court special written charges for the jury. A requested special charge “shall be given” if it does not require qualification, limitation or explanation, and if it is wholly correct and pertinent. *Id*; *State v. Craig*, 95-2499, p. 7 (La. 5/20/97), 699 So.2d 865, 869, *cert. denied*, *Craig v. Louisiana*, 522 U.S. 935, 118 S.Ct. 343, 139 L.Ed.2d 266 (1997). Any special charge must be supported by the evidence. *Id*. However, such charge need not be given if it is included in the general charge or in another special charge. La. C.Cr.P. art. 807; *Craig* ; *State v. Hawkins*, 96-0766, p. 8 (La.1/14/97), 688 So.2d 473, 480. Jury instructions must be considered as a whole. See *State v. Thibodeaux*, 98-1673, p. 17 (La.9/8/99), 750 So.2d 916, 929.

*Id.*, 97-2902, p. 32, 762 So.2d at 683.

The defendant herein was charged with and convicted of the second degree murder of Mr. Smith. The defendant requested that the jury be charged as follows:

**The possibility of voiding the necessity of taking human life by retreat:**

In cases of justifiable homicide, the Legislature – for its own policy reasons – explicitly and categorically prohibits the jury from considering the possibility of the killer’s retreat in order to determine whether the killing was “necessary” to save the killer’s own life.

\* \* \*

No finder of fact shall be permitted to consider the possibility of retreat as a factor in determining whether or not the person who used deadly force had a reasonable belief that deadly force was reasonable and apparently necessary to prevent a violent or forcible felony involving life or great bodily harm or to prevent the unlawful entry.

La. R.S. 14:20 D; *State v. Wells*, 2011-0744 (La. App. 4 Cir. 7/11/14), 156 So.3d 150.<sup>4</sup>

The trial court denied the defendant’s requested jury charge. On the issue of **justification** for the homicide and possibility of **retreat**, the trial judge in this case charged the jury as follows:

If you find that the defendant has **raised the defense that her conduct was justified**, the state must prove that the defendant’s conduct was not justified. Remember, the state bears the burden of proof of guilt beyond a reasonable doubt. A homicide is justifiable when committed for the purpose of preventing a violent or forcible felony involving danger to life or great bodily harm, by one who reasonably believes that such an offense is about to be committed and that such action is necessary to prevent the violent or forcible felony. The circumstances must be sufficient to excite the fear of a reasonable person that there would be serious danger to their own life if attempted to prevent the felony without the killing.

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<sup>4</sup> In requesting the special jury charge, the defendant cited *State v. Wells*, 2011-0744 (La. App. 4 Cir. 7/11/14), 156 So.3d 150. We note that the Louisiana Supreme Court granted a *writ of certiorari* in *Wells*, 2014-1701 (La. 04/17/15), 168 So.3d 389, and, subsequently, reversed this Court’s decision. See *State v. Wells*, 2011-0744 (La. App. 4 Cir. 4/13/16), 191 So.3d 1127, *on remand*, 14-1701 (La. 12/8/15), \_\_\_ So.3d \_\_\_, 2015 WL 8225228, *reversing*, 11-0744 (La. App. 4 Cir. 7/11/14), 156 So.3d 150.

**A person who is not engaged in any unlawful activity and is in a place where he or she has a right to be, has no duty to retreat before using deadly force for the purpose of preventing the commission of a violent or forcible felony involving danger to life or great bodily harm. Under such circumstance, a person may stand their ground and meet force with force. The possibility of retreat shall not be considered as a factor in determining whether or not the use of deadly force was reasonable and apparently necessary to prevent the commission of the violent or forcible felony.**

Thus, if you find that the defendant killed for the purpose of preventing the commission of a violent or forcible felony involving danger to life or great bodily harm and that the defendant reasonably believed that such felony was about to be committed and that the defendant reasonably believed that the killing was necessary to prevent such a felony from being committed and that the defendant reasonably believed that there would be serious danger to her own life if she attempted to prevent the felony without killing, then you must find the defendant not guilty.

[emphasis supplied].

There is little difference between the defendant's requested jury charge and the charge actually given by the trial judge; however, the message was the same - the jury could not consider the issue of the defendant's possibility of retreat in order to determine whether the killing was necessary to save her own life. Thus, this assignment is without merit.

### **Motions in Limine**

In her final assignment of error, the defendant argues that the trial court erred in denying her Motions in Limine to exclude irrelevant and overly inflammatory evidence, particularly the evidence considered in Assignment of Error Number 1, *ante*. Based on our discussion of Assignment of Error Number 1, we find that the defendant failed to prove she was prejudiced by the admission of the evidence considered therein; and there was no error in the trial judge's denial of the Motions in Limine. This assignment is without merit.

## **CONCLUSION**

For the reasons set forth herein, the defendant's conviction and sentence are affirmed.

**AFFIRMED**