STATE OF LOUISIANA

VERSUS

JONATHAN MANUEL

NO. 20-KA-172

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 17-7, DIVISION "L"
HONORABLE DONALD A. ROWAN, JR., JUDGE PRESIDING

June 02, 2021

MARC E. JOHNSON
JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Marc E. Johnson, and Stephen J. Windhorst

VACATED AND REMANDED (COUNT FOUR);
CONVICTIONS AND SENTENCES
AFFIRMED (COUNTS ONE, TWO, AND THREE);
REMANDED WITH INSTRUCTIONS

MEJ
FHW
SJW

COUNSEL FOR PLAINTIFF/APPELLEE,
STATE OF LOUISIANA

Honorable Paul D. Connick, Jr.
Thomas J. Butler
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JONATHAN W. MANUEL A.K.A. "DUGGA"

Kevin V. Boshea

JOHNSON, J.

Defendant/Appellant, Jonathan W. Manuel a/k/a "Dugga," appeals his convictions and sentences for second degree murder, attempted second degree murder, and possession of a firearm by a convicted felon from the 24th Judicial District Court, Division "L". For the following reasons, we vacate the conviction and sentence for count four (possession of a firearm by a convicted felon) and remand the matter to the trial court for further proceedings. We affirm Defendant's remaining convictions and sentences. We further instruct the trial court upon remand.

FACTS AND PROCEDURAL HISTORY

On April 6, 2017, a Jefferson Parish Grand Jury returned an indictment charging Defendant with second degree murder of 10-month-old Xy'Ahir Davis, in violation of La. R.S. 14:30.1 (count one), attempted second degree murder of 16-year-old M.J.[1], in violation of La. R.S. 14:27 and La. R.S. 14:30.1[2] (count two), and two counts of possession of a firearm by a convicted felon in violation of La. R.S. 14:95.1 (counts three and four).[3] On May 16, 2017, Defendant pleaded not guilty at his arraignment.

On May 27, 2017, Defendant filed omnibus motions, including motions to suppress the statement, the evidence, and the identification. On June 6, 2017, the

[1] To observe the principle of protecting minor crime victims set forth in La. R.S. 46:1844(W)(1)(a), this Court, in its published work, generally will identify, by initials only, the victim and any defendant or witness whose name can lead to the victim's identity, i.e., parent, sibling, or relative with the same last name as the victim. See La. R.S. 46:1844(W)(1)(a) and La. R.S. 46:1844(W)(3). However, La. R.S. 46:1844(W)(1)(a) also states, "The public disclosure of the name of a juvenile crime victim by any public official or officer or public agency is not prohibited by this Subsection when the crime resulted in the death of the victim." Because the instant case resulted in the death of Xy'Ahir, his full name has been used for purposes of this Opinion. Nevertheless, because M.J.'s injuries were not fatal, in the interest of protecting him, as a minor crime victim pursuant to La. R.S. 46:1844(W)(3), this Court's published work will use only his initials to identify the victim. See also State v. E.J.M., III, 12-774, 12-732 (La. App. 5 Cir. 5/23/13); 119 So.3d 648.

[2] It is noted that the bill of information charged Defendant with violating "La. R.S. 14:27:30.1." This citation format references both La. R.S. 14:27 and La. R.S. 14:30.1. *See State v. Bonney*, 12-175 (La. App. 4 Cir. 11/14/12); 2012 WL 5597860, *writ denied*, 13-1982 (La. 4/11/14); 137 So.3d 1208.

[3] As to counts three and four, the State alleged that Defendant violated La. R.S. 14:95.1, in that he had in his possession a firearm after having been previously convicted of the crime of possession of cocaine in violation of La. R.S. 40:967(C), in case number 06-3796, in the 24th Judicial District Court, and second offense possession of marijuana in violation of La. R.S. 40:966(C), in case number 08-6205,

State filed State's Answer to Motions for Discovery, State's Motion for Discovery, Demand for Notice of Alibi and/or Mental Condition Defenses, and State's Notice of Intent to Introduce Evidence of Other Offenses. On July 10, 2017, Defendant filed omnibus motions, including motions to suppress the confession and the evidence.[4]

The trial court held a hearing on October 23, 2017, regarding the motions to suppress identification, evidence, and statement. The same day, the trial court denied the motions to suppress identification and evidence. On December 6, 2017, the court denied the motion to suppress the statement.

On November 19, 2018, the State filed an Article 404(B) Notice. On November 21, 2018, Defendant filed a Motion for Supplemental Discovery, Disclosure, Inspections and *Brady* Material.

Defendant filed a Motion to Quash Indictment on the Grounds of Misjoinder of Offenses and a memorandum in support of that motion on March 18, 2019. Defendant filed a Second Motion for Supplemental Discovery, Disclosure, Inspections and *Brady* Material on the same date. On March 26, 2019, Defendant filed a "Motion to Declare Article 782(A) Unconstitutional Because It Allows for a Non-Unanimous Verdict in This Non-Capital Felony Trial." On September 13, 2019, Defendant filed a motion *in limine* in which he asked the trial court to prohibit the introduction of any evidence of, or any reference to, Defendant's incarceration prior to the December 3, 2016 murder and attempted murder.

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in the 24th Judicial District Court. The certified conviction packet introduced into evidence reflects that the offense of possession of marijuana, second offense, occurred on November 4, 2008. At the time of the offense, the sentence for a second conviction for possession of marijuana was a fine of not more than $2,000, imprisonment with or without hard labor for not more than five years, or both. La. R.S. 40:966(E).

[4] All of the motions were not ruled on. When a defendant does not object to the trial court's failure to rule on a motion prior to trial, the motion is considered waived. *State v. Rivera*, 13-673 (La. App. 5 Cir. 1/31/14); 134 So.3d 61, 66.

On September 16, 2019, the trial court held a hearing on Defendant's motion regarding a non-unanimous verdict and denied the motion. On the same day, the trial court also granted the State's 404(B) Notice, denied Defendant's motion *in limine*, and denied Defendant's motion to quash.

The State filed an Article 768 Notice on September 17, 2019, regarding the expected testimony of several witnesses. A jury was selected on the same date. However, on September 18, 2019, the trial court released the jurors from jury service.

On November 4, 2019, the State filed a Notice of Intent to Call Expert Witness – Solomon Burke and a Motion to Compel Testimony. Also on November 4, 2019, jury selection occurred. On November 5, 2019, the State filed a motion for special jury instructions and an incorporated memorandum in support. On the following day, Defendant made an oral motion for mistrial, which the court denied.

The trial commenced on November 7, 2019. At trial, Detective Paul Dimitri, then with the Third District Patrol night watch of the Jefferson Parish Sheriff's Office (JPSO), testified that on November 29, 2016, he responded to a call near 4th Avenue in the Walker Town neighborhood in Marrero.[5] He stated that upon arriving at the scene, he located a car that had bullet holes in the driver-side door and the front windshield. He stated that no one was in the car when he arrived, but he was approached by several people—two females and two males—that he later learned were inside of the vehicle at the time of the shooting. He said that the female victim who first approached him was shot. Detective Dimitri later learned that the males inside of the vehicle were Defendant and Alvin Hayes. He testified that the car belonged to Latoya Wilson, whom he said Defendant

[5] It is noted that Detective Dimitri was specifically asked if he responded to a call about a shooting involving a baby. He answered affirmatively, but the remainder of his testimony made no mention of a baby.

identified as his cousin. Detective Dimitri testified that Defendant was at the scene, and after a few minutes, all of the victims no longer wanted to cooperate.

Sergeant Thomas Gai, assigned to the Criminal Investigations Bureau and Homicide in the Homicide Section, testified that he acted as scene investigator for a homicide at 2188 Caddy Drive shortly after 4:30 p.m. on December 3, 2016. As such, he indicated that he was responsible for ensuring that all relevant evidence was collected and for directing the crime scene technicians. He stated that he, along with other detectives and crime scene technicians, responded to the scene.

Sergeant Gai testified as to numerous photographs taken from the crime scene including depictions of various ballistic material and clothing seized at the scene. Sergeant Gai indicated that the photographs were taken less than 30 minutes after the shooting occurred. He stated that two people were shot, Xy'Ahir Davis,[6] who was 10 months old, and 16-year-old, M.J. Sergeant Gai testified that prior to photographing the scene, Xy'Ahir was transported to the closest hospital where he ultimately died. He stated that technician Ryan Singleton went to the hospital to take photographs and collect evidence.[7] Sergeant Gai testified that M.J. was photographed at the scene before being transported to another hospital. He indicated that M.J. sustained eleven different wounds.

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[6] To observe the principle of protecting minor crime victims set forth in La. R.S. 46:1844(W)(1)(a), this Court, in its published work, generally will identify, by initials only, the victim *and* any defendant or witness whose name can lead to the victim's identity, i.e., parent, sibling, or relative with the same last name as the victim. *See* La. R.S. 46:1844(W)(1)(a) and La. R.S. 46:1844(W)(3). However, La. R.S. 46:1844(W)(1)(a) also states, "The public disclosure of the name of a juvenile crime victim by any public official or officer or public agency is not prohibited by this Subsection when the crime resulted in the death of the victim." Because the instant case resulted in the death of this minor victim, full names have been used for purposes of this memorandum. However, *see State v. Reeves*, 06-2419 (La. 5/5/09); 11 So.3d 1031, 1036 n.3, *cert. denied*, 558 U.S. 1031, 130 S.Ct. 637, 175 L.Ed.2d 490 (2009), where the Louisiana Supreme Court noted that public disclosure of the name of a juvenile crime victim is not prohibited by La. R.S. 46:1844(W) when the crime results in the death of the victim but nonetheless chose to identify the victim and her family by their initials throughout the opinion.

[7] Mr. Singleton testified that he served as an initial crime scene technician in a shooting investigation on December 3, 2016, at 2188 Caddy Drive. He indicated that one of the victims was an infant who was removed from the scene and transported to a hospital. Mr. Singleton stated that he was asked to go to the hospital to take photographs after the child died and that the victim was shot.

Sergeant Gai further testified as to the crime scene photographs. He indicated that there were two .380 caliber casings and six 9 mm casings at the scene. He also identified, in photographs, damage to a door that could indicate "some type of forced entry." He stated that other photographs show blood on the floor and clothing cut off of M.J. "by EMT." Sergeant Gai testified that four fingerprints were obtained from the interior of the front door frame. These fingerprints were later examined by a latent prints expert but only two were deemed viable. He stated that the location and concentration of the prints indicated to him that "an individual had grabbed the door to either pull himself in or to stop himself from falling." Sergeant Gai testified as to a "small defect" in a sofa that was determined to be a ballistic strike mark, and they ultimately obtained a projectile from the sofa. He identified numerous other ballistic materials, such as fragments and spent cartridge casings, which were photographed inside of the home.

Sergeant Gai testified that the ballistic material as captured by the crime scene photographs indicated that two shooters were firing indiscriminately in multiple directions within the living room. He further stated that based on the scene investigation, the two shooters started shooting while outside of the residence and then continued shooting inside. He noted that on the walls there were several strike marks which are visible in the photographs. Sergeant Gai stated that the entire house was searched. He said an SKS style 762 by 39 rifle was found under a bed, and an ammunition box, pills, a small amount of marijuana, and a scale were also located.[8] He stated that the recovery of these items collectively indicated someone in the home may have been packaging and selling narcotics.

[8] Sergeant Gai specifically testified that pills inside of a prescription bottle for Amoxicillin were field-tested, and there was a positive indication for the presence of MDMA. Further, he stated that a clear bag of "greenish vegetable matter" was field-tested and provided a positive indication for the presence of THC, the active ingredient in marijuana. He later testified that the ammunition box contained fifteen live cartridges that would be used with the SKS rifle.

Sergeant Gai testified that based on the six 9 mm casings and the two .380 caliber casings, he determined while at the scene that there were at least two shooters. He stated that five of the 9 mm casings were found inside the home, and one was found outside. He further testified that one .380 caliber casing was found outside of the home, while the other was located inside.

Additionally, Sergeant Gai testified as to a search of Defendant's home and his arrest on December 13. He stated that a search and seizure warrant for Defendant's home was obtained that day. He indicated that plain-clothed officers surveilled the home prior to the search and observed a vehicle leaving the area. He testified that he and other detectives stopped the vehicle at a daiquiri shop on Lapalco. Sergeant Gai stated that Defendant was in the back seat of the car and was arrested pursuant to an arrest warrant for murder and obstruction of justice. There were four people in the vehicle, including Defendant's sister in the front passenger seat. He indicated that the driver consented to a search of her vehicle, and a loaded .40 caliber semiautomatic firearm was located between the center console and the passenger seat. Sergeant Gai testified that at the time, they did not believe the seized weapon was used in the homicide but submitted it to the laboratory for testing. He further stated that based on "testimonial evidence from the scene" and information from Defendant's sister, he established a "chain of custody" that placed the firearm in Defendant's possession.

Sergeant Gai testified that Defendant, Defendant's sister, and the owner of the vehicle (Shanika Meyers), were each interviewed. At the time of his arrest, Defendant was in possession of a phone, which was taken into evidence. After Defendant's arrest, Sergeant Gai participated in a search of Defendant's family home on Birchfield. He testified that a 9 mm hi-point semiautomatic firearm and ammunition were located in the home. He stated that to his knowledge, that firearm was not used in the commission of the homicide.

Lieutenant Donald Meunier, commander of the homicide division of the JPSO, testified that he participated in an investigation that resulted in Defendant's arrest. He indicated that he had seen Xy'Ahir's father, Xevion, in passing the night of the murder, December 3, 2016. He stated that he met Xevion for the first time at the Investigation Bureau on December 13, 2016, when he and his mother went for an interview that she facilitated. Lieutenant Meunier testified that Xevion's mother was living in Texas at the time, and she first reached out to Detective Kurt Zeagler a few days prior to his interview with her and Xevion. He indicated that Xevion's mother brought him from Texas and that Xevion was not threatened by officers or his mother.[9]

Lieutenant Meunier testified that at the time of Xevion's interview, he was not aware that Defendant's fingerprint was lifted on the date of the homicide; he indicated that he learned that information the same date but after the interview. Lieutenant Meunier further testified that he interviewed Xevion as to motives in his son's murder. He stated that he stepped out of the interview on multiple occasions, one of which was to obtain a photographic lineup that included Defendant's photograph. He indicated that Xevion signed and dated his photographic identification of Defendant, that Xevion called him the shooter, and that he wrote it on the identification at Lieutenant Meunier's request. He stated that in that interview, Xevion told him that he was walking up the hallway from the

[9] Xevion's mother "raised her voice" to him during the interview. However, Lieutenant Meunier characterized this as a normal mother-son interaction and recalled her telling Xevion to be more respectful toward him. Further, in the recording itself, she told Xevion to answer the detective's questions and repeatedly tells Xevion to tell the detective what he knows.

bedroom area when shots were fired. Portions of the recording of that interview were played for the jury.[10][11]

At the beginning of the interview, Xevion stated that he knew who killed his son and that there were three people—one driver and two shooters. He identified Defendant by his actual name as one of the shooters, stated Defendant was in his thirties, and noted that he had just come home from "doing ten years." He said he knew Defendant from a past attempt of Defendant trying to rob him. His mother stated that she knew Defendant from an area she previously lived in, and Defendant previously tried to rob her, also. Xevion stated that he knew Defendant's identity from the beginning but was "messed up and all." He also said that "Click" Houston, who he "heard" was 39 years old, was also a shooter, and "Duke" was the driver. Xevion conceded that he did not see the driver that night. He later described Click's height, figure, and haircut and described him as having "brown skin." After being presented with a photographic lineup, Xevion identified Defendant's picture in the lineup and remarked that he has "dreads" now. Xevion dated and signed the back of the lineup and stated that Defendant was the shooter. He was also shown two other photographic lineups, but he indicated that he did not recognize any of the people shown.

In that interview, Xevion asserted that he had seen the two shooters. Xevion indicated that he was on his way to the back of the house when he heard gunshots.

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[10] The State provided that it began the recording at the 2:55 mark. It was the time immediately before Xevion, his mother, and Lieutenant Meunier entered the interview room. It is unclear how long the video was played from that time marker. However, the State then moved to publish from the 5:10 marker and did not provide an end time. While the State did not provide a stopping time from that marker, it is noted that Lieutenant Meunier left the interview room around the 11:36 mark and returned around the 15:26 marker. He then left again around the 16:41 marker and returned around the 21:04 mark. The State resumed playing the video at the 21:06 mark. The record does not reflect at what point the recording was next stopped. However, Lieutenant Meunier was not in the interview room from the 24:15 mark to the 51:09 mark. Earlier in the trial, the State played for the jury the 54:12 mark to the 57:47 mark. The State then noted that the video would play beginning at the 58:43 marker. It is unclear at what time the recording was stopped or which portions were not played for the jury. At another time during trial, the State introduced from the 58:45 marker through the 59:22 marker. It is noted that Lieutenant Meunier left the interview room again around the 1:09:21 mark and re-entered at the 1:19:16 mark.

[11] Lieutenant Meunier identified Defendant in court.

Xevion stated he arrived at 2188 Caddy Drive, went inside, shut and locked the front door, and then showered. He then indicated the various locations of everyone while they were "chilling" and getting dressed. He noted that he was going to drop his baby, Xy'Ahir, off somewhere, so he put the baby's bag in his car. He said, at that time, his baby was on the sofa, and M.J. was standing in the living room. He stated he re-entered the house and while he was in the back of the house, he heard gunshots about three minutes later. Xevion noted that he was coming down the hall, he turned around or peeked around the side of a wall, and he saw his baby on the floor. He indicated that it was at that time that he also saw the shooter with "dreads," whom he identified as Defendant, "hanging through the door."[12] He stated he saw Click "on the side of the door." He said again that Defendant was "hanging in the door," and that he saw Click shooting. He stated he "one hundred percent" saw Defendant and Click. Again, Xevion indicated Defendant was "hanging in the door" and shooting a black gun.

Xevion further stated that the shooting occurred because Defendant and Click wanted marijuana and thought he had money. Xevion and his mother alluded to Xy'Ahir's mother taking somewhere between two and three and one-half pounds of marijuana. When Lieutenant Meunier asked Xevion to "tell [him] what this was for," Xevion indicated that it was for over two pounds of marijuana and stated that his "baby mama hit the lick" from her dad. The officer clarified that she stole the marijuana from her father.[13] Xevion asked if that was what she told the officers, and he then said that was what she told him. Xevion indicated that he sold the marijuana and that her father knew. Xevion stated that her father and another person went to talk to him about the marijuana the day after it was taken but that neither of those persons were the shooters. Xevion said her father

[12] It is noted that at that time, Xevion and his mother indicated that they had social media pictures of the people Xevion identified as the shooters.

[13] At trial, Xevion identified Xy'Ahir Davis' mother as "Marie" and her father as Steven Davis.

told him that he knew he had the marijuana and that his daughter had taken it for Xevion. He stated that he was told to bring it back, but Xevion stated he did not have it at the time. Xevion indicated that after that, her father told him over the phone to put the money toward caring for his daughter and grandson.

Lieutenant Meunier asserted that Xevion did not say he was not present at the time of the shooting, he did not say that he did not see it happen, and he did not distance himself from his identification of Defendant. However, Lieutenant Meunier conceded that in Xevion's two interviews on the day of the murder and in his 9-1-1 call,[14] he stated he was in the house but did not see the shooter. He noted that Xevion stated three times in this interview that Defendant was "hanging on" the door. He acknowledged that Xevion indicated there were three people present, which included Defendant and Click as the shooters, and he speculated "Duke" was in the car. Lieutenant Meunier stated that he was not able to compile a photographic lineup for the individual identified as Click before the end of the interview, but one was later created.

On cross-examination, Lieutenant Meunier acknowledged the varying accounts given by Xevion. These include accounts that he was in the shower getting ready to go out, that he was in a back bedroom, and that he left the front door open after retrieving something from his car. He acknowledged that Xevion stated in his interview that Defendant was there to rob him because Xevion had marijuana and/or money. Lieutenant Meunier testified that he did not know if the shooters were targeting M.J., Xevion, Xy'Ahir, or other persons but stated that there was "no evidence to support that anybody was after" M.J. Lieutenant Meunier acknowledged that there was nothing to suggest that Xevion was being robbed at the time of the shooting. He also acknowledged that Xevion's mother provided him with a photograph of Click and that Xevion indicated in his interview

[14] The 9-1-1 call was not offered into evidence or presented to the jury.

that he previously saw a photograph of Defendant that was possibly provided to him by his mother before the interview.

Lieutenant Meunier testified that after Xevion's interview, efforts were made to locate Xevion, but he was not cooperative, and he was ultimately arrested on a material witness warrant. Lieutenant Meunier testified that he and Detective Zeagler interviewed Xevion again on February 17, 2017, sometime after that arrest. Lieutenant Meunier stated that during that interview, Xevion recanted his prior statements and said they were untrue. Lieutenant Meunier further stated that Xevion asserted that his mother and stepfather compelled him to make those prior statements. Lieutenant Meunier testified that Xevion was again interviewed by Detective Zeagler four days later, on February 21, 2017.

Detective Zeagler with the Homicide Division of the JPSO testified that he was assigned as the supervising detective in an investigation of a shooting on December 3, 2016, on Caddy Drive. He stated that Xy'Ahir, who was 10 months old, died; M.J., who was sixteen years old, was shot "pretty badly." He indicated that M.J. was shot at least 11 times and was holding Xy'Ahir at the time he was shot. He obtained M.J.'s medical records, which indicated he was discharged from the hospital on December 13.[15]

Detective Zeagler stated that several people called 9-1-1 immediately after shots were fired and that at least one of those callers lived on Caddy Drive. He noted that one caller said they saw two people running north up Caddy Drive away from the house. He further indicated that there was either one call with two people or two calls from individuals—Steven Shaw and "one of the Kellers"—inside the

[15] Detective Zeagler stated that he interviewed M.J. briefly at the hospital and then spoke to him again after he was discharged. However, he indicated that he and "all the detectives on [his] squad" unsuccessfully attempted to locate him leading up to the trial.

home. Detective Zeagler stated that he believed Xevion "got on the phone with the operator," and he indicated he was in the back of the house.[16]

Detective Zeagler indicated that he spoke to Xevion around 11:00 p.m. on the night of the shooting and that Detective Menes[17] also spoke to him around 6:35 that night. He agreed that, at that point, Xevion consistently stated that he was in the back of the house at the time of the shooting. Detective Zeagler testified that Xevion told him he was lying on the floor in the hallway where the hall meets the kitchen at the time of the shooting; this was after he walked towards the gunfire and peeked around a corner at the shooters.

Detective Zeagler said that Defendant and Andre Houston a/k/a "Click" were arrested. He indicated that Mr. Houston presented three alibi witnesses for the time of the shooting, but he did not find the alibis credible. Specifically, Detective Zeagler testified that the witnesses were his family members. He stated that they told detectives "what they were prepared to" say but refused to answer any questions and became upset when pressed. He indicated that he was unable to obtain additional proof to corroborate the alibis. He also stated that there was no physical evidence that connected Mr. Houston to the shooting. Detective Zeagler testified that Xevion had never met Mr. Houston until he saw him the night of the shooting, and Xevion's mother provided detectives with a Facebook picture of Mr. Houston. He stated that Mr. Houston is "free" and has not been tried. He indicated that Mr. Houston was charged with intimidation of a witness. Detective Zeagler acknowledged that at some point after the shooting, Xevion encountered Mr. Houston at a gas station, and Xevion reported that Mr. Houston made a veiled threat on his life.

[16] As previously noted, there were no 9-1-1 calls offered into evidence or presented to the jury.
[17] Detective Menes' was not further mentioned during the trial.

Detective Zeagler indicated that on December 13, 2016, following Lieutenant Meunier's interview with Xevion and following the receipt of information from the crime lab regarding a fingerprint, he drafted an arrest warrant for Defendant for the first degree murder of Xy'Ahir and attempted first degree murder of M.J. and a search warrant for Defendant's residence on Birchfield. He stated that Defendant was not home at the time of the search, but Defendant's mother and father, Johnny and Rose Manuel, were present. Detective Zeagler testified that Defendant was taken into custody at Daiquiris and Creams prior to the search. At the time of his arrest, Defendant was in possession of a cell phone, and phone records were later obtained.

Detective Zeagler indicated that the December 3, 2016 shooting at 2188 Caddy Drive occurred at 4:36 p.m. He stated that the phone records showed that the phone was in use prior to the December 3rd shooting. He testified that there was internet search history for September 2016 referencing Defendant's brother, Dondrick Wilson, who was "injured in an incident." However, Detective Zeagler stated that it was not possible that Defendant conducted that search because Defendant was incarcerated for a "period of years" and not released until November 2016. He testified that service for the phone was previously turned off at some point and then turned back on again the day before the murder. Detective Zeagler asserted that the phone records show that the subscriber for the phone was Johnny Manuel, Defendant's father, and the account was opened on May 6, 2016. The phone was activated on December 2, 2016, and was deactivated on December 17, 2016, a few days after Defendant's arrest. Detective Zeagler stated that the phone records reflected numerous searches on "nola.com" about the homicide and showed no communication between that phone and Xevion or any individuals residing on Caddy Drive.

Detective Zeagler stated that the phone records showed that the phone was used for the last time at 4:07 p.m. on December 3, 2016—prior to the murder—from a tower roughly a mile from the house on Caddy Drive, and the phone was then powered off. It next "connects" a call at 5:00 p.m. to a number appearing to belong to Defendant's father. Detective Zeagler said that everyone he interviewed said Defendant had not been to the residence on Caddy Drive other than the night of the murder, and he never obtained information indicating otherwise. He stated that Defendant was not related to anyone that lived in that house, but LaBryant Keller,[18] then a teenager living there, referred to Defendant as a cousin. Detective Zeagler stated that he verified that there was no familial connection.

Detective Zeagler stated that he learned in the course of his investigation that Xevion purchased a car on November 9, 2016. Also during the investigation, Detective Zeagler interviewed Defendant on December 13, 2016 following his arrest. Portions of the recorded interview were played for the jury.[19] Detective Zeagler asserted that he did not have Defendant's phone records at the time of that interview. He acknowledged that Detectives Brad Roniger and Melvin Francis also spoke to Defendant. He stated that since his interview with Defendant, he heard no other explanation for the presence of Defendant's fingerprint on the door at Caddy Drive other than that provided by Xevion.

At the beginning of Defendant's December 13, 2016 interview, he was advised of his *Miranda*[20] rights. Defendant stated he did not know anyone "staying" on Caddy Drive in Marrero but that he has family "all over." Defendant noted that he was "locked up" for seven years and three months and was just released on November 7, 2016. He stated he did not have any problems with

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[18] Mr. Keller appears to be Michelle Smith's son.

[19] Portions of the recorded interview were played for the jury. These portions appear to be 55:51 to 1:16:23, 1:23:53 to 1:34:23, and 2:05:55 onward. The record indicates that the video was then resumed at 2:05:55 but does not provide an end time. As such, the remainder of the interview was played for the jury. Defendant requested an attorney at 2:38:25, and the interview was terminated.

[20] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

anyone because he was just released. He indicated that he had been staying on the Eastbank since his release and had not been to Caddy Drive. Defendant denied knowing Xevion or ever going to his house. He repeatedly denied going to Caddy Drive or ever visiting or knowing anyone at 2188 Caddy Drive.

When asked if he could explain why his fingerprint was there, Defendant again stated he was positive he had never been there. Detective Zeagler asked him where he was on December 3, 2016, and he replied that he was "across the river probably messing with a female." Defendant could not provide details about the female, a more specific location, or definitively state that he was with a female. He indicated he was with three or four females on the day in question. Defendant stated that he could not provide details on where or who he was with at the time of the shooting because it was "two Saturdays ago."

Defendant stated that people call him "Dugga." Defendant said he was seated in the back passenger seat behind his sister in the car on the evening of his arrest. He stated he did not leave anything in the car. He told Detective Zeagler that he was positive there was nothing near his feet in the car. When asked to tell Detective Zeagler about the gun in his house on Birchfield, Defendant stated that his dad has a gun, possibly "a forty," but he did not know where his dad kept it.

When asked, Defendant acknowledged that he had seen the news about a 10-month-old baby, "Nemo," being killed but did not know that it happened in Marrero. Defendant stated he did not visit "Red,"[21] and he did not know "Man-Man."[22] Defendant also continued to deny that he was at the house prior to or at the time of the shooting. When asked about a prior incident involving a car being shot at, Defendant stated he was there "messing with a female." He said he was sitting in the car talking to a female when he looked up and saw someone in a

[21] "Red" is a reference to Xevion.
[22] Detective Zeagler testified at trial that "Man-Man" is M.J.

hoodie firing shots. He stated that he exited the car and ran but returned when the police arrived. He told the detectives he had no reason to lie to them, and they had the wrong person. He stated he would never do something like shoot a 10-month-old baby.

Detective Zeagler testified that he was involved in two statements made by Xevion after December 13, 2016. He acknowledged that during the February 17, 2016 statement, Xevion said that he did not see the shooting and that his prior statements identifying Defendant and explaining what he saw were false. He stated that Xevion further alleged that his December 13, 2016 statement was compelled by his mother and stepfather. He indicated that Xevion was in custody during that interview and another interview four days later.

Detective Zeagler stated that he interviewed Xevion again on February 21, 2017, because Xevion's mother told him he wanted to talk again. The interview was recorded and portions were played for the jury.[23] Detective Zeagler indicated that the February 21st interview was markedly different than his interview four days prior. He acknowledged that at the end of the interview, Xevion asked if he could go home with his mom. He stated that Xevion was clear in this interview that he never brought Defendant to the house on Caddy Drive. He acknowledged that there were roughly six statements from Xevion with two different versions of events.

Detective Zeagler began the February 21, 2017 interview by stating that Xevion's mother reached out to him and said Xevion wanted to talk. Xevion stated that prior to the shooting, he went to put his bag in his car and went back into the house. He indicated that Man-Man was on the sofa, and Xevion proceeded to the back of the house. Xevion then stated Man-Man went outside with Xevion's baby.

[23] The State provided that it would publish 5:00 to 10:16. The transcript indicates that the State then played the recording until 12:03 and then 12:30 to 12:50. The recording was then published from 16:15 to 18:00, 18:18 to 19:16, and 1:06:39 to 1:07:24.

As Xevion came back up the hall, he heard gunshots. He indicated that Man-Man and his baby came back in the house, and he saw Defendant in the front doorway to the house. Xevion stated that he saw Defendant best because he was in front of the other shooter, Click, who was taller than Defendant.[24] He indicated that Defendant was the one who "kept shooting." Xevion identified Click as Andrew Houston. He conceded that he did not see Click shooting a gun but explicitly stated that he did see Defendant shooting a gun. Xevion stated that he was on the floor in the hallway during the shooting. He affirmed that his prior statement given when his mom was present that he was on the floor in the hallway when he saw Defendant shooting was the truth.

Xevion agreed that the first time he spoke to detectives on the night of the shooting he stated he did not see anything. During the interview with his mother present, he acknowledged that he said he saw Defendant and Click. The detective noted that in his last interview, Xevion said it was a lie, and his mom made him say it. Xevion then stated that neither his mother nor stepfather told him to "make up a story." He said no one threatened him or told him to give the police a name. He indicated that he gave Defendant's and Click's names because he actually saw them.

He stated that at a later time, Click threatened him about cooperating with the police. Xevion said he understood the threat to be that he would kill him. He indicated that he told detectives in his statement several days prior that he did not see the shooters because he felt like if he did not "reverse" his story, he and his family would be in danger. Xevion stated that he never brought Defendant to the house on Caddy Drive, to his knowledge Defendant had never been to that house prior to the afternoon of the shooting, and that the people in that house did not "affiliate" with Defendant.

[24] After recanting his story, Xevion again identified the second shooter, Click, as Mr. Houston.

Detective Zeagler was asked about Xevion's grand jury testimony and stated he had no way of knowing what was said. Part of the grand jury testimony from March 9, 2017, was then admitted into evidence. A portion of that testimony was published to the jury in which Xevion stated that he saw Defendant standing to the left of the door shooting and saw Click standing behind him. Xevion also indicated that Defendant and Click did not see him in the house, and he did not know how they knew he was at that house. In another portion presented to the jury, Xevion provided the locations of other people in the house at the time of the shooting. He also said that he retrieved a bag from his car and then went to the room he was sleeping in to get a bag of his clothes to put in his car. Xevion stated that he did not ultimately do this because he heard gunshots outside of the house while he was in the hallway headed toward the kitchen area. He further indicated that he then saw M.J. and Xy'Ahir coming into the house from outside. He noted that he heard gunshots, saw them falling, and "ducked." He said it was at that point that he saw Defendant in the door and Click behind him. Xevion told the grand jury that he then turned and went into the first room where "Dro" was in the closet, and "Dro" called the police.

Detective Zeagler acknowledged that he spoke with Michael Meyers in November of 2018. He recalled that Mr. Meyers contacted a Special Investigative Unit detective in the jail and that detective then contacted him. He further agreed that Mr. Meyers stated that Xevion, a/k/a Red, had the baby at the door but acknowledged that Mr. Meyers could have misstated facts because he was getting his information from Defendant or that he confused Red and Man-Man. Detective Zeagler testified that Mr. Meyers' statement "lacked some accuracy as to the type of gun that was used." He stated that Mr. Meyers told him Defendant thought Red was dead, and Detective Zeagler believed that Red was being confused for M.J. He testified that Mr. Meyers acknowledged that he made a mistake in stating

whether it was Man-Man or Red that was shot. Detective Zeagler further agreed that it was possible the confusion stemmed from Red being Defendant's target and that the wrong person was shot.

Mr. Meyers testified that he was arrested for failing to appear previously for trial in the present case. He stated that he did not want to come to court because he was scared to testify. Mr. Meyers acknowledged that he was convicted in 2009 of having contraband in the Jefferson Parish Correctional Center and in 2015 for distribution of marijuana. He agreed that in April of 2018 he was in the Jefferson Parish Correctional Center after being arrested for being a felon in possession of a firearm, and while there, he met with and provided information to Detective Zeagler on November 19, 2018. Mr. Meyers stated that he and his lawyer met with the district attorney's office, and they reached a plea agreement.[25] He testified that part of the agreement was that he would testify truthfully, and if he did not provide truthful information, he could be prosecuted for the original charges.

Mr. Meyers stated that he provided Detective Zeagler with information about the December 3, 2016 murder on Caddy Drive that he obtained by speaking with Defendant at the Jefferson Parish Correctional Center in 2018. He noted that he and Defendant had known each other their entire lives. He testified that he asked Defendant why he was in jail, and in response, Defendant told him that he shot a baby on December 3, 2016, on Caddy Drive. He stated that Defendant told him Man-Man and Red were present at the house. He indicated that Defendant said Red owed him money from a robbery.

Mr. Meyers further testified that Defendant told him Xevion's baby and Man-Man were shot. He indicated that Defendant said Man-Man was holding the

[25] Pursuant to the plea agreement, Mr. Meyers agreed that he would provide testimony in this case in exchange for a plea of guilty as to three counts of attempted felon in possession of a firearm—rather than three counts of being a felon in possession of a firearm—and he would receive a sentence of four years at hard labor without the benefit of probation, parole, or suspension of sentence.

baby at the time of the shooting but acknowledged that he initially told the police that he said Red was holding the baby. Mr. Meyers further stated that Defendant wanted Red to take his statement back and did not want him to testify; he said Defendant told him he wanted Red dead. Mr. Meyers acknowledged that he originally told Detective Zeagler that Defendant told him that he was shooting with an assault rifle, and Xevion was sitting on the couch with his baby when Defendant entered shooting at him. He further agreed that he told detectives Defendant stated Red tried to shield himself with his own baby.

Dr. Marianna Eserman, then a forensic pathologist with the Jefferson Parish Coroner's Office, was accepted as an expert in the field of forensic pathology. She stated that she performed an autopsy of Xy'Ahir and prepared a report. She determined the cause of death to be a gunshot wound that entered the right abdomen and exited out the right back and a second gunshot wound in the leg area that exited the buttock. She classified the death as a homicide. She stated that the projectile in the first wound went through the skin, hit the liver and diaphragm, hit the lung and vessels that feed the lung, and exited out the right upper back. Dr. Eserman testified that the second projectile entered the left thigh close to the scrotum and exited the left buttock. She noted that Xy'Ahir was 10 months old and that there was no evidence of any type of substance in his system.

Kortnie Sinon testified that she is a latent print examiner at the JPSO and was accepted as an expert in latent print comparison and processing. She testified that she did an analysis relating to a homicide on December 3, 2016, on Caddy Drive. Ms. Sinon stated that she was asked to compare ten slides of prints taken from the exterior door frame of the living room at the scene to individuals' fingerprints. She compared the slides to the fingerprints of Steven Smith[26] and

[26] Detective Zeagler stated that Steven Smith is the nephew of Michelle Smith, who rented the house on Caddy Drive, and a "regular and frequent occupant or visitor to the house." He testified that Ms. Smith knew Defendant and his family, and she was the mother of the children living on Caddy Drive.

Defendant. Ms. Sinon indicated that not all of the prints were suitable for comparison and some were inconclusive matches for Defendant and Mr. Smith. She testified that one print was a conclusive match for Mr. Smith's left index finger and another for Defendant's left middle finger. She issued a report as to her initial findings.

Ms. Sinon stated that she did further analysis on the prints and authored a second report. She testified that she was asked to compare the prints to Steven Davis, Andre Houston, and Anthony Baker. For three of the prints, she conclusively excluded those individuals, and the remaining prints remained inconclusive. Ms. Sinon identified a fingerprint card she took of Defendant's fingerprints that day in court. She stated that those fingerprints matched those on two conviction packets for Defendant—one in July 2009 for a possession of marijuana second offense, wherein he was sentenced to two years and six months imprisonment, and another in February 2007 for possession of cocaine, wherein he was sentenced to one year imprisonment.

Emily Terrebonne is a firearms examiner with the JPSO Crime Lab and was accepted as an expert in firearm and tool mark examination. She testified that she went to the scene to collect evidence and later analyzed evidence regarding a homicide on December 3, 2016 and created three reports. Ms. Terrebonne stated that in her first report dated December 5, 2016, she reviewed several cartridge cases, live cartridges, different projectiles, and a gun. She determined that two cartridges were "380 cartridge cases," and those cases and another six projectiles were fired by the same 9 mm weapon. She indicated that she conclusively found that there were two weapons used to fire all of the projectiles in the case. Ms. Terrebonne testified that three other projectiles were fired from the same weapon, which were "consistent with a 38 caliber class; so, that does incorporate several weapons, but it is consistent with a 9 millimeter," and those projectiles were the

only ones fired from that weapon. She testified that a rifle was recovered at the scene, but it was excluded for evidence purposes because nothing collected at the scene indicated that a rifle was used.

Ms. Terrebonne further testified as to her second report. She stated that her second report contained her analysis regarding a copper jacket and a lead fragment, later recovered from a hospital, and a 9 mm gun. Ms. Terrebonne test-fired the 9 mm gun and determined that it did not fire the casing or projectiles located at the crime scene on Caddy Drive. She was unable to make any conclusions as to the jacket and fragment due to damage.

Ms. Terrebonne also discussed her findings memorialized in a third report. She indicated that this report was specifically for the Integrated Ballistic Information System (IBIS), which she described as a memory bank for cartridge cases. She stated that she analyzed a .40 caliber pistol, but it was not compared to casings at the crime scene because none of them were .40 calibers. Ms. Terrebonne testified that IBIS matched the weapon to another crime scene from 2013. She said that the police did not recover the 9 mm or the .380 caliber guns that fired the bullets and casings collected from Caddy Drive; she indicated that it was common for guns to go unrecovered in such cases.

Detective Solomon Burke with the Digital Forensics Unit for the JPSO was accepted as an expert in mobile device forensics. Detective Burke testified that he examined a ZTE cell phone recovered in connection with a homicide investigation in December 2016 and created an extraction report. He indicated that around 11:00 p.m. on December 3, 2016, the cell phone visited a website titled, "Ten-month old baby killed; man wounded in Marrero shooting." Detective Burke stated that the oldest web search on the phone was on August 14, 2016, and that there were job searches in September 2016. He agreed that there were several searches in October as well. On November 12, 2016, the cell phone was used to

visit several websites, such as, "Jefferson Parish Sheriff's Office releases photo of man wanted in connection with a chase," "Jefferson Parish releases photo of a man wanted," and "Man gets out four years gun charge, nola.com." Detective Burke testified that the device required a password to access it.

Xevion testified at trial that he was almost 22 years old and was incarcerated at Rayburn Correctional. He stated that he had a child, Nemo a/k/a Xy'Ahir, who died at 10 months old.[27] Xevion indicated that Nemo was outside of his car by the house in Marrero when he died. He was in the back of his friend's house and did not see anyone shooting a gun at the time of Nemo's death. He stated that he did not see Defendant or Andre Houston a/k/a Click at the time of the shooting. When asked how many times he saw Defendant in the week prior to his son's death, Xevion replied that he was shot nine times after Nemo's death and did not remember. He denied that he was shot to prevent him from discussing his son's death and implied it was because of money. He stated that he does not "play with guns" and only sells "weed." He denied being a "stickup man" or robbing people.

Xevion testified that after he heard the gunshots, he called someone before calling the police. He indicated that he was later beaten by police officers, resulting in a chipped tooth and an injured mouth.[28] He asserted that he was beaten by officers prior to his interview by a different officer.[29] He denied being threatened or telling the police that he was threatened as it relates to this case. He initially stated that he did not remember going to the detective bureau with his

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[27] This appears to be a reference to Xy'Ahir. Xevion testified that Steven Davis is Nemo's grandfather, and Mr. Davis stated that his grandson, Xy'Ahir, died at ten months old. Mr. Davis also stated that Xevion was Xy'Ahir's father. Various questions and answers further support this.

[28] Shortly thereafter, the jury was excused, and the State submitted a motion to compel testimony pursuant to Article 439.1 because the witness "has asserted that [the State is] trying to put a charge on him which suggests that he has an answer that might subject him to liability. And he's expressing reluctance to answer." The trial court signed the motion. However, the witness still voiced his reluctance to answer questions.

[29] Lieutenant Meunier stated that Xevion had no visible physical injuries at the time of his interview on December 13. He testified that he had no information suggesting that he was harmed in the presence of any police officers either on the third or the 13th. He further stated that as the Commander of Homicide, if an officer was beating someone, he would know about it and reiterated that Xevion was not injured on the third or the thirteenth.

mother 10 days after his son was killed; however, he later said he did remember. He also remembered identifying a picture of Defendant at the bureau but stated it was not in relation to anything beyond knowing him while he was growing up. He denied ever telling detectives that Defendant and Click were "shooting" on the day Nemo died. The State played for the jury a portion of Xevion's police interview on December 13, 2016.

Xevion indicated that the interview was all lies. When asked if he shot at Defendant five days prior to his son's death, Xevion stated that he never shot at Defendant because he "grew up under him." Xevion testified that he knew Defendant when he was younger, but Defendant "went and did time." He indicated that he and Defendant had been drinking daiquiris and playing pool prior to them going to Steven Davis' house to pick up his son.[30] He stated that Steven Davis is the father of Marie, Xevion's former girlfriend and the mother to his son. He stated that he was in the back of the house at the time of the shooting and denied that people went to the house because he had money. He denied robbing someone prior to the shooting. He testified that he did not bring Defendant to the house on Caddy Drive.

When asked, Xevion acknowledged that he identified Defendant out of a set of six photographs and signed the back of the lineup. He again repeatedly stated that he previously lied and that he lied when he identified Defendant as the shooter. Xevion later stated he did not remember the photographic lineup and then testified that he wrote "shooter" on the back but that it was "forced information."

When asked if he was arrested on a material witness warrant, Xevion stated that he was and that an officer named "Pat" was trying to get him to lie about "the

[30] Based on the record, the house on Caddy Drive was not Mr. Davis' home but belonged to Michelle Smith. As such, Xevion was referencing a time and location other than the scene of the shooting at issue. Steven's testimony indicates that this was a reference to the second to last time Xevion picked Xy'Ahir up from his home.

situation … right here." When asked if he was threatened in a police interview after that arrest, he stated that he did not remember, but one of the detectives in that interview was the one that previously beat him. He similarly denied remembering that he said in that interview that his mother and stepfather forced him to go in and lie. The defense then played the recorded statement given by Xevion on December 3, 2016.

In that interview, Xevion gave his address as 2188 Caddy Drive and stated he had been staying there for about two weeks. Xy'Ahir had been there for about five days. He said the house was a friend's mother's house. Xevion said he was at the house and was going to drop his baby off with a friend. He stated that about ten minutes before the incident, he went into the house and showered. Xevion indicated that Man-Man was holding Xy'Ahir somewhere near the front door in the living room. He stated he was in the back of the house getting his bags when he heard gunshots and Man-Man scream that Nemo, Xevion's son, was shot and could not breathe. Xevion said he told Man-Man to be quiet and that they were calling the police. He then said "Steven" called the police and talked to them. Xevion stated he called someone else. That person and a female officer with a gun then arrived at the house.

He indicated that he and the others at 2188 Caddy Drive were in the back when he heard the gunshots and stayed in the back until the police arrived. Xevion stated that Man-Man did not say anything other than that the baby was shot. When asked if he had any idea who or why someone would do such a thing, Xevion replied that no one had a grudge against him and that Man-Man was the only one that could say. He denied that there were any narcotics or other illegal activity at the house. He said he did not know who did it, but he indicated that an officer said

she saw a car fleeing. Xevion stated that everything in that interview was the truth and that at that time, no one was dealing drugs.[31]

Steven Davis testified that his daughter is Xy'Ahir's mother, and Xy'Ahir's father is Xevion. He stated that his grandson was 10 ½ months old when he died and had previously been living back and forth between his grandparents' homes. Steven stated that his wife, Jacqueline Oliver Davis, and Charmaine Davis[32] were more parental figures to Xy'Ahir than his daughter was. Steven testified that Xy'Ahir was staying with him in the days immediately preceding his death. Steven recounted two times during Xy'Ahir's last stay when Xevion picked Xy'Ahir up from his house—the first time Xevion was with Defendant and the second time Steven was not home at the time. Steven testified that when Xevion arrived with Defendant the first time he picked up Xy'Ahir, he allowed him to do so, but the two "had a few words" afterward. Specifically, Steven stated that Xevion called his house and said, "If you don't give me my baby, somebody's going to get hurt." Steven testified that he told Xevion to come get him, and he then arrived with Defendant.

Steven stated that he has prior convictions in state and federal court for drug charges. He testified that his daughter, Xy'Ahir's mother, stole three and a half pounds of marijuana from him about a month before his grandson's death. He indicated that at that time, he was selling marijuana, but he has not sold marijuana since his grandson's death. Steven said he did not get his marijuana back because his daughter told him she gave it to Xevion to sell. He stated that he talked to Xevion about it, but he denied ever having the marijuana. He later indicated that he heard Xevion bought a car with the money from the stolen marijuana. He also

[31] The trial court found Defendant in contempt for not answering questions and for cursing in court. The court sentenced him to serve six months consecutive to the sentence he was already serving.

[32] When later asked if Charmaine was Xevion's mother, Steven replied that he was referring to his baby's grandmother. This appears to be Xevion's biological mother, who provided her name and relationship to Xevion in the recorded interview of Xevion during which she was present.

stated that he told Xevion to take the marijuana and get his daughter and grandson a place to stay. When asked, he agreed that it made him want to take violent action against Xevion, but he denied going to Caddy Drive and shooting anyone or asking anyone to do that for him. Steven testified that he would not put his grandson at risk, and he knew Xevion had the baby with him at that time.

Darrick Cotton testified that his cousin is Michelle Smith, and she goes by "Shirley." He noted that Ms. Smith is his "daddy's brother's daughter." He stated that at the time of the shooting he was living on Lee Place, and Ms. Smith was living with her children on Caddy Drive where the shooting occurred. Mr. Cotton indicated that he frequented Caddy Drive and had numerous friends in the immediate area. He stated that Defendant[33] is his "cousin-slash-nephew" and that Defendant's father is Mr. Cotton's mother's first cousin and his cousin. Mr. Cotton testified that he has known Defendant his whole life and treated him like a nephew. He said he often provided Defendant with transportation after he got out of jail and described various places they would visit.

Mr. Cotton testified that he picked Defendant up from Ms. Smith's house on Caddy Drive "some days before the shooting." He stated that Defendant came out of the front door. He indicated that he passed the house on Caddy Drive the night of the shooting as he left a girlfriend's house and stopped to console Ms. Smith. He acknowledged that he did not tell the police or the district attorney's office that he picked Defendant up from the house prior to the murder, but he told Defendant's first attorney. Mr. Cotton testified that he did not see Defendant the day of the shooting but saw him the afternoon before. He was not aware of Defendant acquiring a phone the day before the shooting. Mr. Cotton acknowledged that he had a prior misdemeanor conviction for domestic abuse

[33] Mr. Cotton indicated that he does not call Defendant "Dugga" but rather "Little Bow Wow."

battery and a conviction in 2011 for violating a protective order. He denied having convictions for possession of marijuana or simple criminal damage to property.

After a four-day trial, the 12-person jury unanimously found Defendant guilty as charged as to counts one, two, and three, and found Defendant guilty as charged as to count four by an 11-1 concurrence.

Defendant filed a Motion for Judgment of Acquittal or in the Alternative Motion for New Trial and Motion in Arrest of Judgment on December 6, 2019. The trial court heard and denied the motion on this same date. Afterward, on that same date, Defendant waived sentencing delays, and the trial court sentenced Defendant as to count one to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. As to count two, Defendant was sentenced to serve 50 years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. As to counts three and four, Defendant was sentenced on each count to serve 20 years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The trial court ordered count one and count two to run "consecutive to each other." The trial court ordered counts three and four to "run concurrent to counts one and two."

On December 27, 2019, Defendant filed a motion to reconsider his sentences and a motion for appeal. The motion for appeal was granted by the court on January 6, 2020. The trial court denied the motion to reconsider sentences on January 14, 2020.[34] The instant appeal followed.

ASSIGNMENTS OF ERROR

On appeal, Defendant alleges: 1) the guilty verdicts are contrary to the law and evidence presented; 2) the trial court erred in granted the State's motion to admit La. C.E art. 404(B) evidence; 3) the trial court erred in allowing

[34] Pursuant to La. C.Cr.P. art. 916(3), the trial court retained jurisdiction after granting the appeal to rule on the motion to reconsider sentence.

inadmissible evidence to be presented; 4) the trial court erred in denying his motion for mistrial; 5) the 11-1 verdict for count four, possession of a firearm by a convicted felon, is null and void; 6) the indictment improperly joined the offenses; 7) the trial court erred in denying his motion to quash for misjoinder of offenses; 8) the trial court erred in denying his motion for new trial; 9) the trial court erred in denying his motion to reconsider sentence; 10) the trial court erred in denying his motion *in limine*; 11) the trial court erred in denying his motion for post-verdict judgment of acquittal/new trial; 12) the trial court erred in allowing evidence of an alleged November 29, 2019 shooting; and, 13) the imposition of his sentences was unconstitutionally excessive.

LAW AND ANALYSIS[35]

Sufficiency of the Evidence and Denial of the Motion for New Trial[36]

Defendant asserts that the State failed to prove second degree murder, attempted second degree murder, and possession of a firearm by a convicted felon.[37] Defendant notes that there were two witnesses to the shooting—Xevion Davis and M.J. He contends that, while Xevion acknowledged he was there, Xevion said that he did not see the shooting or see Defendant at the scene.

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[35] The assignments of error that are interrelated will be jointly discussed.

[36] When the issues on appeal relate to both the sufficiency of the evidence and one or more trial errors, the reviewing court should first determine the sufficiency of the evidence by considering the entirety of the evidence. *State v. Hearold*, 603 So.2d 731, 734 (La. 1992). As the Louisiana Supreme Court has explained, "[t]he reason for reviewing sufficiency first is that the accused may be entitled to an acquittal under *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981). Such an acquittal would necessarily prevent any retrial." *State v. Harrell*, 19-371 (La. App. 5 Cir. 7/8/20); 299 So.3d 1274. Thus, sufficiency of evidence analysis also precedes consideration of whether a verdict must be vacated and remanded under *Ramos*, *infra*. *See State v. Kelly*, 19-425 (La. App. 5 Cir. 7/31/20); 299 So.3d 1284; *Harrell*, *supra*. *See also Hearold*, *supra*; *State v. Gilley*, 19-1543 (La. App. 1 Cir. 7/17/20); 2020 WL 4034792, *writ denied*, 20-1067 (La. 12/22/20); 307 So.3d 1026; *State v. Hunter*, 19-901 (La. App. 4 Cir. 5/27/20); 2020 WL 2751914, *writ denied*, 20-1360 (La. 2/17/21); 2021 WL 613158. *But see State v. Jenkins*, 20-2 (La. App. 3 Cir. 6/10/20); 2020 WL 3071594; *State v. Boner*, 19-658 (La. App. 4 Cir. 6/24/20); 302 So.3d 131. Therefore, the sufficiency of the evidence is addressed before Defendant's other assignments.

[37] Defendant only argues insufficient evidence as to one of the counts of possession of a firearm by a convicted felon, count four, which is the same charge as count three but on a later date. Nevertheless, we find that the evidence presented which allowed the jury to conclude that Defendant shot and killed Xy'Ahir and shot M.J. served simultaneously to allow the jury to conclude that Defendant intentionally possessed a firearm. *See State v. Nelson*, 14-252 (La. App. 5 Cir. 3/11/15); 169 So.3d 493, 504 n.15, *writ denied*, 15-685 (La. 2/26/16); 187 So.3d 468. *See also State v. Saulny*, 16-734 (La. App. 5 Cir. 5/17/17); 220 So.3d 871, 878, *writ denied*, 17-1032 (La. 4/16/18); 240 So.3d 923; *State v. Griffin*, 14-251 (La. App. 5 Cir. 3/11/15); 169 So.3d 473, 484. Further, Ms. Sinon testified at trial that she matched

Defendant states that at trial, Xevion repeatedly denied seeing Defendant and stated several times that he lied to the police. Defendant avers that Lieutenant Meunier acknowledged that Xevion provided various versions of the events. Defendant notes that the State did not call the second witness to the shooting, M.J., to testify at trial. Defendant contends that, if the jury relied on Xevion's testimony, it would have concluded that Defendant was not one of the shooters. However, he further states that, if Xevion testified falsely, the jury should have disregarded his testimony. Defendant argues that regardless of whether Xevion was truthful or lied at trial, his testimony identifying Defendant as the shooter has diminished value.

Defendant further avers that there is no DNA evidence or ballistics evidence connecting him to the crimes. Defendant argues that with no DNA evidence, no credible eyewitness evidence, no ballistics evidence, and no video surveillance in existence, the State's case rests on a single fingerprint. He states that Mr. Cotton provided a rational explanation for the fingerprint in his testimony that he picked Defendant up from that home days prior to the shooting. He also notes that Mr. Meyers provided information that was inconsistent with physical evidence from the crime scene. Defendant asserts that given the evidence presented at trial, the jury made an irrational decision to convict him.

As to count four,[38] Defendant asserts that he was merely present during the seizure of the firearm from the vehicle on December 13, 2016. He states that he was a rear passenger while the weapon was recovered between the center console and front passenger seat. Defendant also alleges that "incompetent hearsay," which the jury should not have heard, was introduced at trial involving an alleged statement made by his sister. Defendant states that the jury failed to act in a

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Defendant's fingerprints to those in two conviction packets which reflected that Defendant was convicted in July 2009 for possession of marijuana second offense wherein he was sentenced to two years and six months imprisonment and was also convicted in February 2007 for possession of cocaine wherein he was sentenced to one year imprisonment.

[38] Defendant also notes that, as he discusses later in his brief, this count was non-unanimous and should be remanded for a new trial.

"rationale [*sic*]" fashion in its deliberations. He concludes that the evidence adduced at trial failed to prove beyond a reasonable doubt that he committed these offenses and asserts that this case should be remanded for a new trial.

The State argues that considering the evidence presented, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. The State notes that Xevion provided two statements in which he identified Defendant as a shooter, he identified Defendant in a photographic lineup, and he testified to the grand jury that he saw Defendant shoot. The State asserts that Xevion identified Defendant as hanging in the door during the shooting, and that identification occurred before Defendant's fingerprint was found on the door frame. The State further argues that the evidence established that the only time Defendant could have left the print at 2188 Caddy Drive was at the time of the shooting. The State points to the narrow window of time to leave the print due to Defendant's recent incarceration and notes that Detective Zeagler testified that the residents of 2188 Caddy Drive all stated Defendant had never been there before the day of the incident. The State argues that Defendant himself told police he did not know anyone there, had never been to that house, and did not know Xevion.

The State further avers that Mr. Meyers testified that Defendant told him he shot the baby, did not want Xevion to testify at trial, wanted Xevion to take back his statement, and wanted Xevion dead. The State asserts that the password-protected phone obtained from Defendant's back pocket was activated on December 2, 2016, and deactivated on December 17, 2016, a few days after Defendant's arrest. The State argues that the phone was registered to Defendant's father but was not his primary phone, and the phone had called Defendant's father's primary phone about thirty minutes before the shooting. The State contends that the call utilized a tower less than a mile from the murder scene that serviced the Caddy Drive area. The State argues that the phone was turned off and

next used at 5:00 p.m. when a call used a tower located across the river. Further, the State asserts that the phone was used at approximately 11:00 p.m. on the date of the homicide to search on nola.com for information pertaining to the shooting earlier that day. The State concludes that based upon the foregoing, any rational trier of fact could have found beyond a reasonable doubt that Defendant committed the crimes of second degree murder and attempted second degree murder.

Additionally, the State argues that the use of the gun by Defendant during the commission of the shooting in counts one and two placed him in possession of a firearm on December 3, 2016, for purposes of count three. The State asserts that as to count four, Sergeant Gai's testimony established that Defendant's sister provided information that the loaded .40 caliber semi-automatic weapon found in the vehicle had been in Defendant's possession. The State contends that hearsay evidence not objected to constitutes substantive evidence. The State generally asserts that the evidence established Defendant had felony convictions for possession of cocaine and possession of marijuana, second offense; Defendant possessed the firearms within 10 years of the prior convictions; and, that he had the requisite general intent. The State therefore concludes that it proved beyond a reasonable doubt all of the necessary elements for the jury to find Defendant guilty as charged in counts three and four. The State further concludes that the trial court did not abuse its discretion in rejecting Defendant's post-verdict challenge to the sufficiency of the evidence.

The question of sufficiency of evidence is properly raised in the trial court by a motion for post-verdict judgment of acquittal under La. C.Cr.P. art. 821. *State v. Bazley*, 09-358 (La. App. 5 Cir. 1/11/11); 60 So.3d 7, 18, *writ denied*, 11-282 (La. 6/17/11); 63 So.3d 1039. Here, Defendant filed a Motion for Post-Verdict Judgment of Acquittal or in the Alternative Motion for New Trial and Motion in Arrest of Judgment, arguing in relevant part that there was insufficient evidence to

support the jury finding him guilty specifically as to the offense of second degree murder. The trial court heard and denied the motion on December 6, 2019. Defendant objected. Although Defendant's motion only challenged the sufficiency of the evidence as to the second degree murder conviction, sufficiency as to the other counts can nevertheless be considered. The failure to file a post-verdict judgment of acquittal does not preclude appellate review of the sufficiency of the evidence. *State v. Thomas*, 08-813 (La. App. 5 Cir. 4/28/09); 13 So.3d 603, 606 n.3, *writ denied*, 09-1294 (La. 4/5/10); 31 So.3d 361 (citing *State v. Washington*, 421 So.2d 887, 889 (La. 1982)).

In reviewing the sufficiency of the evidence, an appellate court must determine if the evidence, whether direct or circumstantial, or a mixture of both, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime have been proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Mickel*, 09-953 (La. App. 5 Cir. 5/11/10); 41 So.3d 532, 534, *writ denied*, 10-1357 (La. 1/7/11); 52 So.3d 885. A review of the record for sufficiency of the evidence does not require the court to ask whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. *State v. Jones*, 08-20 (La. App. 5 Cir. 4/15/08); 985 So.2d 234, 240. Rather, a reviewing court is required to consider the whole record and determine whether a rational trier of fact would have found the State proved the essential elements of the crime beyond a reasonable doubt. *Id.*; *State v. Price*, 00-1883 (La. App. 5 Cir. 7/30/01); 792 So.2d 180, 184.

The requirement that the evidence be viewed in the light most favorable to the prosecution requires the reviewing court to defer to "the actual trier of fact's rational credibility calls, evidence weighing and inference drawing." State v. *Caffrey*, 08-717 (La. App. 5 Cir. 5/12/09); 15 So.3d 198, 202, *writ denied*, 09-1305

(La. 2/5/10); 27 So.3d 297. The credibility of witnesses is within the sound discretion of the trier of fact, who may accept or reject, in whole or in part, the testimony of any witness; the credibility of the witnesses will not be reweighed on appeal. *State v. Saulny*, 16-734 (La. App. 5 Cir. 5/17/17); 220 So.3d 871, 876, *writ denied*, 17-1032 (La. 4/16/18); 240 So.3d 923. In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a requisite factual finding. *Caffrey*, 15 So.3d at 202. *See also State v. Anderson*, 18-45 (La. App. 5 Cir. 10/17/18); 258 So.3d 997, 1004, *writ denied*, 18-1848 (La. 4/15/19); 267 So.3d 1131. "The reviewing court is not permitted 'to decide whether it believes the witness or whether the conviction is contrary to the weight of the evidence.'" Id. It is not the function of the appellate court to assess credibility or re-weigh the evidence. *State v. Smith*, 94-3116 (La. 10/16/95); 661 So.2d 442, 443.

Evidence may be either direct or circumstantial. Circumstantial evidence consists of proof of collateral facts and circumstances from which the existence of the main fact can be inferred according to reason and common experience. *State v. Williams*, 05-59 (La. App. 5 Cir. 5/31/05); 904 So.2d 830, 833. When circumstantial evidence is used to prove the commission of an offense, La. R.S. 15:438 provides that "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." *State v. Wooten*, 99-181 (La. App. 5 Cir. 6/1/99); 738 So.2d 672, 675, *writ denied*, 99-2057 (La. 1/14/00); 753 So.2d 208. This is not a separate test from the *Jackson* standard but rather provides a helpful basis for determining the existence of reasonable doubt. *Id*.

When circumstantial evidence forms the basis of a conviction, such evidence must consist 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. Williams*, 99-223 (La. App. 5 Cir. 6/30/99); 742 So.2d 604, 608. To preserve the role of the fact-finder, *i.e.*, to accord the deference demanded by *Jackson*, the Louisiana Supreme Court has further subscribed to the general principle in cases involving circumstantial evidence that when the fact-finder at trial reasonably rejects the hypothesis of innocence advanced by the defendant, "that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt." *State v. Captville*, 448 So.2d 676, 680 (La. 1984); *State v. Garrison*, 19-62 (La. App. 5 Cir. 4/23/20); 297 So.3d 190, 204, *writ denied*, 20-547 (La. 9/23/20); 301 So.3d 1190. A reasonable alternative hypothesis is not one "which could explain the events in an exculpatory fashion" but one that "is sufficiently reasonable that a rational juror could not 'have found proof of guilt beyond a reasonable doubt.'" *Captville, supra* (quoting *Jackson, supra*); *Garrison, supra*.

Encompassed within proving the elements of an offense is the necessity of proving the identity of the defendant as the perpetrator. *Saulny*, 220 So.3d at 876. Where the key issue is identification, the State is required to negate any reasonable probability of misidentification in order to carry its burden of proof. *Id*.

Defendant in the instant case was found guilty by a jury of second degree murder in violation of La. R.S. 14:30.1(A)(1)[39] (count one), attempted second degree murder in violation of La. R.S. 14:27 and La. R.S. 14:30.1 (count two), and two counts of possession of a firearm by a convicted felon in violation of La. R.S. 14:95.1 (counts three and four).

To prove second degree murder, in this case the State was required to prove (1) the killing of a human being, and (2) that the defendant had specific intent to kill or inflict great bodily harm. *See* La. R.S. 14:30.1(A)(1); *State v. Lawson*, 08-123 (La. App. 5 Cir. 11/12/08); 1 So.3d 516, 522. Additionally, the law does not

[39] The jury was instructed as to specific intent second degree murder.

require that the intent to kill be of the specific victim but only that the defendant had the intent to kill someone. *State v. Yelverton*, 12-745 (La. App. 5 Cir. 2/21/13); 156 So.3d 53, 64, *writ denied*, 13-629 (La. 10/11/13); 123 So.3d 1217. In order to prove attempted second degree murder, the State was required to prove beyond a reasonable doubt that the Defendant specifically intended to kill[40] a human being and that he committed an overt act in furtherance of that goal. *Anderson*, 258 So.3d at 1002.

To support a conviction of possession of a firearm by a convicted felon, the State must prove beyond a reasonable doubt that defendant had: (1) possession of a firearm; (2) a prior conviction for an enumerated felony; (3) absence of the ten-year statutory period of limitation; and (4) the general intent to commit the offense. *State v. Kelly*, 19-425 (La. App. 5 Cir. 7/31/20); 299 So.3d 1284, 1288.

As to his convictions for second degree murder and attempted second degree murder (counts one and two), Defendant does not contest on appeal that the State failed to prove any of the essential statutory elements of the crimes for which he was convicted. Rather, Defendant contends that there is insufficient evidence to support his convictions based upon the alleged insufficient circumstantial evidence in this case linking him to the crimes and alleged lack of witness credibility.[41] Defendant does not challenge the sufficiency of the evidence as to count three.[42]

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[40] This Court has recognized that although specific intent to inflict great bodily harm is sufficient to support a second degree murder conviction, attempted second degree murder requires a specific intent to kill. *Anderson*, *supra*; *Saulny*, 220 So.3d at 877.

[41] Because Defendant does not raise any arguments relating to the sufficiency of the evidence with respect to the statutory elements, we will not address the evidence as it relates to each essential element. *See Nelson*, 169 So.3d at 500; *State v. Henry*, 13-558 (La. App. 5 Cir. 3/26/14); 138 So.3d 700, 715, *writ denied*, 14-962 (La. 2/27/15); 159 So.3d 1064. When considering *State v. Raymo*, 419 So.2d 858, 861 (La. 1982), the State presented sufficient evidence under the *Jackson* standard to establish the essential statutory elements of second degree murder and attempted second degree murder. We find that Defendant shot Xy'Ahir, resulting in his death. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person as well as the extent and severity of the victim's injuries. *State v. Bartholomew*, 18-670 (La. App. 5 Cir. 10/23/19); 282 So.3d 374, 382. We also find that Defendant shot M.J. eleven times, demonstrating an overt act and specific intent to kill.

[42] While Defendant does not argue insufficient evidence as to count three, when considering *Raymo*, *supra*, the State presented sufficient evidence under the *Jackson* standard to establish the essential statutory elements of possession of a firearm by a convicted felon. Specifically, the record indicates that Defendant was convicted in July 2009 for a possession of marijuana second offense wherein he was sentenced to two years and six months imprisonment and another in February 2007 for possession of

As to count four, Defendant does not challenge his prior convictions for enumerated felonies or the absence of the 10-year statutory period of limitation.

In *State v. Cowart*, 01-1178 (La. App. 5 Cir. 3/26/02); 815 So.2d 275, *writ denied*, 02-1457 (La. 5/9/03); 843 So.2d 387, the defendant was indicted for first degree murder. There was no physical evidence linking the defendant to the crime, and a single witness identified the defendant as the perpetrator of the shooting. Blood found on the victim's cane that the victim allegedly used to hit the defendant in the face tested negative for the defendant's blood. Further, fingerprint evidence from the casings and shells did not match the defendant, and no other evidence had any serological value. Additionally, the police conducted two searches of the defendant's girlfriend's apartment but did not retrieve the murder weapon, bullets, or clothing matching the description of that worn by the suspects. At trial, the defendant attacked the reliability of the eyewitness because she was a convicted felon, had been under psychiatric care, had initially lied to the police, gave a description that did not match the defendant, had perjured herself during motion hearings, and changed her story about the crime scene and the number of shots she heard. This Court held that despite this lengthy list of deficiencies, it was within the jury's discretion to believe the witness's testimony. *Id.*

In *State v. Griffin*, 14-251 (La. App. 5 Cir. 3/11/15); 169 So.3d 473, this Court determined the evidence was sufficient to support the defendant's conviction for second degree murder based on the testimony of a single eyewitness. No physical evidence existed to link the defendant to the murder. The eyewitness was the victim's childhood friend, and he provided a statement identifying the

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cocaine wherein he was sentenced to one-year imprisonment. The current offense occurred in December 2016, which was within 10 years of the prior convictions. Additionally, at trial Ms. Sinon identified a fingerprint card she took of defendant's fingerprints that day in court. She stated that those fingerprints matched those on two conviction packets for Defendant—one in July 2009 for a possession of marijuana second offense, wherein he was sentenced to two years and six months imprisonment and another in February 2007 for possession of cocaine wherein he was sentenced to one year imprisonment. The record reflects that he possessed the firearm at the time of the shooting and had the requisite general intent to do so.

defendant as one of three shooters two days after the murder. He did not know the defendant's name but knew him from the neighborhood. The eyewitness did not testify because he died of multiple gunshot wounds prior to trial. Therefore, the jury only heard the eyewitness' taped statement and grand jury testimony. Various witnesses pointed out inconsistencies in the eyewitness' statement regarding his location when the shooting occurred. The eyewitness purchased beer prior to the shooting and had a conviction for a third offense driving while intoxicated. Two witnesses testified that they did not believe the eyewitness was intoxicated at the time of the shooting or at the time of his statement. This court noted that the jury made a credibility determination and chose to believe the eyewitness, despite the slight inconsistencies, in that the defendant was a shooter involved in the murder.

In *State v. Martin*, 15-77 (La. App. 5 Cir. 10/14/15); 177 So.3d 790, *writ denied*, 15-2121 (La. 11/18/16); 210 So.3d 283, the defendant was convicted of second degree murder and challenged the sufficiency of the evidence specifically regarding the testimony of the two eyewitnesses who identified the defendant as the perpetrator of the crime. The defendant contended that these eyewitnesses were not credible due to their criminal history and personal relationships with the victim. The defendant asserted that the details and statements provided by these witnesses were inconsistent, one wrote a letter recanting his prior identification, and the statements between the two witnesses were contradictory. This Court stated that it was not irrational for the jury to accept the witness' explanation that he wrote his recantation when pressured by the defendant in the Jefferson Parish Correctional Center so that he could later retaliate against the defendant "back on the streets." This Court further acknowledged that the other witness was afraid, had been placed in a witness protection program, and did not want to testify at trial. This Court concluded that despite the lack of physical evidence linking the defendant to the murder and the testimony of the defendant's alibi witness, the jury

made credibility determinations and chose to believe one or both of the eyewitnesses.

In the instant case, we find that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that Defendant committed second degree murder and attempted second degree murder beyond a reasonable doubt.

First, Defendant's fingerprint was located in the doorway of the entrance to 2188 Caddy Drive. At trial, Xevion repeatedly described Defendant as "hanging in the door" during the shooting, and, as previously stated, Ms. Sinon confirmed Xevion's assertions and testified that she found a conclusive match for Defendant's left middle finger on the exterior door frame of the living room. Defendant repeatedly stated—in his recorded statement, which was played for the jury—that he had not ever visited 2188 Caddy Drive and that he did not know anyone there. The jury also heard Xevion state that he had never brought Defendant to 2188 Caddy Drive, Defendant had never been to that house, and that the people in that house did not "affiliate" with Defendant. Mr. Cotton was the only person to provide an alternative explanation for Defendant's fingerprint at Caddy Drive, which not even Defendant agreed with. We find that the jury was entitled to weigh the testimony and make a credibility determination, placing Defendant at 2188 Caddy Drive on the night in question.

Second, phone records place Defendant in the vicinity of the shooting. Detective Zeagler stated that the phone found on Defendant at the time of his arrest was activated on December 2, 2016—the day before the shooting—and deactivated on December 17, 2016—a few days after Defendant's arrest. The jury further heard Detective Zeagler testify that the shooting occurred shortly after 4:00pm and the phone was turned off on the day of the shooting roughly between 4:07 p.m. and 5:00 p.m. The last use of the phone prior to the murder used a cell tower roughly

a mile from the house on Caddy Drive. And, the phone records indicated several searches for news articles related to the shooting.

Additionally, in regards to Defendant's claim that there is a lack of credible witness testimony to support his conviction, we disagree. As to the numerous inconsistent statements by Xevion, we find that the jury made a credibility determination. Detective Zeagler testified that Mr. Houston, the alleged second shooter, was charged with intimidation of a witness. He acknowledged thatThe jury could have reasonably determined that Xevion was truthful in identifying Defendant as the shooter, but recanted out of fear. As previously discussed, at some point after the shooting, Xevion and Mr. Houston encountered each other at a gas station and Xevion reported that Mr. Houston made a veiled threat on Xevion's life relating to Xevion's cooperation with the police. Detective Zeagler testified that Mr. Houston, the alleged second shooter, was charged with intimidation of a witness. Mr. Meyers testified that Defendant plainly stated that he wanted Xevion dead. And, Xevion actually was shot nine times between the death of his son and trial. Furthermore, Defendant's assertion that the State merely did not call the second witness to the shooting, M.J., to testify at trial, is woefully inaccurate. Detective Zeagler testified that that he and "all the detectives on [his] squad" unsuccessfully attempted to locate M.J. leading up to the trial. This is not a matter of the State failing to meet its burden, but rather of witness unavailability. Based on the foregoing, we find that the there was sufficient evidence as to counts one and two.

Thus, we find there was sufficient evidence to support Defendant's convictions for counts one and two.[43] We conclude that circumstantial evidence—Defendant's fingerprint and the proximity of the cell tower to the scene—

[43] As to count four (possession of a firearm by a convicted felon), an errors patent review was performed for that offense and, as a result, find no corrective action necessary in regards to that review. However, further discussion of count four is presented *infra*.

reasonably support a finding that Defendant was present at the house on2188 Caddy Drive at the time of the shooting, even though Defendant denied ever being there. Further, the jury appears to have chosen to give less weight to Mr. Cotton's testimony explaining the presence of Defendant's fingerprint at the house. Because the evidence was sufficient, we find that the trial court did not err in denying Defendant's motion for new trial.[44]

The 11-1 verdict is null and void

In this matter, Defendant filed a Motion to Declare Article 782(A) Unconstitutional Because It Allows for a Non-Unanimous Verdict in This Non-Capital Felony Trial. The trial court heard the motion before trial on September 16, 2019. At the hearing, defense counsel acknowledged the then-pending decision in *Ramos*[45] regarding the constitutionality of a non-unanimous verdict. He asserted that a non-unanimous verdict is discriminatory and produces a disparate impact to Defendant. He also noted a district court ruling that found a non-unanimous verdict unconstitutional. The State asserted that the law is clear, and the statute is constitutional until declared otherwise by a court of this state. The State concluded that the court should uphold a non-unanimous verdict unless, and until, the Supreme Court declared it unconstitutional. The trial court denied the motion and Defendant objected.

On appeal, Defendant asserts that in the recent decision in *Ramos*, the Supreme Court invalidated the non-unanimous verdict system in Louisiana. He notes that he previously filed a Motion to Declare La. C. Cr. P. art. 782

[44] 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. La. C.Cr.P. art. 851(A). The decision on a motion for a new trial rests within the sound discretion of the trial judge, and his ruling will not be disturbed on appeal absent a clear showing of an abuse of discretion. *State v. Molette*, 17-697 (La. App. 5 Cir. 10/17/18); 258 So.3d 1081, 1094, *writ denied*, 18-1955 (La. 4/22/19); 268 So.3d 304.

[45] *Ramos v. Louisiana*, 590 U.S. ---, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020).

Unconstitutional and that the verdict as to count four was not unanimous. As such, Defendant concludes that the verdict is legally infirm, null, and void.

The State acknowledges that the verdicts in counts one, two, and three were unanimous while the verdict in count four, possession of a firearm by a convicted felon, was 11-1. As such, the State concedes that *Ramos* controls as to count four and "dictates the result of this issue presented on appeal."

The penalty for a conviction of second degree murder is found in La. R.S. 14:30.1,[46] which provides that whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Additionally, La. R.S. 14:27 states that if the offense attempted is punishable by life imprisonment, he shall be imprisoned at hard labor for not less than ten nor more than fifty years without benefit of parole, probation, or suspension of sentence. As such, the penalty for attempted second degree murder is 10 to 50 years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Finally, the penalty for possession of a firearm by a convicted felon is found in La. R.S. 14:95.1, which provided at the time of the offense, in part, that whoever commits this offense shall be imprisoned at hard labor for not less than 10 nor more than 20 years without the benefit of parole, probation, or suspension of sentence and be fined not less than $1,000 nor more than $5,000.

Since the punishment for these offenses are necessarily confinement at hard labor, a jury of twelve persons was required. *See* La. Const. Art. I, § 17; La. C.Cr.P. art. 782;[47] La. R.S. 14:30.1; La. R.S. 14:27; La. R.S. 14:95.1. The record

[46] The law in effect at the time of the commission of the offense is determinative of the penalty imposed. *State v. Sugasti*, 01-3407 (La. 6/21/02); 820 So.2d 518, 520.

[47] La. C.Cr.P. art. 782 was amended by Acts 2018, No. 493, § 1 to require unanimous jury verdicts in cases where confinement was necessarily at hard labor where the offense occurred on January 1, 2019, or thereafter. La. Const. Art. I, § 17 was amended by Acts 2018, No. 722, § 1, requiring unanimous verdicts in all cases in which punishment is confinement necessarily at hard labor where the offenses were committed on or after January 1, 2019. Defendant's offenses were committed prior to

reflects that on November 7, 2019, the jury unanimously found Defendant guilty of counts one, two, and three and found defendant guilty of count four—possession of a firearm by a convicted felon—by an 11-1 verdict. Non-unanimous jury verdicts were previously allowed based on the circumstances of the instant case.[48]

However, the non-unanimous verdict in the instant case as to count four is now improper under *Ramos v. Louisiana*, 590 U.S. ---, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020). In *Ramos*, the United States Supreme Court found that the Sixth Amendment right to a jury trial—as incorporated against the states by the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense. The Court concluded: "There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal trials equally … So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court." As a result of the Supreme Court's decision in *Ramos*, defendants who were convicted of serious offenses by non-unanimous juries and whose cases are still pending on direct appeal will be entitled to a new trial. Here, because Defendant was convicted of a serious offense by a non-unanimous verdict and his case is pending on direct appeal, Defendant's conviction and sentence should be vacated, and he is entitled to a new trial as to count four. *See State v. Spears*, 18-663 (La. App. 5 Cir. 1/13/21); 2021 WL 117103; *State v. Youngblood*, 18-445 (La. App. 5

January 1, 2019, requiring that ten jurors must concur to render a verdict. *See* La. Const. Art. I, § 17; La. C.Cr.P. art. 782(A).

The constitutionality of La. Const. Art. I, § 17 and La. C.Cr.P. art. 782 was previously addressed by many courts prior to the changes. For example, *see Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); *State v. Bertrand*, 08-2215, 08-2311 (La. 3/17/09); 6 So.3d 738; *State v. Brooks*, 12-226 (La. App. 5 Cir. 10/30/12); 103 So.3d 608, *writ denied*, 12-2478 (La. 4/19/13); 111 So.3d 1030. However, on April 20, 2020, *Ramos v. Louisiana*, 590 U.S. —, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020) was decided.

[48] In 1972, the United States Supreme Court, in a plurality decision, previously determined that the United States Constitution did not mandate unanimous jury verdicts in state court felony criminal trials. *See Apodaca*, *supra*. Further, the Louisiana Supreme Court and this Court previously held that non-unanimous jury verdicts for twelve-person juries are not unconstitutional in non-capital cases. *See Bertrand*, 6 So.3d at 742-43; *State v. Bonilla*, 15-529 (La. App. 5 Cir. 2/24/16); 186 So.3d 1242, *writ denied*, 16-567 (La. 5/2/16); 206 So.3d 881, *cert. denied*, -- U.S. --, 137 S.Ct. 239, 196 L.Ed.2d 183 (2016); *Brooks*, 103 So.3d at 613-14.

Cir. 12/9/20); 308 So.3d 417; *State v. McQuarter*, 19-594 (La. App. 5 Cir. 11/25/20); 305 So.3d 1055, *State v. Lim*, 20-20 (La. App. 5 Cir. 9/22/20); 304 So.3d 114; *Kelly*, *supra*; *State v. Ford*, 19-242 (La. App. 5 Cir. 7/8/20); 307 So.3d 1115.

Based on *Ramos* and the fact that the instant case is on direct appeal, we find that the verdict was not unanimous for this serious offense. Accordingly, we vacate the conviction and sentence as to count four and remand the matter to the trial court for further proceedings as to this count only.[49]

Inadmissible evidence, the denial of the Motion for Mistrial, and the denial of the Motion for New Trial[50]

Defendant asserts that the trial court should have granted his motion for mistrial and granted a new trial. Defendant states that Mr. Meyers testified and had a plea agreement with the District Attorney's office regarding open felony charges. Defendant notes that Mr. Meyers stated Defendant admitted his participation in the shooting. Defendant asserts that when Mr. Meyers was asked if Defendant told him why he did it, Mr. Meyers indicated that Xevion owed Defendant money from a robbery. Defendant states that he then objected and moved for a mistrial on the grounds of improper introduction of other crimes evidence.[51] Defendant argues that this was also asserted in his motion for new trial, which was denied.

Defendant further asserts that Lieutenant Meunier testified that one of Xevion's statements included an assertion that Defendant and Mr. Houston went to

[49] *See Youngblood*, *supra* (wherein this Court vacated count one because the verdict as to that count was non-unanimous but affirmed the verdicts as to counts two and three, which were unanimous); *State v. Perez-Espinosa*, 19-601 (La. App. 5 Cir. 9/22/20); 302 So.3d 598 (wherein this Court vacated count one because the verdict as to that count was non-unanimous but affirmed the verdict as to counts two, which was unanimous); *J.E*, *supra* (where this Court vacated counts three through five because the verdicts as to these counts were non-unanimous but affirmed the verdict as to count six, which was unanimous).

[50] To align with argument two in Defendant's brief, assignments of error numbers three, four, and eight are discussed together.

[51] It is noted that Defendant asserts that the motion for mistrial was made at the bench and was not transcribed. Defendant asserts he requested the transcript.

Caddy Drive to commit a robbery. He states that Lieutenant Meunier referred to the instant case as a homicide committed during commission of a different robbery. Defendant avers that La. C.Cr.P. art. 770 provides that a mistrial is warranted when there is a remark made regarding another crime committed or alleged to be committed by a Defendant. He avers that Mr. Meyers' remarks point to a prior robbery committed by Defendant. Defendant asserts that the State's interpretation of Mr. Meyers' testimony is not accurate and fails to indicate how the State interpreted it or to specify the inaccuracy. Defendant concludes that the motion for mistrial should have been granted, and that the trial court's failure to do so is reversible error.

The State asserts that this argument is without merit. The State notes that the testimony at issue arose during direct examination of a State witness, Mr. Meyers. The State argues that after Defendant's request for a mistrial, the trial court denied the motion based on, among other things, the general nature of the reference to a robbery and the fact that the jury had previously heard other testimony of a robbery. The State contends that the trial court also noted that the subject was addressed on cross, redirect, and direct. The State further asserts that the ruling was based in part on the court's first-hand observations of the jury during that testimony. The State notes that the issue was addressed in Defendant's motion for a new trial and a hearing on that motion. The State argues that the record establishes that the trial court did not abuse its discretion in denying a mistrial and subsequently denying Defendant's motion for a new trial.

The State further asserts that during argument on the motion for a mistrial, the State advised the court that Defendant had received notice and information on the issue and that it formed part of the potential motive and constituted *res gestae*. The State argues that the prosecutor agreed to move on without further reference and spoke to Mr. Myers to inform him that he would not be asked further questions

as to a motive. The State contends that even assuming arguendo that the subject matter was not properly within the scope of admissible evidence, the jury heard only a brief and vague reference to a robbery where the witness did not name Defendant as the perpetrator. The State avers that neither the prosecutor's questions nor the witness' answers unmistakably pointed to a robbery committed by Defendant as the questioning was interrupted prior to the witness identifying the person to whom he was referring as the perpetrator of the robbery. The State also asserts that the jury previously heard about a robbery when Lieutenant Meunier testified that a robbery was a potential motive and when referenced in Xevion's December 13th statement. The State contends that the jury had no reason to believe that Mr. Meyers' reference to a robbery was not to the same robbery previously mentioned. The State argues that Defendant failed to establish an abuse of discretion by the trial court in denying Defendant's motions for a mistrial and for a new trial. The State concludes that Defendant is not entitled to relief.

Generally, evidence of other crimes committed by a defendant is inadmissible at trial due to the risk of grave prejudice to the defendant. *State v. Williams*, 01-1007 (La. App. 5 Cir. 2/26/02); 811 So.2d 1026, 1030, *writ denied*, 08-2070 (La. 1/30/09); 999 So.2d 751. Evidence of other acts of misconduct is generally not admissible because it creates the risk that the defendant will be convicted of the present offense simply because the unrelated evidence establishes him or her as a "bad person." *State v. Ventris*, 10-889 (La. App. 5 Cir. 11/15/11); 79 So.3d 1108, 1123-24.

However, such evidence may be admitted by certain statutory and jurisprudential exceptions to the exclusionary rule when it tends to prove a material issue and has independent relevance other than showing that the defendant is of bad character. *State v. Montero*, 18-397 (La. App. 5 Cir. 12/19/18); 263 So.3d 899, 907. Evidence of other crimes is admissible to prove motive, opportunity,

intent, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding to such an extent that the State could not accurately present its case without reference to the prior bad acts. La. C.E. art. 404(B)(1);[52] *Lawson*, 1 So.3d at 525.

In order for other crimes evidence to be admitted under La. C.E. art. 404(B)(1), one of the factors enumerated in the article must be at issue, have some independent relevance, or be an element of the crime charged. *Lawson*, 1 So.3d at 525-26. Moreover, the probative value of the extraneous evidence must outweigh the prejudicial effect. La. C.E. art. 403.[53]

Upon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771. La. C.Cr.P. art. 775. A mistrial is mandated upon a defendant's motion "when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to ... another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible." La. C.Cr.P. art. 770(2). An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. La. C.Cr.P. art. 770. If the defendant, however, requests that only an admonition be given, the court shall admonish the

[52] La. C.E. art. 404(B)(1) provides:

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.

[53] La. C.E. art. 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."

jury to disregard the remark or comment but shall not declare a mistrial. La. C.Cr.P. art. 770.

La. C.Cr.P. art. 771(1) provides that upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the State, in the mind of the jury when the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.

As a general rule, Article 770 does not apply to testimony by a state witness, since a witness is not considered a "court official." However, an impermissible reference to another crime deliberately elicited by the prosecutor is imputable to the State and triggers the rule mandating a mistrial. *Ventris*, 79 So.3d at 1122; *State v. Carter*, 07-270 (La. App. 5 Cir. 12/27/07); 976 So.2d 196, 201. Although the jurisprudence has held that an impermissible reference to another crime deliberately elicited of a witness by the prosecutor would be imputable to the State and would mandate a mistrial, unsolicited and unresponsive testimony is not chargeable against the State to provide a ground for mandatory reversal of a conviction. *Id*. The Louisiana Supreme Court has stated that the comment must not "arguably" point to a prior crime; to trigger mandatory mistrial pursuant to Article 770(2), the remark must "unmistakably" point to evidence of another crime and the imputation must "unambiguously" point to the defendant. *State v. Lestrick*, 13-289 (La. App. 5 Cir. 10/9/13); 128 So.3d 421, 433, *writ denied*, 13-2643 (La. 4/25/14); 138 So.3d 6439 (citing *State v. Edwards*, 97-1797 (La. 7/2/99); 750 So.2d 893, 906, *cert. denied*, 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed.2d 421 (1999)).

Further, a statement is not chargeable to the State solely because it was in direct response to questioning by the prosecutor. *Ventris, supra*. Although a prosecutor might have more artfully formulated the question that provoked a witness' response, where the remark was not deliberately obtained by the prosecutor to prejudice the rights of the defendant, it is not the basis for a mistrial. *Ventris, supra*. An improper reference to other crimes evidence is subject to a harmless error analysis. *Carter, supra*.

A mistrial is a drastic remedy and is warranted only when a trial error results in substantial prejudice to the defendant that deprives him of a reasonable expectation of a fair trial. *State v. Evans*, 19-237 (La. App. 5 Cir. 6/3/20); 298 So.3d 394, 405. Whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed absent an abuse of that discretion. *State v. Davis*, 12-512 (La. App. 5 Cir. 4/24/13); 115 So.3d 68, 79, *writ denied*, 13-1205 (La. 11/22/13); 126 So.3d 479.

At trial, the prosecutor and Mr. Meyers had the following exchange:

State: Mr. Meyers, did he, did the defendant, Mr. Manuel, tell you why he did this?

Mr. Meyers: Red owed him.

State: Say that one more time, Mr. Meyers.

Mr. Meyers: Red owed him.

State: What did Red owe him?

Mr. Meyers: Money.

State: From what? Did he tell you from what?

Mr. Meyers: A robbery.

State: Who committed a robbery?

Defense Your Honor, may we approach?

Counsel:

Thereafter, the jury exited the courtroom, and a bench conference followed.

At the bench conference, the defense requested a mistrial due to the reference to "another criminal matter." The State asserted that defense counsel had notice, that it was part of Defendant's motive, and part of the *res gestae* of the offense. When asked by the trial court if he had notice, defense counsel answered affirmatively and stated that "their argument was on a previous date." He continued to assert that the motive was retaliation for a shooting a few days prior to this shooting, and the State argued such in opening statement.[54] Defense counsel asserted that the State was now talking about a different instance of robbery that was not part of the original theory. The trial court noted that the defense did not file a motion *in limine* or anything to that effect. The court also stated that it was "res gestae to explain the case to the jury as to why this individual took a statement in the same cell as the gentleman."

Defense counsel then asserted that the prosecutor told him he was going to argue "the motive of the shooting that occurred following." He contended that the prosecutor said it would not bring "this other stuff in." Defense counsel then stated that he and the State had a conference on the issue and that at the conference, the prosecutor said it could not come in but that the prior shooting could come in if he had corroborating evidence. He argued that the State told him "nothing else about all these robberies and incidents would come in." The prosecutor asserted that it had no intention to deceive the defense and that the motive was not known. The State further offered to have a hearing *in limine* at that time because he admitted he "absolutely told him what he just said." Defense counsel argued that it was "just not right" to have a hearing because he would have researched the issue and

[54] Transcripts of the opening statements are not included in the record.

prepared. The prosecutor replied, "I'm going to live up to my word, if you don't think you can properly defend your client in a hearing like that, okay; so let's talk about what the scope of examination can be." The State warned defense counsel that he would have to be careful on cross-examination so as not to open the door.

The prosecutor clarified that he understood defense counsel's interpretation of their prior conversation but that was not his meaning; the State asserted that it would change "course" as a result. The State noted that Mr. Meyers had information regarding Xevion being shot at a gas station and that the fact he was shot was already in evidence. The State then said, "And, you know, and him saying that he wants Xevion dead is his admission. We can agree on that; so if we stay completely away from motive, you have to stay away from motive on cross; is that fair enough?" Defense counsel agreed and the court stated that the defense needed to talk to the witness. Defense counsel said he still needed to move for a mistrial.

The Court responded,

> Okay. I don't believe in any way that a mistrial is warranted. I'm going to deny it based on the fact that this jury has heard multiple times of robbery. They heard it on the tape from the defendant with Lieutenant Meunier; and so as far as they know, that's what everybody's talking about. There's no way. There's been no dates. There's been no times that have been given to this jury. And since it was a generality that was used - -

Thereafter, the court and prosecutor both said only a robbery without a date or time frame had been discussed. Defense counsel noted that he thought Mr. Meyers was saying that Defendant was robbed, which was different from what the jury heard. The prosecution responded that Mr. Meyers indicated Xevion owed Defendant money from a robbery but did not provide who robbed him or who was involved. The court stated, "You brought it up in cross. He brought it up in redirect and direct; so it's out there for the jury."

Defense counsel responded, "Just for the record, Judge." The trial court then stated,

> That's fine. I don't have a problem with you doing that. Just but for the record, I'm just going to state that based on the number of times that robbery has been brought up and it wasn't objected to earlier, then I don't believe that the jury has enough of a time stamp or a grasp for them to be in any way poisoned to the point where it doesn't offer the defendant a fair trial. I mean I don't believe it's risen to that level. If I did, I would grant the mistrial. I was looking at them. They weren't surprised by what was said because they've already heard it I don't know how many different times; so you brought it up. You brought it up. It's not anything that prejudices your client, because if there had been a time and a date - - then I would probably grant your motion, because then it would not be aligned with what was given by Mr. Davis. … So it hasn't risen to that level. It's just a general term, robbery; so I don't believe it's risen to the level where your client is prejudiced and can't receive a fair trial; so I'll deny that.

Defense counsel noted his objection, and the bench conference concluded. In continuing its examination, the State informed Mr. Meyers that he had been asked about motive for the crime but would no longer be asked about it. The State asked defense counsel if such statements were adequate, and he answered affirmatively.

Defense counsel again argued the issue in his Motion for Judgment of Acquittal or in the Alternative Motion for New Trial and Motion in Arrest of Judgment. The defense averred that he was unfairly prejudiced, denied due process, and should be granted a new trial. Defense counsel noted Mr. Meyers' prior convictions and his deal with the State in exchange for his testimony. He stated that Mr. Meyers testified regarding a prior robbery committed by Defendant. Defense counsel asserted he objected and moved for a mistrial. Defense counsel argued that the State never represented its intent to introduce an alleged robbery under Louisiana Code of Evidence 404(B) and noted that the trial court denied his request for a mistrial.

Defense counsel asserted that Lieutenant Meunier stated Xevion told him Defendant and Mr. Houston went to Caddy Drive to rob Xevion. He argued that

Mr. Meyers testified about a separate robbery Defendant allegedly committed prior to that shooting. Defense counsel stated that the Court ruled that the robbery discussed by Mr. Meyers was not distinguished from the robbery discussed by Lieutenant Meunier. However, defense counsel asserted that there is no way to determine if the jury believed Mr. Meyers was referring to the same or a different robbery.

This motion was argued before the court on December 6, 2019. Defense counsel argued that Mr. Meyers mentioned a robbery not related to the December 3rd offense. He noted that he then objected and asked for a mistrial because the evidence was related to "other crimes bad evidence." He stated that the information was "out there" and could not be taken back. He argued that the information was significant because "we also have the other charge, felon in possession with a firearm; so now we can talk about a convicted felon, possession of cocaine, convicted felon, possession of marijuana; and then we have a robbery that has nothing to do with this case." Defense counsel noted that the court denied his motion. Defense counsel then stated that he and the State had pretrial discussions about what could or could not come in and agreed that the robbery would not. He asserted that he objected during the testimony, and they "tried to clean it up," but such measures were not sufficient because the jury already heard about this robbery. He noted that a detective previously testified that Xevion said Defendant and Mr. Houston came to the house that night to rob him. He asserted that Mr. Meyers mentioned a different robbery. Defense counsel argued that the court should reconsider its prior ruling and grant the motion for mistrial because of this other crimes evidence.

Issues beyond Mr. Meyers' testimony but relating to this overall motion and the granting of a new trial were also argued at this hearing. The State argued that Mr. Meyers testified regarding a robbery after testimony from several witnesses

about an armed robbery possibly being a motive for the shooting. The State asserted that at the bench conference following defense counsel's objection, the court stated that the jury had already heard testimony from several witnesses about the motive behind this shooting being an armed robbery and instructed the parties not to bring it up again. The State argued that Mr. Meyers was told not to talk about a robbery anymore and said, "while he never stated that it was a prior robbery or a separate date or separate set of facts, we had also turned that information over." The State asserted that the defense had Mr. Meyers' full statement and plea agreement before trial. The State averred that everything Mr. Meyers testified to was previously presented to the defense except for one inconsistency that the State elicited from him.

The trial court noted that the jury had already heard about a robbery that Mr. Meyers referred to, there was "never any specificity as to dates and separate acts," and it went to the totality of one offense. The court then stated,

> The jury was instructed to follow the law which they did. The jury was also instructed that it applies to 95.1 and other instances that they were not to find your client guilty mainly based on other charges; that the jury would instruct them that they were only to be judging him on the acts that he's charged with, not on any other prior offenses. And I believe that you had ample opportunity in voir dire and there were people excused that couldn't follow the law and said that if an individual was charged with multiple offenses that involved priors, they couldn't be fair; so they were excused; so these were all jurors that said they could follow the law. As you were allowed to voir dire them, the State was allowed to voir dire them; rather long, too. It was a long voir dire; so based on all the things and what I've said to you, I'm going to deny your motion as it applies to that. I'll note your objection.

In response, defense counsel acknowledged that he received a statement from Mr. Meyers in which he discussed a robbery committed by defendant and Xevion prior to the shooting. Defense counsel stated that when Mr. Meyers mentioned robbery, he knew where Mr. Meyers was going. He said, "I would just ask that the record speak for itself in terms of what he said, how he said it, what was delivered to the

jury with respect to that particular robbery. I think he said more than just robbery." The trial court then responded,

> Well, the jury had already heard about a robbery; so as far as the jury is able to infer that this is a continuation of the original testimony of the robbery. The jury didn't infer, they didn't have any other information to suggest that it was multiple acts; so like I said, it's the Court's contention based on the totality of all the evidence presented and the evidence that was allowed to be introduced, that the jury did its job. And I don't believe that they in any way, that information or evidence prejudiced your client; so I'll note your objection.

The trial court then denied the defense's motion.

In *Ventris*, 79 So.3d 1108, this Court found that the State did not solicit the statement from the defense witness that the defendant was his drug dealer. Rather, the court noted that the question regarding their relationship could have been answered in many ways other than the way it was actually answered. The Court stated that even when the State took the questioning a step further and inquired as to the time period of the relationship, the State was faced with conflicting testimony and was trying to present an explanation for the discrepancies. The length of the relationship appeared relevant to the credibility of the witness. The Court concluded that a mistrial was not mandated because the statement was not imputable to the State. Further, this Court found that the trial court did not err in denying the motion for a mistrial because the defendant failed to show how he was prejudiced by the comment, and the witness' remark did not make it impossible for the defendant to obtain a fair trial.

In the present case, we find that the State did not solicit the statement from Mr. Meyers in that Mr. Meyers could have answered the question of whether or not he knew why Defendant committed the offense in a number of ways. Additionally, we find that the trial court did not err in denying the motion for a mistrial because defense counsel failed to show how Defendant was prejudiced by the comment, and the witness' remark did not make it impossible for Defendant to obtain a fair

trial. As noted by the trial court, prior to Mr. Meyers' testimony, the jury heard a taped interview from Xevion in which he stated that Defendant was at the house on Caddy Drive to rob him because Xevion had marijuana and/or money. Lieutenant Meunier was asked on cross-examination about Xevion's statement regarding Defendant being at the house to rob him. Xevion denied his own involvement with any robbery prior to the shooting. Further, as noted by the trial court, Mr. Meyers' remarks appear somewhat vague and could be inferred to be remarks as to the previously mentioned robbery, not a different robbery committed by Defendant and Xevion as asserted by Defendant. Finally, unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged, and defense counsel has failed to show prejudice from Mr. Meyers' remarks. *See State v. Smith*, 19-607 (La. App. 5 Cir. 1/21/20); 2020 WL 356010, *writ denied*, 20-328 (La. 5/1/20); 295 So.3d 945.

On appeal, an improper reference to other crimes evidence is subject to the harmless error rule, *i.e.*, whether the verdict actually rendered in the case was surely unattributable to the error. *State v. Nelson*, 02-65 (La. App. 5 Cir. 6/26/02); 822 So.2d 796, 805, *writ denied*, 02-2090 (La. 2/21/03); 837 So.2d 627.

We find that, in light of Xevion's numerous yet inconsistent statements and identification, Defendant's fingerprint at the crime scene, the rest of Mr. Myers' testimony, and the evidence from Defendant's phone—including the internet searches, location, and service dates—the verdicts rendered were unattributable to Mr. Myers' remark. We further find that the trial court did not err in denying Defendant's motions for mistrial and for a new trial.

Improperly joined offenses and the denial of the Motion to Quash for Misjoinder of offenses[55]

In his next argument, Defendant asserts that counts three and four were improperly joined with counts one and two. Defendant notes that the indictment charged Defendant with second degree murder and attempted second degree murder (counts one and two), which occurred on December 3, 2016. He states that the indictment then charged him with two counts of possession of a firearm by a convicted felon (counts three and four), which occurred on December 3, 2016, and December 16, 2016. He asserts that he filed a Motion to Quash for Misjoinder of Offenses prior to trial, and the court denied his motion. Defendant argues that the statute for possession of a firearm by a convicted felon requires the State prove Defendant had a prior felony conviction, and the State introduced two alleged prior felony convictions—possession of cocaine and possession of marijuana second offense, case numbers 06-3796 and 08-6205, respectively, in the 24th Judicial District Court. Defendant avers that these prior convictions were not admissible as to the charges of second degree murder and attempted second degree murder. He also asserts that the State was able to inform the jury that Defendant was incarcerated for seven years prior to the date of the shooting. Defendant contends that the prior convictions would "rationally infer" to the jury that Defendant has a prior criminal disposition and that "by including Counts 3 and 4 with the first two counts, the intended effect of jury hostility was achieved."

Defendant avers that the State intentionally joined the offenses so that it could inform the jury of Defendant's criminal history and prior incarceration, and he notes that he did not testify at trial. Defendant argues that the court's jury charge was also prejudicial and specifically cites the following charge:

> Evidence that the defendant was involved in the commission of an offense other than the offense for which he is on trial is to be

[55] To align with argument three in Defendant's brief, assignments of error numbers six and seven are discussed together.

> considered only for the limited purposes of determining whether he committed the crime for which he is presently charged.

Defendant asserts that two weapons were seized but neither were connected to the incidents in counts one and two. He argues that to a rational jury, the weapons demonstrate defendant's "propensities for firearms." He states that this is not probative as to whether he committed the murder but rather is overly prejudicial. Defendant contends that the weapons offenses were included so as to allow the introduction of the prior felonies, which should have been excluded and served no independent, legitimate purpose. Defendant avers that the offenses informed the jury that he has a significant criminal history, served a substantial term of prior incarceration, has a strong tendency to possess firearms, and is guilty of second degree murder and attempted second degree murder. Defendant argues that the denial of the motion to quash was not harmless error beyond a reasonable doubt. He contends that counts one and two should have been charged separately from counts three and four. He concludes that the motion to quash for misjoinder should have been granted.

The State asserts that relief is not warranted as to this argument. The State avers that defense counsel's memorandum in support of his motion to quash demonstrates that he believed the December 3, 2016 events, and the December 13, 2016 events were not linked, were not of the same or similar character, were not close enough in time, involved different guns, and would be prejudicial if tried together. The State notes that the court denied the motion. The State further asserts that at the trial level, defense counsel did not argue that counts three and four should be severed from counts one and two but rather only requested that count four be severed. The State argues that had the trial court granted the motion to sever count four, the jury would still have heard evidence of the prior convictions at trial during the presentation of evidence as to count three. The State

concludes that Defendant's argument is not properly before the court, and the rationale in Defendant's brief is "defeated by the relief actually sought."

The State asserts that, should this Court consider the grounds raised at the trial court level, relief would still not be warranted. The State avers that all four counts were triable by the same mode of trial, and the charges were connected. The State contends that the offenses at issue were properly charged in the same indictment, and the trial court's denial of the motion to quash was legally sound. The State avers that defense counsel's argument as to prejudicial joinder is weaker. The State specifically asserts that the facts and charges are not complicated, the jury would not be confused by the counts, and the jury would not have difficulty segregating the evidence of each count.

The State avers that the record does not reflect that Defendant was confounded in presenting his defense and that the trial court clearly instructed the jury as to each of the four charged offenses. The State contends that jurisprudence reflects that possession of a firearm and second degree murder have been tried together and that multiple counts of possession of a firearm by a convicted felon have been tried together, even where not all of the counts occurred on the same day. The State notes that the crimes in counts one through three form the basis of the arrest warrant for Defendant that resulted in his arrest and the charge in count four. The State asserts that joinder of the offenses would not render the jury hostile towards Defendant or cause the jury to infer a criminal disposition. Further, the State argues that Defendant was facing more serious crimes of violence associated with the December 3rd gun possession and that the jury was informed that different weapons were possessed on the different dates. The State concludes that Defendant failed to establish either misjoinder or prejudicial joinder in regard to the counts.

On March 18, 2019, Defendant filed a Motion to Quash Indictment on the Grounds of Misjoinder of Offenses. In his motion, Defendant asserted that count four was dissimilar to the other counts in that it was "not based on the same act or transaction or not on two or more acts or transactions connected together; and does not constitute parts of a common scheme or plan with counts 1, 2, and 3." Defendant specifically argued that his December 13, 2016 arrest stemmed from the execution of an arrest warrant for first degree murder, attempted first degree murder, and carrying a firearm by a convicted felon. He argued that no evidence from that date relates to the December 3, 2016 charges and that the firearm seized incident to his arrest was not linked to ballistics evidence obtained from the December 3rd shooting at Caddy Drive.

That same date, defense counsel filed a memorandum in support of his motion. In addition to the arguments in his motion, defense counsel asserted that the incidents of December 3, 2016, and December 13, 2016, do not involve the same facts, evidence, or witnesses. He argued that the two different guns possessed on the different dates were not uniquely similar and were "in no way" linked to each other. He noted that the offenses of possession of a firearm by a convicted felon are not crimes of violence like second degree murder and attempted second degree murder. He argued that the facts of the offenses are not of the same or similar character, and the only similarity is that he was charged with the same offense on different dates, one offense as a result of the shooting and the other as a result of his arrest. He asserted that there was a ten-day time lapse between the two incidents and that no probative evidence from December 13th is relevant to support a conviction for the shooting. He noted that the gun from December 13th was not linked by ballistics to evidence recovered at the scene of the shooting.

Further, Defendant argued that because the guns used in the shooting were never recovered, the jury would be confused by the firearms and tool marks evidence in the same trial. He asserted that "the crimes charged would undoubtedly be used by the jury to infer a criminal disposition." He noted that prior convictions would already be admissible as to count three, but count four would serve as "an additional weight of prejudice" to Defendant. He further argued that given the death of a 10-month-old child, the jury would already be sympathetic and trying him with this additional count would further "inflame the jury and divert it from deciding the case on the relevant evidence." Defendant asked that the trial court grant his motion to quash the indictment and sever count four from counts one, two, and three.

On September 16, 2019, the trial court held a hearing on Defendant's motion to quash. Defense counsel explained that Defendant was arrested on December 13, 2016, pursuant to an arrest warrant. He, along with three other people, was a passenger in a vehicle in which a firearm was located and "they charged him for a new arrest regarding the possession of a firearm." Defense counsel argued that he was charged for that possession of a firearm in the same indictment as "the homicide, as well as the attempted homicide, and the felon in possession with a firearm." He asserted that the police examined the firearm from December 13th, and it was not the same firearm used "in the homicide." He argued that the firearm was "never traced back" to Defendant, but he was charged. He averred that it was neither similar nor part of a common scheme. Defense counsel asserted that "it has no remote connection whatsoever."

Defense counsel argued that that the "two felonies" could be linked for efficiency but indicated that Defendant would be substantially prejudiced if the State could talk about an incident of possession of a firearm on December 13th. Defense counsel asserted that Defendant would also be substantially prejudiced by

the introduction of two prior felony convictions. Defense counsel argued that there was "no way" Defendant could get a fair trial and that such evidence would taint the jury.

The State argued that the charges are connected together in that the arrest was made pursuant to a warrant pertaining to a homicide. The State further asserted that Defendant was effectively asking that the court exclude the circumstances surrounding Defendant's arrest for second degree murder. The State argued that the actions were connected and that the arrest was less than two weeks after the murder. The State averred that it was incorrect to say the charge was unrelated to the homicide, not part of the same chain of events, or that "if the State had elected not to charge him with being a felon in possession as part of this indictment, that [the State] would be barred from introducing evidence relating to the circumstances of his arrest on that charge."

Defense counsel asserted that he was justified in seeking to remove the December 13, 2016 charge of possession of a firearm from the indictment. He indicated that the State could still present evidence regarding the arrest and that the only similarity was that the charge occurred during the execution of the warrant. He also questioned the need for the State to present evidence of two felonies when the law only requires one felony to be convicted of possession of a firearm by a convicted felon. Defense counsel further questioned the necessity for the jury to hear that Defendant was in prison for seven years. Defense counsel implied that the State sought to introduce both convictions to demonstrate that he is "just always in trouble."

On September 16, 2019, the trial court held a hearing on Defendant's motion and subsequently denied Defendant's motion. In giving its ruling, the trial court stated,

> I understand your argument. But, under 493 of the Code of Criminal Procedure, it allows the State to use any and all avenues and resource [sic] where everything is connected. And it says "Two or more offenses may be charged with the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction, or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial".
>
> And that's what's going to happen, and that is a viable article; therefore, based upon the argument presented and the code article that specifies the actions, the Court's going to deny the Motion to Quash.

Defense counsel then asked the court to strike the bill of indictment, so that it includes only one felony instead of two. The trial court denied the request, explaining that the State decides such decisions. The court further stated that the indictment was valid and "that there's no problems whatsoever in the way the joinder of the offenses are. Therefore, I'm going to deny." Defense counsel responded that he believed the court could ask the State to strike or modify the indictment. The court indicated that it was an element, and the court would not strike it. Defense counsel objected.

A misjoinder of offenses can only be urged by a motion to quash the indictment. La. C.Cr.P. art. 495. Where a defendant fails to file a motion to quash the indictment or information, the defendant has been deemed to have waived any objection to the misjoinder of offenses. *State v. Robinson*, 11-12 (La. App. 5 Cir. 12/29/11); 87 So.3d 881, 910, *writ denied*, 12-279 (La. 6/15/12); 90 So.3d 1059.

A motion to quash shall specify distinctly the grounds on which it is based. The court shall hear no objection based on grounds not stated in the motion. La. C.Cr.P. art. 536. As per La. C.Cr.P. art. 536, this Court cannot hear any ground for reversal not stated in the original motion to quash. *State v. Pete*, 12-378 (La. App. 4 Cir. 3/20/13); 112 So.3d 353, 358. *See State v. Jordan*, 02-820 (La. App. 5 Cir.

12/30/02); 836 So.2d 609, 611 (This Court noted that it is well-established in our law that a new basis for an objection cannot be raised for the first time on appeal.).

Here, Defendant filed a Motion to Quash Indictment on the Grounds of Misjoinder of Offenses. We note, however, that Defendant only asserted below misjoinder as to count four. On appeal, Defendant argues that counts three and four were misjoined. Because misjoinder as to count three was not included in the original motion to quash, we decline to address this issue as to that count. Additionally, on appeal, Defendant is limited to his arguments originally presented to the trial court regarding count four.

As previously mentioned, at the trial court level, defense counsel argued that count four did not involve the same facts, evidence, or witnesses as the other three counts. He argued that the two guns possessed on separate dates were not uniquely similar and were not linked to each other. He asserted that no probative evidence from count four on December 13th is relevant to support a conviction for the shooting, and the gun from December 13th was not linked by ballistics to evidence recovered at the scene of the shooting. Defense counsel asserted that he would be prejudiced by the introduction of the two prior felonies and by the introduction of the incident in count four. As such, Defendant here is limited to these same arguments as to count four only.

La. C.Cr.P. art. 493 states:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial.

A defendant properly charged in the same bill of information with two or more offenses pursuant to La. C.Cr.P. art. 493 may nevertheless move for a severance of the offenses under La. C.Cr.P. art. 495.1, which provides: “If it

appears that a defendant or the state is prejudiced by a joinder of offenses in an indictment or bill of information or by such joinder for trial together, the court may order separate trials, grant a severance of offenses, or provide whatever other relief justice requires." The objections of misjoinder of defendants or misjoinder of offenses may be urged only by a motion to quash the indictment. La. C.Cr.P. art. 495.

The trial court must consider the following factors in determining whether prejudice results from a joinder of offenses: 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, considering the nature of the charges, the charging of several crimes would make the jury hostile. *State v. Maize*, 16-575 (La. App. 5 Cir. 6/15/17); 223 So.3d 633, 646, *writ denied*, 17-1265 (La. 4/27/18); 241 So.3d 306. Additionally, the trial court must consider whether prejudice from the joinder of offenses can be mitigated by clear jury instructions and by an orderly presentation of evidence by the State. *Id*.

A defendant alleging a prejudicial joinder of offenses has a heavy burden of proof. *State v. Molette*, 17-697 (La. App. 5 Cir. 10/17/18); 258 So.3d 1081, 1091, *writ denied*, 18-1955 (La. 4/22/19); 268 So.3d 304. A defendant is not entitled to a severance as a matter of right, but the decision is one resting within the sound discretion of the trial court. A denial of a motion to sever will not be overturned absent a clear abuse of discretion. *Id*.

In *State v. Johnson*, 16-99 (La. App. 5 Cir. 10/26/16); 203 So.3d 1121, *writ denied*, 16-2210 (La. 9/15/17); 225 So.3d 484, the defendant argued that the trial court erred in refusing to sever the two counts of the indictment, which he stated essentially forced him to plead guilty to the felon in possession of a firearm count

in order to avoid prejudice at trial for the second degree murder count. This Court noted that the two offenses occurred on the same date, and the State offered evidence at trial that the victim was killed as a result of gunshot wounds. This Court stated that the murder and the possession of the gun were similar in character or based on the same transaction. This Court held that the facts of each offense appeared sufficiently distinguishable so as to avoid confusion. Additionally, because the offenses were necessarily punishable by hard labor, they were triable by the same mode of trial before a twelve-person jury. Thus, this Court found no error with the two offenses being tried in the same proceeding and that the trial court did not abuse its discretion in denying the defendant's motion to sever.

In *State v. Jones*, 16-122 (La. App. 4 Cir. 10/5/16); 203 So.3d 344, *writ denied*, 16-2088 (La. 9/15/17); 225 So.3d 484, the defendant asserted on appeal that the February 11, 2014 offenses—two counts of felon in possession of a firearm—should have been tried separately from the February 17, 2014 offenses—attempted second degree murder and felon in possession of a firearm. He argued that he was prejudiced by trying all four counts together as the jury could have inferred from the first two counts that he had a criminal disposition. The court stated that the offenses were clearly of the same or similar nature. The court noted that three of the four charges were for the same crime—felon in possession of a firearm, and the fourth charge was based on the defendant's use of a gun to shoot the victim. The court stated that the evidence of each gun possession count and the attempted murder count were clearly presented and did not lead to jury confusion. The court held that the charges were properly joined and that the defendant failed to meet the necessary burden for obtaining relief.

It is noted that all counts in the instant case are triable by the same mode of trial before a 12-person jury because the offenses are necessarily punishable by hard labor. *See Johnson*, 203 So.3d 1121 (wherein this Court found that charges of

second degree murder and possession of a firearm by a convicted felon were triable by the same mode of trial).

Further, Defendant did not meet his heavy burden of proving prejudice under La. C.Cr.P. art. 495.1. We note that counts three and four are of the same character as they are both counts of possession of a firearm by a convicted felon. We also find that count four is based on the same act or transaction or on two or more acts or transactions connected together as the charge in count four stems from a warrant for Defendant's arrest as to the other counts. Also, the evidence of each crime was presented in a way so as to distinguish between the counts. The jury was able to segregate the various charges and evidence as it unanimously found Defendant guilty of counts one through three but found him guilty as to count four by a non-unanimous verdict.

Additionally, the trial judge charged the jury separately as to each offense, explaining in detail what the State was required to prove with respect to each count. The jury instructions also provided that the evidence of Defendant's prior conviction was admitted only for the limited purpose of determining whether he committed the presently-charged offense, that he was only on trial for the offenses charged, and that the jury was not to find him guilty of the charged offense merely because he may have committed another offense. We find that such jury instructions limited any prejudice.

Accordingly, we find that the offense in count four was properly joined, and the trial judge did not err in denying Defendant's motion to quash for misjoinder of offenses.

La. C.E. art. 404(B) evidence and the denial of the Motion *in Limine* (Incarceration) [56]

Pursuant to La. C.E. art. 404(B), Defendant challenges the admissibility of evidence regarding his prior incarceration. He asserts that the "gravely prejudicial" effect of the evidence outweighed the "non-existent probative value," such that the trial court committed reversible error in the admission of this evidence. More specifically, Defendant argues that the reference to his prior incarceration was "clearly" a reference to another crime and not a reference to the cocaine or marijuana convictions given the length of the incarceration. Additionally, he asserts that such 404(B) evidence failed to meet any statutorily permitted purpose, and lacked independent relevance.

The State argues that, at trial, it presented highly relevant evidence establishing the existence and the significance of Defendant's fingerprint at the location, as well as the time-frame during which it could have been placed at the house where the shooting occurred. The State further asserts that even if there was error, relief is not warranted because the evidence of Defendant's recent incarceration was not connected to a specific crime, and the jury was already aware that Defendant had prior convictions. The State concludes that the harmless error analysis demonstrates that the verdicts rendered would surely be unattributable to the jury being aware that defendant was previously incarcerated.

As a general rule, a court may not admit evidence of past crimes to prove a defendant possesses bad character and acted in conformity with that character. La. C.E. art. 404(B); *State v. Brown*, 17-348 (La. App. 5 Cir. 12/20/17); 235 So.3d 1314, 1322, *writ denied*, 18-158 (La. 11/5/18); 256 So.3d 276, *cert. denied*, -- U.S. --, 139 S.Ct. 2033, 204 L.Ed.2d 233 (2019). While the State may not admit evidence of other crimes to prove defendant is a person of bad character, evidence

[56] To align with argument five in Defendant's brief, assignments of error numbers two and 10 are discussed together.

of prior crimes may be admitted if the State establishes an independent relevance aside from providing defendant's criminal character. *Id*. Additionally, one of the factors listed in Article 404(B)[57] must be at issue, have some independent relevance, or be an element of the crime charged in order for the evidence to be admissible. *State v. Jackson*, 625 So.2d 146, 149 (La. 1993). Finally, even if independently relevant, the evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, by considerations of undue delay, or waste of time.[58] La. C.E. art. 403. The State must provide the defendant with notice and a hearing before trial if it intends to offer such evidence. *State v. Napoleon*, 12-749 (La. App. 5 Cir. 5/16/13); 119 So.3d 238, 242.

The burden is on the defendant to show that he was prejudiced by the admission of other crimes evidence. Absent an abuse of discretion, a trial court's ruling on the admissibility of evidence pursuant to La. C.E. art. 404(B) will not be disturbed. *State v. Le*, 13-314 (La. App. 5 Cir. 12/12/13); 131 So.3d 306, 317, *writ not considered*, 14-934 (La. 6/3/16); 192 So.3d 757. On appeal, an improper reference to other crimes evidence is subject to the harmless error rule, *i.e.*, whether the verdict actually rendered in the case was surely unattributable to the error. *Nelson*, 822 So.2d at 804.

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[57] La. C.E. art. 404(B)(1) provides:

> 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.

[58] The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged. *Smith*, *supra*.

On November 19, 2018, the State filed an Article 404(B) Notice. In that notice, the State said that the shooting occurred on December 3, 2016, within a residence that Defendant denied ever being present at. The State asserted that Defendant's fingerprint was found at that location. The State argued that Defendant was incarcerated for more than seven years preceding November 2, 2016, and that such evidence "substantially" limited the possibility of any other explanation for his fingerprint at that location. The State noticed its intent to offer evidence of Defendant's incarceration to establish his opportunity to commit the crimes and his identity as the perpetrator of the crimes.

On September 13, 2019, Defendant filed a motion *in limine* asking the court to prohibit the introduction of any evidence of, or reference to, Defendant's incarceration prior to the December 3, 2016 shooting. He contended that the prejudicial effect outweighed the probative value of the evidence because such evidence is "merely a subterfuge for depicting his bad character or his propensity for bad character."

On September 16, 2019, the trial court held a hearing on the issue. At the hearing, the State informed the court that it would play Defendant's audio-recorded interview for the jury and that Defendant refers to the fact that he was very recently incarcerated for a period of years. The State asserted that such evidence of Defendant's incarceration was relevant and admissible. The State further noted that a "primary piece of evidence" in the case is Defendant's fingerprint in the doorway and that Defendant left the fingerprint there at the time he committed the crimes. The State argued that in Defendant's statement, he denied ever being at the house and offered an explanation as to his whereabouts at the time of the offenses. The State contended that such evidence was relevant to refute other explanations as to why his fingerprint was there.

Additionally, the State asserted that the "extremely limited" time between Defendant's incarceration and the shooting was relevant. The State argued that such evidence addressed a primary issue in connection with the homicide and is thus significantly relevant. The State averred that Defendant was also charged with two counts of possession of a firearm by a convicted felon, and the jury would already hear that defendant has felony convictions.

The State clarified that it was not suggesting that the recent incarceration was from the prior convictions in the indictment but rather that because of his past crimes, the jury would not be surprised to hear that he was incarcerated. The State asserted that it did not intend to explain why Defendant was incarcerated for those years and that it would be reasonable to infer that someone convicted of a felony might serve time in jail. The State argued that "a jury would not be unduly prejudiced by hearing that this individual had served time in jail."

The trial court ruled in favor of the State and noted Defendant's objection. The trial judge stated,

> I find it to be material and relevant and probative as it was portrayed in that—that light. I believe that the jury is going to hear that Mr. Manuel, by the Indictment, was incarcerated, they're not going to be taken aback by hearing that. And I believe that any of that is substantially outweighed by the relevant and probative matter, and that it's material in fact to the case.
>
> So under that particular limited purpose, I'll allow it. I'll note your objection.

On December 6, 2019, Defendant filed a Motion for Judgment of Acquittal or in the Alternative Motion for New Trial and Motion in Arrest of Judgment. Among other issues, Defendant argued in that motion that he was unfairly prejudiced by the introduction of evidence that he was recently incarcerated because it served as "additional evidence of his bad character." He noted that at trial, as part of the elements to prove possession of a firearm by a convicted felon,

the State presented evidence of his previous sentences to show that the offense was within the 10-year period of completion of sentence of the previous felony. He argued that it was clear he was serving a sentence for another prior crime that he was not on trial for. His motion asserted that evidence he "committed a separate robbery, was in a car that was shot at four days prior to the murder and was incarcerated approximately thirty days prior to the murder unfairly prejudiced Mr. Manuel and made it impossible for him to have a fair trial."

The trial court heard that motion on December 6, 2019. As presented in the motion, defense counsel appeared to argue that Defendant was entitled to a new trial because he did not receive a fair trial for various evidentiary reasons including the admissibility of the prior felony convictions, mention of a prior robbery by Mr. Meyers, evidence relating to a shooting four days before the shooting on Caddy Drive, and evidence regarding Defendant's release from incarceration 30 days prior to the shooting. Specifically regarding Defendant's recent incarceration, defense counsel noted that Defendant's statement was played for the jury in which he indicated he was just released from jail and had not been out long enough to commit the charged offenses. Defense counsel argued that he filed a motion *in limine* to exclude evidence regarding his recent incarceration, and the court denied the motion. Defense counsel asserted,

> The State said, "Listen. If you look at the offenses from the felony, the convicted felon that we have prove [sic] to the jury, then perhaps the jury can just look at those offenses, convicted for possession of cocaine, convicted for possession of marijuana"; then maybe the jury can say, "Well, maybe he's doing time for those charges." But it was made clear that the time, the range, the State had to prove the sentencing range. Did he commit these charges within the ten-year period? I objected because I said, "Well, now it's becoming clear to the jury that he's doing time. He finished the time on those matters"; so he's incarcerated on something we don't know.

Defendant asserted that a fair trial was impossible with the admission of the reference to a robbery, the prior shooting, and his recent release from jail. He

further implied that the jury may have thought the incarceration was for the robbery Mr. Meyers referred to and thought that Defendant was a bad guy who was always in trouble.

The State responded that Defendant's incarceration until 30 days before the homicide was litigated pretrial, and the judge made a clear ruling. The State asserted that it demonstrated a "very small window" for Defendant's fingerprint to get on the door frame and that such window included the day of the shooting. The State indicated that such evidence was relevant to Defendant's guilt and that the trial court, after hearing the same arguments, determined prior to trial that it was relevant under Article 404.

Defense counsel and the State addressed the various other issues in the motion. Then, in ruling on the motion as a whole, the trial court stated,

> It was all the totality of one offense. The jury was instructed to follow the law which they did. The jury was also instructed that it applies to 95.1 and other instances that they were not to find your client guilty mainly based on other charges; that the jury would instruct them that they were only to be judging him on the acts that he's charged with, not on any other prior offenses. And I believe that you had ample opportunity in voir dire and there were people excused that couldn't follow the law and said that if an individual was charged with multiple offenses that involved priors, they couldn't be fair; so they were excused; so these were all jurors that said they could follow the law. As you were allowed to voir dire them, the State was allowed to voir dire them; rather long, too. It was a long voir dire; so based on all the things and what I've said to you, I'm going to deny your motion as it applies to that. I'll note your objection.

The trial court concluded: "Based on everything that I've heard and I've already made prior rulings along with those facts, I'm going to deny your motion for judgment of acquittal, a motion for a new trial, a motion to arrest the judgment. I'll note your objection to that."

We find that evidence of Defendant's incarceration until roughly one month prior to the shooting was relevant as to the opportunity and time in which Defendant could have left his fingerprint on the door frame at 2188 Caddy Drive.

The fingerprint placed Defendant at the scene of the shooting and Defendant's recent incarceration narrowed the time in which Defendant could have left his fingerprint. This is also relevant as it affects the credibility of Defendant's recorded statement in which he denied ever being at that house. We find that evidence of Defendant's recent incarceration is probative to the case.

We further find that such evidence is not overly prejudicial to Defendant. Evidence of two of Defendant's prior felony convictions and their sentences had already been introduced as elements of the two counts of possession of a firearm by a convicted felon. Additionally, Defendant voluntarily offered up the information in his December 13, 2016 interview, which was played for the jury. He explicitly stated that he had been "locked up" for seven years and three months, was released on November 7, 2016, and made several other references to the recent incarceration. To this end, we find that general reference to Defendant's previous incarceration was not prejudicial; rather, we conclude that the probative value of the evidence outweighed any prejudicial effect.

Nevertheless, even if evidence of Defendant's recent incarceration constituted inadmissible other crimes evidence, any such error is subject to a harmless error analysis. The test for determining if an error was harmless is whether the verdict actually rendered in the case was surely unattributable to the error. *State v. Barnett*, 18-254 (La. App. 5 Cir. 4/3/19); 267 So.3d 209, 225. We find that even if the trial court had erred by admitting the evidence, any such error would have been harmless considering the evidence of Defendant's guilt. In light of Xevion's statements and identification, Mr. Meyers' testimony, Defendant's fingerprint at the scene, and the wealth of evidence derived from Defendant's cell phone (internet searches, pinged location, service dates, etc.), the verdicts were surely unattributable to the evidence of Defendant's prior incarceration.

Accordingly, we find that the trial court did not err in granting the State's motion to admit Article 404(B) evidence and did not err in denying the motion *in limine*.

Denial of Motion for Post-Verdict Judgment of Acquittal/New Trial and November 29, 2019 shooting incident evidence[59]

Defendant argues that evidence of an alleged prior shooting involving Xevion and Defendant was non-probative and overly prejudicial. Defendant notes that Detective Dimitri was called by the State and testified as to a shooting incident on November 29, 2016, in which Defendant was allegedly present. He asserts that this was argued as error in the "Motion for Post Verdict Judgment of Acquittal/Motion for New Trial." Defendant avers that the State introduced such "irrelevant non-consequential, highly prejudicial evidence to mask the inability to prove that Jonathan Manuel as one of the actual shooters on Caddy Drive." Defendant contends that the probative value of such evidence was substantially outweighed by the prejudicial impact by causing confusion of the issues and misleading the jury. Defendant concludes that such evidence was not relevant and was inflammatory.

The State acknowledges that Detective Dimitri testified regarding a shooting on November 29, 2016, in which Defendant was in a vehicle that was shot at. The State notes that the testimony was admitted without objection to its relevancy or admissibility, and the defense did not cross-examine the witness on the matter. The State argues that Defendant's failure to object to the introduction of the evidence operates as a waiver of the issues raised in this argument. The State asserts that even if that was not the case, Defendant would still not be entitled to relief.

[59] To align with argument six in Defendant's brief, assignments of error numbers 11 and 12 are discussed together.

The State avers that the November 29th shooting was not alleged to have been committed by Defendant but rather against him. The State notes that defense counsel acknowledged that the State's theory of the case included the position that the shooting charged in counts one and two may have been an act of retribution against Xevion for the prior shooting that targeted Defendant several days earlier, and defense counsel acknowledged that he had advanced notice that the State intended to introduce evidence of the prior shooting. The State contends that Defendant failed to establish that the evidence was improperly admitted and/or confusing to the jury. The State notes that in denying Defendant's motion for new trial, the trial court stated that the evidence goes to Defendant's specific intent, that it was retribution, and that it formed part of the *res gestae*. The State therefore concluded that, while it maintains that Defendant's argument has not been preserved for appeal, he would not be entitled to relief, in any event.

The State filed an Article 768 Notice on September 17, 2019, which was the date the first jury was selected, regarding the expected testimony of several witnesses. One of these witnesses was Detective Dimitri, who was expected to testify that he interviewed Defendant as a witness on November 29, 2016, in connection with a shooting incident that occurred that morning. The notice further stated that Detective Dimitri's interaction with Defendant was summarized in JPSO Incident Report, K-23616-16, and that a copy of that report was provided to Defendant. Additionally, the notice indicated Brandon Davis would testify that, among other things, Defendant took responsibility for Xy'Ahir's murder and told him that the murder was committed in retaliation for an earlier incident in which Defendant was fired upon by the baby's father. The record does not reflect any objections or filings related to this notice by defense counsel.

On December 6, 2019, defense counsel filed a Motion for Judgment of Acquittal or in the Alternative Motion for New Trial and Motion in Arrest of

Judgment. Among other issues, defense counsel argued that he relied on the State's representation that it would not present evidence of motive of Defendant wanting to shoot Xevion absent corroborating evidence that defendant was in a car that was shot at by Xevion on November 29, 2019. Defense counsel asserted that in a teleconference with the State, defense counsel raised concerns regarding the admission of evidence that Defendant was in the car when it was shot at, and the female driver was wounded. He alleged that the State asserted it believed that the shooter was Xevion but agreed that the evidence would not be introduced unless the State had corroborating evidence. Defense counsel averred that the State informed him that it was still investigating to confirm that Xevion was the shooter, which would show Defendant's motive to retaliate. Defense counsel argued that he relied on that representation and did not file a Motion *in Limine* to preclude evidence of the November 29, 2016 incident.

Further, in the motion, defense counsel alleged that on the initial jury selection date, the State produced for defense counsel the transcribed statements of two witnesses that showed that Xevion was the shooter and tried to rob Defendant on November 29, 2016. Defense counsel asserted that he relied on the State's representations that it would call the witnesses during trial as corroborating evidence and argued that because of that representation, he did not object to the evidence for its lack of relevance and improper character evidence. He argued that he did not know that the State "changed course in the middle of trial" and only admitted testimony from Officer Dimitri. Defense counsel contended that he was unable to lodge a motion *in limine* and/or contemporaneously object because he relied on the State's previous representations that it would introduce supporting evidence from the witnesses, and he anticipated the corroborating witnesses would be called which would cure his prior objection during the teleconference. Defense counsel argued that those witnesses were never called. He asserted that Defendant

was unfairly prejudiced because the jury viewed another incident in which he was "involved in a violent unrelated incident which colored his character even more." Defense counsel argues that this, among other things, made it impossible for Defendant to have a fair trial.

On December 6, 2019, the trial court held a hearing on defense counsel's motion. At that hearing, other evidentiary issues beyond the November shooting were addressed. Pertaining to the prior shooting specifically, defense counsel again stated that during a teleconference with the State, he took issue with the admissibility of evidence relating to the shooting of the car four days before the murder. He asserted that he said at that time that it was not relevant, was prejudicial, and "paints" Defendant as a bad guy. Defense counsel said the State agreed with him but asserted if the State had corroborating evidence that Xevion was shooting at Defendant, evidence of the shooting would prove motive and be relevant. Defense counsel stated that he and the State agreed, and he did not file any motions.

Defense counsel argued that the State provided him with that evidence via transcripts from two witnesses on the first day of jury selection. He stated that he did not object at trial when the detective testified because he believed two other witnesses would testify, but they did not. Defense counsel asserted that there was no proof presented that the November shooting had anything to do with these charges. He asserted that he would have objected and filed a motion if he knew the State did not plan on calling those subpoenaed witnesses. Defense counsel noted, "We have him getting shot at four days before, just kind of dangling out there; nothing to do with this case. The jury hears it, but it's out there." Defense counsel argued that evidence of a robbery, that defendant was "shot up," and that he was just released from jail prevent Defendant from receiving a fair trial.

The prosecutor responded that he was not part of the previous conversation regarding the prior shooting and could not speak to it. The State noted that Defendant argued in his motion that such evidence was improper character evidence against him. The State asserted that such was "clearly not the case." The State argued that it presented evidence that Defendant was not the perpetrator of the shooting four days prior to the charged shooting. The State said, "He was the victim of a shooting several days prior to us coming to Court." The State concluded that the evidence was not improper character evidence "or anything else that is not admissible under the code of evidence." The State noted that it argued he was the victim of a shooting and not that he perpetrated another crime.

Defense counsel questioned the purpose and relevance of presenting him as a victim of the prior shooting. The trial court responded, "It goes to the argument of specific intent to kill when it happened on December 3rd. It's retribution. That's what it goes to." In response, defense counsel asserted that "we don't know who shot." He stated that evidence was not presented to demonstrate that Defendant was shot at. The trial court stated,

> I think the State is stating that the totality of all of the evidence presented by Xevion Davis, Michael Meyers, the police, the statements taken as a totality, that the jury could infer from the evidence that was received beyond a reasonable doubt that that shooting was the impetus for the murder, and it took place on December 3rd. That was the res gestae. That was what was the 404(b) which I ruled was, the evidence was more probative in its value to the State than any prejudicial effect to your client.

The court then denied Defendant's motion.

La. C.Cr.P. art. 841 states that an irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. The purpose of the contemporaneous objection rule is to allow the trial judge the opportunity to rule on the objection and thereby prevent or cure an error. *State v. Priest*, 18-518 (La. App. 5 Cir. 2/6/19); 265 So.3d 993, 1000, *writ denied*, 19-418 (La. 5/20/19); 271

So.3d 201. The failure to object to the introduction of evidence at the time it is offered operates as a waiver of any complaint on appeal. *Id.*

In *State v. Reaux*, 14-215 (La. App. 5 Cir. 11/25/14); 165 So.3d 944, 957, *writ denied*, 14-2639 (La. 10/9/15); 178 So.3d 1000, the defendant contended that the State improperly submitted other crimes evidence of the robberies committed in several areas through the testimony of four officers. This Court noted that the record showed the defendant failed to properly preserve this issue for appellate review because he failed to lodge a contemporaneous objection to the detectives' and lieutenant's testimony at trial or to request an admonition or mistrial pursuant to La. C.Cr.P. arts. 770 and 771. As such, this Court found that these issues were not properly preserved for this Court's consideration on appeal.

In *State v. Lyons*, 01-719 (La. App. 5 Cir. 11/14/01); 802 So.2d 801, the defendant argued that the trial court erred in allowing the State to elicit irrelevant and prejudicial testimony from a witness regarding her reasons for moving away from the neighborhood. This Court stated that defense counsel did not object to the line of questions until after the witness had given her answers. As such, this Court found that the defendant failed to preserve the issue for appeal because he failed to lodge a contemporaneous objection to that portion of the witness' testimony which he now challenges on appeal. This Court then noted that even if the defendant had preserved the issue, an improper reference to other crimes is subject to the harmless error analysis and any error in admitting the testimony was harmless because the guilty verdict was surely unattributable to the testimony.

We note that the State provided notice that it would call two witnesses who would testify regarding the November 29, 2016 shooting. Defense counsel did not object to this notice.[60] Additionally, we find that the only objections made by

[60] Defense counsel filed a motion to suppress the confession on July 10, 2017, prior to the State's notice, in which he asked the court "to suppress the use as evidence of all written or oral confessions or any other written or oral inculpatory statements obtained from the mover by law enforcement officers of

Defendant during Detective Dimitri's testimony were objections as to hearsay regarding what the victim told the detective and whether the people in the car at the time of the shooting would provide each other's names. As noted by the State in its brief, Defendant did not cross-examine Detective Dimitri. We find that Defendant waived any objection to the admissibility of evidence relating to the November 29, 2016 shooting.

Nevertheless, we note that even if Defendant had preserved the issue, improperly admitted evidence is subject to the harmless error analysis. *See State v. Oliphant*, 13-2973 (La. 2/21/14); 133 So.3d 1255, 1260. "An error is harmless when the verdict is 'surely unattributable to the error.'" *State v. LaGarde*, 07-288 (La. App. 5 Cir. 10/30/07); 970 So.2d 1111. As stated previously, the verdicts were unattributable to Detective Dimitri's testimony regarding the November 29, 2016 shooting in which Defendant was a victim, and it was harmless error.

Denial of motion to reconsider sentence and imposition of consecutive sentences[61]

Defendant argues that Louisiana Code of Criminal Procedure Article 883 favors concurrent sentences for crimes committed as part of the same transaction or series of transactions. He asserts that "significant jurisprudence" requires that the lower court articulate the reasons for imposing consecutive sentences. Defendant avers that "since the District Court focused on the trial testimony, it must be argued that this factor should not form the basis of consecutive sentences which in this matter, which constitute 100% of the absolute maximum possible sentence. Given the clear fact that both violations are part of the same criminal episode, the sentences should have been run concurrent." Defendant concludes

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the Jefferson Parish Sheriffs [*sic*] Office." This motion was not ruled on. When a defendant does not object to the trial court's failure to rule on a motion prior to trial, the motion is considered waived. *Rivera*, 134 So.3d at 66.

[61] To align with argument seven in Defendant's brief, assignments of error numbers 13 and 14 are discussed together.

that the court abused its discretion by imposing consecutive sentences in the instant case.

Defendant does not specify which sentences or counts he is challenging. However, the trial court ordered that count one and count two run consecutive to each other and counts three and four to run concurrent to counts one and two. As such, Defendant is only alleging an excessive sentence as to the consecutive nature of counts one and two. However, he also challenges the denial of his motion to reconsider sentences, which encompasses his sentence as to each count.

The State first maintains that Defendant is precluded from challenging the consecutive nature of his sentences on appeal because he did not specifically object to the consecutive nature of his sentencing upon imposition of the sentences, and he did not raise the issue as a specific ground in his motion to reconsider sentences. The State thus asserts that Defendant is not entitled to review of the consecutive nature of the sentencing on appeal as he is limited to bare review for constitutional excessiveness.

As to the constitutional excessiveness of Defendant's sentences, the State notes that the sentences are within the statutory ranges, and the sentences as to counts three and four are illegally lenient as the court did not impose the required fine. The State asserts that the court did not abuse its discretion in sentencing. Specifically, the State argues that Defendant placed multiple lives at risk by unleashing indiscriminate gunfire into a residence, that a 10-month-old was wounded and died as a result of the shooting, and that a teenager suffered 11 gunshot wounds and spent 10 days in the hospital. The State avers that Defendant illegally possessed firearms as a convicted felon on not one but two different occasions in December of 2016. The State contends that the two victim impact statements demonstrate some of the loss and devastation caused by Defendant's "senseless act of violence and reckless indifference to human life."

The State further argues that the trial court set forth the considerations for the sentences on the record. The State asserts that from pretrial proceedings, the trial court was aware that Defendant had additional prior criminal cases in Jefferson Parish—in 2011 for possession of a firearm by a convicted felon, aggravated flight from an officer, and cruelty to a juvenile and misdemeanor convictions in 2008 for resisting an officer, battery of a police officer, and possession of marijuana. The State avers that the court knew of Defendant's significant criminal history and that Defendant committed the instant offenses within a month of his release from his previous term of incarceration. The State also contends that similar sentences have been upheld by Louisiana courts for similar offenses. The State argues that Defendant did not move for a downward departure in sentencing as to his sentence for second degree murder, and the record does not indicate that he would have been able to meet his burden had he attempted to do so. The State concludes that the trial court did not abuse its broad sentencing discretion in this case.

La. C.Cr.P. art. 881.1(B) provides that a motion for reconsideration of sentence "shall be oral at the time of sentence or shall be in writing thereafter and shall set forth the specific grounds on which the motion is based." La. C.Cr.P. art. 881.1(E) provides that "failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based including a claim of excessiveness, shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review."

This Court has held that the failure to file a motion to reconsider sentence, or to state the specific grounds upon which the motion is based, limits a defendant to

a bare review of the sentence for constitutional excessiveness. *State v. McKinney*, 19-380 (La. App. 5 Cir. 12/26/19); 289 So.3d 153, 166.[62]

Here, Defendant filed a timely Motion to Reconsider Sentence under La. C.Cr.P. art. 881.1. Defendant's entire motion reads:

> Now into court, through undersigned counsel comes the defendant before the bar, Jonathan Manuel, who moves this Court, pursuant to art. 881.1 of the Code of Criminal Procedure, to reconsider the sentences imposed herein. This Motion is being made due to the excessive and harsh nature of the sentences imposed.

The trial court denied the motion.

On appeal, Defendant only challenges the consecutive nature of his sentences as excessive and not the excessiveness of any individual sentence. However, defense counsel did not argue that the imposition of consecutive sentences was excessive in his written motion to reconsider sentence. Additionally, at sentencing, the trial court acknowledged defense counsel's oral objection, but defense counsel did not provide grounds for the objection. Because Defendant failed to argue that the imposition of consecutive sentences was excessive in the trial court, the issue was not preserved for review on appeal, and review here is limited to constitutional excessiveness.

The Eighth Amendment to the United States Constitution and Article I, § 20 of the Louisiana Constitution prohibit the imposition of excessive punishment. *Franklin*, 142 So.3d at 304. Although a sentence is within statutory limits, it can

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[62] *See State v. Franklin*, 13-723 (La. App. 5 Cir. 5/28/14); 142 So.3d 295, *writ denied*, 14-1396 (La. 2/13/15); 159 So.3d 462. The defendant, on appeal, argued that the consecutive nature of his sentences render them unconstitutionally excessive. He orally objected to his sentences but failed to state any grounds for his objection or file a written motion. This Court noted that at no time did the defendant object to his sentences in the trial court on the basis of their consecutive nature. This Court found that the defendant was not entitled to a review of the consecutive nature of his sentences on appeal but was limited to a review of his sentences for constitutional excessiveness and thus reviewed the sentences for constitutional excessiveness. *See also, State v. Austin*, 12-629 (La. App. 5 Cir. 3/13/13); 113 So.3d 306, *writ denied*, 13-673 (La. 10/25/13); 124 So.3d 1092. The defendant asserted that his sentences were unconstitutionally excessive due to their consecutive nature. In his motion to reconsider sentence, the defendant challenged his sentence on the grounds of excessiveness and did not specifically object to the consecutive nature of his sentences. This Court stated that the defendant was not entitled to review of the consecutive nature of his sentences on appeal, but this Court reviewed his sentences for constitutional excessiveness.

be reviewed for constitutional excessiveness. *Id*., citing *State v. Smith*, 01-2574 (La. 1/14/03); 839 So.2d 1, 4. A sentence is considered excessive if it is grossly disproportionate to the offense or imposes needless and purposeless pain and suffering. *Id*. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. *Id*.

Here, Defendant was sentenced to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence for count one; 50 years imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence for count two; and 20 years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for count three. The trial court ordered that counts one and two run consecutive to each other.

The record reflects that two juveniles—one 16-year-old and one 10-month-old—were shot at as the older victim held the infant and several other people were inside the home. The infant died from being shot twice while the older victim sustained eleven gunshot wounds but survived. Defendant possessed a firearm to commit these offenses. When considered in light of the harm done to society, we find that the imposed consecutive sentences do not shock the sense of justice and are not constitutionally excessive.[63] Furthermore, we note that similar consecutives sentences have been upheld by the courts. *See*, *State v. Duckett*, 19-319 (La. App. 4 Cir. 12/18/19); 288 So.3d 167, 177, *writ denied*, 20-135 (La. 7/24/20); 299 So.3d 73; *State v. Sarpy*, 10-700 (La. App. 3 Cir. 12/8/10); 52 So.3d 1032, *writ denied*, 11-46 (La. 6/3/11); 63 So.3d 1006; and, *State v. Bethley*, 12-853 (La. App. 3 Cir. 2/6/13); 107 So.3d 841, 851.

[63] As previously discussed in Assignment of Error Number Five, we vacate count four and remand the matter in light of *Ramos*, *supra*.

Defendant also challenges the denial of his motion to reconsider sentences, which encompasses his sentence as to all four counts. In the motion, defense counsel asked the court to "reconsider the sentences imposed herein." Counsel then stated, "This motion is being made due to the excessive and harsh nature of the sentences imposed." Defendant's appellant brief does not address this lower court's ruling.

Uniform Rules-Courts of Appeal, Rule 2-12.4, provides the requirements of an appellant's brief, including, among other things, assignments of error, a statement of relevant facts, and the argument. Rule 2-12.4 further provides that all assignments of error and issues for review must be briefed. Additionally, Rule 2-12.4 allows the court the discretion to disregard any argument set forth in an appeal brief in the event suitable reference to the record is not made.

We find that Defendant's brief fails to adhere to the requirements provided in Rule 2-12.4. Defendant did not include an argument as to the motion to reconsider sentences and that he fails to allege any specific facts or case law as support. Based on the foregoing, we find that Defendant has abandoned this assignment of error and decline to address its merits. *See State v. Blackwell*, 18-118 (La. App. 5 Cir. 12/27/18); 263 So.3d 1234, 1240; *State v. Aguliar-Benitez*, 17-361 (La. App. 5 Cir. 12/10/18); 260 So.3d 1247, 1261, *writ denied*, 19-147 (La. 6/3/19); 272 So.3d 543; *State v. Blank*, 01-564 (La. App. 5 Cir. 11/27/01); 804 So.2d 132, 139.

In sum, we affirm Defendant's sentences on the remaining counts.[64]

[64] Nevertheless, we note that as to count one, Defendant received the statutorily mandated sentence of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Defendant received the maximum sentence of 50 years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence as to count two. Also, Defendant received the maximum sentence of 20 years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for count three.

In reviewing a trial court's sentencing discretion, three factors are considered: 1) the nature of the crime; 2) the nature and background of the offender; and 3) the sentence imposed for similar crimes by the same court and other courts. *State v. Woods*, 18-413 (La. App. 5 Cir. 12/19/18), 262 So.3d 455. After conducting a bare review of excessiveness for each count, we find that the imposed sentences are not constitutionally excessive.

Errors Patent Discussion

The record was reviewed for errors patent, according to La. C.Cr.P. art. 920; *State v. Oliveaux*, 312 So.2d 337 (La. 1975); and *State v. Weiland*, 556 So.2d 175 (La. App. 5th Cir. 1990).

First, the record reflects that the trial court did not impose the mandatory fine of "not less than one thousand dollars nor more than five thousand dollars" associated with defendant's convictions on counts three and four, possession of a firearm by a convicted felon, in violation of La. R.S. 14:95.1.[65] Nevertheless, this Court has previously exercised its discretion to decline to correct an illegally lenient sentence in the case of an indigent defendant. *State v. Fisher*, 19-488 (La. App. 5 Cir. 6/24/20); 299 So.3d 1238, 1249. In the instant case, Defendant is represented by the Louisiana Appellate Project, which represents indigent defendants in non-capital felony cases. Therefore, due to Defendant's indigent status, we decline to remand this matter for imposition of the mandatory fine as to count three. *See* State v. West, 19-253 (La. App. 5 Cir. 12/18/19); 285 So.3d 605, 612. Further, we note that, in light of the previous recommendation that Defendant's conviction and sentence as to count four be vacated, we find this error moot as to that count.

Additionally, we note that there is a discrepancy between the transcript and the minute entry. Although the minute entry reflects that Defendant was properly advised of the prescriptive period for post-conviction relief pursuant to La. C.Cr.P. art. 930.8, the transcript does not show any advisal as to post-conviction relief. Where there is a discrepancy between the transcript and the minute entry, the transcript generally prevails. *State v. Lynch*, 441 So.2d 732, 734 (La 1983).

[65] The law in effect at the time of the commission of the offense is determinative of the penalty imposed. *Sugasti*, 820 So.2d at 520. It is noted that while the statute has been amended since the time of the commission of the offense, the mandatory fine has not changed.

If a trial court fails to advise, or provides an incomplete advisal, pursuant to La. C.Cr.P. art. 930.8, the appellate court may correct this error by informing the defendant of the applicable prescriptive period for post-conviction relief by means of its opinion. *State v. Becnel*, 18-549 (La. App. 5 Cir. 2/6/19); 265 So.3d 1017, 1022. Accordingly, by way of this opinion, we inform Defendant that no application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of La. C.Cr.P. arts. 914 or 922. *See Barnett*, 267 So.3d at 235.

Finally, it is noted that the December 6, 2019 sentencing minute entry indicates Defendant's "conviction is designated by the court as a crime of violence." Per La. C.Cr.P. art. 890.3(C), effective August 1, 2017, certain crimes "shall always be designated by the court in the minutes as a crime of violence." Among the crimes that shall always be designated by the court in the minutes as crimes of violence are: "(3) second degree murder." La. C.Cr.P. art. 890.3(C). Therefore, one of Defendant's convictions must be designated as a crime of violence in the district court minutes. *See State v. Holloway*, 15-1233 (La. 10/19/16); 217 So.3d 343, 346 n.3. However, the minute entry does not reflect which conviction was designated as a crime of violence; therefore, we remand the matter for correction of the December 6, 2019 sentencing minute entry to designate specifically which conviction is a crime of violence. *See State v. Parnell*, 17-550 (La. App. 5 Cir. 5/16/18); 247 So.3d 1116.[66]

[66] It is noted that attempted second degree murder is also defined as a crime of violence under La. R.S. 14:2(B). However, La. C.Cr.P. art. 890.3 does not list attempted second degree murder as an enumerated offense requiring such a designation in the minutes. Further, counts three and four, possession of a firearm by a convicted felon, do not need to be designated as crimes of violence. *See State v. Harrell*, 18-63 (La. App. 5 Cir. 10/17/18); 258 So.3d 1007, 1014 ("While certain crimes are required to be designated by the court in the minutes as a "crime of violence" per La. C.Cr.P. art. 890.3(C), the crime of possession of a firearm by a convicted felon is not one of them.").

DECREE

For the foregoing reasons, we affirm Defendant's convictions and sentences for counts one, two, and three. In regards to count four, we vacate the conviction and remand to the trial court for further proceedings. We further instruct the trial court to correct the December 6, 2019 sentencing minute entry upon remand.

VACATED AND REMANDED (COUNT FOUR);
CONVICTIONS AND SENTENCES
AFFIRMED (COUNTS ONE, TWO, AND THREE);
REMANDED WITH INSTRUCTIONS

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **JUNE 2, 2021** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

20-KA-172

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THOMAS J. BUTLER (APPELLEE)
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