

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 KA 0419

STATE OF LOUISIANA

VERSUS

DAVID PORTER ADAMS, JR.

Judgment Rendered: DEC 29 2017

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On appeal from the  
Twenty-Third Judicial District Court  
In and for the Parish of Ascension  
State of Louisiana  
Docket Number 32,145, Division E

Honorable Alvin Turner, Jr., Judge Presiding

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BEFORE: GUIDRY, PETTIGREW, AND CRAIN, JJ.

*J.P.*  
Pettigrew J. concurs.

*Mr. Crain, J. concurs and assigns reasons*

**GUIDRY, J.**

The defendant, David Porter Adams, Jr., was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. He entered a plea of not guilty and, following a jury trial, was found guilty of the responsive offense of negligent homicide, a violation of La. R.S. 14:32. The defendant was sentenced to two years imprisonment at hard labor, which the district court suspended. The district court ordered the defendant to pay a fine of \$5,000.00 and serve one year in parish prison in default of paying the fine. See La. C. Cr. P. art. 894. The district court placed the defendant on probation for a period of five years and imposed various conditions on the probation, including restitution. The defendant objected to the sentence, arguing that it was excessive and noting that the amounts of restitution were imposed without the introduction of any evidence in support thereof. The defendant now appeals, alleging four assignments of error. For the following reasons, we affirm the defendant's conviction, vacate the sentence, and remand to the district court for resentencing, including a restitution hearing to determine the amount the defendant owes in restitution and the manner in which payments will be made.

**FACTS**

On October 17, 2013, the defendant and the victim, thirty-four-year-old Jules Bennett Weil, who were co-workers at a pawn shop, traveled from Baton Rouge to Prairieville, Louisiana, in the defendant's vehicle. The two arrived at the residence of the victim's cousin, Drake Daigle, around 10:30 p.m. and entered his camper. Both the defendant and the victim were drinking beer. The three men talked, and Drake gave the defendant three muscle relaxers. Shortly thereafter, the defendant requested that he and the victim leave. The two walked to the defendant's truck and, per the defendant's request, the victim proceeded to back the defendant's vehicle out of the driveway. Almost immediately thereafter, Drake

heard what sounded like the vehicle “peel[ing] out.” His mother, Peggy Daigle, who lived in a trailer next to his camper, exited and told Drake that she heard gunshots. According to Peggy, Drake’s visitors were at his camper approximately fifteen minutes before she heard the truck engine start and “back up real fast.” She then heard three shots fired.

Drake approached the defendant’s truck and saw that the victim was in the driver’s seat and had a gunshot wound to his head. Peggy contacted 911 at 11:13 p.m., and officers and medical personnel immediately responded to the scene and attempted, unsuccessfully, to revive the victim, who was found sitting in the driver’s seat of the truck wearing his seatbelt and “twitching.” The victim had both feet on the brake and a bottle of beer between his legs. The vehicle was running, its taillights and reverse lights were illuminated, and the gear column was not in the park position. The driver’s-side door was closed, but its window was shattered. Three spent shell casings were located inside of the truck as well as the muscle relaxers given to the defendant by Drake. No illegal substances were found inside of the truck, but a yellow plastic baggie containing synthetic marijuana was collected from the victim’s pocket.

While speaking with Drake on the scene, Ascension Parish Sheriff’s Office Deputy Melancon did not smell the scent of marijuana, nor did she notice him to be intoxicated or impaired. He informed her that the victim and the defendant had come over, but that the defendant asked to leave, appeared anxious to do so, and got “jittery.” Drake also told her that although the victim may have wanted to stay at his camper longer, there was no argument between the defendant and the victim. Drake provided a description of the defendant to law enforcement as they received a call from dispatch that a subject called at 11:30 p.m. and was on the telephone line with 911 stating that he was lost and covered in blood. Dispatch advised that the subject was directly across the street from the scene of the shooting. Prior to

the defendant's call to 911, at approximately 11:24 p.m., the defendant's girlfriend, Kristin Loupe, contacted 911 and reported that the defendant was lost in the woods. She further advised that Raychel Martinez, the defendant's ex-girlfriend, had "taken out a hit" on the defendant.

Shortly thereafter, the defendant, who was still on the telephone with the 911 operator, emerged from a wooded area across the street from the shooting. The defendant was wearing only shorts and was wet. There was no appearance of any bruising on the defendant, and he did not indicate that anyone had hit him. Law enforcement personnel did not observe any unusual behavior associated with the use of synthetic marijuana while interacting with the defendant. After being advised of his rights, the defendant stated that his girlfriend had a "hit put on him," and he knew who was "supposed to do the hit." The defendant did not name the individual who was allegedly hired to kill him. The defendant then advised that he did not want to answer any questions and just "wanted to be arrested." The defendant's clothing, two gun magazines, and a handgun grip were located near the scene of the shooting, but the firearm used by the defendant was never recovered.

An autopsy of the victim was conducted on October 21, 2013, and the cause of death was found to be a gunshot wound to the head. The victim also sustained gunshot-related injuries to his right hand and a graze wound to the back of his neck. Specifically, there was an entrance wound to the back of victim's right hand, an exit wound on the palm side of his right hand, and an entrance wound on the right side of the back of the victim's head. The coroner opined that the victim may have been covering the back of his head in a defensive manner. According to the coroner, the gun was fired approximately six to nine inches from the victim's body, and at most, from two or two-and-one-half feet away. The coroner stated that the three wounds sustained by the victim were caused by two bullets, one grazing the back of the victim's head and exiting the vehicle's window, and the

other entering and exiting the victim's hand, then entering his head. That bullet was recovered from the victim's head. The victim's toxicology report indicated that he tested positive for alcohol and morphine. According to the coroner, the morphine was in the elimination phase and would not have had an effect on the victim in that phase. The coroner further testified that there were no injuries to the victim's hands indicating any type of recent fighting.

### **SUFFICIENCY OF THE EVIDENCE**

In his first assignment of error, the defendant argues that the evidence presented by the State was insufficient to support his conviction. Specifically, the defendant contends that the State failed to prove that he was criminally negligent. Additionally, the defendant claims that the State failed to disprove that he acted in self-defense. According to the defendant, he "did not negligently fire his gun in [the victim's] direction. Rather, [the defendant] intentionally fired his gun in an effort to escape the situation." The defendant also argues that he "believed his life was in danger and feared the aggression of a man who had a reputation for violence and had just ingested synthetic marijuana."

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. C. Cr. P. art. 821B; State v. Mussall, 523 So. 2d 1305, 1308-09 (La. 1988). When analyzing circumstantial evidence, La. R.S. 15:438 provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the Jackson constitutional sufficiency standard. Ultimately, all evidence, both direct and circumstantial, must be sufficient under Jackson to

satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. State v. Shanks, 97-1885, pp. 3-4 (La. App. 1st Cir. 6/29/98), 715 So. 2d 157, 159.

The Jackson standard is applicable in cases involving both direct and circumstantial evidence. An appellate court reviewing the sufficiency of evidence in such cases must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. State v. Sutton, 436 So. 2d 471, 474 (La. 1983); State v. Lott, 535 So. 2d 963, 966 (La. App. 2nd Cir. 1988).

The defendant was originally charged with second degree murder, which in pertinent part, “is the killing of a human being: (1) [w]hen the offender has a specific intent to kill or to inflict great bodily harm....” La. R.S. 14:30.1A(1). However, the defendant was convicted of the lesser included offense of negligent homicide, which is “[t]he killing of a human being by criminal negligence.” La. R.S. 14:32A(1). According to La. R.S. 14:12, “Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender’s conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.” Negligent homicide is a responsive verdict to second degree murder under Louisiana Code of Criminal Procedure article 814. The defendant in the instant case did not object to the responsive verdicts. Where the defendant acquiesces in the submission of responsive verdicts, he is bound by the trier of fact’s determination to employ a responsive verdict. State v. Harris, 02-1589, p. 9 (La. 5/20/03), 846 So. 2d 709, 715. “[A]n appellate court will not reverse a [factfinder’s] return of a responsive verdict, whether or not supported by

the evidence, as long as the evidence is sufficient to support a conviction for the charged offense.” Harris, 02-1589 at p. 4, 846 So. 2d at 712-13.

Specific intent is that state of mind that exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Such state of mind can be formed in an instant. State v. Cousan, 94-2503, p. 13 (La. 11/25/96), 684 So. 2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. State v. Graham, 420 So. 2d 1126, 1127 (La. 1982). The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. State v. McCue, 484 So. 2d 889, 892 (La. App. 1st Cir. 1986). Specific intent to kill, as is required for a second-degree murder conviction, may be inferred from defendant’s act of pointing a gun and firing at a person. La. R.S. 14:10(1) & 14:30.1A(1); State v. Henderson, 99-1945 p. 3 (La. App. 1st Cir. 6/23/00), 762 So. 2d 747, 751, writ denied, 00-2223 (La. 6/15/01), 793 So. 2d 1235.

At trial, the defendant did not dispute that he drew his weapon, pointed it at the victim, and fired. However, he claimed that he shot the victim in self-defense. When the defendant in a homicide prosecution claims self-defense, the State must prove beyond a reasonable doubt that the homicide was not committed in self-defense. Louisiana Revised Statutes 14:20A(1) provides that a homicide is justifiable when committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger. On appeal, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, a rational fact finder could have found beyond a reasonable doubt that the defendant did not act in self-defense. State v. Williams, 01-0944, pp. 5-6 (La. App. 1st Cir. 12/28/01), 804 So. 2d 932, 939, writ denied, 02-0399 (La. 2/14/03),

836 So. 2d 135. A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith. See La. R.S. 14:21.

The defendant testified at trial and admitted that he shot the victim. According to the defendant's testimony, he was in fear of losing his life when he fired his weapon. The defendant claimed that he occasionally drove the victim home from work at the pawn shop. The defendant also claimed that the victim gave his number to him and told him to call if he wanted to "hang out." Addressing why he contacted the victim on the day of the shooting, the defendant explained that he called because the victim had given him Lortabs two days prior to the shooting, and he was trying to acquire more. The defendant claimed that the victim told him to pick him up at the Alamo Motel in Baton Rouge so the two could travel together to get the Lortabs. After picking up the victim, the defendant testified that he drove to a gas station where he purchased four bottles of beer and a bottle of 5-Hour Energy. The defendant claimed that when he opened his wallet to pay for the beer, the victim commented on the amount of money inside.

The defendant and the victim then traveled toward Prairieville. Once they arrived at Drake's camper, the victim exited the vehicle and greeted Drake, who the defendant did not know. The defendant testified that he remained in the truck, put his gun inside his pants, and removed the majority of the cash from his wallet and placed it under the truck's console. He claimed that he had an uneasy feeling. The defendant stated that the victim had a yellow bag containing a weed-like substance, which he and Drake smoked while inside the camper, approximately five or ten minutes after their arrival. The defendant claimed that the three of them were inside of the camper between twenty minutes and a half hour. When the subject of pills came up, the victim stated that he did not have Lortabs, but that Drake had muscle relaxers. The defendant claimed that after the victim and Drake



smoked the “mojo,” the “mood” and conversation changed. He claimed that there was discussion of demons and selling of souls to the devil. At that point, the defendant stated that he was ready to leave the camper. He claimed that the victim discussed whether he would stay at the camper or leave with the defendant, and ultimately decided to leave with the defendant after the defendant informed him that he would not return the next day to pick the victim up for work. The defendant took the muscle relaxers from Drake when they left the camper and dropped them in his truck console. The defendant confirmed that there were “no problems” at that point.

The defendant testified that he asked the victim to back his vehicle out of the driveway and proceed to a gas station. According to the defendant, the area was dark and he did not think he could successfully back out. Once the two were inside the vehicle, the defendant claimed that he told the victim he needed to give him money for gas, and the victim became “agitated.” The defendant claimed that the victim put the vehicle in reverse and hit the gas pedal, jerking the vehicle backward at a fast pace. The defendant grabbed his door and told the victim to slow down. The victim allegedly stated, “You want me to f’ing slow down, I’ll slow down” and became “more aggressive” before slamming on the brakes. When the truck came to an abrupt stop, the victim allegedly reached across the vehicle and pushed the defendant’s face with the palm of his hand and stated, “I’ll f\*\*\* over you. I’ll take that s\*\*\* from you.” The defendant claimed that he attempted to exit the vehicle, but hit the button for the window instead of the button that unlocked the door. The defendant stated that he could not get out of the truck, and the victim grabbed his left arm and pulled him. According to the defendant, he could not see the victim, but could “feel” him pulling on his arm. The defendant responded by pulling his arm away, retrieving his pistol, and firing three shots in rapid succession. The defendant claimed that he thought the victim was attempting to

take his gun, and he was concerned because he knew the victim was a marine, trained in martial arts, and engaged in fights. The defendant claimed he once broke up a fight between the victim and a fifteen or sixteen-year-old male customer.

The defendant continued to testify as to his perception of the victim and claimed that his boss at the pawn shop, Brad Boring, told him not to show guns to the victim because the victim was a convicted felon. The defendant claimed that he talked to the victim about time the victim served in jail, and was also warned by another employee at the pawn shop to limit the time he spent with the victim because he was “not the kind of person” the defendant should be around. The defendant testified that the victim had a bolt tattoo on his neck, which he allegedly stated was “earned” for the “shedding of blood.” The defendant claimed that the victim was racist, “against blacks,” and believed in genocide.

In explaining his actions after the shooting, the defendant testified that he exited the truck and ran as fast as he could after firing the shots, but was unsure whether he shot the victim. He explained that he had a “panic attack” and removed his clothing in an effort to distance himself from the situation. He admitted that he dropped his gun, and did not know where it was located. He further admitted that the magazine, bullet, and grip located by law enforcement belonged to him. He then claimed that he removed his clothing because after walking through a body of water, he was soaking wet. He claimed that he stopped and contacted his girlfriend so he could talk to “someone [who] loved [him] and cared about [him].” The defendant explained that although he told law enforcement his girlfriend had a “hit” out on him, it was actually his ex-girlfriend, Martinez. According to the defendant, one or two days prior to the shooting, his five-year-old daughter with Martinez told him that “momma was going to hire somebody to hurt daddy.” At

the conclusion of his direct testimony, the defendant admitted that he was convicted of domestic abuse battery of Martinez in 2008.

On cross-examination, the State pointed out that on the night of the shooting, the defendant called the victim eight times, and had also contacted the victim multiple times earlier that month, including a Sunday, when the pawn shop was not open. The defendant claimed that he thought he was “exempt” from the victim’s alleged bad behavior because he was the victim’s boss. The State also asked the defendant why he called his mother from jail and stated that he was friends with a “Klansman” if he was afraid of such racism, as allegedly engaged in by the victim. He claimed that he did not mean that he and the “Klansman” were friends.

The defense also presented the testimony of Brad Boring, who owned the pawn shop where the defendant and victim worked. According to Boring, he knew the victim for more than fifteen years and did not think that the victim was someone who would hurt anyone. Boring also testified that he could not have told the defendant that the victim was a convicted felon, because he did not know. According to Boring, on the day of the shooting, the victim told him that he and Drake made synthetic marijuana.

Aside from the defendant’s testimony, the State presented evidence reflecting circumstantially on what transpired between the victim and the defendant. Drake testified that everything seemed “cool” while the three men were inside of the camper. The defendant exited the camper to turn off the engine of his truck. When the defendant returned to the camper, he stated that he was seeking pain pills. Drake gave the defendant three muscle relaxers. According to Drake, the defendant mostly stayed on his phone while inside the camper. Drake testified that when the defendant was ready to leave, he had a “blank stare” on his face. The defendant indicated that he was leaving, but the victim stated that he was planning to stay. Drake testified that the defendant insisted he bring the victim

home, but neither looked angry when leaving. After they left the camper, Drake heard someone press the gas too hard on the truck. He looked outside and claimed that it “looked like somebody had hit the gas pedal too hard, kind of peeled out, and they slowly was backing up.” After his mother told him that she heard shots fired, he grabbed his knife and “snuck up” to the truck. He noticed that the window on the driver’s side was shattered and the passenger-side door was open. The rear lights to the vehicle were on, and the truck was still in reverse.

Ascension Parish Sheriff’s Office Detective Latonya Sullivan also spoke with Drake on the night of the shooting. According to Detective Sullivan, Drake was upset but did not appear intoxicated or under the influence of any substances, and the statement that she took from Drake at 12:15 a.m. was consistent with what he told officers that initially arrived on the scene. Detective Sullivan conducted a second recorded statement with Drake. She testified that Drake’s second statement was more detailed than the first, but was consistent. Detective Sullivan later took a third statement from Drake, and testified that it was also consistent. Pursuant to an anonymous call that there may have been illegal drugs inside of Drake’s camper, Detective Sullivan obtained a search warrant. No illegal substances were located inside the camper.

The victim’s sisters went to his motel room after the shooting but did not find any drugs. According to his sister Allison’s testimony, she spoke with Drake about the night of the shooting. She testified that Drake told her that he, the defendant, and the victim were smoking that night, but she thought he was referring to cigarettes. Drake testified that they were not smoking synthetic marijuana inside his camper.

The defendant’s girlfriend, Kristin Loupe, was called to testify, but invoked her rights under the Fifth Amendment.

According to testimony presented at trial, the victim was found sitting in the driver's seat of the vehicle with a beer bottle between his legs, was still wearing his seatbelt, and was unarmed. Both of his feet were on the brakes of the vehicle. He had been shot in his head, and an entrance wound in his hand indicated that he attempted to protect himself. The victim's toxicology reports did not indicate that he was under the influence of any illegal substances at the time of the shooting. When the defendant emerged from the woods, there was no apparent bruising on his body, and he did not claim that anyone had hit or injured him. Both the defendant and Drake testified that there was no arguing or fighting inside the camper. It was not irrational for the jury to infer from these facts that the defendant did not act in self-defense as he claimed. See State v. Ordodi, 06-0207, p. 14 (La. 11/29/06), 946 So. 2d 654, 662.

The defendant's actions following the shooting are also inconsistent with a theory of self-defense. After the shooting, the defendant ran into a wooded area and walked through a bayou where he got completely wet and removed his clothing. He also discarded the murder weapon. The defendant attempted to contact his mother, then called his girlfriend. Records revealed almost seven minutes of conversation between the defendant and his girlfriend before he called 911. During the conversation with the 911 operator, the defendant never stated that he was defending himself or that he was afraid of the victim. The defendant also did not state that anyone was trying to rob him until trial. Rather, the defendant stated that he was lost, covered in blood, and did not remember anything that happened. After emerging from the wooded area, he told officers that he thought his ex-girlfriend had a "hit" out on him. "Although an individual's flight does not in and of itself indicate guilt, it can be considered as circumstantial evidence that the individual has committed a crime; flight shows consciousness of guilt." State v. Williams, 610 So. 2d 991, 998 (La. App. 1st Cir. 1992), writ

denied, 617 So. 2d 930 (La. 1993). Additionally, the State presented two rebuttal witnesses who established that prior to the search of Loupe's house, where the defendant resided before the incident, the defendant instructed Loupe to remove a white box from their nightstand, which they suspected to be the box containing ammunition for his weapon. At that point, the defendant had not yet claimed that he shot the victim in self-defense.

Considering the evidence presented during the trial, the jury could have reasonably concluded that the victim did not pose an imminent threat. A rational jury could have found that the State established beyond a reasonable doubt that the defendant did not act in self-defense. Thus, in reviewing the evidence, we cannot say that a jury finding that the defendant was guilty of second degree murder would have been irrational under the facts and circumstances presented to them. See Ordodi, 06-0207 at p. 14, 946 So. 2d at 662; see also Harris, 02-1589 at pp. 4-6, 846 So. 2d at 712-13. In accepting a hypothesis of innocence that was not unreasonably rejected by the fact finder, a court of appeal impinges on a fact finder's discretion beyond the extent necessary to guarantee the fundamental protection of due process of law. See State v. Mire, 14-2295, p. 4 (La. 1/27/16), — So.3d —, —, 2016 WL 314814 (per curiam). An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. State v. Calloway, 07-2306, pp. 1-2 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam). After a thorough review of the record, viewing the evidence presented in this case in the light most favorable to the State, we are convinced that a rational trier of fact could find that the State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of second degree murder. Therefore, there was sufficient evidence introduced at trial to support the

defendant's conviction for the responsive verdict of negligent homicide. Accordingly, this assignment of error is without merit.

### **EVIDENCE OF VICTIM'S DANGEROUS CHARACTER**

In his second assignment of error, the defendant argues that he was denied his right to cross-examine several State witnesses because the district court's ruling allowing the defense to present evidence pertaining to the victim's dangerous character was not made until the seventh day of trial.

Evidence of a person's character generally is not admissible to prove that the person acted in conformity with his or her character on a particular occasion. La. C. E. art. 404A. However, there are specific exceptions to this general rule. Relevant here is the exception with respect to evidence of the dangerous character of the victim of a crime. Such evidence is admissible when the accused offers evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense charged. La. C. E. art. 404A(2)(a). Thus, in order to introduce any evidence regarding the victim's character, it had to first be shown that the victim made some hostile demonstration or overt act at the time of the offense charged.

The term "overt act," as used in connection with prosecutions where the plea of self-defense is involved, means any act of the victim that manifests to the mind of a reasonable person a present intention on his part to kill or do great bodily harm. State v. Loston, 03-0977, p. 12 (La. App. 1st Cir. 2/23/04), 874 So. 2d 197, 205-06, writ denied, 04-0792 (La. 9/24/04), 882 So. 2d 1167. To meet the "overt act" requirement of Article 404, this court has held the defendant must introduce "appreciable evidence" in the record relevantly tending to establish the overt act. State v. Miles, 98-2396, p. 7 (La. App. 1st Cir. 6/25/99), 739 So. 2d 901, 906, writ denied, 99-2249 (La. 1/28/00), 753 So. 2d 231; State v. Brooks, 98-1151, p. 10 (La. App. 1st Cir. 4/15/99), 734 So. 2d 1232, 1237, writ denied, 99-1462 (La.

11/12/99), 749 So. 2d 651. Once the defense has introduced such appreciable evidence, the district court cannot exercise its discretion to infringe on the fact-determining function of the jury by disbelieving this defense testimony and denying the accused a defense permitted him by law. Miles, 98-2396 at pp. 7-8, 739 So. 2d at 906.

Where a proper foundation is laid, dangerous character may be shown in support of a plea of self-defense by general reputation in the community or by prior threats against the defendant or specific acts that were known to the defendant at the time of the offense. State v. Jackson, 419 So. 2d 425, 428 (La. 1981). The admissibility of a victim's character trait depends on the purpose for which the evidence is offered. Once evidence of an overt act on the part of the victim has been presented, evidence of threats and of the victim's dangerous character is admissible for two distinct purposes: (1) to show the defendant's reasonable apprehension of danger which would justify the conduct; and (2) to help determine whom was the aggressor in the conflict. Only evidence of general reputation and not specific acts is admissible in order to show whom the aggressor was in the conflict. Evidence of prior specific acts of the victim against a third party is inadmissible for this purpose. When evidence of a victim's dangerous character is offered to explain the defendant's reasonable apprehension of danger, evidence of specific acts may be introduced to show the accused's state of mind only if it is shown that the accused knew of the victim's reputation at the time of the offense. Loston, 03-0977 at pp. 13-14, 874 So. 2d at 206-07.

Prior to trial, the State filed a motion in limine to prevent the defendant from introducing evidence of the victim's alleged reputation for violence or bad character under La. C. E. art. 404. A hearing was held on the motion prior to trial. At the hearing, defense counsel argued that in order to introduce evidence of the victim's general bad reputation as well as what the defendant knew about the



victim at the time of the offense, it had to show an overt act. Defense counsel stated that the defendant would testify that the conversation inside of the camper coupled with the fact that the parties were ingesting illegal substances alarmed him and made him want to leave. Defense counsel also stated that the defendant would testify that the victim attacked him and attempted to take his money and his gun. Outside of the defendant's proposed testimony, defense counsel stated that there was other evidence to support the defendant's theory, namely a recording of a 911 call by the defendant wherein he stated that someone was trying to kill him. The State responded that the defendant's reliance on his own self-serving testimony was not sufficient to establish an overt act. The district court stated that it agreed with the State that there was "nothing to warrant allowing the defendant to introduce evidence of the reputation of violence or bad character of the victim in this matter." The defendant objected to the court's ruling.

During Drake's testimony at trial, defense counsel notified the court that were he permitted, he would have cross-examined Drake "on the fact that . . . the person he committed the crime of burglary with was [the victim] . . . and that they were fall partners with each other." Defense counsel further stated that he would cross-examine Drake about his knowledge of other acts of violence that he saw and witnessed to prove that the victim "was a dangerous character." Counsel noted that after the defendant testified, he planned to request that the court reconsider its ruling and would recall Drake to the witness stand. Defense counsel requested that Drake remain under sequestration and noted that he would make a proffer of the areas on which he would have cross-examined Drake. At the conclusion of Drake's testimony, the court stated that he was still under the rule of sequestration.

Defense counsel also entered an objection at the conclusion of Peggy's testimony, arguing that he would have cross-examined her as to: (1) her knowledge of the dangerous character of the victim; (2) her knowledge of his drug

abuse; (3) her knowledge of his propensity for violence; (4) the fact that she did not want him on her property because he and Drake had been convicted of simple burglary of an automobile and criminal damage to property; and (5) her knowledge of the meaning of tattoos on the victim's body. Defense counsel noted he would include that information in his proffer. Defense counsel requested that the court "allow [Peggy] to be withdrawn from the rule of sequestration and be present without waiving any of the rights or objections [he] made regarding the cross-examination issues." The State noted that it would instruct Peggy not to speak about her testimony to anyone. After the victim's two sisters testified, defense counsel noted that he wanted to "maintain [his] continuing objection."

During the defendant's testimony at trial, defense counsel interrupted his direct examination of the defendant and asked the court to make a determination whether he established appreciable evidence of an overt act or hostile demonstration by the victim. Defense counsel argued that in addition to the defendant's testimony, physical evidence corroborated the defendant's version of events. Specifically, defense counsel argued that the fact that the floor mat on the passenger-side of the vehicle had been moved and the passenger-side window was partially rolled down corroborated the defendant's testimony that there was a struggle inside of the vehicle and that the defendant attempted to exit the truck. The district court then found that based on the defendant's testimony and the evidence presented, including photographs introduced in the State's case-in-chief, there was appreciable evidence of an overt act. The court ruled that the defendant would be allowed to testify as to what he knew about the victim's general reputation in the community and to specific acts of the victim at the time or around the time of the instant offense.

On appeal, the defendant argues that the district court's ruling precluded him from questioning the victim's family members about his alleged affiliation with

white supremacist gangs, his prior criminal history, and his propensity for violence. The defendant contends that after the district court made its ruling, the victim's family members were no longer sequestered and unable to testify. Under La. C. E. art. 615B(4), family members of the victim of the offense are exempt from the rule of sequestration. Nonetheless, after Drake testified, the court informed him that he was still under the rule of sequestration. After Peggy's testimony, defense counsel requested that Peggy be excluded from the rule of sequestration, and the State noted that it would instruct Peggy not to speak about her testimony. The defendant noted that he maintained his objection after the victim's sisters testified, but did not request that they be sequestered. Accordingly, this assignment of error is without merit.

#### **EXCESSIVE SENTENCE**

In related assignments of error, the defendant challenges the sentence imposed by the district court. In his third assignment of error, the defendant argues that the district court imposed an illegal sentence that exceeded the maximum penalty for his negligent homicide conviction. The defendant argues in his fourth assignment of error that the amount of the fines and restitution imposed by the district court were excessive and that the district court improperly ordered the fines and restitution without first holding a restitution hearing. Because we find the sentence to be indeterminate, which requires that the matter be remanded to the district court for resentencing, we pretermitted addressing any remaining claims of sentencing error.

Upon sentencing the defendant, the district court listed special conditions of his probation, including that he was to "Pay restitution in an amount not to exceed \$10,000 during the period of probation" and "Pay to the victim's children . . . the sum of \$25,000 each for a total of \$75,000."

If a defendant who has been convicted of an offense is sentenced to imprisonment, the court shall impose a determinate sentence. La. C. Cr. P. art. 879. Louisiana Code of Criminal Procedure article 895.1A(1) provides that the court shall order restitution in a reasonable sum not to exceed the actual pecuniary loss to the victim in an amount certain, and that the restitution payment shall be made, at the discretion of the court, either in a lump sum or in monthly installments based on the earning capacity and assets of the defendant. As to the district court's order that the defendant pay "restitution in an amount not to exceed \$10,000 during the period of probation[,]" the court failed to specify the exact amount of restitution that the defendant would be required to pay. Further, although the district court did order the defendant to pay \$25,000.00 to each of the victim's three children, it failed to make a determination of the defendant's earning capacity and assets, and there was no payment schedule set for restitution.

Due to the nonspecific restitution order, the sentence imposed by the district court was indeterminate and, thus, invalid. See State v. Fussell, 06-2595, p. 25 (La. 1/16/08), 974 So. 2d 1223, 1238. An indeterminate and thus illegal sentence necessitates that the sentence be vacated and the case remanded for resentencing. State v. Baxley, 14-48, p. 2 (La. App. 3d Cir. 5/7/14), 139 So. 3d 556, 557-58. See State v. Mingo, 15-0435, p. 3 (La. App. 1st Cir. 9/18/15), 2015 WL 5516277 (unpublished), writ denied, 15-1896 (La. 3/14/16), 189 So. 3d 1072.

Accordingly, we vacate the sentence and remand the case for resentencing. Following an evidentiary hearing, the district court is instructed that if restitution is ordered, it must specify the amount of restitution owed and manner of payments. We affirm the defendant's conviction, vacate the sentence, and remand for resentencing.

**CONVICTION AFFIRMED. SENTENCE VACATED AND REMANDED TO DISTRICT COURT FOR RESENTENCING AND FOR A DETERMINATION OF THE AMOUNT OF RESTITUTION OWED, AND**

**THE MANNER OF RESTITUTION PAYMENTS BASED ON THE  
DEFENDANT'S EARNING CAPACITY AND ASSETS.**

**STATE OF LOUISIANA**

**STATE OF LOUISIANA**

**VERSUS**


**COURT OF APPEAL**

**DAVID PORTER ADAMS, JR.**

**FIRST CIRCUIT**

**NO. 2017 KA 0419**

**CRAIN, J. concurs.**



I agree with affirming the defendant's conviction. I also agree that the restitution order requires that the defendant's sentence be vacated. Additionally, I would address the issues related to an excessive sentence and the restitution awards to the children. *See* La. R.S. 14:32; La. Code Crim. Pro. art. 880; La. Code Crim. Pro. art. 895.1.