

**NOT DESIGNATED FOR PUBLICATION**

<b>STATE OF LOUISIANA</b>	<b>*</b>	<b>NO. 2006-KA-0799</b>
<b>VERSUS</b>	<b>*</b>	<b>COURT OF APPEAL</b>
<b>JOHN D. RAGAS, JR. A/K/A</b> <b>"JOHNNY" A/K/A "FORD"</b>	<b>*</b>	<b>FOURTH CIRCUIT</b>
	<b>*</b>	<b>STATE OF LOUISIANA</b>

**\* \* \* \* \***

**APPEAL FROM**  
**25TH JDC, PARISH OF PLAQUEMINES**  
**NO. 04-1911, DIVISION "B"**  
**Honorable William A. Roe, Judge**

**\* \* \* \* \***

**Judge Patricia Rivet Murray**

**\* \* \* \* \***

(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, III, Judge David S. Gorbaty)

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**AFFIRMED IN PART, AMENDED  
IN PART, AND RENDERED**

In this is a criminal case, the defendant, John Ragas, appeals his convictions and sentences for aggravated rape, unauthorized entry of an inhabited dwelling, criminal damage to property, and attempted manslaughter. With one exception, we affirm his convictions and sentences. The exception is that we amend the sentence for unauthorized entry to delete the prohibition on parole eligibility.

**STATEMENT OF THE CASE**

On April 19, 2004, the grand jury indicted Mr. Ragas charging him with one count of aggravated rape, two counts of attempted first degree murder, one count of unauthorized entry of an inhabited dwelling, and one count of aggravated criminal damage to property. On April 28, 2004, he was arraigned and pled not guilty. On May 19, 2005, at the conclusion of a three-day trial, a twelve-person jury found him guilty as charged on the aggravated rape, unauthorized entry, and criminal damage counts. The jury also found him guilty of two counts of attempted manslaughter. On January 11, 2006, the district court denied Mr. Ragas' motions for new trial and post-

verdict judgment of acquittal.

On the aggravated rape count, the district court sentenced Mr. Ragas to life imprisonment without benefit of parole, probation and suspension of sentence. On the unauthorized entry count, the court sentenced him to serve ten years at hard labor without benefit of parole, probation, or suspension of sentence. On each of the remaining counts, the court sentenced him to serve five years at hard labor. The court made the sentences run concurrently. This appeal followed.

### **STATEMENT OF FACTS**

The events that led to Mr. Ragas' convictions occurred on November 23, 2003. The rape victim is D.S., and her adult daughter is K.B. K.B. and Mr. Ragas were involved in a long-term relationship that produced two children, a boy and a girl. K.B. also had an older daughter from a prior relationship. K.B. and her three children resided with Mr. Ragas until early October 2003 when the relationship between K.B. and Mr. Ragas ended. At that time, K.B. and her children moved into the home of K.B.'s mother, D.S., and her stepfather (D.S.'s husband). D.S. and her husband live in a trailer located on Highway 11 in Buras, Louisiana.

K.B. testified that Mr. Ragas continued contacting her and attempting to persuade her and the children to return to him. She further testified that

Mr. Ragas and her mother did not get along and that he was not allowed inside her mother's trailer during their estrangement. On November 22, 2003, the day before the events in question, Mr. Ragas came to D.S.'s trailer because his daughter had fallen and injured herself. Even that day, Mr. Ragas did not enter the trailer.

In early November 2003, K.B. met Tilton Boudreaux at her work. Mr. Ragas neither knew Mr. Boudreaux, nor knew that K.B. and Mr. Boudreaux were seeing each other. K.B. described Mr. Ragas as a jealous man. On November 23, 2003, Mr. Boudreaux followed K.B. home to D.S.'s trailer. Mr. Boudreaux and K.B. drove in separate vehicles. K.B. testified that as she was driving toward her mother's trailer she saw Mr. Ragas headed in the opposite direction. Mr. Ragas made a U-turn and pulled abreast of her, yelling to her to pull over because he wanted to talk to her. She refused, told him to go away, and continued driving toward her mother's trailer. Mr. Ragas then turned around. When K.B. and Mr. Boudreaux arrived at the trailer, Mr. Ragas pulled up and stayed on the highway, yelling at her. K.B.'s mother came out of the trailer and told Mr. Ragas to leave or she would call the police. He cursed at them and then left.

K.B. testified that she, her mother, and Mr. Boudreaux then went inside her mother's trailer, where she introduced Mr. Boudreaux to her

mother. After the trio talked for a while, K.B., her two daughters, and Mr. Boudreaux left to visit Fort Jackson. They decided to go to the fort because Mr. Boudreaux had never visited it, and K. B.'s stepfather worked there. Because K.B.'s son was asleep in a bedroom in the trailer, they decided to leave him home with D.S. K.B. estimated that they stayed at the fort about one hour, and then drove back to her mother's trailer.

When they arrived at D.S.'s trailer, the front door was closed and locked. K.B. testified that her older daughter looked through the window and announced that Mr. Ragas was inside. K.B. testified that the door opened, and her mother told them to come inside because Mr. Ragas wanted to talk to her. They all went inside, and Mr. Ragas told her he wanted to marry her. Mr. Boudreaux announced he was leaving, and K.B. tried to dissuade him from doing so. Mr. Boudreaux walked outside, K.B. followed him, and Mr. Ragas followed her outside. Mr. Ragas begged K.B. to give him another chance. She stated that Mr. Ragas had his hand in his pocket at that time. After K.B. told Mr. Ragas it was over between them, he ran toward the back of the trailer. D.S. and the children went back inside the trailer. Mr. Boudreaux told K.B. to go inside, and he began backing up his truck. K.B. testified that she went to the door, which was locked, and began beating on it. She heard a sound like a gun clicking, and her daughter let her

inside. As K.B. walked toward her mother's bedroom, a window shattered. She called Mr. Boudreaux to tell him to leave. Meanwhile, she saw Mr. Ragas crawling in through the broken window. K.B. then left the trailer through the back door and ran to the front of the trailer. As she ran towards the highway, K.B. saw Mr. Ragas standing on the front steps loading the shotgun. She kept running toward a nearby convenience store and heard several shots being fired. She ran into the parking lot of the store, and she saw Mr. Boudreaux's truck. Mr. Boudreaux told her to get inside. She did so and ducked down. Shotgun pellets then hit Mr. Boudreaux's truck. While Mr. Boudreaux returned fire, K.B. called 911. They drove away from the scene to a nearby YMCA where they waited until the police arrived.

K.B. testified that the police retrieved her son from the trailer. Although she gave a statement to the police that night wherein she stated that Mr. Ragas was continually shooting at her, she testified that she was still upset when she gave the statement. She identified the shotgun the police seized from near D.S.'s trailer as one that Mr. Ragas owned. K.B. testified that she did not learn that her mother had been raped until they took D.S. to the hospital that night.

D.S. testified that Mr. Ragas came to her trailer three times on November 23, 2003. Early that afternoon, he came to the trailer to drop off

his son, who had spent the night with him. Although Mr. Ragas pulled into D.S.'s driveway, D.S. testified that she did not go outside to greet him.

Rather, the boy came inside by himself. Mr. Ragas then left. At that time, D.S. was expecting K.B. to arrive home soon from her job in Belle Chasse.

Shortly thereafter, Mr. Ragas returned a second time. On that occasion, D.S. heard yelling outside her trailer, looked outside, and saw Mr. Ragas standing on the highway in front her trailer. K.B. and Mr. Boudreaux were standing in D.S.'s yard, and Mr. Ragas was yelling at K.B. D.S. heard Mr. Ragas ask K.B. why she was "doing this" to him, and K.B. reply by telling Mr. Ragas to leave. D.S. then went outside, and she too told Mr. Ragas to leave. He responded that he did not have to do so because he was on a public highway. D.S. threatened to call the police, and Mr. Ragas cursed and left.

After Mr. Ragas left, D.S. went back into her trailer. K.B. and Mr. Boudreaux followed her inside. The trio, as K.B. testified, talked for a while, and then Mr. Jackson, K.B, and her two daughters departed to Fort Jackson. After they left, D.S. went into her bedroom to iron the clothes she planned to wear to a church function later that evening. While she was ironing, she heard footsteps coming toward the bedroom. She thought it might have been her husband coming home from work early. Instead, it was Mr. Ragas who

had returned for a third time. According to D.S., she did not have a good relationship with Mr. Ragas, and he did not have permission to enter her trailer.

D.S. testified that she saw Mr. Ragas standing in the bedroom door with a large pocketknife in one hand and a shotgun in the other. Although she tried to go past him, he told her to get back in the bedroom. He then told her: “Get smart now with me. Act smart now.” Mr. Ragas pushed her back onto the bed, ordered her to take off her pants, and ordered her to perform fellatio. She complied and kept asking him to please stop. Instead, he ordered her to turn around on the bed. She tried to push him away, and she got cut on her hand by the knife. Mr. Ragas then penetrated her anus. Mr. Ragas then ordered her to turn around, and he penetrated her vagina. During the entire episode, D.S. insisted that the shotgun was lying on the bed and that she kept begging him to stop. She also told him that she expected her husband to return soon, to which he replied: “Good, I want him to go home so that I can kill him.”

After the attack, Mr. Ragas told D.S. to get dressed and go into the living room. By that time, Mr. Ragas had retrieved the shotgun. D.S. tried to get Mr. Ragas to leave before K.B. returned because she was afraid he would kill K.B., but he refused to leave. She also tried to get him to put the



gun in his car, telling him that she would talk to K.B. and try to convince her to return to him. He replied that he had parked his car some distance away on Highway 23, out of sight of the trailer. D.S. stated that she also told him that if he left, she would not tell anyone what had happened. He replied that he knew she would call the police. However, she was able to talk him into unloading the shotgun and throwing it out one of the windows of the trailer. He put the knife in his pocket and then sat on the couch awaiting K.B.'s arrival.

Shortly thereafter, K.B., her two daughters, and Mr. Boudreaux arrived. When they came inside the trailer, K.B. stated that she did not want to speak with Mr. Ragas. Mr. Boudreaux announced he was leaving. Mr. Boudreaux walked out the door, K.B. followed him, and Mr. Ragas followed her. Mr. Ragas stated that he wanted to talk to her. D.S. testified she slammed and locked the door. As D.S. walked to the front room to get the phone, she passed a window and saw K.B. standing next to Mr. Boudreaux's truck. Mr. Boudreaux entered his truck, and Mr. Ragas ran toward the back of D.S.'s trailer where he had thrown the shotgun out the window. K.B. knocked on the door, and D.S. let her in. D.S. then heard a loud noise coming from the back of the trailer. As D.S. ran out the front door, she saw glass flying inside the trailer. D.S. began running toward her brother's

nearby trailer, and she heard gunshots. She looked back and saw Mr. Ragas standing by the side of the road with the gun in his hand. She also saw her daughter running toward a nearby convenience store. D.S. continued running toward her brother's trailer and heard more shots. Once she arrived at her brother's trailer, D.S. called the police and told them that Mr. Ragas was trying to kill her daughter. She also called her husband. She testified that her family later took her to the hospital to be examined.

On cross-examination, D.S. denied calling Mr. Ragas' mother after the attack; rather, she testified that Mr. Ragas called his mother. She also denied telling Mr. Ragas' mother that she had invited him to go to church with her that evening. D.S. testified that she did not run outside when K.B. and Mr. Boudreaux returned to the trailer because she knew Mr. Ragas still had the knife in his pocket. D.S. stated that she did not remember everything that she told either the doctor or the nurse at the hospital that night, but she was certain that she told the nurse she had been cut with Mr. Ragas' knife. D.S. did not know why this was not mentioned in the nurse's notes. D.S. admitted that she did not tell the police in her 911 call that she had been raped. She explained that when she made the 911 call she was concerned with her daughter's safety.

Mr. Boudreaux acknowledged that when they returned to the trailer

from Fort Jackson, D.S. did not mention to him that she had been raped. However, he testified that she was upset. Mr. Boudreaux corroborated K.B.'s testimony regarding the incident on the highway in which Mr. Ragas pulled his vehicle abreast to K.B.'s car in an attempt to get her to pull over. Mr. Boudreaux testified that when they arrived at D.S.'s trailer, Mr. Ragas stopped on the side of the road and exited his vehicle. Mr. Ragas yelled at K.B. and asked her if she was dating Mr. Boudreaux. At that point, D.S. came out of the trailer and ordered Mr. Ragas to leave. Mr. Boudreaux testified that Mr. Ragas eventually left and that he, K.B., and her mother entered the trailer. Mr. Boudreaux stated that they stayed a short time, and then he, K.B., and her daughters drove to Fort Jackson where he met K. B.'s stepfather.

When they arrived back at the trailer from Fort Jackson, Mr. Boudreaux testified that only D.S.'s and K.B.'s cars were parked outside the trailer, but they could see a man inside the trailer sitting on the sofa. K.B.'s oldest daughter identified the man as "Johnny." They went inside, and K.B. asked Mr. Ragas what he was doing there. Mr. Ragas replied that he wanted them to get back together. Mr. Ragas became agitated when K.B. refused to do so. Mr. Boudreaux told K.B. that he had better leave, and he walked out the door. She followed him, and Mr. Ragas followed her outside.

Mr. Boudreaux got into his truck, and K.B. stood next to his door. Mr. Ragas again asked her to return to him, and she again refused. At that point, Mr. Ragas ran around to the back of the trailer. Mr. Boudreaux told K.B. to go inside, and he started to back his truck out of the driveway. He heard a loud noise, and D.S. and one of her granddaughters ran out the front door of the trailer. Mr. Boudreaux testified that he heard D.S. say that “he” was shooting. D.S. ran towards the back of her trailer, and then Mr. Ragas came out of the trailer and fired at Mr. Boudreaux’s truck. Mr. Boudreaux testified that he had a gun on the seat, and he picked it up and fired back a few times at Mr. Ragas. He testified that a shotgun pellet grazed him arm.

Mr. Boudreaux backed out of the driveway and drove toward the convenience store. He saw K.B. running up the street, and he stopped so that she could get into his truck. When she got into the truck, Mr. Ragas again fired at and hit Mr. Boudreaux’s truck. Mr. Boudreaux again fired back. Mr. Boudreaux then drove away, and K.B. called the police. Although he admitted firing at Mr. Ragas, the police bagged and tested his hands later that night. Mr. Boudreaux insisted that he did not fire at Mr. Ragas until after Mr. Ragas fired at him.

Gustave Roberts testified that he is D.S.’s brother and that on November 23, 2003, he lived in a trailer located behind her trailer. On that

evening, Mr. Roberts opened the door to his trailer to go to his friend's house and saw a man walking around to the front of D.S.'s trailer. Mr. Roberts went back inside to get something, and D.S. appeared at his trailer. She was yelling that "he" was inside her trailer and that he broke in through the window. Mr. Roberts testified that D.S. called 911 from his trailer. Because he heard shooting, Mr. Roberts decided to stay inside his trailer. He had not heard anything earlier that evening, but he had been watching television.

Ivan Barcus testified that he was at the convenience store near D.S.'s trailer at the time of the shooting. Mr. Barcus testified that he heard shots coming from the direction of D.S.'s trailer, and he opened the front door of the store to see what was happening. As a truck passed by, something passed Mr. Barcus' leg and hit a soda can inside the store. Contemporaneously, Mr. Barcus heard a shot. He ordered everyone inside the store to get behind the counter. Then he heard five or six rapid shots.

Police officers responded to the report of gunshots. Someone at the convenience store pointed out D.S.'s trailer and indicated that someone was still inside with a weapon. Detective Mark Plummer testified that he saw a man standing in the doorway of the trailer. He further testified that the man went inside when he saw the police. Although Detective Plummer and his

partner called for backup, they entered the trailer before the backup arrived. The only person they found inside the trailer was K.B.'s son, who was unharmed. Detective Plummer testified that he later saw Mr. Ragas at the hospital where he was being treated for lacerations. He also spoke with D.S., who did not tell him that she had been raped. However, when Detective Plummer asked D.S. if she had been raped, she put her head down and nodded.

Lieutenant Troy LaGreco testified that when he arrived on the scene of the shooting, a SWAT team was looking for Mr. Ragas. He went inside the trailer and found a broken window, broken glass, and bloodstains. He spoke with the other deputies at the scene and directed the collection of evidence, including the taking of a multitude of photographs. At trial, he identified those photographs, which were introduced into evidence and shown to the jury. He testified that the police also collected two spent shotgun cartridges from the scene, as well as the shotgun purportedly used in the shooting. The deputies also seized D.S.'s clothing at the hospital.

Lieutenant LaGreco further testified that a rape was not mentioned in the 911 calls made in connection with the shooting; however, no record of the 911 calls was preserved. He still further testified that testing of the shotgun found at the scene was inconclusive, but he explained that such

testing often is inconclusive due to the nature of shotguns. Lieutenant LaGreco took statements that night from D.S., K.B., and Mr. Boudreaux. He admitted that K.B. stated that Mr. Ragas kept firing at her, but he noted that Mr. Boudreaux was also returning fire at that time. He noted that it appeared that Mr. Boudreaux had fired eight times when shooting back at Mr. Ragas. He stated that Mr. Boudreaux indicated he did not fire at Mr. Ragas until Mr. Ragas fired at him. Lieutenant LaGreco also indicated that D.S. told him that Mr. Ragas cut her hand when he swung a knife at her and that he saw a nick on her wrist. He stated that the glass in the window of the trailer had been broken from the outside. He also stated that a few hours after the shooting, Mr. Ragas turned himself in at the Belle Chasse Lockup.

Dr. Moshen Mabudian testified that on the night of the incident he examined D.S. at the hospital. He found bruising to the back of her head and an abrasion on her wrist, which he estimated had occurred within a few hours of the examination. He opined that the abrasion was consistent with having been made with a knife. He also conducted a rape exam and took samples for a rape kit. He testified that D.S. had a discharge in her vagina, and her anus was dilated with two recent tears on the sides. She had no bruises on her chest or the inside of her thighs, but Dr. Mabudian stated that this bruising was not always present after a rape. He stated that he did not

question D.S. too closely because she was still upset.

Dr. Mabudian testified that later that evening he also treated Mr. Ragas for several lacerations on his upper extremities and his face. He further testified that Mr. Ragas told him that the lacerations were from going through a broken window. Dr. Mabudian also took samples for a rape kit from Mr. Ragas.

Pamela Williams, an expert in forensic serology, testified that she took samples from the rape kits taken from both D.S. and Mr. Ragas. The parties stipulated that testing results showed that there was a one in ten million chance that Mr. Ragas was not the donor of DNA found in the victim's vaginal swab and the swab taken from the broken glass in her trailer.

Detective Curtis Bowers testified that he administered a gunshot residue test on Mr. Ragas while he was at the Belle Chasse Lockup. Mr. Ragas admitted he had fired his shotgun, but he insisted he was shot at first. Detective Bowers questioned Mr. Ragas about the rape. According to Detective Bowers, Mr. Ragas denied raping D.S. and insisted that the sexual encounter was consensual, as D.S. always wanted to have sex with him. Mr. Ragas also told Detective Bowers where he had hidden his shotgun behind D.S.'s trailer; the deputies later found the shotgun where Mr. Ragas



indicated he had left it. When Detective Bowers asked Mr. Ragas why he took the shotgun into D.S.'s trailer, Mr. Ragas responded: "I guess it wasn't a good idea." Mr. Ragas denied having a knife with him when he was at D.S.'s trailer.

The defense called Mr. Ragas' mother, Rolanna Ragas. Ms. Ragas testified that on the day of the shooting Mr. Ragas called her from D.S.'s trailer, and he told her that he was with D.S. and that everything was okay. D.S. then got on the phone and told her the same thing. Additionally, D.S. told her that Mr. Ragas was going to go to church with her that evening. Ms. Ragas testified that her son was talking with D.S. that day about trying to get back together with K.B. Ms. Ragas further testified that she received another call that evening from D.S. in which D.S. told her to get Mr. Ragas' father to come and get him. Ms. Ragas testified that D.S. did not mention that she had been raped.

Mr. Ragas testified in his defense. He admitting having a prior conviction for the solicitation of a prostitute for which he was sentenced to six months inactive probation. He denied raping D.S. Mr. Ragas testified that after he and K.B. broke up, he wanted to reunite with her. However, K.B. resisted his attempts to get her to reunite with him. He indicated that their estrangement was cordial, even to the point that they continued to

engage in sexual activity while they were separated. He also testified that he had been allowed inside D.S.'s trailer and that D.S. had never told him he was not allowed to enter.

Mr. Ragas further testified that he dropped his son off at D.S.'s trailer early in the afternoon of November 23, 2003, and then started driving home. He denied trying to run K.B. off the road that day when he saw her driving toward her mother's trailer. He testified that he wanted her to pull over so that he could tell her why their son was back at D.S.'s trailer. He denied yelling at K.B. from the highway, but he admitted he was upset at the time.

Mr. Ragas admitted that the shotgun the police seized belonged to him. He testified that after he left D.S.'s trailer, he drove to his house and picked up the shotgun. He intended to give it to a friend who trains dogs for hunting. He went to the friend's house, but the friend was not home. He then went to a nearby store. In the parking lot of the store, he saw a man and young boy. Seeing this, he explained, made him start thinking about his estranged family. He remembered hunting in the woods behind D.S.'s trailer. He thus decided to go to her trailer. He did not park his car near her trailer; instead, he parked behind a restaurant on Highway 23, which apparently was somewhat separated from D.S.'s trailer by a woody area.

Mr. Ragas testified that he walked through the woody area to D.S.'s

trailer. He intended to enlist D.S.'s help in convincing her daughter, K.B., to reconcile with him. He testified that he carried the shotgun into the woody area behind D.S.'s trailer because there were snakes in the woods. When he arrived at the trailer, he knocked at the door, and D.S. let him in. When she noticed he had the shotgun, she told him to leave it outside. He unloaded the gun and put it outside near the corner of the trailer. They sat on the sofa and discussed his marital problems. Mr. Ragas testified that he then started to cry and to wonder aloud if K.B. and Mr. Boudreaux were having sex. According to Mr. Ragas, D.S. then lifted his head and led him into her bedroom where they engaged in consensual sex. He denied having either a knife or a gun during the sexual encounter. He also denied hitting D.S. or forcing her to have sex. Afterward, he testified that they dressed and went back into the living room where they talked. He insisted that D.S. and his mother talked on the telephone and that he told his mother where he was. He also insisted that when K.B., her two daughters, and Mr. Boudreaux returned to the trailer, D.S. never mentioned to them that she had been raped.

When K.B. and Mr. Boudreaux left the trailer, Mr. Ragas followed them. After Mr. Boudreaux entered his truck, Mr. Ragas noticed that Mr. Boudreaux had a gun. He walked to where he had put his shotgun, picked it up, and heard K.B. banging on the door to the trailer. He tried to get inside

the trailer through the back door, but it would not open. When he saw K.B. inside the trailer, he broke the window and entered. Mr. Ragas testified that he had no intention of shooting anyone when he entered the trailer. Once he was inside the trailer, K.B. ran out the back door while D.S. exited the front door. Mr. Ragas ran out the front door and saw K.B. running from the back of the trailer toward the highway. He ran behind her, and Mr. Boudreaux shot at him. Mr. Ragas then loaded the shotgun and returned fire. Mr. Boudreaux continued shooting at him, and Mr. Ragas again returned fire. He testified that he never aimed his gun at K.B., and he denied shooting at Mr. Boudreaux's truck after K.B. entered it.

After K.B. and Mr. Boudreaux left, Mr. Ragas ran into the woods behind D.S.'s trailer. When he tripped and fell, he lost the shotgun. He retrieved his car and drove home, where he noticed he was bleeding. He then surrendered at the Belle Chasse Lockup, where he gave a statement. Later that evening he was taken to the hospital for medical attention. Mr. Ragas testified that his cuts were from the broken window glass. He denied knowing what caused D.S.'s cut. He also denied blaming D.S. for his breakup with K.B. Mr. Ragas insisted that D.S. voluntarily performed fellatio on him and voluntarily engaged in anal and vaginal sex with him. He stated that D.S. told him during their sexual encounter that they needed

to hurry up because everyone would be returning soon to her trailer.

## **DISCUSSION**

### **A. Errors Patent/Assignment of Error Four**

By his fourth assignment of error, Mr. Ragas requests a review of the record for patent errors. Such review reveals that the trial court imposed the unauthorized entry sentence without benefit of parole, probation, or suspension of sentence. La. R.S. 14:62.3 does not prohibit parole eligibility. Thus, the trial court erred by imposing this sentence without eligibility for these benefits. We thus amend this sentence to delete the prohibition. There are no other patent errors.

### **B. Remaining Assignments of Error**

#### ***(i) Insufficiency of evidence to support aggravated rape conviction***

By his first assignment of error, Mr. Ragas contends that there was insufficient evidence to support his aggravated rape conviction. He contends that the evidence did not show that he was armed while raping the victim.

In *State v. Brown*, 03-0897, p. 22 (La. 4/12/05), 907 So.2d 1, 18, the Louisiana Supreme Court set forth the standard for determining a claim of insufficiency of evidence:

When reviewing the sufficiency of the evidence to support a conviction, Louisiana appellate courts are controlled by the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under this standard, the appellate court “must determine that the evidence, 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 had been proved beyond a reasonable doubt.” *State v. Neal*, 00-0674, (La.6/29/01) 796 So.2d 649, 657 (citing *State v. Captville*, 448 So.2d 676, 678 (La.1984)).

When circumstantial evidence is used to prove the commission of the offense, La. R.S. 15:438 requires 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.” *Neal*, 796 So.2d at 657. Ultimately, all evidence, both direct and circumstantial must be sufficient under *Jackson* to prove guilt beyond a reasonable doubt to a rational jury. *Id.* (citing *State v. Rosiere*, 488 So.2d 965, 968 (La.1986)).

*Id.*; see also *State v. Sykes*, 04-1199 (La. App. 4 Cir. 3/9/05), 900 So.2d 156.

Mr. Ragas was indicted for and convicted of aggravated rape. La.

R.S. 14:42 provides in pertinent part:

A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) When the victim resists the act to the utmost, but whose resistance is overcome by force.

(2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.

(3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon.

La. R.S. 14:41 defines rape as “the act of anal, oral, or vaginal sexual

intercourse with a male or female person committed without the person's lawful consent." Subpart C defines "oral sexual intercourse" as "the intentional engaging in any of the following acts with another person: . . . (2) The touching of the anus or genitals of the offender by the victim using the mouth or tongue of the victim."

D.S. testified that Mr. Ragas entered her bedroom armed with a shotgun and a pocketknife. She further testified that she tried to get past him, but he blocked her way, threw her down on the bed, and ordered her to disrobe. He forced her to perform fellatio. He then ordered her to turn around. She testified that she did so, but when she tried to push him away, he cut her with his knife. She denied that she cut her hand on broken glass inside her trailer. He then forcefully penetrated her anally and then vaginally. Although D.S. admitted that Mr. Ragas did not rip off her clothing during the attack, she stated that she did not feel that she could resist him because she feared for her safety. She further testified that Mr. Ragas hit her on the back of her head during the attack. She still further testified that she continually begged him to stop, but she complied with his orders because he was armed.

Mr. Ragas contends that there was insufficient evidence to support his conviction because there was no testimony that he was armed when he had

sexual intercourse with D.S. He argues that although D.S. testified he had the knife in his hand when he entered her bedroom, there was no testimony that he was holding the knife while they were engaged in sexual intercourse. He also notes that D.S. testified that during the rape the shotgun was lying on the bed. He theorizes that because there was no evidence that he was armed when he vaginally and anally penetrated her, his conviction for aggravated rape cannot stand.

Nonetheless, D.S. testified that after she was forced to perform fellatio, Mr. Ragas made her turn around, and when she tried to push him away, he cut her with his knife. He then raped her anally and vaginally. As per the definition of “oral sexual intercourse” set forth in La. R.S. 14:41, which is considered an act of rape, Mr. Ragas’ conviction would stand because at the time he forced her to perform fellatio, which would fall within the definition of “oral sexual intercourse,” he was armed. Therefore, even if there was no testimony that Mr. Ragas was holding the knife when he raped D.S. vaginally and anally, the evidence showed that he was armed with the knife when he committed “oral sexual intercourse” with D.S., and thus a rape occurred while he was holding the knife.

The cases Mr. Ragas cites for the proposition that there must be testimony that he was actually holding a weapon when he raped the victim



are distinguishable. In *State v. Touchet*, 04-1027 (La. App. 3 Cir. 3/9/05), 897 So.2d 900, the court found there was insufficient evidence of aggravated rape. Although the defendant in *Touchet* initially pulled a knife on the victim with whom he lived, there was no testimony that the defendant was anywhere near the victim when he did so. In addition, there was no showing of any great force in that the victim initially told the defendant that she did not want to have sex, but she admitted that she would have probably disrobed and submitted to the defendant even if he did not have the knife. In so finding, the *Touchet* court distinguished *State v. Jackson*, 03-1079 (La. App. 3 Cir. 2/4/04), 866 So.2d 358, in which the defendant initially placed a knife to the victim's throat, then took her into another room and raped her, leaving the knife in the first room but taking with him a pair of scissors which he left near the victim's head during the rape. The victim testified that because the defendant was having trouble completing the act, he went back into the hallway where he had left the knife, then locked the victim in a bathroom and fled. The court upheld the defendant's aggravated rape conviction, finding that the jury "was reasonable in determining that [the scissors] were easily accessible to [the defendant]." *Jackson*, 03-1079 at p. 16, 866 So.2d at 366.

As noted, the other cases Mr. Ragas cites are also distinguishable. In

*State v. Parish*, 405 So.2d 1080 (La. 1981)(*on reh'g*), the Louisiana Supreme Court found the evidence was insufficient to support the defendant's attempted aggravated rape conviction. Although the defendant in *Parish* entered the victim's home, grabbed her, and squeezed her so tight that she could not breathe, threatening to kill her if she did not submit, he ultimately left the house after only ordering her to undress. Likewise, in *State v. Powell*, 438 So.2d 1306 (La. 1983), the Supreme Court found insufficient evidence to support the defendant's *forcible* rape conviction (which does not require the use of a dangerous weapon). In that case, the victim voluntarily entered the defendant's car, he drove her to a secluded spot, and then he threatened to kill her with a weapon he said he had under his seat if she did not submit to sexual intercourse. They both disrobed, had sex, and then dressed, and the defendant dropped off the victim where he had picked her up. The Court found that there was no showing of resistance by the victim and little evidence that she was prevented from resisting by force or threats of violence.

In this case, as in *Jackson*, D.S. testified that the shotgun was on the bed next to them while Mr. Ragas anally and vaginally raped her. In addition, D.S. testified that Mr. Ragas cut her wrist when she tried to push him away right before he anally raped her. Thus, there was sufficient

evidence to support his aggravated rape conviction.

Mr. Ragas also argues that D.S.'s testimony as to the rape was unbelievable because she did not tell the 911 operator that she had been raped. Nor did she tell K.B. or Mr. Boudreaux when they returned to her trailer from Fort Jackson that she had been raped. Although the shotgun was outside at the time K.B. and Mr. Boudreaux returned, D.S. testified that she did not tell them about the rape because she was still fearful, knowing that Mr. Ragas still had the knife in his pocket. D.S. also testified that at the time she made the 911 call, she was concerned that Mr. Ragas was going to shoot her daughter. At that time, it is likely that she was more concerned with her daughter's immediate safety than with reporting that she had been raped.

The jury was aware of D.S.'s failure to tell anyone about the rape until after the entire episode was over. Nonetheless, the jury found her testimony to be more credible than that of Mr. Ragas. A fact-finder's credibility decision should not be disturbed on appeal unless it is clearly contrary to the evidence. *State v. Huckabay*, 00-1082 (La. App. 4 Cir 2/6/02), 809 So.2d 1093; *State v. Harris*, 99-3147 (La. App. 4 Cir. 5/31/00), 765 So.2d 432. The jury was able to observe both D.S. and Mr. Ragas. The testimony elicited at trial does not show that the jury was clearly wrong in choosing to believe D.S. Thus, there was sufficient evidence to support the aggravated

rape conviction. This assignment has no merit.

**(ii) *Insufficiency of evidence to support attempted manslaughter convictions***

By his second assignment of error, Mr. Ragas attacks the sufficiency of evidence to support his two attempted manslaughter convictions. He argues that the State failed to show that he had the intent to kill either K.B. or Mr. Boudreaux. The *Jackson* standard for determining the sufficiency of evidence is set forth above. *Brown, supra*. Mr. Ragas was charged with attempted first degree murder, but the jury found him guilty of the responsive verdict of attempted manslaughter.

La. R.S. 14:31 defines manslaughter as follows:

A. Manslaughter is:

(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed;

The statute further provides that “[p]rovocation shall not reduce a homicide to manslaughter if the jury finds that the offender’s blood had actually cooled, or that an average person’s blood would have cooled, at the time the

offense was committed.” La. R.S. 14:31; *see State v. Collor*, 99-0175 (La. App. 4 Cir. 4/26/00), 762 So.2d 96.

"Sudden passion" and "heat of blood" are not separate elements of the offense, but are mitigating factors that the defendant must establish by a preponderance of the evidence. *State v. Jones*, 2001-0630 (La. App. 4 Cir. 3/20/02), 814 So.2d 623; *State v. McClain*, 95-2546 (La. App. 4 Cir. 12/11/96), 685 So.2d 590. As this court noted in *State v. Collor*, 99-0175 at p. 11, 685 So.2d at 103:

Thus, in reviewing defendant’s claim that the evidence supports a manslaughter verdict, this Court must determine whether a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found that the mitigating factors were not established by a preponderance of the evidence. *State v. Sanders*, 93-0001, p. 18-19 (La. 11/30/94), 648 So.2d 1272, 1287, *cert. denied* 517 U.S. 1246, 116 S.Ct. 2504 (1996).

First degree murder is defined in pertinent part by La. R.S. 14:30:

A. First degree murder is the killing of a human being:

(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.

*See State v. Points*, 2000-1371 (La. App. 4 Cir. 4/11/01), 787 So.2d 396. In

addition, an attempt is defined in pertinent part by La. R.S. 14:27:

A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually

accomplished his purpose.

B. (1) Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.

In this case, the jury apparently found that Mr. Ragas intended to kill K.B. and Mr. Boudreaux, but the offenses were committed in the heat of passion. Indeed, Mr. Ragas does not dispute the jury's finding as to heat of passion. The evidence shows that the shootings occurred after Mr. Ragas followed K.B. and Mr. Boudreaux out of the trailer, and K.B. refused his pleas that they reconcile. Mr. Ragas argues instead that the evidence does not show that he had the intent to kill either K.B. or Mr. Boudreaux. Rather, he maintains that the shootings occurred in self-defense.

In *State v. McClain*, 95-2546 at pp. 8-9, 685 So.2d at 594, this court discussed the defense of self-defense:

A homicide is justifiable if committed by one in defense of himself when he reasonably believes that he is in imminent danger of being killed or receiving great bodily harm and that the homicide is necessary to save himself from that danger. La. R.S. 14:20(1). When a defendant claims self-defense, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Lynch*, 436 So.2d 567 (La.1983); *State v. Brumfield*, 93-2404 (La.App. 4th Cir. 6/15/94), 639 So.2d 312. Regarding self-defense, it is necessary to consider whether the defendant had a reasonable belief that he was in imminent danger of losing his life or receiving great bodily harm and whether the killing was

necessary, under the circumstances, to save the defendant from that danger. *State v. Dozier*, 553 So.2d 911 (La.App. 4th Cir.1989), *writ denied* 558 So.2d 568 (La.1990). Although there is no unqualified duty to retreat, the possibility of escape is a factor in determining whether or not the defendant had a reasonable belief that deadly force was necessary to avoid the danger.

*Id.*; *see also Jones, supra; State v. Gibson*, 99-0946 (La. App. 4 Cir. 5/3/00), 761 So.2d 670.

Contrary to Mr. Ragas' argument, however, the evidence adduced at trial does not support his claim. Although Mr. Ragas maintained that he did not fire at Mr. Boudreaux's truck either time until after Mr. Boudreaux fired at him, Mr. Boudreaux testified that Mr. Ragas shot at him both times before he returned fire. Again, the jury chose to believe Mr. Boudreaux's testimony, not Mr. Ragas', and nothing in the testimony would lead this court to believe that the jury abused its discretion in its credibility finding.

Moreover, although Mr. Ragas testified that he did not fire at Mr. Boudreaux's truck after K.B. entered it, both K.B. and Mr. Boudreaux testified that she got in the truck and ducked down at Mr. Boudreaux's insistence, and then Mr. Ragas fired the second time at the truck as Mr. Boudreaux tried to flee. Thus, the evidence shows that Mr. Ragas shot twice at Mr. Boudreaux's truck, the first time as it was backing out of the driveway and the second time when both Mr. Boudreaux and K.B. were

inside the truck. In addition, a pellet from Mr. Ragas' shotgun fired during the first shooting injured Mr. Boudreaux's arm. Given these circumstances, the jury could have easily rejected Mr. Ragas' self-defense claim and found that Mr. Ragas shot at K.B. and Mr. Boudreaux, intending to kill them, while in the heat of passion. Contrary to Mr. Ragas' argument, the evidence supports the attempted manslaughter convictions.

*(iii) improper joinder of offenses*

By his final assignment, Mr. Ragas argues that the joining of the offenses for trial was improper and prejudicial to his substantive rights. While two of the offenses with which he was charged mandated that he be tried by a jury of twelve (ten of whom must agree to the verdict), the other two charges should have been tried by a jury of six (all of whom must agree to the verdict). Mr. Ragas thus contends that his rights were violated because all four charges were tried by a twelve-person jury. Although Mr. Ragas does not contend that he objected to the composition of the jury at trial, he cites *State v. Pollard*, 438 So.2d 1208 (La. App. 3 Cir. 1983), for the proposition that such error is a patent error discoverable on the face of the record.

At the time *Pollard* was decided, the jurisprudence consistently held that "the verdict returned by a jury composed of either more or less than the



correct number of jurors is null.” *Pollard*, 438 So.2d at 1210 (collecting cases). The law was changed in 1997 when the Legislature added La. C.Cr.P. art.493.2. *See State v. Carter*, 97-1096, p. 5 (La. App. 4 Cir. 5/20/98), 713 So.2d 796, 799 (noting the result in that case would have been different if the case had been tried after the enactment of Article 493.2).

Article 493.2 provides in pertinent part:

[O]ffenses in which punishment is necessarily confinement at hard labor may be charged in the same indictment or information with offenses in which the punishment may be confinement at hard labor, provided that the joined offenses 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. Cases so joined shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.

La. C.Cr.P. art. 493.2.

Applying Article 493.2 to this case, we find all the counts with which Mr. Ragas was charged could be tried together by a twelve-person jury. Moreover, the record reflects that at least ten jurors voted to convict Mr. Ragas on each count. The events leading to all five counts arose from the same transaction, occurring in sequence on the same afternoon at the same place. At trial, after the verdicts were read, the defense requested a polling of the jury. The transcript indicates that twelve jurors voted to convict Mr. Ragas of unauthorized entry of an inhabited dwelling, ten jurors voted to

convict him of aggravated rape, twelve jurors voted to convict him of the attempted manslaughter of K.B., eleven jurors voted to convict him of the attempted manslaughter of Mr. Boudreaux, and twelve jurors voted to convict him of aggravated criminal damage to property. Thus, the counts were properly tried together. This assignment of error has no merit.

**DECREE**

For the foregoing reasons, Mr. Ragas' five convictions are affirmed. His sentence for unauthorized entry of an inhabited dwelling is amended to delete the prohibition of parole eligibility and, as amended, is affirmed. The remaining sentences are affirmed.

**AFFIRMED IN PART, AMENDED IN PART, AND RENDERED**