NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2013-KA-1029**
VERSUS	*	
		COURT OF APPEAL
JAMINE E. FELTON	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 506-511, SECTION "F"
Honorable Robin D. Pittman, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Paul A. Bonin)
BONIN, J., CONCURS WITH REASONS

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JANUARY 17, 2014 MOTION TO SUPPLEMENT RECORD GRANTED; CONVICTION AND SENTENCE AFFIRMED; REMANDED FOR IMPOSITION OF A FINE

AUGUST 13, 2014

In June 2011, Jamine Felton ("Defendant") was charged by bill of information with attempted second degree murder, in violation of La. R.S. 14:(27)30.1, and possession of a firearm by a convicted felon, in violation of La. R.S. 14:95.1.[1] In light of the evidence against Defendant, we hereby affirm both of Defendant's convictions and his sentence on the attempted second degree murder count, but remand for the imposition of a fine on the convicted felon in possession of a firearm count.

PROCEDURAL HISTORY

A trial in this matter commenced on March 4, 2013. The same date, Defendant filed a motion to declare La. C.Cr.P. art. 782(A) and La. Const. art. 1 § 17 unconstitutional on the grounds that they violate the Fourteenth Amendment's Equal Protection clause.[2] The trial court denied this motion. After a jury was selected, the State filed a motion in limine to exclude the introduction of evidence of the victim's character under La. C.E. art. 609.1 and La. C.E. art. 404. After

[1] The bill of information was amended on January 8, 2013, to change the predicate conviction for possession of a firearm by a convicted felon to possession of dextropropoxyphene. Originally, it listed attempted distribution of marijuana as the prior felony conviction.

[2] Defendant also filed a motion to declare La. R.S. 14:95.1 unconstitutional, which the trial court denied.

hearing arguments, the trial court granted the State's motion in limine.[3] On March 5, 2013, the jury found Defendant guilty as to both counts. Ten of the twelve jurors found Defendant guilty of attempted second degree murder. The jury unanimously found Defendant guilty of possession of a firearm by a felon.

At the sentencing hearing on March 25, 2013, Defendant filed a motion for post-verdict judgment of acquittal and a motion for new trial.[4] The same date, the State filed a motion to invoke the firearm sentencing provisions of La. C.Cr.P. art. 893.3.[5] The trial court denied both of Defendant's motions as well as the motion filed by the State.[6]

The trial court sentenced Defendant to twelve and a half years at hard labor, without benefit of parole, probation, or suspension of sentence, and assessed $201.50 in court costs for attempted second degree murder. In connection with his conviction for possession of a firearm by a convicted felon, the trial court sentenced Defendant to ten years at hard labor, without the benefit of parole, probation, or suspension of sentence; assessed $201.50 in court costs; and ordered to pay $500 to the Indigent Defenders Transcript Fund for felony possession of a

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[3] The trial court prohibited Defendant from discussing facts related to a prior incident between the victim, Courtney McCarter, and Brittany Labat that occurred on February 1, 2011, and McCarter's violation of a protective order issued on February 3, 2011. The trial court noted, however, that the defense would be able introduce evidence of McCarter's conviction, but not the details underlying the offense. The trial court also indicated that it would be willing to reconsider its ruling later.

[4] Defendant also filed motion for appeal and designation of record, which was granted on June 10, 2013.

[5] La. C.Cr.P. art. 893.3 provides for escalating sentencing enhancements depending upon the kind of offense committed with a firearm and whether the firearm was actually possessed; actually used; actually discharged; and, if actually used or discharged, caused harm.

[6] The State's motion was denied as untimely.

firearm.[7] The trial court noted that both offenses are crimes of violence and that the sentences imposed are to run concurrently. [8]

The State subsequently filed a multiple offender bill charging Defendant as a double felony offender. The multiple offender bill of information alleged that in addition to his recent conviction for attempted second degree murder, Defendant previously pled guilty to possession of dextropropoxyphene on May 1, 2010 in Case No. 492-538. Defendant pled guilty to the multiple offender charge on June 6, 2013. The trial court then vacated its previous sentence for attempted second degree murder and sentenced Defendant to thirty years at hard labor, without the benefit of probation, parole, or suspension of sentence, with credit for time served, to run concurrently with the sentence imposed after his conviction for possession of a firearm by a convicted felon.[9] The trial court again assessed court costs in the amount of $201.50.[10] Defendant now appeals this final judgment.

On January 17, 2014, Defendant filed a motion to supplement the record on appeal with evidence relating to the victim's prior bad acts and character, which the trial court allegedly refused to permit defense counsel to proffer into evidence. In his motion, Defendant requests this Court to supplement the record of appeal with a copy of the protective order issued against the victim; a copy of the transcript of Brittany Labat's (a witness to the incident) 911 telephone call; and copies of two warrants issued for the victim's arrest. We hereby grant Defendant's

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[7] The trial court also recommended "any and all vocational and self-help programs" that Defendant qualifies for while serving at the Department of Corrections.

[8] Defendant was given credit for time served for both sentences.

[9] The trial court again recommended Defendant for any and all vocational and self-help programs that he would qualify for while serving his sentence.

[10] The minute entry of June 6, 2013 states that the $201.50 assessment was to be paid to the Indigent Defender Transcript Fund, not as court costs. However, when there is a discrepancy

motion to supplement because the materials[11] will assist this Court in determining whether the trial court's decision to exclude certain evidence relating to McCarter's prior threats denied Defendant's right to present a defense, an issue Defendant raises on appeal.[12]

FACTS

The facts giving rise to the offenses at issue occurred on April 11, 2011, between 1:00 a.m. and 2:00 a.m. at 1840 Painters Street. Yolanda Haynes, a 911 operator and the custodian of records in the 911 department, testified that when a 911 call is received, the call is recorded and assigned a number. She identified the 911 tape in this case, which bore the item number D-16372-2011, and the incident recall associated with the 911 call, which is a hard copy of the recording. The 911 call was played for the jury. Haynes testified that the 911 tape is accurately depicted in the incident recall.

Detective Tanisha Sykes of the NOPD, Homicide Division, testified that she investigated the shooting that occurred in the 1800 block of Painters Street on April 11, 2011. At the time of the incident, Det. Sykes was assigned to the Fifth District Investigative Unit. She stated that she arrived on the scene close to 2:00 a.m. at the intersection of Franklin Avenue and North Miro Street, less than a mile from Painters Street. Upon arrival, Det. Sykes observed a victim, later identified

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between a minute entry and the transcript, the transcript prevails. *State v. Randall*, 10–1027, p. 3 (La. App. 4 Cir. 6/22/11), 69 So.3d 683, 685.

[11] The 911 transcript referenced in Defendant's motion to supplement, however, was not offered at trial or at the hearing on the motion in limine. As such, only the protective order and arrest warrants will be considered in assessing Defendant's arguments on appeal.

[12]Defendant argues in his motion that the referenced documents should be supplemented into the record because the trial court refused to permit the defense from proffering evidence and hampered Defendant's ability to pursue his appeal. However, as will be discussed herein, Defendant did not actually make a proffer of the police officers' testimony, whom would have testified about the events depicted in the supplemental documents. Nevertheless, this Court will review the documents in order to address Defendant's assignments of error.

as Courtney McCarter, suffering a gunshot wound to the face. McCarter was receiving medical treatment on a stretcher about to be placed in an ambulance when she arrived. Det. Sykes testified that McCarter told her "Jamine shot me." After McCarter was taken to the hospital, Det. Sykes relocated to 1840 Painters Street, where the shooting actually occurred. She stated that upon arrival she observed a trail of blood from Painters Street to the location McCarter was found. Det. Sykes identified photographs taken of the scene.

Det. Sykes testified that while on the scene she spoke with Brittany Labat, a witness to the incident, and learned that "the possible suspect was Jamine Felton." She stated that Labat did not remain cooperative in the investigation, and she was unable to locate Labat after she spoke with her the night of the shooting.

Det. Sykes stated that when she relocated to the hospital where McCarter was undergoing treatment, McCarter again informed her that Defendant was the shooter. McCarter also told Det. Sykes that Defendant lived in the 1800 block of Painters and described the house. Based on this information, Det. Sykes compiled a photographic line-up with six Louisiana driver's license photographs. She testified that McCarter was able to identify Defendant as the perpetrator. Det. Sykes stated that she then prepared a warrant for Defendant's arrest. Defendant was arrested on April 13, 2011, when he turned himself in to the Gretna Police Department.[13]

Det. Sykes testified that during the course of her investigation, she became aware that a video of the incident existed, captured by a neighboring property's surveillance camera. She testified that she watched the video and identified the

[13] Det. Sykes' testimony in this regard is contradicted by Officer Jerald Holmes, who testified that he arrested Defendant on April 12, 2011 after a struggle.

tape in open court. Det. Sykes stated that she obtained a warrant to search Defendant's home, located at 1833 Painters Street. She testified that Defendant and his sister, Virginia Felton, lived at the address, and no evidence was found during the search of the property.

On cross-examination, Det. Sykes testified that through speaking with Labat on the day of the incident, she learned that Labat lived at 1840 Painters Street and Defendant's full name. She stated that Labat informed her that McCarter had come to Labat's residence to confront Labat and that they had an altercation over money. On redirect, Det. Sykes stated that the altercation between Labat and McCarter was not physical, and at no time was Labat attacked during the dispute. She testified that Labat had informed her that Defendant had previously stolen money from her.

Doctor Mark Welch, the Clinical Director for Oral Maxillofacial Surgery at University Hospital, testified that he treated McCarter for the gunshot wound to his face. He stated that there are multiple arteries in the face and that a gunshot wound to the face "could bleed out very easily." Dr. Welch stated during the course of his treatment, he was able to determine that the bullet entered just above McCarter's upper left lip. He testified that the medical records indicated that McCarter's condition was life-threatening when he initially came into the ER. Dr. Welch stated that bullet projectiles were found in McCarter's right cheek, "less than an inch" from McCarter's brain.

McCarter testified that prior to the April 11, 2011 shooting, he had an argument with Labat over the telephone. He stated that Labat was his ex-girlfriend, and they had dated for about two and a half years. McCarter began walking to Labat's house as he was talking to her. He testified that they were

talking about money he had given her in restitution for breaking her door. During the conversation, McCarter stated Labat informed him that she no longer had the money he paid her. McCarter stated when he got to Labat's house, she came outside on the porch. He testified he was standing in the driveway by the steps. McCarter admitted he was angry and pacing back and forth. As McCarter and Labat were talking, McCarter observed Defendant come around the corner. He said Defendant was walking quickly toward them and initially did not say anything to him. Eventually, McCarter confronted Defendant about whether he had stolen the money he had paid Labat in restitution. Neither McCarter nor Defendant was armed at this time. However, McCarter said after he brought up the money issue, Defendant walked across the street and got a gun from underneath a trash can. McCarter testified Defendant began waving the gun around. McCarter then said: "Oh you need a gun, right," to which Defendant responded, "Yeah you should get one too." Labat asked them both to leave. McCarter said he stayed, but that Defendant went back toward where he retrieved the gun. McCarter stated that while he and Labat were talking, Labat remained on the porch and he remained on the street. Soon thereafter, McCarter testified Defendant came back, got in his face, and shot him. McCarter said he saw a flash, heard a pop, and his ears began to ring. He stated that prior to the shooting he believed the situation was diffusing. McCarter testified that he did not make any gesture towards Defendant or say anything to him before the shooting. He said that initially he thought he was dead, but then went into "defense mode," lunged at Defendant, and ran towards Franklin Avenue. McCarter said he was dazed and stumbling as he fled the scene, but could hear Defendant behind him and four more gun shots. He called 911 as he was heading towards Franklin. McCarter identified himself, Labat, and Defendant in

the video tape. The video of the incident was played for the jury. McCarter recalled speaking with a detective at the scene and at the hospital. He testified that he positively identified Defendant in the photographic line up presented by the detective.

On cross-examination, McCarter admitted he had a conviction for simple burglary, disturbing the peace by threats, and obstructing a police officer. He said after he and Labat broke-up, she began dating Defendant, but that she continued to seek his advice on various issues. McCarter admitted that the video did not contain footage of Defendant retrieving a gun from under the trash or the initial argument with Defendant. He agreed that the video showed that when he was talking with Labat he moved from the street, closer towards the house, near the "bottom stoop." McCarter also admitted that he pointed at Labat during their discussion. He testified that the second Defendant raised his arm in the video is when Defendant pulled the trigger and knocked him off balance. McCarter admitted that in the video Defendant had the gun at his side while he was running after him.

On redirect, McCarter testified that he never threatened or physically harmed Labat during their conversation. He stated he never went to the porch where Labat was standing. McCarter testified the reason he was angry and went to Labat's residence was because of the information he received from her regarding "the restitution for the door [he] had broken" and because "the money had got [sic] stolen." He stated he never gestured towards Defendant prior to the shooting, did not have a weapon, and did not threaten or physically harm Defendant.

Officer George Jackson, an expert in the taking, examination, and comparison of fingerprints, testified that he had taken Defendant's fingerprints in court that day. He stated that Defendant's fingerprints matched the fingerprints on

an arrest register, a bill of information, and a plea of guilty form evidencing Defendant's 2010 conviction for possession of dextropropoxyphene.

Officer Jerald Holmes of the HANO Police Department stated that he arrested Defendant on April 12, 2011. At the time of the arrest, Off. Holmes was working for the Gretna Police Department and had been investigating a disturbance on Pratt and Kepler Streets. He stated he observed Defendant walking up Kepler and decided to stop to see if he knew anything about the disturbance in the area. When the officers pulled in front of Defendant, he ran. When Off. Holmes' partner was able to catch up with Defendant, he struggled and punched the officer in the chest or arm. Defendant was subsequently arrested. Off. Holmes stated he was not aware that an arrest warrant was out for Defendant until after he was booked and in custody.

Deputy Donald Hancock, the telephone supervisor for the Orleans Parish Sheriff's Office, testified that he oversees all the operations of the telephone systems in prison. He stated that all calls made by inmates are recorded. Dep. Hancock testified that when an inmate makes a call, he has to use his pin number issued at booking, and that upon acceptance of the call by the receiver, there is an automatic announcement that all calls are subject to monitoring and recording. He identified the disc and call detail report assigned to Defendant's folder number. The phone calls were played for the jury.

After introducing several exhibits into evidence, the State rested. The exhibits the State offered into evidence include: the 911 tape, the incident recall, crime scene photographs, the photographic line-up, the video surveillance of the incident, the arrest warrant, the search warrant, McCarter's medical records, the fingerprint cards from January 8, 2013 and February 5, 2013, the certified

conviction packet, the tape of Defendant's phone calls from prison, and the call detail.

The defense recalled Det. Sykes to testify about the surveillance video. She stated that she had not viewed the video introduced into evidence but had seen it prior to trial. Det. Sykes stated that the video she reviewed depicted McCarter standing on the stairs speaking to someone on the porch and Defendant subsequently exiting the residence and walking river bound on Painters Street. She also testified that the video showed Defendant return a few minutes later, raise his arm and shoot McCarter. The video was played again, after which Det. Sykes indicated that the first part of the video, depicting the events she described, must have been cut off in error. She also discussed the portion of the video shown to the jury. Det. Sykes testified that when Defendant raised the gun, he shot the gun but missed, and the second time he pulled the trigger, he struck McCarter in the face. She agreed that the video did not have sound, but she was going off of McCarter's body motions and what McCarter told her. Det. Sykes, when questioned again by the State, testified that at no point in the video she saw, or in the video presented by the State did she observe a physical altercation occur prior to the shooting.

Officer Quincey Broaden of the NOPD, Fifth District, testified that he investigated an incident that occurred on February 1, 2011, at 1840 Painters Street and subsequently arrested McCarter as a result of that incident.

The defense attempted to called Officer Gerald Lee and Officer Jackson as witnesses. However, Off. Lee could not testify until after 6:30 p.m., and Off. Jackson was not available until the following day. Defendant requested that the trial court declare the officers unavailable and introduce certified copies of the police reports. The trial court denied Defendant's request. The record provides

that on March 4, 2013, the trial court had advised the parties to have all witnesses lined up and how long trial would last. The defense later requested a material witness bond for both officers, which was denied by the trial court.

Officer Carolyn Dalton of the NOPD testified that she investigated an incident at 1840 Painters Street on February 2, 2011.

Defendant testified he did not personally know McCarter, but knew he had dated his then girlfriend, Labat. He stated that prior to the shooting, McCarter had stalked and threatened him as a result of his relationship with Labat. Defendant testified when he would stay with Labat, McCarter "used to peep though the windows, or kick the door, and threaten us" at 2:00 or 3:00 in the morning. Defendant also testified that McCarter would call a hundred times a day, threatening to kill both him and Labat. He stated that they had called the police in the past, but by the time the police arrived, McCarter had fled the scene. Defendant said prior to the shooting, he was living with Labat, but had moved to Gretna and ended his relationship with Labat because he did not feel safe "because her ex-boyfriend was harassing us so much."

Defendant testified that on the night of the shooting, he was about to get off work when Labat called him to come to her house because she was frightened of McCarter. He stated that he went to Labat's house and then left, but as he was leaving observed McCarter walking towards them, "screaming and cursing." Defendant testified that after McCarter threatened to kill him, he went to his sister's house, which was across the street from Labat's home. When he got inside the house, Defendant stated that McCarter's voice had gotten louder, sounding like he was standing on his sister's porch. Defendant then asked for his sister's gun. He testified his sister generally would not allow him to have the gun, but gave it to

him because she was scared and knew that Labat had previously obtained a restraining order against McCarter.

After obtaining the gun, Defendant testified that he walked outside with a gun in his shirt and observed McCarter acting aggressively towards Labat. He then cautiously moved around McCarter until he was directly in front of his face. Defendant stated he informed McCarter he had a gun on him, hoping McCarter would retreat, but that McCarter just got angrier and continued to make threats that he was going to kill them. Defendant testified he got scared, pulled out the gun, and "pretended" to fire the weapon by making a noise with his mouth. He stated that McCarter then spun around, and when McCarter realized he was not shot, he lunged at Defendant. Defendant testified that he then shot McCarter as a reflex. He stated that he only ran after McCarter to make sure he was gone and did not fire additional shots.

Defendant testified that although he and Labat had broken up before the incident, they remained friends and that he still loved her. He said he put himself between Labat and McCarter because he did not want McCarter to attack her. Defendant testified that he was frightened of McCarter and believed he was capable of causing harm due to his aggressive body language, sound of his voice, and "rage in his eyes." Defendant stated he obtained the gun from his sister in order to scare McCarter away from the neighborhood. He testified that he did not threaten McCarter prior to pulling the gun.

On cross-examination, Defendant admitted that he possessed the gun he fired at McCarter and that he was convicted of possession of dextropropoxyphene within the last ten years. Defendant conceded that on the jail tape, he blamed Labat for the incident and stated that the incident would not have occurred if Labat

was not trying to play both sides. He testified that on prior occasions when McCarter had threatened them, Labat called the police, not him. Defendant admitted that Labat was on her porch and McCarter was in the street when he exited his sister's house, but he believed that McCarter might physically harm Labat based on his hostile behavior and the fact that there was a restraining order against him. He stated that when McCarter "rushed" him, he thought he was coming for the gun. Defendant admitted, however, that he never saw McCarter with a weapon.

Defendant conceded that he had the chance to call the police before he relocated to Labat's home from work. He also stated that his sister had a phone, but he did not call the police when he entered her house. Defendant further stated when he observed McCarter allegedly acting aggressively towards Labat, he did not call the police. He stated that the reason he did not call the police was because the police had "failed" them on previous incidents involving McCarter. Defendant explained that when the police would come on prior occasions, McCarter would flee or hide from the police, but come back two to three hours later. Defendant also testified that McCarter threatened to kill him and Labat when the police were still on the scene.

ERRORS PATENT

A review of the record reveals two errors patent with regard to sentencing.

La. C. Cr. P. art. 873 states that if "a motion for new trial, or in arrest of judgment,t is filed, sentence shall not be imposed until at least twenty-four hours after the motion is overruled," unless the defendant "expressly waives" the delay or pleads guilty. A defendant may also implicitly waive the twenty-four hour delay. *See, State v. Pierre*, 99-3156, p. 7 (La. App. 4 Cir. 7/25/01), 792 So.2d 899, 903

(implicit waiver where defense counsel responded in the affirmative when the trial court inquired if he was ready for sentencing); *State v. Robichaux,* 00-1234, p. 7 (La. App. 4 Cir. 3/14/01), 788 So.2d 458, 464-465 (defense counsel announcing to judge that prior to sentencing he wished to file a motion for new trial operated as implicit waiver of twenty-four hour delay).

Here, the trial court sentenced Defendant on the same day that the trial court denied Defendant's motion for post-judgment verdict of acquittal and motion for new trial without an express waiver of the twenty-four hour delay required by La. C.Cr.P. art. 873. However, at the beginning of the hearing, defense counsel noted that the matter was before the court for sentencing but she had filed post-trial motions.[14] Moreover, after the trial court denied Defendant's motions and stated it was prepared for sentencing, defense counsel responded that she would like to call a witness for the trial court's consideration prior to the trial court's ruling.[15] These statements made by defense counsel and the preparedness to put forth mitigating

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[14] Counsel for defense stated: "Your Honor, today we're set for sentencing. The defense has filed several motions this morning."

[15] The transcript provides

> The Court: … [A]t this time Mr. Felton, if you and your attorneys could come to the podium for sentencing.
>
> Ms. McClary [Defense Counsel]: Your Honor, actually, we -- we would like to put on mitigation evidence at this time.
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> ***
>
> And your Honor, we would like to put on one witness prior to --
>
> The Court: Okay.
>
> Ms. McClary: -- the State -- I'm sorry --
>
> The Court: So --
>
> Ms. McClary: -- prior to the Court making its ruling.

Ultimately, defense counsel withdrew her request to put on a mitigation witness, but noted that Defendant's family members and friends were at the hearing in support of Defendant.

evidence indicate Defendant was ready for sentencing and thus implicitly waived the twenty-four hour waiting period.

Furthermore, this Court has recognized that the failure to observe the twenty-four hour delay does not prejudice a defendant when the original sentence is vacated at the multiple offender hearing. *State v. Sam*, 99-0300, pp. 7-8 (La. App. 4 Cir. 4/19/00), 761 So.2d 72, 78 (citing *State v. Bentley*, 97-1552, p. 3 (La. App. 4 Cir. 10/21/98), 728 So.2d 405, 408). This Court has also held that the failure to observe the twenty-four hour delay provided is harmless error "where there is a sufficient delay between the date of conviction and the date of sentencing; there is no indication that the sentence was hurriedly imposed and; there is no argument or showing of actual prejudice by the failure to observe the twenty-four hour delay." *State v. Stovall*, 07-0343, p. 12 (La. App. 4 Cir. 2/6/08), 977 So.2d 1074, 1082, (quoting *State v. Foster*, 2002–0910, pp. 3-4 (La. App. 4 Cir. 12/11/02), 834 So.2d 1188, 1192).

Defendant's original sentence on count one, attempted second degree murder, was vacated when Defendant pled guilty to the multiple offender bill. Thus, as to the attempted second degree murder count, the trial court's failure to observe the twenty-four hour delay was harmless. As to the second count, felon in possession of a firearm, any error on the part of the trial court in this regard is likewise harmless. Defendant was convicted on March 5, 2013, and sentenced over two weeks later, on March 25, 2013. Accordingly, there is no indication Defendant's sentence was hurriedly imposed. Defendant also does not challenge his sentence on appeal or raise the failure to observe the 24-hour delay as error. Thus, even assuming Defendant did not implicitly waive the twenty-four hour

delay, the trial courts' error in failing to observe the delay required by La. C.Cr.P. art. 873 did not prejudice Defendant.

The second patent error concerns the sentence the trial court imposed for Defendant's conviction of felon in possession of a firearm. La. R.S. 14:95.1(B) provides that "[w]hoever is found guilty of violating the provisions of [possession of a firearm by a convicted felon] shall be imprisoned at hard labor for not less than ten nor more than twenty years without the benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars."

In the present case, the trial court sentenced Defendant to ten years without benefit of probation, parole, or suspension of sentence, but failed to impose the mandatory fine required by La. R.S. 14:95.1(B). As a result, we remand the matter to the trial court in order for the trial court to impose an appropriate fine pursuant to La. R.S. 14:95.1(B). *See, State v. Martin*, 2010-1356, p. 3 (La. App. 4 Cir. 8/24/11), 72 So. 3d 928, 932 (the failure to impose a mandatory fine requires remand for imposition of that fine).

ASSIGNMENT OF ERROR NUMBER 1

Defendant's first assignment of error is that there is insufficient evidence to support his convictions for attempted second degree murder and possession of a firearm by a convicted felon. This Court in *State v. McMillian,* 10-0812, pp. 5-8 (La. App. 4 Cir. 5/18/11), 65 So.3d 801, 804-805, set out the well-settled standard for reviewing convictions for sufficiency of the evidence:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a

reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green,* 588 So.2d 757 (La. App. 4 Cir. 1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. *State v. Mussall,* 523 So.2d 1305 (La. 1988). The reviewing court is not permitted to consider just the evidence most favorable to the prosecution but must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *Mussall,* 523 So.2d at 1309-1310. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." *State v. Smith,* 600 So.2d 1319, 1324 (La. 1992).

In addition, when circumstantial evidence forms the basis of the 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. Shapiro,* 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from *Jackson v. Virginia,* but rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. *State v. Wright,* 445 So.2d 1198 (La. 1984). All evidence, direct and circumstantial, must meet the *Jackson* reasonable doubt standard. *State v. Jacobs,* 504 So.2d 817 (La. 1987). If a rational trier of fact reasonably rejects the defendant's hypothesis of innocence, that hypothesis falls; and, unless another one creates reasonable doubt, the defendant is guilty. *State v. Captville,* 448 So.2d 676 (La. 1984).

A factfinder's credibility decision should not be disturbed unless it is clearly contrary to the evidence. *State v. Huckabay,* 2000–1082 (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 determination of whether

> the requisite intent is present in a criminal case is for the trier of fact. *State v. Huizar,* 414 So.2d 741 (La. 1982); *State v. Butler,* 322 So.2d 189 (La. 1975). In reviewing the correctness of such a determination, the court should review the evidence in a light most favorable to the prosecution and must determine if the evidence is sufficient to convince a reasonable trier of fact of the guilt of the defendant beyond a reasonable doubt as to every element of the offense. *Jackson v. Virginia; State v. Huizar.*[16]

Attempted Second Degree Murder

Second degree murder is defined, in part, as "the killing of a human being ... [w]hen the offender has a specific intent to kill or to inflict great bodily harm." La. R.S. 14:30.1(A)(1). A person is guilty of an attempt to commit an offense if, having a specific intent to commit crime, he does an act "for the purpose of and tending directly toward the accomplishing of his object" and "it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose." La. R.S. 14:27(A).

To obtain a conviction for attempted second degree murder the State must prove the defendant: (1) intended to kill the victim; and (2) committed an overt act tending toward the accomplishment of the victim's death. *State v. Bishop,* 01–2548, p. 4 (La.1/14/03), 835 So.2d 434, 437. Attempted second degree murder requires proof of specific intent to kill. La. R.S. 14:27(A); *Bishop*, 01–2548, p. 4, 835 So.2d at 437. "Specific criminal intent is that state of mind which 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).

[16] The Fourth Circuit in *State v. Sparkman*, 08-0472, pp. 6-7 (La. App. 4 Cir. 1/28/09), 5 So.3d 891, 895, noted that the *Jackson* standard is legislatively embodied in La. C.Cr.P. art. 821(B), which provides that a "post-verdict judgment of acquittal shall be granted only if the court finds that the evidence, viewed in a light most favorable to the state, does not reasonably permit a finding of guilty."

Specific intent may be inferred from the circumstances surrounding the offense and the conduct of the defendant. *Bishop*, 01–2548, p. 4, 835 So.2d at 437. Deliberately pointing and firing a deadly weapon at close range are circumstances which will support a finding of specific intent to kill. *State v. Coleman*, 12-1408, p. 10 (La. App. 4 Cir. 1/8/14), 133 So. 3d 9, 18 (citing *State v. Brown,* 03–0897, p. 22 (La.4/12/05), 907 So.2d 1, 18).

However, Defendant argues that there was insufficient evidence to convict him of attempted second degree murder because he was acting in self-defense and in defense of Labat.

The general provisions for justification are set forth in La. R.S. 14:18, and provide, in pertinent part, "[t]he fact that an offender's conduct is justifiable, although otherwise criminal, shall constitute a defense to prosecution for any crime based on that conduct." One of the specifically enumerated situations in which a defendant may claim justification is "[w]hen the offender's conduct is in defense of persons or of property under any of the circumstances described in Articles 19 through 22." *See*, *State v. Sanchell*, 11-1672, pp. 6-7 (La. App. 4 Cir. 10/31/12), 103 So. 3d 677, 681.

La. R.S. 14:19(A) provides, in relevant part, that "[t]he use of force or violence upon the person of another is justifiable when committed for the purpose of preventing a forcible offense against the person ... provided that the force or violence used must be reasonable and apparently necessary to prevent such offense." La. R.S. 14:22 states that "[i]t is justifiable to use force or violence or to kill in the defense of another person when it is reasonably apparent that the person attacked could have justifiably used such means himself, and when it is reasonably believed that such intervention is necessary to protect the other person."

In a non-homicide situation, the defense of justification requires a dual inquiry: (1) an objective inquiry into whether the force used was reasonable under the circumstances; and (2) a subjective inquiry into whether the force was apparently necessary. *State v. Cooks*, 11-0342, p. 11 (La. App. 4 Cir. 12/14/11), 81 So. 3d 932, 939 (citing *State v. Fluker*, 618 So.2d 459, 462, 462 (La. App. 4 Cir. 1993).

There is a split within this Circuit whether the State or the defendant should bear the burden of proof when the defendant claims justification as a defense. This Court, in *Cooks*, explained:

> It is unsettled, at least in this circuit, whether the burden of proof as to a claim of self-defense in a non-homicide situation is: (1) upon the defendant to establish by a preponderance of the evidence that he acted in self-defense; or (2) upon the State to establish beyond a reasonable doubt that the defendant did not act in self-defense. However, it is well-settled that the latter standard is applicable in a homicide situation. *See Fluker,* 618 So.2d at 463. In *Fluker,* this Court held that the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense:
>
> We see no distinction between these provisions [La. R.S. 14:18, 14:19, and 14:20], and fail to see why the State would have the burden of disproving in one situation (homicide), and why the defendant would bear the burden of proving in another (nonhomicide). Absent a clear direction from our legislature, we feel that the defendant should not have the burden of proving anything.
>
> *Fluker,* 618 So.2d at 463; *see also State v. Wischer,* 2004–0325, pp. 8–9 (La. App. 4 Cir. 9/22/04), 885 So.2d 602, 606–607 (holding that in a nonhomicide situation the defendant has the burden of showing justification, as an affirmative defense, by a preponderance of the evidence).
>
> In several instances, this court acknowledged *Fluker* and *Wischer,* but ultimately found it unnecessary in each case to resolve the conflicting decisions because, under the particular facts of each case the evidence was sufficient to negate the defendant's claim of self-defense applying

> either standard. *See State v. Black,* 2009–1664 (La. App. 4 Cir. 6/17/10), 41 So.3d 1243, *writ denied,* 2010–1678 (La.1/28/11), 56 So.3d 966; *State v. Boudreaux,* 2008–1504 (La. App. 4 Cir. 9/29/10), 48 So.3d 1144, 1162, *writ denied,* 2010–2434 (La. 4/8/11), 61 So.2d 682; *State v. Stukes,* 2008–1217 (La. App. 4 Cir. 9/9/09), 19 So.3d 1233; and *State v. Jefferson,* 2004–1960 (La. App. 4 Cir. 12/21/05), 922 So.2d 577.

Cooks, 11-0342, pp. 11-12, 81 So. 3d at 939-940.

Here, while Defendant and McCarter dispute certain facts related to the shooting, both testified that Defendant stood directly in front of McCarter, pointed a gun at his face, and fired. In fact, Defendant admitted that McCarter was two to three inches from the gun before he fired the weapon. Det. Sykes also stated that the video of the incident, which was played for the jury, showed Defendant raise a weapon in McCarter's direction and shoot. Additionally, the jury heard testimony from McCarter that Defendant pursued him as he fled the scene and fired the gun four more times. Although Defendant testified that he merely chased McCarter to make certain he had left the neighborhood and denied firing additional shots, the jury was entitled to choose to accept the testimony of McCarter over Defendant's. The jury could reasonably find from the evidence presented that when Defendant fired the weapon at McCarter's face in a close range, chased McCarter down the street, and fired four additional shots, that Defendant had the specific intent to kill McCarter and committed an overt act towards accomplishing that goal. *See, State v. Cooks*, 11–0342, p. 17, 81 So.3d at 942, (noting that while pointing and firing a gun at a person is a circumstance from which an inference can be drawn that a defendant possessed specific intent to kill, the circumstances surrounding that act, such as the distance from the firearm to the victim and the number of shots fired, must also be considered). Furthermore, the jury heard testimony from McCarter's

treating physician, Dr. Welch, that McCarter's condition was life threatening when he was admitted into the ER. Dr. Welch further testified that a gunshot wound to the face could bleed out easily and that bullet fragments were found within an inch of McCarter's brain. Therefore, viewing all the evidence in a light most favorable to the prosecution, a rational trier of fact could find Defendant guilty of attempted second degree murder. Accordingly, there is sufficient evidence in the record to support Defendant's conviction.

Defendant, however, argues that the preponderance of the evidence shows that shooting McCarter was justified due to McCarter's prior threats and McCarter's hostile and aggressive behavior the night of the shooting. At trial, Defendant testified that he was frightened of McCarter because he had stalked, harassed, and made threats against his and Labat's lives on previous occasions and on the night of the incident. He also testified that McCarter was screaming and cursing the night of the incident and had threatened to use the gun Defendant was holding prior to shooting McCarter.

Defendant further testified that he believed McCarter was capable of causing him physical harm based on his bodily language and a look in his eye. In contrast to Defendant's testimony, McCarter testified that at no point during the confrontation did he threaten to physically harm Defendant or Labat. McCarter admitted he was angry and had prior convictions for disturbing the peace and simple burglary, but stated that it was Defendant who made the threats on the evening at issue. McCarter testified that once he mentioned the money, which he believed Defendant had stolen from Labat, Defendant retrieved a gun, waved it around, and suggested that McCarter should also get a gun. McCarter further stated that after Defendant walked away the situation began to diffuse. McCarter

testified that Defendant later returned with a gun, came up behind him, got in his face and shot him. Again, the jury apparently chose to believe McCarter's version over Defendant's testimony. The jury's decision to accept McCarter's testimony is within the discretion of the fact-finder. Moreover, Defendant admitted that McCarter was unarmed and that there was distance between McCarter and Labat prior to shooting McCarter. Defendant also admitted he had an opportunity to call the police, but did not do so.

Defendant further claims that the video surveillance footage supports Defendant's version of events. Defendant argues that the video shows: that Defendant pretended to fire the gun to scare McCarter, and it was only after McCarter lunged at Defendant that he fired the gun; and that Defendant had his gun to his side when he chased McCarter.[17]

However, the video does not contain audio, and thus it is unclear whether McCarter in fact pretended to fire the weapon or if he fired the gun as soon as he raised the weapon. Based on the testimony adduced at trial, the video shows: Defendant exit a residence across the street from Labat's home and point the gun at McCarter; McCarter lose his balance and gesture towards Defendant; McCarter turn and run; and Defendant chase after McCarter. The video does show the gun by Defendant's side as he ran after McCarter; however, there is apparently a glare in the video when Defendant allegedly fired the four additional shots at McCarter. The video therefore does not clearly confirm or contradict either Defendant or McCarter's testimony.

[17] Defendant further contends that Det. Sykes' testimony, wherein she stated that the portion of the video that was not presented to the jury showed Defendant initially exiting Labat's home and walking by McCarter prior to confronting McCarter, is consistent with Defendant's testimony. However, this does not necessarily conflict with McCarter's version.

Considering that McCarter was unarmed and at most verbally threated Defendant and Labat, a rational juror could find that a discharge of a firearm by Defendant was not objectively reasonable under the circumstances. Further, the record shows that Labat remained on her porch during the entire argument, which could suggest that McCarter's behavior did not amount to Labat fearing for her life. Moreover, Defendant admitted he could have called the police on the night of the shooting and stated that on past occasions, McCarter had fled when the police arrived. Also, the jurors had an opportunity to view the video of the incident several times during trial and were entitled to reach their own conclusion as to what occurred. Therefore, the jury could reasonably find it was not apparently necessary for Defendant to shoot McCarter in defense of himself or Labat. As noted earlier, to the extent that there was conflicting evidence and testimony at trial, the resolution thereof depends on the determination of credibility of the witnesses, and the credibility of witnesses are not to be re-weighed on appeal. *See, State v. Helou*, 02–2302, p. 5 (La.10/23/03), 857 So.2d 1024, 1027. Accordingly, there is sufficient evidence to negate Defendant's self-defense and defense of others claim as to the attempted second degree murder charge.

Possession of Firearm by a Convicted Felon

La. R.S. 14:95.1(A) states, in pertinent part, that "[i]t shall be unlawful for any person who has been convicted of … any violation of the Uniform Controlled Dangerous Substances Law which is a felony … to possess a firearm." However, the prohibition of the possession of firearms by a convicted felon does not apply to "any person who has not been convicted of any felony for a period of ten years from the date of completion of sentence, probation, parole, or suspension of sentence." La. R.S. 14:95.1(C)(1). Thus, to convict a defendant of possession of

a firearm by a convicted felon, the State must prove: possession of a firearm; conviction of an enumerated felony; absence of the ten-year statutory period of limitation; and general intent to commit the offense.[18] La. R.S. 14:95.1; *State v. Husband*, 437 So.2d 269, 271 (La. 1983). In the present case, Defendant does not argue on appeal that the State failed to prove the statutory elements of the offense; rather Defendant claims his possession of the firearm was justified.

Even if these issues were raised on appeal, however, Defendant specifically admitted that he was a convicted felon and was in actual possession of a firearm when he fired at McCarter. Moreover, Off. Jackson's testimony demonstrated that Defendant was previously convicted of possession of dextropropoxyphene in 2010. Possession of dextropropoxyphene is a felony and a violation of the Uniform Controlled Dangerous Substances Law as required by La. R.S. 19:95.1(A). *See also*, La. R.S. 40:964; La. R.S. 40:969(C); La. C.Cr.P. art. 933(3). Further, the record shows that Defendant possessed the firearm within ten years of his prior conviction.

Justification has been recognized as providing a defense in any case in which it is not expressly prohibited, including a prosecution for violating La. R.S. 14:95.1. *State v. Sanchell,* 11–1672, p. 7 (La. App. 4 Cir. 10/31/12), 103 So.3d 677, 68 (citing *State v. Blache*, 480 So.2d 304, 308 (La.1985)). However, the Louisiana Supreme Court limited the ability of a convicted felon to claim "justification" as a defense to La. R.S. 14:95.1:

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[18] General intent exists when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the proscribed criminal consequences as reasonably certain to result from his act or failure to act. La. R.S. 14:10(2). General criminal intent need not be proven as a fact, but may be inferred from the circumstances of the case. *State v. Smith*, 98-0366, p. 7 (La. App. 4 Cir. 5/12/99), 744 So.2d 73, 77. The very doing of the acts that have been declared criminal shows general criminal intent necessary to sustain a conviction. *Id.*

> We hold that when a felon is in imminent peril of great bodily harm, or reasonably believes himself or others to be in such danger, he may take possession of a weapon for a period no longer than is necessary or apparently necessary to use it in self-defense, or in defense of others. In such situation justification is a defense to the charge of felon in possession of a firearm.
>
> This is not to say that a convicted felon is entitled to own or maintain possession of a weapon, constructive possession or otherwise, for protection, or for any other reason.

Sanchell, 11–1672, p. 7, 103 So.3d at 681 (quoting *Blache*, 480 So.2d at 308); *see also, State v. Perkins*, 12-0662, pp. 9-10 (La. App. 4 Cir. 7/31/13), 120 So. 3d 912, 918. "'Necessity,' when raised as a defense to the illegal possession of a firearm, entails proof that the threat of force by another is imminent and apparent, and that the person threatened has *no reasonable alternative* but to possess the firearm." *Perkins*, 12-0662, p. 10, 120 So. 3d at 919 (quoting *State v. Jackson,* 452 So.2d 776, 779 (La. App. 4 Cir. 1984) (emphasis in original).

Defendant argues that he was justified in possessing the firearm based on his testimony that it was only after he heard McCarter's voice get increasingly louder and believed that McCarter was on his sister's porch that he asked his sister to borrow her gun. He also claims that when he exited his sister's residence he observed McCarter act aggressively towards Labat. However, as noted above, the record shows that McCarter was never armed with a weapon and was standing near the street several feet away from Labat prior to Defendant confronting him with the weapon. Defendant also admitted that he had the opportunity to call the police before the shooting McCarter. Even assuming McCarter gestured aggressively and made threats toward Labat and Defendant, in light of the fact that McCarter was unarmed and some distance from both parties, a rational trier of fact could find that

neither Defendant nor Labat was in imminent danger and that Defendant had a reasonable alternative to possessing the firearm. Accordingly, there is sufficient evidence to support his conviction for felon in possession of a firearm and negate Defendant's justification claim.

ASSIGNMENT OF ERROR NUMBER 2

As his second assignment of error, Defendant argues that the trial court erred in granting the State's motion in limine and preventing Defendant from introducing evidence of McCarter's prior threats and stalking. Defendant argues that the trial court's ruling resulted in the denial of his constitutional right to present a defense, that he was justified in borrowing his sister's gun and believing Labat was in imminent danger. Defendant also argues the trial court erred in refusing to allow Defendant to proffer evidence or testimony.

The Louisiana Supreme Court, in *State v. Van Winkle*, 94–0947, p. 5 (La.6/30/95), 658 So.2d 198, 201–202, stated:

> A criminal defendant has the constitutional right to present a defense. U.S. Const. Amend. VI; La. Const. Art. 1 § 16; *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Gremillion*, 542 So.2d 1074 (La.1989); *State v. Vigee*, 518 So.2d 501 (La.1988). Due process affords a defendant the right of full confrontation and cross examination of the State's witnesses. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Mosby*, 595 So.2d 1135 (La.1992). It is difficult to imagine rights more inextricably linked to our concept of a fair trial.

Evidentiary rules may not supersede the fundamental right to present a defense. *Van Winkle*, 94-0947, p. 6, 658 So. 2d at 202; *State v. Sartain,* 2008–0266, p. 16 (La. App. 4 Cir. 12/30/08), 2 So.3d 1132, 1141. However, all evidence presented must be relevant. *Winkle*, 94-0947, p. 6, 658 So. 2d at 202. ("[N]ormally inadmissible hearsay may be admitted if it is reliable, trustworthy and relevant, and

if to exclude it would compromise the defendant's right to present a defense. See *Chambers v. Mississippi,* 410 U.S. at 302, 93 S.Ct. at 1049.").

The admissibility of a victim's character and bad acts is governed by La. C.E. art. 404, which states, in relevant part:

> A. Character evidence generally. Evidence of a person's character or a trait of his character, such as a moral quality, is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> ***
>
> (2) Character of victim. (a) Except as provided in Article 412, evidence of a pertinent trait of character, such as a moral quality, of the victim of the crime offered by an accused, or by the prosecution to rebut the character evidence; provided that in the absence of evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense charged, evidence of his dangerous character is not admissible[.]
>
> ***
>
> B. Other crimes, wrongs, or acts. (1) 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.
>
> ***
>
> (2) In the absence of evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense charged, evidence of the victim's prior threats against the accused or the accused's state of mind as to the victim's dangerous character is not admissible[.]

In *State v. Thomas*, 11-1219, pp. 15-16 (La. App. 4 Cir. 12/6/12), 106 So.3d 665, 675-676, this Court summarized the law regarding the use of victim character evidence and the evidence necessary to meet the threshold requirement set forth in La. C.E. art. 404. The Fourth Circuit stated:

> When a defendant pleads self-defense, evidence of the victim's dangerous character or of threats against the defendant is relevant to show the victim was the aggressor and that the defendant's fear of danger was reasonable. *State v. Edwards,* 420 So.2d 663, 669

(La.1982); *State v. Montz,* 92–2073 (La.App. 4th Cir.2/11/94), 632 So.2d 822, 824–825, *writ denied,* 94–0605 (La.6/3/94), 637 So.2d 499.

For such evidence to be admissible, the defendant must first produce evidence that at the time of the incident the victim made a hostile demonstration or committed an overt act against him of such character that would have created in the mind of a reasonable person the fear that he was in the immediate danger of losing his life or suffering great bodily harm. *State v. Gantt,* 616 So.2d 1300, 1304 (La.App. 2nd Cir.1993), *writ denied,* 623 So.2d 1302 (La.1993). An overt act is any act which manifests to the mind of a reasonable person a present intention to kill or inflict great bodily harm. *Edwards, supra* at 669.

Once evidence of an overt act is established, evidence of the victim's threats to the defendant and of the victim's dangerous character are admissible: (1) to show the defendant's reasonable apprehension of danger justifying his conduct and (2) to help determine who was the aggressor. *Edwards, supra* at 670.

If the purpose is to show the defendant's reasonable apprehension of danger, it must be shown that the defendant knew of the victim's prior threats or reputation. *Edwards, supra,* at 670; *State v. Eishtadt,* 531 So.2d 1133, 1135 (La.App. 4th Cir.1988). Once this knowledge is established, evidence of the victim's character, both general reputation and specific threats or acts of violence against the defendant are admissible. *Edwards, supra,* at 670.

If the purpose is to show that the victim was the aggressor, there is no requirement that the defendant know of the victim's prior acts or reputation. *Eishtadt, supra* at 1135. [quoting *State v. Williams*, 96–1587, pp. 7–8 (La. App. 4 Cir. 4/16/97), 693 So.2d 249, 253–254].

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The evidence tending to establish an overt act must be "appreciable." *State v. Lee,* 331 So.2d 455, 459 (La.1975), *original opinion reinstated on reh'g* (La.1976). When appreciable evidence of the overt act is in the record, the trial court cannot infringe on the fact-finding function of the jury by disbelieving the defense

> testimony and thereby deny the accused a defense permitted him by law. *Id.* at 459.
>
> A defendant's unsupported, self-serving testimony which is sufficiently contradicted by other evidence does not constitute "appreciable evidence" of an overt act or hostile demonstration on the part of the victim. See *State v. Carter,* 490 So.2d 291, 294 (La.App. 4th Cir.1986); *State v. Hardeman,* 467 So.2d 1163, 1171 (La.App. 2d Cir.1985). [quoting *State v. James,* 95–1182, p. 4 (La. App. 4 Cir. 6/5/96), 675 So.2d 1224, 1227].

A trial court's ruling on the admissibility of evidence will not be disturbed in the absence of a clear abuse of the trial court's discretion. *State v. Bagneris*, 01-0910, p. 4 (La. App. 4 Cir. 12/19/01), 804 So. 2d 831, 834.

Here, the trial court granted a motion in limine filed by the State. In doing so, the trial court prohibited Defendant from discussing facts related to a prior incident between McCarter and Labat that occurred in February of 2011, and a protective order issued against McCarter on February 3, 2011.[19] The trial court noted that the arrest warrant[20] from the prior incident did not show that Defendant and McCarter had a confrontation. The trial court thus found the matter irrelevant and that it did not fall under the exception set forth in La. C.E. art. 404(A)(2).[21]

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[19] At the hearing, the trial court primarily discussed the incident that occurred on February 1, 2011, which resulted in McCarter pleading guilty to simple burglary and disturbing the peace. However, the record provides that another incident occurred on February 2, 2011, wherein McCarter caused criminal damage to Labat's property.

[20] At the hearing, the trial court refers to the document evidencing McCarter's prior bad acts as a police report. However, the record shows that the document was the warrant for McCarter's arrest.

[21] La. C.E. art. 404 states, in relevant part:

> A. Character evidence generally. Evidence of a person's character or a trait of his character, such as a moral quality, is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
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> (2) Character of victim. (a) Except as provided in Article 412, evidence of a pertinent trait of character, such as a moral quality,

The trial court ruled, however, that the Defendant could introduce evidence of McCarter's past convictions, including the name of the offense, the date, and the sentence; just not the details of the conviction. *See*, La. C.E. art. 609.1.[22] The trial court further opined that a violation of the protective order did not constitute an overt act, noting that First Circuit decision's in *State v. Schexnayder*, 97-0729 (La. App. 1 Cir. 4/8/98), 708 So. 2d 851,[23] which held that a victim's action of moving toward the defendant while cursing and reaching in his pocket, was not an overt act.[24] As a result, the trial court found that McCarter's alleged violation of the

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> of the victim of the crime offered by an accused, or by the prosecution to rebut the character evidence; provided that in the absence of evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense charged, evidence of his dangerous character is not admissible[.]

[22] La. C. E. art. 609.1 provides, in pertinent part:

> B. Convictions. Generally, only offenses for which the witness has been convicted are admissible upon the issue of his credibility, and no inquiry is permitted into matters for which there has only been an arrest, the issuance of an arrest warrant, an indictment, a prosecution, or an acquittal.
>
> C. Details of convictions. Ordinarily, only the fact of a conviction, the name of the offense, the date thereof, and the sentence imposed is admissible. However, details of the offense may become admissible to show the true nature of the offense:
>
> (1) When the witness has denied the conviction or denied recollection thereof;
>
> (2) When the witness has testified to exculpatory facts or circumstances surrounding the conviction; or
>
> (3) When the probative value thereof outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury.

[23] It is important to note that part of the reason *Schexnayder* found insufficient evidence to establish an overt act was also due to the fact that the defendant was the only person to testify as to the act. The First Circuit noted that the two other eye witnesses did not see the victim move toward the defendant or his hand toward his pocket and that no weapon was found on or near the victim. 97-0729, 708 So. 2d at 855.

[24] In his brief, Defendant points out that *Schexnayder*, the case the trial court relied on in part in granting the State's motion in limine, suggested that bad character evidence should be admissible when the victim has continuously harassed or stalked and expressed some reservation about requiring a defendant to prove an immediate overt act in such a situation. The First Circuit stated:

> We note that, under different circumstances, the evidence of bad character should be admissible: a continually harassed, injured, or stalked innocent individual might re-act to a tormentor, without

February 3, 2011 protective order did not qualify as an overt act such that the evidence would be admissible under La. C.E. art. 404(A)(2).

Defendant argues that the trial court erred in precluding evidence of McCarter's character and bad acts because a violation of a protective order should qualify as an overt act. Defendant notes that in the "Notice to Law Enforcement" portion of the document, the protective order states that "[i]t has been determined by a court of competent jurisdiction that the subject [Defendant] of this order poses a threat of danger to the protected party [Labat]." Defendant further claims that the trial court's refusal to allow evidence of McCarter's harassment and threats prejudiced his right to present a defense.

However, a review of the record shows that the jury did hear testimony relating to McCarter's prior bad acts and the protective order. Defendant specifically testified that during his relationship with Labat, McCarter had stalked and threatened them on numerous occasions. He also gave a detailed description

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> waiting for yet another overt act. After the connected series of threats of harm or injuries, there is no logic in demanding yet another overt act with the tormentor before any evidence of dangerous character can be admitted. If so, "hostile demonstration" or "overt act" become limited in time to immediacy. Such a holding asks too much of a frayed innocent human being. We should allow a state of mind exception for the defendant so that the defendant can submit to the fact-finder the basis for the reaction. If that evidence is precluded from the jury's mind, the defendant in such a case cannot receive a fair hearing. The federal rule, on which Louisiana Evidence Rule 404 is patterned, does not contain the "overt act" requirement. The omission protects the defendant's absolute right to present a true defense. This is a deliberate omission. A defendant involved in a stalking, or continuing pattern of threats case, cannot present a full defense, unless allowed to explain the basis for the re-action. We must let the jury decide: it is their constitutional duty. Thus, the jury is the appropriate one to determine if the re-action was reasonable and justifiable, under the circumstances. In continuing threat of harm cases, the jury can only make a just decision if given all the evidence.

of the harassment. Defendant stated that McCarter would frequently show-up to Labat's house at around two in the morning, peep through the window, bang on the door, and threaten to kill Defendant and Labat. He also said that McCarter would call "like a hundred times a day." Defendant testified that McCarter's continuous harassment caused him to end his relationship with Labat. Defendant further stated that Labat was frightened of McCarter because he had previously broken into her home and that McCarter had a "reputation for breaking in houses." Moreover, Defendant testified that that he and his sister were scared of McCarter on the night of the shooting, partly because McCarter violated the protective order. Defendant explained that his sister lent him the gun, because she knew Labat "had put a restraining order out on him [McCarter] and he was still coming around there and they didn't know what he was gon' [sic] do." He also stated the reason he fired the weapon was because McCarter lunged toward him.

In addition to Defendant's testimony, the jury also heard testimony from McCarter, wherein he admitted that he had previous convictions for simple burglary, disturbing the peace, and obstructing a police officer. He also admitted that he had broken Labat's door on a prior occasion and was required to pay her restitution for the damage he caused. Moreover, Off. Broaden testified he arrested McCarter for an incident that occurred at Labat's residence on February 1, 2011. Additionally, Off. Dalton stated that she had previously investigated an incident at Labat's home on February 2, 2011. Accordingly, contrary to Defendant's assertions, Defendant was able to present evidence of McCarter's character and prior offenses to support his claim for justification.

Schexnayder, 97-0729, 708 So. 2d at 855-856. However, because the defendant in *Schexnayder* was not the subject of planned continuous series of threats, that issue was not before the court;

Defendant also claims the trial court erred in refusing to allow Defendant to proffer evidence or testimony. La. C.E. art. 103(A)(2) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and ... [w]hen the ruling is one excluding evidence, the substance of the evidence was made known to the court by counsel." Thus, in order to preserve for review an alleged error in a ruling excluding evidence, counsel must make known to the court the substance of the excluded testimony. *State v. Magee*, 11-0574, p. 60 (La. 9/28/12), 103 So. 3d 285, 326-327. This can be effected by proffer, either in the form of a complete record of the excluded testimony or a statement describing what the party expects to establish by the excluded evidence. *Id*. (citing *State v. Adams*, 537 So.2d 1262, 1264–1265 (La. App. 4 Cir. 1989), *aff'd in part, rev'd in part on other grounds*, 550 So.2d 595 (1989). "The purpose of an offer of proof is to create a record of the excluded evidence so that the reviewing court will know what the evidence was and will thus be able to determine if the exclusion was improper, and if so, whether the improper exclusion constituted reversible error." *State v. Hankton*, 12-0375, p. 6 (La. App. 4 Cir. 8/2/13), 122 So. 3d 1028, 1031 *writ denied,* 2013-2109 (La. 3/14/14). A refusal to permit counsel to make a proffer with respect to testimony of witnesses or any other evidence is improper. *Adams*, 537 So.2d at 1265.

In the present case, Defendant requested the trial court to proffer the testimony of Det. Sykes and McCarter. The trial court granted Defendant's initial request to proffer Det. Sykes' testimony, but did not respond to Defendant's subsequent requests to proffer. The record provides that after the trial court

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thus the First Circuit's statement in this regard is non-binding dicta.

prohibited Det. Sykes from testifying about McCarter breaking Labat's door, Defendant moved to proffer the testimony. The trial court responded: "Okay. We'll do that outside the presence of the jury." Later, however, after the State's redirect, the trial court permitted Det. Sykes to leave. The transcript provides:

> The Court: Thank you Detective Sykes. You can step down. Is Detective Sykes release from her subpoena?
>
> Ms. Reed [The State]: She is by the State, Your Honor.
>
> Ms. Long [Defense Counsel]: No, Your Honor. We still need her to proffer some testimony.
>
> The Court: Detective Sykes, you're free to leave the courthouse. If we need to get you back to court, someone will give you a call.

With regard to Defendant's request to proffer McCarter's testimony, the trial court advised defense counsel to proceed to the next question. Thus, neither Det. Sykes nor McCarter's testimony was ever actually proffered for the record.

Nevertheless, on appeal, Defendant does not seek review of the trial court's ruling related to Det. Sykes or McCarter's testimony. Instead, Defendant contends it was error for the trial court to prohibit Off. Broaden and Off. Dalton from testifying regarding McCarter's past incidents.[25] Because the trial court previously reviewed the arrest warrants at the hearing on the State's motion for limine and was aware of what the officers would testify to, we find that the substance of the officers' testimony is discernible from the record and we can address the trial court's decision to exclude this testimony.[26]

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[25] Defendant argues that "because the trial court repeatedly refused to allow proffers it was futile for the defense counsel to have asked to proffer the testimony of the two police officers."

[26] *See*, La. Prac. Civ. Trial § 5:157 (stating that La. C.E. art. 103 was designed to follow Fed. R. Evid. Rule 103(a) which provides that the substance of excluded evidence must be made known to the court by offer of proof or be apparent from the context of the question); *Magee*, 2011-0574, p. 61 (La. 9/28/12), 103 So.3d at 326-327.

Defendant claims that the trial court's refusal to allow Off. Broaden and Off. Dalton to testify about the February 1, 2011 and February 2, 2011 incidents prejudiced Defendant because he was denied the chance to corroborate his account of the incident. Defendant relies on *State v. Brooks*, 98-1151 (La. App. 1 Cir. 4/15/99), 734 So.2d 1232, to support his contention.

In *Brooks,* the defendant, who was charged with second degree murder,[27] shot an intoxicated victim after the victim and another man approached the defendant and a woman outside a dance hall. The defendant claimed self-defense and defense of another. Prior to trial, the defense moved in limine, seeking a ruling allowing evidence of the victim's abusive behavior and death threats toward the defendant. The trial court denied the motion in limine without reasons. On appeal, the *Brooks* Court found that the trial court committed reversible error by failing to allow a third party, who witnessed an earlier incident between the defendant and the victim and could corroborate the defendant's account of the incident, to testify at trial. *Brooks,* 98-1151 at pp. 16-18, 734 So.2d at 1240-41. The First Circuit stated:

> We note defendant was not only hampered in presenting his defense, but was prejudiced by the fact that Moore, a witness to the supper incident, was not allowed to corroborate defendant's account of the incident. The jury could have reasonably inferred there was no corroborative evidence. Although the trial judge erred in failing to find an overt act, defendant was allowed to testify regarding the supper incident. Thus, we find no reversible error in that regard. However, we find reversible error in the trial judge's refusal to allow corroborative evidence from Moore.

[27] Although the defendant in *Brooks* was charged with second degree murder, the jury convicted the defendant of manslaughter.

Here, like in *Brooks*, the trial court prohibited Off. Broaden and Off. Dalton from testifying about the details of McCarter's prior offenses. However, the witness in *Brooks* actually observed the victim threatening the defendant; whereas in the instant case, neither officer witnessed McCarter's behavior prior to arriving on the scene.[28] The only person aside from Defendant who was present during the incidents was Labat, who did not testify at trial.[29] At best the officers could only have testified as to what Defendant or Labat told them. Any statements made by Defendant to the officers are self-serving, and any statements the officers obtained from Labat would constitute inadmissible hearsay. *See,* La. C.E. art. 801(A),(C) (hearsay is an oral or written assertion, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted); La. C.E. art. 802 (hearsay evidence is not admissible except as otherwise provided by the Code of Evidence or other legislation); *see also, Thomas*, 11-1219, p. 16, 106 So. 3d at 676 (defendant's unsupported, self-serving testimony which is sufficiently contradicted by other evidence does not constitute "appreciable evidence" of an overt act or hostile demonstration on the part of the victim).

Moreover, contrary to *Brooks*, the jury did hear some evidence corroborating Defendant's testimony of McCarter's prior bad acts. As discussed above, McCarter admitted that he had three prior convictions and that he had previously

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[28] It is important to note that the arrest warrant issued as a result of the February 1, 2011 incident provides that during the police investigation McCarter returned to 1800 block of Painters Street said "Bitch I'm a [sic] kill you" while an officer was present. It is unclear, however, which officer was on the scene to observe McCarter threaten Labat. Officer Gerald Jackson was the affiant on that warrant. The arrest warrant issued for the February 2, 2011 incident, however, lists Off. Broaden as the affiant.

[29] This statement assumes that Defendant was a witness to both incidents. The arrest warrant pertaining to the February 1, 2011 incident does state that Defendant was present when McCarter

damaged Labat's door, as a result of which he was required to pay restitution. Further, Off. Broaden was able to testify that he had investigated an incident on February 1, 2011, involving McCarter that occurred at Labat's residence, and he subsequently arrested McCarter. Off. Dalton was also permitted to testify that she investigated an incident on February 2, 2011, at Labat's residence. The jury could infer from the testimony of Defendant, McCarter, and the officers that McCarter was involved in both February incidents; that McCarter had an altercation with Labat on these occasions; that McCarter's convictions arose from these incidents; and that Defendant was aware of these prior incidents. As such, corroborating evidence of Defendant's testimony exists. Therefore, the trial court's decision to preclude Defendant from eliciting hearsay evidence and self-serving testimony from the officers at trial does not infringe on Defendant's right to present a defense.

ASSIGNMENT OF ERROR NUMBER 3

As his third assignment of error, Defendant argues that he was denied a fair trial as a result of the prosecutor's improper comments during cross-examination which attacked Defendant's credibility and misled the jury.

The first comment to which Defendant refers is the prosecutor's statement that the protective order against McCarter is hearsay. The trial transcript provides:

> [The State]: … You talked about Brittany Labat on these jail tapes, correct?
>
> [Defendant]: Yes, ma'am.
>
> [The State]: All right. This is the woman that who you loved so much that you decided to break up with her so that you could see her free from all the problems that was [sic] going on between you and Mr. McCarter right?

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came to Labat's home. The arrest warrant for the February 2, 2011 incident, however, does not indicate if Defendant was on scene at the time.

> [Defendant]: Not the problems for me, from him. He was the one who got a restraining order, not me.
>
> [The State]: But you were the one stealing her money, because that's what she told the police.
>
> [Defendant]: I never stole her money. She can't come here and say that. That's what the detective said. Brittany never came and took the stand.
>
> [The State]: And interestingly --
>
> [Defendant]: That's hearsay. That's not really her testimony.
>
> [The State]: And so is the fact that he [McCarter] had a restraining order.

However, Defendant failed to object to the State's remark. Under La. C.Cr.P. art. 841(A) "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence." Because Defendant did not make an objection to the State's comment, the error has not been preserved for appeal. *See, State v. Draughn,* 2005-1825, p. 55 (La. 1/17/07), 950 So. 2d 583, 621 (the failure of the defense to contemporaneously object waives review of the issue on appeal

Defendant did, however, object to other comments made by the State on cross-examination, wherein the prosecutor implied there was no evidence to support Defendant's version of events. The transcript provides:

> [The State]: There was no possible way for you to call the police at time [sic] and tell them that Courtney McCarter was out there threatening you or Brittany Labat?
>
> [Defendant]: No, ma'am.
>
> [The State]: And that is because you were just so nervous about everything that was happening?
>
> [Defendant]: Not because I was nervous. Because I felt like the police failed. They put restraining orders out on him, they had warrants out for him, he came in front of police and threatened to kill both of us.
>
> [The State]: And if we are to believe you because there's nothing that has been offered to show that --
>
> [Defendant]: I have police reports right now.

> [The State]: There's been nothing offered to show that. And if we are to believe you each of those times --
>
> [Defense Counsel]: Objection, Your Honor.
>
> [The State]: -- are we going to be able to pull a 911 call where you called the police?
>
> The Court: Grounds?
>
> COUNSEL: Misstatement of -- a misstatement, Your Honor.
>
> COURT: Overruled.
>
> [The State]: You can answer the question. On each of those times are we going to be able to produce a 911 call for this jury to hear when you called the police?
>
> [Defendant]: No ma'am, but you'll get -- pull the 911 tape and see that Brittany called the police just about minutes after I came on the scene. I got police reports show the time and the dates and everything. And then he still came back on the scene while the police was still doing the reports.
>
> [The State]: And just like you said before - - all right, let me ask you. We really have nothing other than your word.
>
> [Defendant]: No, you have more than my word. Excuse me. I have police reports and transcripts from court and everything.
>
> [Defense Counsel]: Objection, Your Honor.
>
> The Court: Grounds?
>
> [Defense Counsel]: Mischaracterization.
>
> The Court: Overruled.
>
> [The State]: We have nothing other than your word but I'm going to move on from that[.]

Defendant did not request a mistrial or an admonition to the jury. However, the record provides that on March 25, 2013, Defendant moved for a new trial based in part on prosecutor's comments in this regard. Moreover, Defendant objected to the State's remarks at trial and thus preserved the issue for review. *See*, *State v. Diggins*, 12-0015, p. 13 (La. App. 4 Cir. 10/23/13), 126 So. 3d 770, 784 (a defendant preserves review of prejudicial remarks of prosecutor by a motion for mistrial or a contemporaneous objection to the alleged prejudicial comments).

Appellate courts review claims of prejudicial comments under a harmless error analysis. *Diggins*, 12-0015, pp. 13-14, 126 So. 3d at 784. Harmless-error review looks to the basis on which "the jury actually rested its verdict." *Diggins*, 2012-0015, p. 14, 126 So.3d at 784 (quoting *Yates v. Evatt,* 500 U.S. 391, 404, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991)). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. *Id*. (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)). In order to constitute reversible error, the improper comments must be such as to have influenced the jury and contributed to the verdict, thereby denying the defendant a fair trial. *Id*. (citing *State v. Johnson,* 438 So.2d 1091, 1102 (La.1983)).

Here, the State's comments regarding the lack of evidence to corroborate Defendant's claims were inappropriate. The State was aware that McCarter had made threats against Labat on previous occasions and that a protective order was issued against McCarter as result of his behavior. The State also was aware that while the police were investigating the February 1, 2011 incident, McCarter returned to the scene and in an officer's presence threatened to kill Labat. The only reason Defendant was not able to introduce the protective order and details leading up to the issuance of the protective order was due to the State's objections.

However, the trial court did instruct the jury that statements of counsel made during trial were not evidence. Additionally, the jury was aware of previous incidents involving McCarter and Labat as Off. Broaden, Off. Dalton, and McCarter testified as to his prior offenses. The evidence also shows that McCarter

was unarmed and at most made verbal threats prior to Defendant confronting him with the firearm. Thus, we find that in light of the evidence against Defendant and after giving credit to the good sense and fair-mindedness of the jurors, the prosecutor's improper remark did not influence the jury's verdict.

ASSIGNMENT OF ERROR NUMBER 4

As his final assignment of error, Defendant contends his constitutional right to equal protection under the Fourteenth Amendment was violated by the non-unanimous jury verdict on the count of attempted second degree murder.

The punishment for attempted second degree murder is imprisonment "at hard labor for not less than ten nor more than fifty years without benefit of parole, probation, or suspension of sentence." *See,* La. R.S. 14:30.1(B); La. R.S 14:27(D)(1)(a). Both La. C.Cr.P. art. 782(A) and La. Const. art. I, § 17 provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.

The record provides that on March 4, 2013, Defendant filed a motion to declare La. C.Cr.P. art. 782(A) and La. Const. art. I, § 17(A) unconstitutional. (R. 25, 90). In the motion, he argued that the two provisions violate the Equal Protection Clause of the Fourteenth Amendment because racial animus and discrimination toward African–Americans were the substantial or motivating factors in Louisiana's introduction and first-time adoption of the non-unanimous jury provisions in 1898. The same date, the trial court heard and denied

Defendant's motion.[30] The following date, the jury found Defendant guilty of attempted second degree murder by a ten to two non-unanimous vote.

The Louisiana Supreme Court and this Court have rejected arguments that non-unanimous twelve-person jury verdicts violate the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. *State v. Bertrand,* 08–2215, 2008–2311 (La. 3/17/09), 6 So.3d 738; *State v. Barbour*, 09–1258 (La. App. 4 Cir. 3/24/10), 35 So.3d 1142. However, this Court, in *State v. Hankton*, 12-0375, p. 8 (La. App. 4 Cir. 8/2/13), 122 So. 3d 1028, 1032, *writ denied*, 13-2109 (La. 3/14/14), 134 So. 3d 1193, recognized that the equal protection contention relating racial animus as the motiving factor in adopting the non-unanimous provisions was "not foreclosed by the *Bertrand* ruling" or substantively addressed by any other court.

Nevertheless, the *Hankton* Court found that by failing to request an evidentiary hearing on his allegations of unconstitutionality, the defendant failed to preserve that issue for appellate review, and therefore the Court could not consider the merits of his argument on appeal. This Court stated:

> Mr. Hankton did not seek an evidentiary hearing in the district court on his allegations. He urges us to accept the experience of Alabama, as decided in *Hunter v. Underwood,* is self-proving and applicable to his challenge. In this he is mistaken.
>
> Like the district court in *State v. Schoening,* 00–0903 (La.10/17/00), 770 So.2d 762, where the Supreme Court vacated a judgment declaring La. C.E. art. 615 B(4)

[30] The trial court stated:

> I understand what the Defense is saying that having that law here in Louisiana, the non-unanimous jury verdict, is violating the rights of Mr. Felton, but … that's what the law states currently, and so the Court will note your objection for the record. But currently the law says for these two crimes that ten out of twelve jurors must agree in a legal verdict as to both counts.

> unconstitutional, the district court here conducted no hearing. The parties in *Schoening* did not raise the issue of unconstitutionality themselves; the district court raised the issue by its own motion after Mr. Schoening's conviction. The constitutional challenge, therefore, was procedurally deficient because it was not brought in a motion by one of the parties. The Supreme Court held that "because there was no contradictory hearing held specifically for the purpose of debating the constitutional question, there is an inadequate record on review concerning the statute's legislative history, its construction by the courts, and precisely how the statute allegedly offends the Louisiana and/or the United States Constitution." *Id.,* 00–0903, pp. 5–6, 770 So.2d 762, 766. The Supreme Court also received insufficient evidence to determine whether the district court gave the statute "the strong presumption of constitutionality due it under our law or that the trial court attempted to interpret the statute in a manner so as to sustain its constitutionality before declaring it unconstitutional." *Id.,* 00–0903, p. 6, 770 So.2d 762, 766.
>
> In *State v. Collins*, 10–1181, p. 11 (La. App. 4 Cir. 3/23/11), 62 So.3d 268, 275, and *State v. Kelly*, 2010–0853, p. 8 (La. App. 4 Cir. 12/12/10), 54 So.3d 1159, 1164, we found no merit to the defendants' claims that the trial court erred in failing to afford them contradictory hearings on their motions for new trial. In each case, this Court noted that the respective records reflected that each defendant submitted his motion without argument, and there was nothing to suggest that either defendant intended to call any witnesses or submit any evidence in support of his motion, or that either was prevented from doing so.
>
> Because Mr. Hankton did not move for a hearing on his motion to declare La. Const. art. I, § 17 and La.C.Cr.P. art. 782 A unconstitutional or assign as error on appeal his lack of a hearing, we find that he has not created an adequate record for us to review his assertion of unconstitutionality.

Hankton, 12-0375, pp. 16-17 122 So.3d at 1036-1037.

In the instant case, the trial court did conduct a hearing on Defendant's motion prior to trial. However, Defendant did not specifically request an

evidentiary hearing on the motion nor did he argue the merits of the allegations of the unconstitutionality at the pre-trial hearing.[31] At the hearing, Defendant merely stated he had a motion before the trial court alleging that La. C.Cr.P. art. 782(A) and La. Const. art. I, § 17(A) violate the Equal Protection Clause of the Fourteenth Amendment. He did not mention that the motion was based on the racial motive behind Louisiana's less-than-unanimous jury verdict provisions. Additionally, there was no indication in the motion itself or at the pre-trial proceeding, wherein the motion was denied, that Defendant planned on calling witnesses or introducing evidence to support his contentions. Therefore, like in *Hankton*, we find that Defendant failed to provide an adequate record such that this Court could review the merits of his constitutional challenge. As such, Defendant did not sufficiently preserve the issue for appellate review.

Accordingly, we hereby affirm both of Defendant's convictions and his sentence on the attempted second degree murder count, but remand for the imposition of a fine on the convicted felon in possession of a firearm count.

JANUARY 17, 2014 MOTION TO SUPPLEMENT RECORD GRANTED; CONVICTION AND SENTENCE AFFIRMED; REMANDED FOR IMPOSITION OF FINE

[31] Defendant concedes in his brief that "there is no indication that the defense ever requested an evidentiary hearing in the trial court" and that under *Hankton*, he has not preserved the issue for review. However, because the writ application in *Hankton* was pending before the Louisiana Supreme Court at the time defense counsel filed her brief, Defendant raised the argument to preserve if for further review in the event *Hankton* was reversed. The Supreme Court subsequently denied writs on March 14, 2014.