NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2015-KA-0309**
VERSUS	*	**COURT OF APPEAL**
JOE RILEY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 509-505, SECTION "B"
Honorable Tracey Flemings-Davillier, Judge
* * * * * *

Judge Dennis R. Bagneris, Sr.

* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Daniel L. Dysart, Judge Rosemary Ledet)

Leon A. Cannizzaro, Jr.
District Attorney
Kyle C. Daly
Assistant District Attorney
Parish of Orleans
619 South White Street
New Orleans, LA 70119
COUNSEL FOR APPELLEE, STATE OF LOUISIANA

William Martin Sothern
Law Office of William M. Sothern
3015 Magazine Street
New Orleans, LA 70115
COUNSEL FOR DEFENDANT/APPELLANT, JOE RILEY

CONVICTION AND SENTENCE AFFIRMED

SEPTEMBER 30, 2015

Joe Riley seeks reversal of his conviction and sentence. Riley was charged with one count of discharge of a firearm during a crime of violence, a violation of La. R.S. 14:94(F), and one count of attempted second degree murder, a violation of La. R.S. 14:27 and 14:30.1. A jury found Riley guilty as charged of illegal discharge of a weapon during a crime of violence but the jury was unable to reach a verdict on the attempted second degree murder charge. Riley was sentenced to ten years of hard labor without benefit of parole, probation or suspension of sentence, with credit for time served, the sentence to be served concurrently with any other sentence. Riley now appeals this final judgment. For the following reasons, we hereby affirm the conviction and sentence.

PROCEDURAL HISTORY

On November 16, 2011, the State charged Riley with one count of discharging a firearm during a crime of violence, a violation of La. R.S. 14:94(F), to which Riley pled not guilty on January 24, 2012.

The trial court conducted a preliminary hearing on August 16, 2012, and heard Riley's Motions to Suppress the Evidence and Statement. The trial court denied the Motion to Suppress the Statement. In addition, the court did not find

probable cause for the charge of illegal discharge of a firearm under La. R.S. 14:94(F) but did find probable cause for the charge of illegal discharge of a firearm under La. R.S. 14:94(A).

On September 20, 2012, the trial court granted Riley's Motion to Suppress the firearm recovered during the investigation.[1] On March 11, 2013, the State amended the bill of information, charging Riley with one count of attempted second degree murder.

On April 30, 2013, the trial court denied the Motion to Suppress the Video.

On August 28, 2013, Riley filed a motion to reconsider the trial court's earlier ruling denying his Motion to Suppress Statement and Motion to Exclude Video. The trial court denied the motions on September 12, 2013.[2] On the day of trial, March 10, 2014, the State filed a superseding bill of information charging Riley with one count of discharging a firearm during a crime of violence and one count of attempted second degree murder. Defense counsel moved for continuance, arguing that he was not prepared to defend against the illegal discharge count. The trial court denied the request for continuance. Riley was re-arraigned on the charges and pled not guilty.

Trial commenced on March 11, 2014, and at the close of the State's case, the defense moved for a directed verdict, which the trial court denied. On March 12, 2014, the jury found Riley guilty as charged of illegal discharge of a weapon

[1] This Court and the Louisiana Supreme Court denied the State's writ application. See *State v. Riley,* unpub. 2012-1528 (La. App. 4 Cir. 10/31/12), *writ den*. 2012-2421 (La. 11/10/12), 102 So.3d 27.

[2] This Court denied Riley's writ application. See *State v. Riley,* unpub. 2013-1408 (La. App. 4 Cir. 10/13/14).

during a crime of violence but was unable to reach a verdict on the attempted second degree murder charge.[3]

On June 3, 2014, the defense filed Motions for Post-Judgment Verdict of Acquittal, Arrest of Judgment and New Trial. On September 12, 2014, the trial court denied the motions.

Riley filed a Motion for Appeal on September 30, 2014, which the trial court granted. Also on that date, the trial court sentenced Riley to ten years at hard labor without benefit of parole, probation or suspension of sentence, with credit for time served, the sentence to be served concurrently with any other sentence.

FACTS

Officer Kiana Lumpkins testified that, at the time of the incident, she was employed as an NOPD 911 call operator. Officer Lumpkins explained that she answered calls for police assistance, obtained pertinent information and then relayed the information to dispatch officers to the person/area requesting assistance. When a call is received, an item number is generated for that call as well as an incident recall document. All calls are recorded and stored with the police department. Officer Lumpkins identified State's Exhibit 1, bearing Item Number I-33910-11, as the documentation of the 911 call pertinent to this matter. She confirmed that State's Exhibit 2 was the audiotape of the 911 call in this case, and the State played the audiotape for the jury.

Gus Volts, a seminarian at Notre Dame Seminary, testified that he did not know Riley or the victim, Robert Poree. On the day of this incident, Volts visited a friend who lived on the second floor of the Park Esplanade Apartments. After the

[3] The State has elected to re-prosecute the attempted second degree murder charge. Trial is set for September 21, 2015.

visit, Volts rode the elevator down to the main floor of the building. As the elevator doors opened, Volts observed Riley and the victim engaged in a fist fight. Volts observed that Riley was quite a bit larger than the victim, and that both men were fighting vigorously. He noted that the fight was mismatched because the victim was getting the worst of the fist fight.

Volts looked for a security guard and/or someone from the management office to break up the fight. Unsuccessful, Volts asked one of his friends to call 911 before one of the combatants was injured. As there was no help at hand, Volts and his friends intervened, separating Riley and the victim. Volts said it appeared that Riley wanted to continue the fight, and that he produced a gun from the waistband of his pants. The victim ran from the encounter toward the parking lot, with Riley in pursuit. Volts and his friends ran in the opposite direction. Volts did not see Riley fire the gun, but he heard two gunshots. The manager asked Volts what was going on and after he told her, she requested that he return to the lobby with her to identify the men who had been fighting. When they did not see Riley or the victim, Volts and the manager walked down a hallway where they encountered an elderly woman pushing a shopping cart. The woman told them that she saw Riley chasing the victim down the hallway and into the parking lot. Volts and the manager proceeded to the parking lot and observed that the sliding glass door opening into the parking lot had been shattered by a bullet.

Under cross examination, Volts stated that he did not witness the verbal altercation between the victim and Riley that turned into a physical fight. Volts could not recall whether Riley pulled the gun from his pocket or waistband, but he said it was obvious Riley was intent on using the weapon. When the police

arrived, Volts gave them a statement and provided them with his contact information. Volts also identified the victim on the scene.

Ms. Devon Perez lived on the sixth floor at the Park Esplanade Apartments on September 23, 2011, the day of the incident. On that day, as she stepped from the elevator onto the sixth floor, she encountered Riley and the victim, neither of whom she knew, engaged in a verbal dispute. She heard Riley tell the victim, "Just wait right there." She watched as Riley entered his apartment. The victim then said, "Well, if you're going to do something, do it right now." Then, the victim stepped into the elevator and left the area. Ms. Perez proceeded to her apartment. Ten to fifteen minutes later, she heard two gunshots outside the building. She looked out her apartment window and saw Riley standing in the parking lot holding a gun as the victim fled. Ms. Perez gave the police a written statement (State's Exhibit 3) at the apartment complex.

Under cross examination Ms. Perez admitted that she did not witness the physical altercation between Riley and the victim, and she did not see Riley fire his gun.

Officer Denise Smothers responded to a signal 94 – illegal use of a weapon – at the Park Esplanade Apartments on September 23, 2011. Officer Smothers and other officers canvassed the area for victim(s), witnesses and suspects. While canvassing, Officer Smothers received a call that someone who may have been involved in the incident was located on the sixth floor of the complex. The officers went to Riley's sixth floor apartment and knocked on the door. When Riley opened the door, Officer Smothers noticed that Riley was bleeding from his mouth area – as if he had been in a physical altercation. Riley told the officers that he was just about to call them. Riley stated that he had been in a verbal altercation with

the victim on the sixth floor. He said that the victim followed him to his apartment and threatened to kill him if he came out of his apartment. In response to the victim's threats, Riley said he armed himself and rode the elevator to the lobby area. As Riley stepped from the elevator, the victim punched him in his face, instigating a fist fight. Riley said he noticed a bulge in the victim's right pocket. As the victim reached into his pocket, Riley pulled out his handgun and fired at the victim.

Officer Smothers spoke to the victim and to Devon Perez and Gus Volts. The witnesses recounted the events just as the victim told the police. Officer Smothers recalled that Riley's version of the events contradicted what the witnesses described. That same afternoon, the officer viewed surveillance video (State's Exhibit 4) taken at the apartment.

Describing the victim and Riley, Officer Smothers recalled that Riley was bigger and heavier than the victim. Officer Smothers narrated a surveillance video obtained from the apartment complex as it was viewed by the jury. She pointed out that the video showed the victim running from the building and being chased by Riley into the complex parking lot. Smothers pointed out the glass door shattered by a bullet fired by Riley and informed the court that bullet fragments were recovered from a wall. The video was played again, and Officer Smothers identified Riley walking back into the building carrying something in his hand.

NOPD Crime Lab technician Shaeed Mohammad testified that he processed the crime scene on the day of the incident by photographing it and collecting ballistics evidence. One photo depicts the bullet shattered glass door, while another is a close up photo of Riley's bleeding lip. Mohammad gathered two spent bullet casings from the apartment complex lobby.

Robert Poree, the victim, testified that he and his parents were tenants at the Park Esplanade Apartments in September 2011. His parents' apartment was on the sixth floor, while his was on the fifth floor. Poree related that he first met Riley about three months prior to this incident. On that day, Riley asked the victim for his phone number so that the two could work out together. A week later, Riley called the victim and invited him to see a movie. The victim was uncomfortable and told Riley that he was straight. A day or so later, when Riley attempted to talk to the victim again, the victim told Riley: "Look, dude, I would appreciate it if you see me, just don't talk to me."

Three months later, on September 23, 2011, the victim had just visited his parents on the sixth floor and was waiting for the elevator. Once again, Riley attempted to engage the victim in conversation. The victim told Riley that he wanted nothing to do with him, after which an argument erupted. The victim told Riley to leave him alone or he would beat him up. In response, Riley said to the victim: "Well, wait right here. I've got something for you" and proceeded to his apartment. The victim got into the elevator and descended to the lobby. Less than a minute later, Riley stepped out of the elevator into the lobby. The victim asked Riley: "Dude, did you just threaten my life?" With that said, Riley pushed the victim with both of his hands. The victim responded by punching Riley and cutting Riley's lip. The pair exchanged punches and fell to the floor. After a few moments, the victim disengaged from the fight. He stepped back and told Riley to calm down. However, Riley pulled a gun from the waistband of his pants. The victim ran from the lobby to the exit, and as he did so, he heard one gunshot, then another. As he ran to the exit door, the victim noticed glass shattering next to him. Riley pursued the victim, firing four or five more shots, until the victim ran into the

parking lot. From the safety of a stairwell, the victim watched Riley re-enter the lobby, and then he called his father. The police arrived. Shortly thereafter, the victim gave a written statement. Riley was arrested for the shooting. The victim was arrested for fighting; however, those charges were dropped.

Riley testified that at the time of this incident, he had been living in New Orleans for approximately three years and working for the federal government as a construction manager. On the morning of the incident, Riley arrived at his office and realized he had forgotten some paper work at his apartment, so he returned to the apartment complex to retrieve the paper work.

Riley indicated that he knew the victim from the apartment complex. Because he noticed that the victim had lost weight, Riley asked if he could work out with the victim. The victim agreed and gave Riley his phone number. They exercised together on several occasions in 2010.

Riley explained that the September 23, 2011 altercation between them stemmed from Riley inviting the victim to see a movie approximately one year earlier. On September 23, 2011, the victim rode the apartment complex elevator with Riley to the sixth floor. Riley told the victim hello; the victim did not respond but shook his head as if in disgust. When Riley asked the victim what was wrong, the victim told him: "You know why I'm not speaking. I can't believe you sent me a text message to go see an X-Men movie." As the pair stepped off the elevator on the sixth floor, the victim threatened him: "I'm going to f---k you up when you come back. I'm going to kill your ass." Riley ignored the victim and walked to his apartment where he spent about ten to fifteen minutes gathering his paperwork and arming himself in case he needed to defend against the victim's threats. He then got into the elevator and exited at the lobby. When he did so, the victim was

waiting and threw a punch, cutting Riley's lip. He and the victim fell to the ground fighting. They exchanged punches for about five minutes, tussling all the way from the lobby down the hallway to the back door, until people in the area pulled them apart. Riley observed a bulge in the victim's pocket, which Riley believed was a gun or knife. The victim reached into his pocket, and Riley retrieved his weapon from the back waistband of his pants.

Commenting on the apartment complex video showing Riley chasing the victim down the hallway, Riley explained that his gun discharged as he pulled it from his pants, and that he ran after the victim to see if the bullet had hit him. Riley said he ran after the victim simply to dissuade the victim from further attacking him. When Riley saw that the victim had run to the other end of the complex, he returned to his apartment and called the apartment manager requesting that she call the police. Riley opened his door to four officers with their guns drawn. The officers ordered Riley to get down on the floor and handcuffed him. Eventually, the officers removed the handcuffs, questioned Riley and confiscated his weapon.

Riley denied being a violent person and said he had never been in trouble with the law. In fact, he said he had never fired a gun at anyone, never intended to murder the victim and fired only two of the four bullets in his legally registered weapon.

DISCUSSION

A review for errors patent on the face of the record reveals none.

The first issue we will address is whether the evidence is sufficient to support the conviction, which is Riley's fifth assignment of error. When issues are raised on appeal as to the sufficiency of the evidence and as to one or more trial

errors, the reviewing court should first determine the sufficiency of the evidence. *State v. Miner,* 2014-0939, p. 5 (La. App. 4 Cir. 3/11/15), 163 So.3d 132,135 (citing *State v. Hearold,* 603 So.2d 731, 734 (La.1992)).

The standard of appellate review for a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. McMillian*, 2010-0812, pp. 5-8 (La. App. 4 Cir. 5/18/11), 65 So.3d 801, 804-805; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). This standard, now legislatively embodied in La. C.Cr.P. art. 821, does not provide the appellate court with a vehicle to substitute its own appreciation of the evidence for that of the factfinder. *State v. Pigford*, 2005-0477, p.5 (La. 2/22/06), 922 So.2d 521. The appellate court does not assess the credibility of witnesses or reweigh evidence. *State v. Smith*, 94-311, p.2 (La.10/16/95), 661 So.2d 442, 443.

"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." *State v. Mussall*, 523 So.2d 1305, 1310 (La.1988). "A factfinder's credibility decision should not be disturbed unless it is clearly contrary to the evidence." *State v. Huckabay*, 2000-1082, p. 33 (La. App. 4 Cir. 2/6/02), 809 So.2d 1093, 1111.

"Absent internal contradiction or irreconcilable conflict with the physical evidence, a single witness' testimony, if believed by the fact finder, is sufficient to support a factual conclusion." *State v. Rapp,* 201-0633, pp. 6-7 (La. App. 4 Cir. 2/18/15), 161 So.3d 103, 108 (citing *State v. Marshall,* 2004-3139, p. 9 (La.11/29/06), 943 So.2d 362, 369).

Riley argues the evidence is insufficient in that a conviction under La. R.S. 14:94(F) requires proof that the discharge of a firearm occurred while committing, attempting to commit, conspiring to commit or otherwise trying to get someone else to commit a crime of violence, i.e., proof beyond a reasonable doubt of a predicate "violent crime", citing *State v. Dussett*, 2013-0116 (La. App. 4 Cir. 10/2/13), 126 So.3d 593, *writ den.* 2013-2559 (La. 4/11/14), 137 So.3d 1214. Riley maintains that the inadequacies of the State's case in support of a predicate crime of violence is borne out by its failure to obtain a guilty verdict for attempted second degree murder.

The State counters that Riley intentionally discharged a gun, with the intent to commit great bodily harm, while attempting to commit a crime of violence. The State relies upon its trial evidence – surveillance footage capturing Riley pursuing the victim and shooting at his back; eyewitness testimony concerning the verbal confrontation between the victim and defendant; and the shooting incident which began in the apartment complex lobby.

La. R.S. 14:94(F) prohibits the intentional discharging of a firearm when it is foreseeable that it may result in death or great bodily harm to a human being during the attempt or commission of a crime of violence. To convict a defendant for illegal use of a weapon during a crime of violence, the State must prove: (1) that Riley intentionally, or through criminal negligence, discharged a firearm; (2) that it was foreseeable that it may have resulted in death or great bodily harm to a human being; and (3) that Riley did so while committing, attempting to commit, conspiring to commit or otherwise trying to get someone else to commit a crime of violence. *State v. Dussett*, 2013-0116, p.6, 126 So.3d 598.

La. R.S. 14:2(B) defines "crime of violence" as "an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature…may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon. . . ''.

In *Dusset,* the defendant was convicted of illegal use of a weapon by discharging a firearm during the commission of a crime of violence. Specifically, the victim and his family were sitting on their front porch when the defendant approached the house and began shooting. On appeal, the defendant argued the insufficiency of the evidence. This Court disagreed:

> The bill of information did not specify which crime of violence [the defendant] committed. However, in opening statements, the State alleged that [the defendant] discharged the firearm during the commission of an aggravated battery and attempted second degree murder. The State argued that [the defendant] knowingly and recklessly discharged a firearm while in the commission of 'an aggravated battery . . . and attempt[ed] second degree murder. . .'. Louisiana Revised Statute 14:2(B) lists aggravated battery and attempted second degree murder as crimes of violence. Because only one violent crime is needed to violate Louisiana Revised Statute 14:94(F), this opinion will only address the aggravated battery against [the victim].

Id., 2013-0116, p. 6, 126 So.3d at 598.

This Court based its decision on the testimony of two eyewitnesses and the responding officers, crime lab report, photographic line-up and an in-court identification, concluding that a rational trier of fact could have found that the defendant discharged the firearm during the commission of an aggravated battery – a crime of violence under La. R.S. 14(B). Further, this Court noted that even though the bill of information did not specify the crime of violence, the evidence presented at trial was sufficient for a rational trier of fact to conclude that the

defendant illegally discharged a firearm during the commission of a crime of violence. *Dussett* indicates that a conviction under La. R.S. 14:94(F) does not depend upon a specific finding of guilt for a crime of violence. Even so, the predicate crime of violence in this case was attempted second degree murder (La. R.S. 14:2(B)(3)).

The Louisiana Supreme Court explained the requisites of a conviction of attempted second degree murder as follows:

> To sustain a conviction for attempted second degree murder, the state must prove that the defendant: (1) intended to kill the victim; and (2) committed an overt act tending toward the accomplishment of the victim's death. La. R.S. 14:27; 14:30.1. Although the statute for the completed crime of second degree murder allows for a conviction based on "specific intent to kill or to inflict great bodily harm," La. R.S. 14:30.1, attempted second degree murder requires specific intent to kill. *State v. Huizar,* 414 So.2d 741 (La.1982). Specific intent may be inferred from the circumstances surrounding the offense and the conduct of the defendant.

State v. Bishop, 2001-2548, p. 4 (La.1/14/03), 835 So.2d 434, 437. See also La. R.S. 14:10(1).

La. R.S. 14:10(1) defines specific criminal intent as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or his failure to act." Specific intent can be formed in an instant. *State v. Cousan*, 94-2503 (La.11/25/96), 684 So.2d 382, 390.

To prove Riley in this case guilty of illegal use of a weapon by discharging a firearm during the commission of a crime of violence, the State had to prove that it was foreseeable that Riley’s actions were intentional **or** criminally negligent, and that such action would result in bodily harm while Riley was “committing,

attempting to commit, conspiring to commit or soliciting, coercing or intimidating another to commit a crime of violence." La. R.S. 14:94(F). Proof of illegal use of weapons may include an element of "intentional conduct", but the charge may also be established by proof of "criminal negligence," which could lead a factfinder to a determination of guilt also.

La. R.S. 14:12 defines criminal negligence as follows:

> Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such a disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.

Criminal negligence requires a lesser standard, requiring gross deviation below a reasonable person's standard of care, yet there is no specific requirement that the person intend to kill or cause great bodily harm to another. Therefore, the fact that the jury in this case did not convict Riley of attempted second degree murder, which requires "specific intent to kill or cause great bodily harm", does not preclude a finding of guilt as to illegal use of weapons, which requires the lesser standard of gross deviation below the reasonable standard of care.

Assault is defined as "an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery." La. R.S. 14:36. Aggravated assault is defined as "an assault committed with a dangerous weapon." La. R.S. 14:37(A).

In this case, the victim and Riley presented conflicting stories of the incident. However, an eyewitness supported the victim's rendition of facts. Gus Volts testified that he came upon the victim and Riley engaged in a fist fight, with Riley gaining the advantage on the victim. Volts said that even after he and his friends pulled the victim and Riley apart, and it was clear the victim wanted no

more of the fight, Riley wanted to continue the fight, produced a gun, and fired at the victim as the victim fled in fear of his life. The State also presented the Park Esplanade Apartments' surveillance video, which captured the victim fleeing with Riley in pursuit shooting at him. Moreover, the video showed a resident of the apartment complex walking in the same exit hallway when Riley fired upon the victim.

Conversely, the defense presented no testimony or evidence to support Riley's argument that he was the victim in this case. Further, at trial, Riley admitted that he fired his gun at the victim while the victim was fleeing the scene and even pursued the victim out to the apartment complex parking lot.

Viewing the evidence in a light most favorable to the State, it was proven that Riley verbally threatened the victim on the sixth floor, pushed the victim in the chest in the apartment complex lobby, and fired a gun at the victim as the victim fled the confrontation. Moreover, the jury rejected Riley's arguments of self-defense and justification. It was not unreasonable for the jury to determine from their life experience: that Riley intentionally or negligently discharged a firearm; that it was foreseeable that it may result in death or great bodily harm to a human being; and that Riley did so while committing the crime of aggravated assault with a firearm. Accordingly, we find no merit in this assignment of error.

In Riley's assignments of error 1, 2 and 6, Riley complains that the court failed to instruct the jury on the elements of La. R.S. 14:94(F) and criminal negligence (assignments of error 1 and 2, respectively) and gave an improper instruction concerning attempted second degree murder (assignment of error 6).

A claim that a jury charge was improper will not be considered on appeal if no contemporaneous objection was made. La. C.Cr.P. art. 841(A); *State v.*

Hankton, 2012-0375 (La. App. 4 Cir. 8/2/13), 122 So.3d 1028, *writ den.* 2013-2109 (La. 3/14/14), 123 So.3d 1193, *cert. den*. *Hankton v. Louisiana,* 135 S.Ct. 195, 190 L.Ed.2d 152, (2014).

The only special jury instructions Riley requested and received were charges as to self-defense and justification. Defense counsel did not object to any of the jury instructions given by the trial judge. Accordingly, assignments of error numbers 1, 2 and 6 have not been preserved for appellate review.

In assignment of error 4, Riley argues that the trial court erred in failing to grant his request for continuance of trial based on the State's last minute amendment to the bill of information on March 10, 2014.

The State countered with the argument that the defense would suffer no prejudice if the trial court refused to grant the continuance because the factual basis for each charge was the same. The trial judge opined:

> . . . the court does find that the Bill of Information, which was, as Defense Counsel states is amended today includes a charge of Intentional Criminally Negligent Discharging of a Firearm, that that charge is directly related to the charge of Attempted Second Degree Murder. That charge involves the same set of circumstances, the same factual allegations, the same setting, the same timing. The Attempted Second Degree Murder is based on the use of the same weapon which forms the basis of Intentional or Criminally Negligent Discharge of a Firearm. Both offenses also involve the exact same victim and both offenses took place at the exact same time. And so, the Court does not see where proceeding to trial would greatly prejudice or would prejudice at all, the Defense, given those circumstances and given those - - not just similarities, but the exact same event. And so, based on that, the Court is going to deny Defense's request for a continuance at this time. The Court notes that Court will proceed - - or counsel will proceed with picking a jury today and trial will not commence until tomorrow.

> . . . if the intentional and negligent discharge of a firearm was the only charge and that the State amended it up to an Attempted Second [Degree] Murder you would have a different argument, but in this case, you have what is basically a lesser charge, a lesser offense, which is included in the Second Degree Murder [sic]. So, again, the court disagrees that any Constitutional Rights of the defendant had been violated, that is certainly not the Court's intention and the Court is not violating any defendants Constitutional Rights. In fact, the Court feels that if Defense counsel had adequately prepared for the Attempted Second Degree Murder, then you should also be prepared for the Intentional Criminally Negligent of the same firearm that's used in the Second Degree Murder [sic] case. . .

Generally, a motion for continuance shall be in writing and specifically allege the grounds upon which it is based, and it shall be filed at least seven days prior to the commencement of trial. La. C.Cr.P. art. 707. However, upon written motion at any time and after contradictory hearing, a trial court may grant a continuance upon a showing that granting the motion is in the interest of justice. Id. An oral motion for a continuance is permitted when the grounds that allegedly made the continuance necessary arose unexpectedly. *State v. German*, 2012-1293, p.24 (La. App. 4 Cir. 1/22/14), 133 So.3d 179, 196, *writ. den*. 2014-0396 (La. 11/26/14), 152 So.3d 897.

The trial court is vested with considerable discretion in ruling on a motion for continuance, and the reviewing court will not disturb the trial court's ruling absent a clear abuse of discretion. *State v. Brown*, 2012-0626, p. 16 (La. App. 4 Cir. 4/10/13), 115 So.3d 564, 575; *State v. Reeves*, 2006-2419, p. 73 (La.5/5/09), 11 So.3d 1031, 1078. When raised on appeal, the reviewing court should generally decline to reverse a conviction even on a showing of an improper denial of a motion for a continuance--absent a showing of specific prejudice. *Reeves*, 2006-2419, p. 73, 11 So.3d at 1079. More specifically, the denial of a motion for

continuance on grounds of counsel's lack of preparedness does not warrant a reversal unless counsel demonstrates specific prejudice resulting from the denial, or the preparation time is so minimal as to call into question the basic fairness of the proceeding. *Id.* 98-1078, p. 33 (La.4/14/99), 750 So.2d at 856. The Louisiana Supreme Court has held that when preparation time is unreasonably short, counsel has been diligent, and there is a general allegation of prejudice, denial of a motion for a continuance is an abuse of discretion which may constitute reversible error. *Snyder,* 98-1078, p. 33, 750 So.2d at 856-857, (citing State v. Durio, 371 So.2d 1158 (La. 1979); *State v. Winston*, 327 So.2d 380 (La.1976)).

In this case, Riley complains he was prejudiced by the trial court's failure to define criminal negligence to the jury, and that if it he had been allowed a continuance of trial, he would have requested such charge. Riley cites *State v. Gibson,* 322 So.2d 143 (La. 1975) in support of his argument. In *Gibson,* the defendant was charged with distribution of heroin as a result of an undercover operation wherein Officer Charles Spillers arranged, through an informer, for the purchase of heroin from the defendant. Originally, the bill of information and bill of particulars furnished by the State set forth that the defendant distributed heroin directly to Officer Spillers. Four days before trial, the State amended the bill of information by deleting the provision that indicated that the defendant had distributed heroin "to C. Spillers" but did not disclose any information concerning the informer to whom the defendant actually distributed the heroin. On the morning of trial, defendant filed a continuance based on the amendment. The defendant argued that it was necessary for the defense to have time to find out the name and whereabouts of the informer to whom the sale was allegedly made in order to properly prepare his defense. The trial court denied defendant's motion,

and the Louisiana Supreme Court reversed, finding that pursuant to La. C.Cr.P. art. 489, defendant was prejudiced in the preparation of his defense. In reaching its decision, the Court reasoned that as a result of the amendment, the defendant was confronted for the first time with a change by the State of the identity and possible testimony of an informant, which might have been helpful and highly relevant to the defense. Moreover, the Court concluded that defendant's opportunity to cross-examine Officer Spillers would not be a substitute for an opportunity to examine the informer.

In reversing the defendant's conviction, the Louisiana Supreme Court found that:

> . . . the name and location of the person to whom the sale was allegedly made by defendant became crucial in the preparation of his defense. The circumstances of the case demonstrate that the identity and possible testimony of the informer were highly relevant and material and might have been helpful to the defense. Defendant's opportunity to cross-examine Officer Spillers was hardly a substitute for an opportunity to examine the man who allegedly took part in the transaction. The informer's testimony might have thrown doubt upon defendant's identity or the identity of the substance allegedly distributed. Moreover, defendant took the stand in his own behalf and denied making the sale to the said informer or to anyone. The informer might have corroborated his testimony. Officer Spillers admitted that he did not consider the informant would make a good witness for the state because he was an addict and had been involved in 'other things.' He also expressed a view as to the possibility that the informer might 'turn us around' if he testified or refused to testify. Whatever reason the state had for not calling the informer as its witness was within its prerogative; however, the accused had a right to make his own decision in this regard after having sufficient time in which to locate and interview the informer in the preparation of his defense. The action by the state in amending the bill of information and bill of particulars four days before trial and the denial of a continuance effectively denied the accused this opportunity. Under these circumstances, we conclude that defendant was prejudiced in the preparation of his defense. Hence, the trial judge committed reversible error when he denied defendant's motion for a continuance in this case.

Id., 322 So.2d at 145.

Unlike *Gibson*, the amendment of the bill of information in this case did not expand the evidence the State would have been permitted to present at trial. Moreover, the jury did not receive the case for deliberation until three days after the start of trial, time enough for defense counsel to request any special charges he deemed appropriate.

In this case, counsel has not shown specific prejudice. The trial judge indicated that if defendant was prepared to defend against the attempted murder charge, he should have been prepared to handle the original illegal discharge count considering that:

> . . . [both charges] involve the same set of circumstances, the same factual allegations, the same setting, the same timing. The Attempted Second Degree Murder is based on the use of the same weapon which forms the basis of Intentional or Criminally Negligent Discharge of a Firearm. Both offenses also involved the exact same victim and both offenses took place at the exact same time.

Additionally, the State's evidence in this case was overwhelming, given the eyewitness testimony and the video surveillance showing Riley brandishing a gun and firing it at the victim's back as the victim was running away from Riley. This assignment is meritless.

In assignment of error 5, Riley complains that the trial court failed to properly and timely arraign him.

La. C.Cr.P. art. 555 provides, in part, that the failure to arraign the defendant or the fact that he did not plead is waived if Riley enters the trial without objecting thereto. In such a case, it shall be considered as if he had pleaded not guilty. *State v. Goldston,* 2001-1215, p.6 (La. App. 4 Cir. 2/11/04), 868 So.2d 196, 200.

In this case, Riley failed to object to the trial court's failure to arraign him on the amended charge prior to swearing the jury. However, when the trial court discovered the omission, Riley was arraigned on the amended bill on March 10, 2014, prior to opening statements and after the jury had been dismissed for the day. Moreover, Riley did enter a plea - not guilty "under protest." Nonetheless, the record indicates that Riley did not object to the trial court's failure to re-arraign him prior to the commencement of trial. Consequently, this issue is not preserved for appellate review and has no merit.

In assignment of error 7, Riley argues the trial court erred by failing to suppress his statement and refusing to allow him to re-open the litigation on the motions to suppress his statement and the video of the incident. Riley contends that his statement was given during custodial interrogation, and the police failed to give him *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966) warnings. That omission, according to Riley, mandated suppression of his statement.

It is well-settled that a trial court is vested with vast discretion in ruling on a motion to suppress. *State v. Ulmer*, 2012-0949, p. 4 (La. App. 4 Cir. 5/29/13), 116 So.3d 1004, 1007, *writ den*. 2013-1484 (La. 1/27/14), 130 So.3d 956. Stated another way, "a trial court's ruling on a motion to suppress evidence is entitled to great weight and will not be set aside absent an abuse of discretion." *Id.*, 2012-0949 at p. 4, 116 So.3d at 1007, citing State v. Wells, 08-2262, p.5 (La. 7/6/10), 65 So.3d 577, 581.

Although not required to do so, an appellate court may review the testimony adduced at trial, in addition to the testimony adduced at the suppression hearing, in determining the correctness of the trial court's pre-trial ruling on a motion to suppress. *State v. Leger,* 2005-0011, p.10 (La. 7/10/06), 936 So.2d 108, 123.

Miranda warnings are applicable only when it is established that the defendant has been subject to a "custodial interrogation." See *State v. Hunt*, 09-1589, p.11 (La. 12/1/09), 25 So.3d 746,754. In *Miranda,* the Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 86 S.Ct. at 1612.

A suspect is "in custody" for *Miranda* purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint of freedom of movement of the degree associated with formal arrest. *State v. Stewart,* 2013-0779, p.10 (La. App. 4 Cir. 1/22/14), 133 So.3d 166, *writs den*. 2014-0296 (La. 9/12/14), 147 So.3d 704.

Miranda warnings are not required when officers conduct preliminary, non-custodial, on-the-scene questioning to determine whether a crime has been committed, unless the accused is subjected to arrest or a significant restraint short of formal arrest. *State v. Shirley,* 2008-2106 (La. 5/5/09), 10 So.3d 224. Thus, an individual's responses to on-the-scene and non-custodial questioning, particularly when carried out in public, are admissible without *Miranda* warnings. See *State v. Davis*, 448 So.2d 645, 651-652 (La.1984) (Question, "Who shot the deer?" directed to a group of hunters did not point the finger of suspicion at any one person, even though wildlife agent knew that adult female deer had been taken and that citizens were holding the culprits, and therefore did not require *Miranda* warnings); *State v. Thompson*, 399 So.2d 1161, 1164-1167 (La.1981) dissent at 400 So.2d 1080 (question of "how he came by the blood spots on his shirt," asked by officer of man in motel lobby identified as perpetrator of assault and who agreed to talk with the officer, was to learn if crime had occurred and therefore occurred in a pre-custodial

setting which did not require *Miranda* warnings); *State v. Mitchell*, 437 So.2d 264, 266 (La.1983) (question asked by an Arkansas deputy after handcuffing a drunken Monroe driver for traffic offenses and noticing dried blood on his neck, "What happened?" did not amount to custodial interrogation for *Miranda* purposes; defendant's reply, "My wife shot me," admissible without *Miranda* warnings under time pressure of finding injured wife).

When a ruling on a motion to suppress a confession or statement is adverse to the defendant, the state shall be required, prior to presenting the confession or statement to the jury, to introduce evidence concerning the circumstances surrounding the making of the confession or statement for the purpose of enabling the jury to determine the weight to be given the confession or statement. *State v. Montejo*, 2006-1807, p.21 (La.5/11/10), 40 So.3d 952, 966. Likewise, the testimony of the interviewing police officer alone may be sufficient to prove that a defendant's statement was given freely and voluntarily. State v. Hunt, 2009-1589, p. 13 (La. 12/1/09) 25 So.3d 746, 755 citing La. Code Crim. Proc. art. 703(D); La. R.S. 15:451.

At the suppression hearing of August 16, 2012, Officer Smothers testified that she was directed to Riley's apartment via a radio call from her ranking officer. When Riley answered Smothers' knock, she noticed that his lip was bleeding. She asked what happened. Riley told her he was just about to call the police and reported that he had gotten into a physical altercation with the victim, prior to which the victim threatened to kill him. Officer Smothers testified that when she encountered Riley at his apartment door: she asked him what happened in order to determine the facts and circumstances of incident; she was simply investigating the incident; she did not enter the apartment but rather stood in the hallway; Riley was

not under arrest at that time; and the police initially had information that Riley may have been the victim in the incident. Riley continued to speak to Officer Smothers, telling her that the handgun[4] he used was in his bedroom. Further, she stated that Riley was not detained when he initially spoke to her. After speaking with Riley, Officer Smothers sought out and spoke with the victim. From that conversation, she concluded that Riley was the aggressor in the incident. Officer Smothers returned to Riley's apartment, read him his rights and arrested him for aggravated assault with a firearm.

The trial judge did not err in denying the motion to suppress the statement based upon her conclusion that Riley was not under detention at the time he voluntarily gave information to the officers. There was no evidence indicating that Riley was detained prior to his statement.

Even if there was error in the admission of the statement, which there was not, the erroneous admission of a statement or confession is subject to a harmless error analysis. *State v. LeBlanc*, 2010-1484, p. 29 (La. App. 4 Cir. 9/30/11), 76 So.3d 572, 590. In this case, the evidence was overwhelmingly against Riley. Discounting Riley's statement, the jury heard the testimony of witnesses Devon Perez and Gus Volts and viewed surveillance video capturing the victim fleeing, being pursued and shot at by Riley.

As for Riley's claim he should have been allowed to re-open the issue of suppression of the statement, he cites no authority that would entitle him to revisit the issue. Moreover, Riley's trial testimony was exculpatory. See La. R.S. 15:454.[5] Thus, we find no merit in this assignment of error.

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[4] The handgun was suppressed as having been seized without a search warrant.
[5] La. R.S. 15:454 provides:

Inapplicability of free and voluntary rule to admissions not involving criminal intent

In assignment or error 8, Riley asserts that the trial court erred in denying his Motion for Downward Departure and imposed a constitutionally excessive sentence of ten years.

Article 1, Section 20 of the Louisiana Constitution of 1974 provides that "No law shall subject any person ... to cruel, excessive, or unusual punishment." On appellate review of an excessive sentence claim, the relevant question is not whether another sentence might have been more appropriate but whether the trial court abused its broad sentencing discretion. *State v. Walker*, 2000-3200, p. 2 (La.10/12/01), 799 So.2d 461, 462. The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La. C.Cr.P. art. 881.4(D); *State v. Robinson*, 2011-0066, p. 17 (La. App. 4 Cir. 12/7/11), 81 So.3d 90, 99. An appellate court reviewing an excessive sentence claim must determine whether the trial court adequately complied with the statutory sentencing guidelines set forth in La. C.Cr.P. art. 894.1, as well as whether the particular circumstances of the case warrant the sentence imposed. *State v. Black*, 98-0457, p. 8 (La. App. 4 Cir. 3/22/00), 757 So.2d 887, 892.

The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. *State v. Wilson,* 2011-0960, p.5 (La. App. 4 Cir. 9/5/12), 99 So.3d 106, quoting *State v.*

The rule that a confession produced by threat or promise is inadmissible in evidence does not apply to admissions not involving the existence of a criminal intent.

La. R.S. 15:451 concerns the "free and voluntary rule" as a "condition precedent to use of a confession." "The term 'admission' is applied to those matters of fact which do not involve criminal intent; the term 'confession' is applied only to an admission of guilt, not to an acknowledgment of facts merely tending to establish guilt." La. R.S. 15:449.

Robinson, 2008-0287, p.12-13 (La. App. 4 Cir. 9/24/08), 996 So.2d 56, 62-63 (the trial court need not recite the entire checklist of article 894.1, but the record must reflect that it adequately considered the guidelines). If the appellate court finds the trial court adequately complied with Article 894.1, it then must determine whether the sentence imposed is too severe in light of the particular defendant and the particular circumstances of the case, "keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged." *State v. Boudreaux,* 2011-1345, p.5 (La. App. 4 Cir. 7/25/12), 98 So.3d 881, 885 quoting *State v. Landry*, 2003-1671, p.8 (La. App. 4 Cir. 3/31/04) 871 So.2d 1235, 1239.

A sentence, although within the statutory limits, is constitutionally excessive if it is "grossly out of proportion to the severity of the crime" or is "nothing more than the purposeless and needless imposition of pain and suffering." *State v. Fleming,* 2011-1126, p.7 (La. App. 4 Cir. 5/30/12), 95 So.3d 1129, 1130.

The defendant bears the burden of rebutting the presumption that a mandatory minimum sentence is constitutional. *State v. Bentley*, 2002-1564, p. 11 (La. App. 4 Cir. 3/12/03), 844 So.2d 149, 156. "To do so, a defendant must show by *clear and convincing evidence* that he is exceptional, which, in this context, means that, because of unusual circumstances, this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense and the circumstances of the case." *Id.*

In his Sentencing Memorandum and Request for Downward Departure, Riley pointed out that at the time of his sentencing he was a forty-eight year old man whose life had been focused on his role as a father, engineer, public servant

and observant Christian with no criminal record. He had worked his way through college to obtain both bachelor's and master's degrees in computer design and engineering fields. He applied his education and drive to public service, working for the General Services Administration of the United States Government for nearly two decades managing large scale construction projects, some of which brought him to New Orleans after Hurricane Katrina, where he was involved in the government's post-Katrina rebuilding efforts.

Riley was convicted of the illegal use of a weapon by discharging a firearm while committing a crime of violence. La. R.S. 14:94(F). A conviction under La. R.S. 14:94(F) mandates a sentence of imprisonment at hard labor for not less than ten years nor more than twenty years, without benefit of parole, probation, or suspension of sentence. Riley was sentenced to the statutory minimum of ten years at hard labor without benefits, and although the trial judge did not articulate reasons for the sentence imposed, the facts of this case support the sentence. While it is true Riley had no prior criminal record, the facts indicate that Riley chased the fleeing victim, firing several shots at the victim's back in total disregard for the safety of the victim and others. Moreover, apartment complex surveillance video captured the victim's flight and Riley's pursuit and discharge of a firearm, all while one complex resident was walking the same hallway where Riley was chasing and shooting at the victim.

The trial court did not err when it found that Riley failed to prove by clear and convincing evidence that he is exceptional, which, in this context, means that, because of unusual circumstances, he was a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense and the circumstances of the case. *Bentley*, *supra.*

Other jurisdictions have found identical and greater sentences for convictions for illegal use of a weapon while committing crime of violence not excessive. See *State v. Smith,* 2014-0578 (La. App. 1 Cir. 11/7/14), ---So.3d ---, 2014 WL 5794196 (ten years not excessive); *State v. Jackson,* 42,960 (La. App. 2 Cir. 2/13/08), 976 So.2d 279 (fourteen years not excessive); and *State v. Baham,* 2014-0653 (La. App. 5 Cir. 3/11/15), ---So.3d ---, 2015 WL 1119489. Accordingly, we find no merit in this assignment of error.

For these reasons, we hereby affirm Riley's conviction of discharge of a firearm during a crime of violence as well as his sentence of ten years without benefit of parole, probation or suspension of sentence.

CONVICTION AND SENTENCE AFFIRMED