

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	NO. 2016-KA-0534
VERSUS	*	
KERMITT BERNHART	*	COURT OF APPEAL
	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 515-118, SECTION "C"
Honorable Benedict J. Willard, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

* * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Sandra Cabrina Jenkins)

Leon A. Cannizzaro, Jr.
DISTRICT ATTORNEY, ORLEANS PARISH
Donna Andrieu
ASSISTANT DISTRICT ATTORNEY, ORLEANS PARISH
J. Taylor Gray
ASSISTANT DISTRICT ATTORNEY, ORLEANS PARISH
619 South White Street
New Orleans, LA 70119
COUNSEL FOR APPELLEE, STATE OF LOUISIANA

Katherine M. Franks
LOUISIANA APPELLATE PROJECT
P.O. Box 1677
Abita Springs, LA 70420-1677
**COUNSEL FOR DEFENDANT/APPELLANT, KERMITT
BERNHART**

**CONVICTION AND
SENTENCE AFFIRMED**

JANUARY 18, 2017

The defendant, Kermitt Bernhart, appeals his conviction on manslaughter charges. For the reasons that follow, we affirm.

STATEMENT OF CASE

On February 21, 2013, the State indicted the defendant, Kermitt Bernhart, for the second-degree murder of Christopher Lambert.¹ The defendant entered a plea of not guilty. The trial court denied defendant's motions to suppress the evidence, identification, and statement. On August 20, 2015, at the end of a three day jury trial, the defendant was convicted of manslaughter.

On September 9, 2015, prior to sentencing, the defendant filed a motion for new trial, motion to reconsider sentence, and motion for appeal. On the same date, the trial court denied the motion for new trial and granted the appeal motion.

On October 14, 2015, the trial court sentenced the defendant to twenty-seven years at hard labor, the sentence to be served currently with any other sentence. It also denied the defendant's motion to reconsider sentence.

Thereafter, the instant appeal was lodged with this Court.

¹ James Williams was also charged with second-degree murder in the same indictment. His charge was later amended to accessory after the fact to second-degree murder.

STATEMENT OF FACT

The following testimony was adduced at trial.

Joanna Lambert, the victim's cousin, testified that the victim's parents predeceased him. She recounted that he got involved with drugs after Hurricane Katrina, which he used as an escape from his unhappy childhood. She maintained the drug addiction caused the victim to live on the streets until his death.

Rogell Lewis, the 911 call operator, explained the procedure to record and identify all police/medical assistance calls. Lewis identified the State's exhibit of the 911 call that was subsequently played for the jury. Mr. Lewis verified the call was received at 4:45 p.m. on October 19, 2011 and that the record displayed the name "James" as the caller.

Officer Melvin Hunter said he responded to a 911 call about a shooting in the 2500 block of Orleans Avenue. He identified James Williams as the person who directed him to the second floor of an abandoned building. Ofc. Hunter then discovered the body of the victim on the bathroom floor.

Aaron Williams acknowledged he was incarcerated at Winfield Correctional Facility on drug possession and distribution charges. He described the victim as a friend. He testified he had given clothes to the victim before his incarceration and that the victim was wearing some of those clothes on the day he was killed.

Detective Theo Kent of the NOPD homicide division stated he assisted Detective Ryan Vaught, the lead investigator on the case. Det. Kent directed crime scene technicians in photographing the victim's body and the interior and exterior of the crime scene area. Det. Kent identified thirty-six pictures taken the day of the

shooting and the crime scene technician's report. He also said he had the victim's pants tested for DNA.

Dr. Cynthia Gardner, a staff member of the Orleans Parish Coroner's Office, testified as an expert in forensic pathology. She performed an autopsy on the victim's body. Dr. Gardner relayed the victim suffered three gunshots to the head and one to his right hand. Two of the bullets were recovered during the autopsy. Testing of bodily fluids proved positive for cocaine and heroin.

Detective Ryan Vaught testified he was the lead detective in the case. He instructed Officer Darryl Doucette to contact James Williams, the man who placed the 911 call, and to canvass the area for potential witnesses. Det. Vaught conducted two interviews of James Williams at police headquarters on the day of the shooting. The second interview came after Det. Vaught had viewed still images of the shooting area taken from surveillance cameras of an Orleans Avenue restaurant.

Upon viewing the still images, Det. Vaught identified the victim from the Saints football jersey he wore on the day of the shooting. He observed the two black males seen in a still shot with Williams and the victim bore a strong resemblance to persons later identified as Bernard "Stink" Santiago and Kerry "Twin" Jones, who had arrived at the police station for questioning. Det. Vaught noticed that Williams, Santiago and Jones wore the same clothes at the police station as they had worn in the still images from the video surveillance. In their interviews with Det. Vaught, Santiago, Jones, and Williams identified themselves and the victim from a still image picture. Det. Vaught said that Santiago and Williams identified the defendant from a six-person photo lineup; however, Jones

claimed he was unable to identify anyone. Det. Vaught added that the gun residue test done on Williams, Santiago, and Jones were negative.

Det. Vaught said that on the day after the shooting, he confiscated some jackets from the crime scene and obtained a search warrant for James Williams' vehicle, a 2006 red Hyundai Elantra. Det. Vaught instructed crime lab personnel to process the car for items, such as, DNA, hairs, fibers, and blood. The search of the car produced several latent fingerprints, a partial palm print, a cell phone packing slip containing a cell phone number, and a can of soda. Det. Vaught ordered DNA tests done on these items. Test results showed the palm print on the exterior of the right rear passenger door belonged to the defendant. The results also showed the DNA of Aaron Williams was found in the pocket of the victim's pants.²

Det. Vaught testified that video footage of a barbershop established that the defendant had gone to the barbershop on the afternoon of the shooting and had called James Williams to pick him up at the barbershop. As a result of his subpoena of Williams' cell phone records, Det. Vaught discovered a witness, Tyara Lipscomb, who also placed the defendant at the barbershop on the afternoon of the shooting. Det. Vaught added that other video surveillance footage showed the defendant enter the barbershop around 3:51 p.m. and left at 4:02 p.m., headed in the direction of St. Ann Street.

Det. Vaught described related video footage from a nearby restaurant. The footage showed that before the shooting, James Williams had pulled his vehicle to the curb and talked with the defendant, the victim, Santiago, and Jones. The video

² Det. Vaught explained the presence of Aaron Williams' DNA in the victim's pants pocket stemmed from Williams' previously having owned and worn the victim's pants.

footage also depicted Santiago, Jones, and James Williams walking back and forth in the area of the crime scene between 4:08 p.m. and 4:37 p.m. Det. Vaught reiterated that James Williams made the 911 call that reported the homicide at 4:45 p.m. Based upon the interviews and his investigation, Det. Vaught developed the defendant as a suspect. He obtained an arrest warrant to charge the defendant with second degree murder.

NOPD firearms examiner Meredith Acosta identified the State's report of her test findings. From her testing, Ms. Acosta concluded specimens 1 and 2 were consistent with .38 caliber class ammunition and were fired by the same revolver.

Certified latent fingerprint examiner Officer George Jackson testified that he examined one palm print and eight fingerprints. His examination of the palm print indicated it belonged to the defendant, as did one of the fingerprints.

Officer Darrell Doucette testified he had the crime lab conduct GSR (gunshot residue) tests on James Williams, Bernard Santiago and Kerry Jones. He personally observed the technician perform the GSR tests. He verified the test results came back negative as to Williams, Santiago and Jones.

Tyara "Yari" Lipscomb testified he was at the barbershop around 3:51p.m. on October 19, 2012. He said the defendant entered the barbershop and used his (Lipscomb's) cell phone. The defendant stepped outside and made the call. Lipscomb described the defendant as moving fast "looked like something was wrong . . .like somebody was after him or something." Lipscomb retrieved his phone from the defendant. After that, he said the defendant left the area.

James Williams acknowledged at trial that he had been incarcerated for second degree murder and faced a simple burglary charge. Williams admitted the State offered him a reduction of his second-degree murder charge to accessory

after the fact in exchange for his truthful testimony. Williams told the jury the victim was his friend and that he spoke with police the day the victim was killed. Williams knew the defendant prior to the shooting from their association at Covenant House. He conceded he gave Det. Vaught untruthful information during his first interview, wherein he denied he knew the victim and claimed that he only made the 911 because he heard gunshots and discovered the body. Williams said he lied to the police because he did not want to get involved. Williams admitted in his second interview that the victim was his friend, that they had known one another from the neighborhood, and that they had done drugs together. Williams also acknowledged that he falsely named Bernard Santiago as the man who shot the victim and that he did not initially identify the defendant as the shooter. After Det. Vaught presented Williams with more photos, he ultimately conceded the defendant was the man who shot the victim. Williams testified he identified the defendant as the shooter from a six photo lineup presented by Det. Vaught. Williams also identified the persons shown in a blow up of one of the still shots as the defendant, “Twin,” “Stink,” and the victim.

Williams recounted that on the morning of the shooting, Terrance “Streets” Albert³ and he drove to the intersection of Orleans Avenue and Galvez Streets. They encountered Jones, Santiago, the defendant and the victim. Williams indicated the four of them would customarily walk to an abandoned building nearby where they would hang out and do drugs.

³ Terrance Albert was deceased at the time of trial.

On the afternoon of the shooting, Albert, Williams, and the defendant went to Albert's house. Albert and the defendant entered the house, while Williams waited in the car. They then drove back to the corner of Orleans Avenue and Galvez Street. As they sat in the car, the defendant told Williams and Albert that he wanted to kill the victim because the victim and he had gotten into an altercation the night before on Bourbon Street. Williams knew the defendant was armed with a revolver on that day. Williams did not tell the victim what the defendant had said because he did not believe the defendant would follow through. The four of them - the defendant, the victim, Santiago, and Jones - walked towards the 2500 block of Orleans Avenue, an area where they had previously done drugs. As the four walked, Williams drove by in his car and told them Albert and he were on the way to get some heroin on Broad Street. En route to buy the drugs, Williams received a call from the defendant, who sounded very scared. The defendant told Williams he was calling from a barbershop and asked Williams to "come get [him] before the cops did." Williams complied. He picked the defendant up at the intersection of St. Ann and Broad Streets. Albert was also in the car. The defendant sat in the rear passenger seat and did not speak to Williams or Albert. Williams drove to the house in the 2500 block of Orleans Avenue, where they met up with Jones and Santiago. Williams suspected something had happened to the victim when Jones and Santiago said they heard gunshots as they entered the Orleans Avenue house. Williams, accompanied by Jones, Santiago and the defendant, entered the house where they found the victim on the bathroom floor. Williams did not call 911 then because he suspected he was with the likely killer and did not want the killer to know his intent to call the police. The four left the house and encountered "Lips," an "old-timer who [would] get loaded."

Williams told “Lips” what was going on. Williams called 911 and returned to the house on Orleans Avenue to wait for the police. Williams denied having anything to do with the victim’s death.

Kerry Jones testified the victim and he had been neighborhood friends for years. On the day of the shooting, Jones met with a detective at the police station to discuss the shooting. However, he admitted he was not completely honest about what he told the detective because he was afraid. Jones revealed Bernard Santiago was his cousin and was deceased at the time of trial. Jones stated Santiago and he were shot because of this incident.

Jones said Santiago, the victim, defendant, and he were on Bourbon Street the night before the shooting. They sold counterfeit drugs for money to purchase heroin and crack cocaine. The four men left Bourbon Street about 4:00 a.m. on October 19, 2012, and returned to 2519 Orleans Avenue, where they slept until about 6:00 a.m. When they woke, they did heroin and crack cocaine and decided to hang out at Orleans Avenue and Galvez Street, the “spot.” Jones remembered that the victim rolled his own cigarettes and smoked Bugle tobacco. About one hour after they arrived at the spot, James Williams drove up in a red vehicle. Williams hung out with the four for a short while, and then Williams and the defendant left in Williams’ car. When they returned a short while later, the defendant invited the victim to return to the house in the 2500 block of Orleans Avenue to do drugs. Eventually, Jones, Santiago, the victim and the defendant all decided to go to the house.

Jones identified a still image from the surveillance video in which the four men were seen passing a restaurant en route to the house on Orleans Avenue. Jones stopped to buy a drink and then caught up with the rest of the group. He said

the defendant entered the Orleans Avenue house first. About forty seconds later, Santiago, Jones and the victim entered the house. He relayed the victim was hesitant to enter because he felt something was wrong. As soon as Jones entered the house, he heard gunshots and jumped from the second story floor of the house. Santiago ran to the front of the house and escaped. When Jones and Santiago met up outside the house, they started to look for the victim. When they could not find the victim, Jones and Santiago went back to Orleans Avenue and Galvez Street. They found Williams and the defendant laughing with one another. Jones noticed the defendant was rolling cigarettes with the victim's Bugle tobacco. Jones accused the defendant of popping firecrackers at the house. The defendant told Jones and Santiago he had shot the victim at the house. Jones, Santiago, the defendant, and Williams returned to the house. Jones discovered the victim's body on the bathroom floor. The four men left the house, walked on Orleans Avenue and encountered "Lips." He acknowledged Williams eventually dialed 911 to report the shooting. Jones stated Santiago and he left the area after they noticed police had arrived at the house.

Later that afternoon, Jones and Santiago voluntarily went to police headquarters to report what they knew of the shooting. Jones reiterated he initially lied to the police because he feared for his safety and did not want to be labeled a snitch. Jones denied that Santiago and he had anything to do with the victim's death.

Halbert "Lips" Wilson testified he was like a father figure to the victim and had befriended him after the death of his parents. Wilson acknowledged the victim had a drug problem. He knew Bernard "Stink" Santiago, Kerry "Twin" Jones and James "Jay" Williams from the drug culture. Wilson said the victim was

the only one in his crowd who smoked Bugle tobacco and rolled his own cigarettes.

On the afternoon of the shooting, Wilson encountered Jones, Santiago, Williams, and the defendant in the Orleans Avenue-Galvez Street area. He asked about the victim's whereabouts. No one answered him; however, he heard Jones tell Santiago: "The bullet liked to hit me. It almost hit me." When Wilson asked about the victim again, the defendant adjusted his waistband and said: "You don't want to f**k with that." Wilson said the defendant attempted to intimidate him with the gun. Wilson told Williams to call 911. As Williams spoke to the 911 operator, it became apparent to Wilson that Williams knew more about what happened to the victim than he originally indicated. Wilson listened while Williams reported to the operator that the victim was wearing a Saints jersey and was lying in the bathroom at the address of the vacant Orleans Avenue house. Wilson accompanied Williams to the vacant house and found the victim's lifeless body on the bathroom floor. He saw the victim had been shot in the head. When a police officer arrived, Wilson gave the police his name; however, Williams gave a false name. When Wilson confronted Williams about the false name, Williams supplied his correct name.

The defendant testified his relationship with the victim was "very close . . . like a brother." He admitted using drugs on occasion. The defendant also recounted that Twin, Stink, the victim, and he had hung out on Bourbon Street and sold counterfeit drugs on the night before the shooting. He said that was the first time he met Twin and Stink. He also verified they left the French Quarter about 4:00 a.m. and slept in the vacant house at 2519 Orleans Avenue until about 6:30

a.m. After they awoke, they hung out at the intersection of Orleans Avenue and Galvez Street, the spot for drug use in the area.

The defendant testified that later in the day, around 3:00 p.m., James Williams and Terrance Albert arrived in Williams' red vehicle. Williams got out of the car and visited with Stink, Twin, the victim, and the defendant. A few moments later, Stink and Twin announced they were going back to the abandoned house on Orleans Avenue to retrieve their jackets and asked the defendant and the victim to accompany them. Williams and Albert drove away.

The defendant testified that after the group arrived, the victim entered the house first. He was followed by the defendant, Stink, and Twin. The defendant said the victim was already six to seven steps ahead of him by the time the defendant entered. The defendant heard shots as he entered the doorway. The defendant, Stink and Twin then ran down the stairs away from the house. The defendant said he did not see who shot the victim, but he knew someone was in the house when he heard the gunfire. The defendant ran to the Broad Street barbershop where he had gotten his hair cut in the past. He entered the barbershop and used a patron's cell phone to call James Williams. He was scared and knew James Williams would drive him from the area. Instead, however, Williams drove to 2519 Orleans Avenue where they met up with Stink and Twin. Williams, Stink, Twin, and the defendant decided to go into the house to look for the victim. The defendant denied telling anyone he wanted to kill the victim. He said he did not know anyone named "Streets." He also denied having a weapon the day the victim was killed and any involvement in the victim's death.

The defendant acknowledged his friendship with Dale Lambert, the victim's cousin. He stated they were housed together for a time in the Orleans Parish jail,

and that Dale Lambert was convicted of the killing of Bernard “Stink” Santiago. The defendant admitted he refused to speak to the police; however, he explained he feared the police would try to blame him for the murder. The defendant denied threatening Halbert “Lips” Wilson.

ERRORS PATENT

Our review reveals an errors patent regarding the timing of defendant’s sentence and the granting of the appeal. The record shows an order of appeal in this case was granted after trial, however, before sentencing. Although a defendant can take an appeal only from a conviction and sentence, this Court has held that an appeal taken prior to sentencing will not be dismissed “because ‘[d]ismissing the appeal would simply result in a delay of the appellate process and hinder defendant's right to appeal.’ ” *State v. Fields*, 2012-0674, n. 3 (La. App. 4 Cir. 6/19/13), 120 So. 3d 309, 314, citing *State v. Warren*, 538 So.2d 1036, 1037 (La. App. 4 Cir.1989), quoting from *State v. Martin*, 483 So.2d 1223, 1225 (La. App. 4 Cir.1986). Accordingly, the errors patent requires no corrective action by this Court.

ASSIGNMENT OF ERROR

In a sole assignment of error, the defendant contests the sufficiency of the evidence to support his conviction. Specifically, the defendant claims the State failed to prove his identity as the perpetrator of this crime.

In *State v. Hickman*, 2015-0817, p. 9 (La. App. 4 Cir. 5/16/16), 194 So. 3d 1160, 1165–1166, this Court set forth the standard for determining a claim of insufficiency of the evidence:

When reviewing the sufficiency of the evidence to support a conviction, Louisiana appellate courts are controlled by the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Under this standard, the appellate court “must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt.” *State v. Neal*, [20]00–0674 (La.6/29/01) 796 So.2d 649, 657 (citing *State v. Captville*, 448 So.2d 676, 678 (La.1984)).

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

“If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all of the evidence most favorable to the prosecution must be adopted.” *State v. Green*, 588 So.2d 757, 758 (La. App. 4th Cir.10/29/91). It is not the function of the appellate court to assess the credibility of witnesses or reweigh the evidence. *State v. Scott*, 2012–1603, p. 11 (La. App. 4 Cir. 12/23/13), 131 So.3d 501, 508 (citing *State v. Johnson*, 619 So.2d 1102, 1109 (La. App. 4th Cir.1993)). Credibility determinations, as well as the weight to be attributed to the evidence, are soundly within the province of the fact finder. *Id.*, (citing *State v. Brumfield*, 93–2404 (La. App. 4 Cir. 6/15/94), 639 So.2d 312, 316). Moreover, conflicting testimony as to factual matters is a question of weight of the evidence, not sufficiency. *State v. Jones*, 537 So.2d 1244, 1249 (La. App. 4th Cir.1989). Absent internal contradiction or irreconcilable conflict with the physical evidence, a single eyewitness' testimony, if believed by the fact finder, is sufficient to support a factual conclusion. *State v. Marshall*, 2004–3139, p. 9 (La.11/29/06), 943 So.2d 362, 369.

In this case, the defendant was charged with second-degree murder. However, he was convicted by a 10-2 verdict of manslaughter,⁴ a responsive verdict to the charge of second-degree murder. The defendant did not object to the inclusion of manslaughter as a responsive verdict. A reviewing court need not determine whether the evidence supports the responsive verdict returned by the jury where the defendant does not object to the inclusion of the responsive verdict and the evidence is sufficient to support a conviction of the greater offense charged. *State v. Alvarez*, 2013–1652, p. 6 (La. App. 4 Cir. 12/23/14), 158 So.3d 142, 148 (citing *State v. Colbert*, 2007–0947, p. 13 (La. App. 4 Cir. 7/23/08), 990 So.2d 76, 84–85 (internal citations omitted)). *See also State ex rel. Elaire v. Blackburn*, 424 So.2d 246, 251(La.1982).⁵ Therefore, in the absence of defendant’s objection to the responsive verdict, the jury’s verdict of manslaughter is authorized provided the evidence adduced at trial was sufficient to support a

⁴ Manslaughter is defined as a homicide which would be first or second-degree murder, but the offense is committed in “sudden passion” or “heat of blood” immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. La. R.S. 14:31. “Sudden passion” and “heat of blood” are not elements of the offense of manslaughter; rather, they are mitigatory factors, in the nature of a defense, which diminish the degree of culpability and reduce the grade of the offense from murder to manslaughter. *State v. Lombard*, 486 So.2d 106, 110–111 (La.1986).

⁵ In *State ex rel. Elaire*, 424 So.2d at 249, the Court noted that the 1982 amendment adding Section C to La. C.Cr.P. art. 814 gives the trial judge discretion, on motion of either side, to exclude a responsive verdict which is not supported by the evidence. *Id.* Therefore, even if the offense is legislatively designated as responsive by Article 814, the defendant may timely object to an instruction on a responsive verdict on the basis that the evidence does not support that responsive verdict. *Id.* If the court overrules the objection and the jury returns a verdict of guilty of the responsive offense, the reviewing court must examine the record to determine if the responsive verdict is supported by the evidence and may reverse the conviction if the evidence does not support the verdict. *Id.* However, if the defendant does not enter an objection (at a time when the trial judge can correct the error), then the reviewing court may affirm the conviction if the evidence would have supported a conviction of the greater offense, whether or not the evidence supports the conviction of the legislatively responsive offense returned by the jury. *Id.* at 251.

conviction for the charged offense of second-degree murder. *State v. Johnson*, 2013-0343 (La. App. 4 Cir. 10/1/14), 151 So. 3d 683, 688–89, *writ denied*, 2014-2288 (La. 8/28/15), 175 So. 3d 965, and *writ denied*, 2014-2309 (La. 8/28/15), 175 So. 3d 965, *reconsideration denied*, 2014-2309 (La. 10/30/15), 179 So. 3d 613, and *cert. denied*, 136 S. Ct. 1666, 194 L. Ed. 2d 778 (2016), citing *State v. Harris*, 97–2903, p. 8 (La. App. 4 Cir. 9/1/99), 742 So.2d 997, 1001.

In order to prove second-degree murder in this matter, the State had to establish beyond a reasonable doubt the defendant had the specific intent to kill a human being and that he committed an overt act in furtherance of that goal. La. R.S. 14:27; 14:30.1; *State v. Bishop*, 2001–2548, p. 4 (La. 1/14/03), 835 So.2d 434, 437. Specific intent is defined 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 failure to act.” La. R.S. 14:10(1). “Specific intent may be inferred from the circumstances surrounding the offense and the conduct of the defendant.” *Id.* (Citations omitted).

In support of the defendant’s intent to kill the victim, the State referenced the testimony of its witnesses and video surveillance film offered into evidence. Specifically, Dr. Cynthia Gardner of the Orleans Parish Coroner’s Office testified the victim suffered two fatal gunshot wounds to the head. The wounds were inflicted at close range -less than twenty-four inches from the victim’s head. One of the wounds was almost squarely between the victim’s eyes, and the other was so destructive it blew out a portion of the victim’s brain. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. *State v. Sullivan*, 596 So.2d 177, 190 (La.1992).

The testimony of other witnesses called by the State also supported the defendant's specific intent to kill. James Williams testified the defendant told him of his plan to kill the victim and even explained to Williams his plan to do so by luring the victim to the abandoned house on Orleans Avenue under the guise of sharing drugs with him. Halbert "Lips" Wilson corroborated Williams' testimony that the defendant was armed the day of the shooting. Wilson maintained the defendant intimidated him with a gun to warn Wilson not to pursue questions concerning the victim's whereabouts after the shooting.

Kerry Jones' testimony established some level of animosity between the defendant and the victim. Jones revealed the defendant told him of his plan to get even with the victim for embarrassing him and because of a disagreement the two had the night before the shooting. Most importantly, Jones said the defendant admitted he had killed the victim.

The surveillance video presented at trial also conformed to the timeline of events recounted by Kerry Jones and James Williams.

When, as in this case, the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is also required to negate any reasonable probability of misidentification. *State v. Sippio*, 2013-0206 (La. App. 4 Cir. 1/30/14), 133 So. 3d 294, 296, citing *State v. Dorsey*, 2010-0216, p. 43 (La. 9/7/2011), 74 So.3d 603, 633 (citation omitted). The defendant challenges the credibility and reliability of the State's witnesses, referencing in part the conflicting statements given by James Williams and the substance abuse history of some of the witnesses. However, it is not the function of the appellate court to assess the credibility of witnesses or re-weigh the evidence. *State v. Johnson*, 92-0731 (La. App. 4 Cir. 5/13/93), 619 So.2d 1102, 1109. Credibility

determinations, as well as the weight to be attributed to the evidence, are soundly within the province of the fact finder. *State v. Brumfield*, 93-2404 (La. App. 4 Cir.6/15/94), 639 So.2d 312, 316.

Clearly, the jury accredited the testimony of the State's witnesses. The State presented substantial testimony from numerous witnesses who identified the defendant as the shooter and video surveillance film that provided collateral corroboration of their testimony. Although the defendant points to some of the witnesses as the probable killer, Det. Vaught's testimony dismissed Kerry Jones and Bernard Santiago as suspects. His testimony espoused that although they and the defendant were present in the abandoned house after the victim was shot, Jones and Santiago tested negative for the presence of gunshot residue. Det. Vaught's testimony also established that James Williams tested negative for gunshot residue.

Hence, based upon the jury's apparent accreditation of the witnesses and the evidence admitted, we find the State negated any reasonable probability of misidentification.

CONCLUSION

Based upon the record and viewing the evidence in the light most favorable to the prosecution, the State introduced sufficient evidence to support the jury's verdict. We find no merit in defendant's assignment of error. Accordingly, defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFIRMED