STATE OF LOUISIANA	*	**NO. 2016-KA-0999**
VERSUS	*	**COURT OF APPEAL**
SHAVEZ WILEY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 510-197, SECTION "J"
Honorable Darryl A. Derbigny, Judge
* * * * * *
Judge Regina Bartholomew-Woods
* * * * * *

(Court composed of Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins, Judge Regina Bartholomew-Woods)

LEDET, J., CONCURRING IN PART WITH REASONS

Leon A. Cannizzaro, Jr.
DISTRICT ATTORNEY
Kyle Daly
ASSISTANT DISTRICT ATTORNEY
Parish of Orleans
619 South White Street
New Orleans, LA 70119

COUNSEL FOR DEFENDANT/APPELLEE

Holli Herrle-Castillo
LOUISIANA APPELLATE PROJECT
P.O. Box 2333
Marrero, LA 70073-2333

COUNSEL FOR PLAINTIFF /APPELLANT

AFFIRMED
NOVEMBER 15, 2017

Defendant/Appellant, Shavez Wiley ("Defendant"), appeals his conviction, following a jury trial, of one count of second degree murder and one count of attempted second degree murder. For the reasons that follow, we affirm.

PROCEDURAL AND FACTUAL BACKGROUND

On January 17, 2012, a grand jury returned an indictment charging Defendant with one count of second degree murder and two counts of attempted second degree murder, violations of La. R.S. 14:30.1 and 14:27/14.30.1, respectively. On January 23, 2012, Defendant appeared for arraignment and entered pleas of not guilty on all charges. On January 31, 2012, Defendant filed motions to suppress statements, evidence, and identifications. At a hearing held on June 27, 2012, the district court denied the motion to suppress identifications and took the motion to suppress statements under advisement. On July 24, 2012, the district court granted Defendant's motion to suppress statements and the State sought a writ, which this Court ultimately denied.[1]

[1] *State v. Wiley*, 2012-1356 (La.App. 4 Cir. 9/28/12) (*unpub.*). The Louisiana Supreme Court also denied the State's writ. *State v. Wiley*, 2012-2360 (La. 12/14/12), 104 So.3d 452.

On both August 6, 2013, and October 9, 2013, Defendant filed motions to exclude evidence and on May 29, 2014, filed a motion for an in-camera inspection of the grand jury transcripts. At the hearing on May 30, 2014, the district court denied both of the motions to exclude evidence and granted the motion for inspection of the grand jury transcripts. On September 18, 2015, the district court held a *Prieur* hearing and ordered evidence of all prior bad acts inadmissible, except for threats of physical harm Defendant allegedly made to law enforcement officers during the course of the case.

A jury trial commenced on October 13, 2015. At the conclusion of the four-day trial, the jury found Defendant guilty on the one count of second degree murder and on one count of attempted second degree murder, but not guilty on the second count of attempted second degree murder. On December 4, 2015, Defendant filed a motion for a new trial, which the trial court denied. On the same day, the court sentenced Defendant to life imprisonment at hard labor on the count of second degree murder, and forty-nine years' imprisonment at hard labor on the count of attempted second degree murder. This timely appeal now follows.

The facts of the case are as follows. Calva Williams, one of the attempted second degree murder victims and an eyewitness to the shooting, testified at trial that she dated decedent, Jasper Branch, for two months prior to his murder. They lived together and sold small amounts of marijuana from their residence. Ms. Williams also knew Defendant, as they had briefly dated at least a year before the murder.

Ms. Williams stated that Defendant was acquainted with her landlord, who also resided in the home, and began visiting regularly for several weeks. Ms. Williams subsequently learned that Defendant and decedent were also acquainted.

Ms. Williams testified she made plans to move out of the residence. She learned that her best friend's sister, Crystal Thomas, who she did not know, had an extra bedroom into which she and decedent could move.

According to Ms. Williams, the night before she was supposed to move in with Ms. Thomas, Defendant told her and decedent that his friend was leaving town and needed to sell some things, including two handguns and a quarter-pound of marijuana. Ms. Williams stated that they made plans to purchase the marijuana and one of the handguns the next day.

According to Ms. Williams, on the day of the murder, she picked up decedent from work and drove to Ms. Thomas' house to see the accommodations before they moved in. After she took decedent back to work, she returned to where she and decedent had been living, packed their belongings, and moved them to Ms. Thomas' residence. As Ms. Williams and Ms. Thomas were running errands, Ms. Williams received a phone call from a woman who was also moving out of Ms. Williams' former residence, asking for a ride.

When Ms. Williams and Ms. Thomas arrived at Ms. Williams' former residence to pick the woman up, Defendant was present and asked Ms. Williams for a ride to his cousin's house. Ms. Williams took the woman to her destination, and then picked up decedent from work again, intending to make the purchase they arranged the previous night. The four of them (Ms. Williams, Ms. Thomas, Defendant, and decedent) drove to the home of Defendant's cousin and went inside. Defendant and his cousin had a discussion in a separate room while Ms. Williams, Ms. Thomas, and decedent waited in the living room. When Defendant emerged, he stated that they needed to relocate to an apartment complex on Tara Lane to "meet [his] homeboy."

When they arrived at the complex, Ms. Williams and Ms. Thomas indicated that they preferred to wait inside the car while Defendant and decedent completed the purchase, but Defendant demanded that the women exit the vehicle and accompany them. The group entered the apartment complex through the front courtyard, and Defendant asked Ms. Williams if he could use her cell phone to make a call. Ms. Williams overheard defendant speak into the phone, "Oh hello. You ready? We downstairs." After the call, Defendant brandished a handgun from his waistband and said to decedent, "Where's at partner?" then immediately began shooting. Ms. Williams heard decedent yell, "Baby. Gun. Run." so she ran toward the back of the apartment complex. Defendant shot Ms. Thomas and decedent and then chased after Ms. Williams while continuing to fire the weapon. Ms. Williams ran down an alley and attempted to climb over a fence. When she realized she could not escape that way, she zigzagged back to the front of the apartment complex and attempted to conceal herself within the crowd of people also running from the gunfire. She was ultimately not injured.

When the shooting stopped, Ms. Williams ran back to the courtyard and heard Ms. Thomas yell, "He dead, he dead." Ms. Williams observed decedent lying in the courtyard entryway. She ran over to him, dropped her purse and keys, and knelt beside him. Ms. Williams attempted to keep him awake, although he could not speak or hold her gaze. Neighbors gave her towels to apply pressure to the wounds and a nurse also attempted to render aid. The police arrived shortly thereafter and transported Ms. Williams to a mobile police station for questioning.

Ms. Williams identified Defendant by name as the shooter and subsequently selected his photo out of a photographic lineup. Because Ms. Williams began

receiving threats, the police placed her and Ms. Thomas in witness protection where they resided together in a hotel room.

On cross-examination, Ms. Williams admitted that she moved to Florida sometime after the shooting, and had initially refused to testify against Defendant at trial. The district attorney ultimately had her arrested and brought to the Orleans Parish Jail until she agreed to testify. She further admitted that she used to work as a stripper and a prostitute, and her former relationship with Defendant centered on her efforts to pursue a rapping career. She also admitted that while speaking to Defendant's former counsel, she asked, "what do they really need to pin [the murder] on [Defendant]?" She also stated that Defendant and decedent were friends and they had not been arguing prior to the shooting.

On re-direct, Ms. Williams stated that Defendant and decedent met in jail. She also explained that she was not trying to falsely "pin" the murder on Defendant; she just wanted to see him brought to justice. Ms. Williams further testified that the reason she did not want to return to New Orleans was because she was afraid that Defendant's family members were "looking for her."

Crystal Thomas, the surviving shooting victim, related the same series of events. She explained that she was pregnant at the time, and was allowing Ms. Williams and decedent to move into an empty bedroom in her house. She described the errands she ran with Ms. Williams that day, taking Ms. Williams' friend to her new house, picking up Defendant and decedent, and driving to Defendant's cousin's house, and then to the apartments at Tara Lane. She stated that she had been aware that Ms. Williams, Defendant, and decedent had planned to engage in a transaction, but she did not know the details. Although Ms. Thomas had never met Defendant before that day, she was able to identify him at trial.

Ms. Thomas testified that when they arrived at the apartment complex, she wanted to wait in the car because she was not included in the planned transaction, but Defendant became angry and ordered her and Ms. Williams out of the vehicle. They walked into the courtyard of the apartment complex and Defendant used Ms. Williams' cell phone to make a call. After the call, Defendant pulled a gun from his waistband, asked, "Where's at partner?" and began shooting.

Ms. Thomas stated that Defendant was four or five feet from her when he started shooting. She heard decedent tell them to run, so she and Ms. Williams ran toward the rear of the complex while Defendant was shooting at decedent in the courtyard. As Ms. Thomas was running, her leg began to hurt and she became weak, so she lay down in the alleyway, pretending to be dead. Through the corner of her eye, she saw Defendant stand over her to see if she was moving, as he continued to chase and shoot at Ms. Williams. While Ms. Thomas lay in the alleyway, she began to feel "her insides burning" and realized she had been shot. She waited until she believed it was safe to stand up and then ran for help. Because decedent fell in the entryway to the courtyard, Ms. Thomas had to step over his body and she observed that he was still alive, gasping for breath. She stated that the residents of the apartment complex rendered aid until the paramedics arrived and transported her to University Hospital.

Ms. Thomas testified that while she was in the hospital, the police took her statement and showed her a photographic lineup. She recalled that she had been in shock and in pain and was slurring her words while speaking to the police. Ms. Thomas stated that she chose Defendant's picture out of the lineup, but because he had been wearing a hat during the shooting and not in the picture, she could not be

absolutely certain. In her statement to police, she described the shooter as wearing a blue-striped polo shirt, red and white tennis shoes, and a baseball cap.

On cross-examination, Ms. Thomas was adamant that Defendant was the shooter and denied having any difficulty remembering the incident. She stated that she remembered the shooter had five gold teeth, two on the top and three on the bottom. Ms. Thomas admitted that she pled guilty in 2010 to unauthorized use of a motor vehicle and was sentenced to two years of probation. Her probation was subsequently extended for another two years after she failed a drug test and had not made payments toward restitution. She also stated that she only became aware of the proposed drug deal when the group was driving to the Tara Lane Apartments; she was unaware that Defendant had a gun.

On cross-examination, Ms. Thomas testified that Ms. Williams informed her that Defendant was the father of her child, which she later learned was not true. She also denied telling the police that they were shot near the car, explaining that if an officer wrote that in his report, he must have misunderstood. She also denied telling the police that decedent was planning to buy a small amount of marijuana, as she was unaware of the nature of the transaction that the others had planned. She stated that, although she never saw Defendant remove anything from decedent's pockets, she believed robbery was the motive for the shooting. Ms. Thomas also admitted that she did not tell the police that the shooter had tattoos on his face because she had not noticed, as she had only just met Defendant a short time before the shooting.

On re-direct, Ms. Thomas stated that, while she did not mention Defendant's tattoos to the police, she also did not say the shooter had no tattoos, and she did tell the grand jury that the shooter had facial tattoos. She also denied that she and Ms.

Williams had planned to have decedent murdered, as she had only met him the day of the shooting.

Clarissa Lebanks Ross, another eyewitness to the shooting, testified that she was a resident of the apartment complex on Tara Lane on the date of the murder. She stated that she was sitting in a chair outside her apartment door watching her children ride their bikes in the courtyard when two men and two women entered. She noticed that one of the women was pregnant and the other had a very short haircut she described as a "fade." Once the strangers began arguing, Ms. Ross told her children to go inside the apartment while she remained outside. She stated that one of the men made a call on a cell phone and asked, "are you ready?" then put the cell phone in his right, rear pocket. She observed him pull out a gun and shout, "Give it up," then start shooting toward the front gate of the courtyard. When she saw the gun, Ms. Ross immediately entered her apartment, shut the door, and watched the incident unfold through the window.

Ms. Ross testified that the perpetrator shot the other man and then ran across the courtyard toward the back of the apartment complex, still firing the gun. Because the two women who were with them had run toward the back of the apartment complex, Ms. Ross believed the shooter was chasing and shooting at them. As the shooter was crossing the courtyard in pursuit of the two women, he looked in Ms. Ross's window and they locked eyes. She testified that she saw him very clearly and she identified Defendant in the courtroom as the shooter, stating that there was no doubt in her mind.

After the shooting stopped, Ms. Ross left her apartment and went upstairs to the second floor of the apartments to observe from the balcony. As she ascended the staircase, she was able to see Defendant jump over the fence behind the

apartment building. Ms. Ross testified that her neighbor called 911 and threw a towel down into the courtyard to press onto decedent's wounds, as he was bleeding profusely from his stomach.

Ms. Ross testified that she did not recall talking to the police the night of the shooting, but a detective came to her apartment the next day to ask questions. Several weeks later, the detective returned and showed her a photographic lineup. She identified the shooter and circled Defendant's picture. The back of the photograph contained Ms. Ross's signature and was dated November 1, 2011 at 11:55 am.

On cross-examination, Ms. Ross stated that she did not know how many apartments were occupied at the time of the shooting. She knew her neighbors but stated that she had not discussed the shooting with any of them at any time. She also stated that Defendant's facial tattoos stood out to her during the shooting, in the photographic lineup, and in the courtroom during trial.

Rachel Smith, an "NOPD complaint operator," testified that, according to the incident report sheet, her division received several 911 calls starting at 7:49 pm on September 29, 2011. The callers reported the shooting of a pregnant woman, and described the shooter as a black male with a "low haircut," two gold teeth, a "504" and a fleur de lis tattoo under his eyes, and wearing a blue and white striped Polo shirt, blue jeans, and red and white "drawers." On cross-examination, Ms. Smith stated that the description of the shooter contained in the report appeared to have been provided by a police officer at the scene, and that one of the 911 callers described the shooter as someone's "boyfriend." She also testified that the report log did not indicate that any 911 callers were named Clarissa.

Dr. Jeffrey Rouse, the Orleans Parish Coroner, testified that he was not employed in Orleans Parish at the time of the murder, but he authenticated the former coroner's report and explained its contents. The report indicated that decedent's cause of death was gunshot wounds. Specifically, he sustained gunshots to his thumb, ring finger, and collarbone and three bullets entered his buttocks area, causing injury to his femoral artery, iliac artery, and his large and small intestines.

On cross-examination, Dr. Rouse stated that the report showed a lack of soot or stippling surrounding the wounds, indicating the shooter was more than two feet away from decedent. The report also revealed that no gunshot residue test had been performed on decedent, and his blood contained no toxic substances. He also agreed that the report described bullets one and three as "mushroomed," and described bullet two as "full metal, yellow-jacket," although he stated that the report contained no description of any of the bullets as "hollow-point."

Meredith Acosta, a senior firearms examiner for the NOPD crime lab, testified that the striation patterns on the eleven bullets recovered from the courtyard at the crime scene and the three bullets extracted from decedent, were identical, indicating that they all were fired from the same gun, consistent with a nine millimeter. However, without the gun available for examination, she could not say whether the recovered bullets were "previously attached" to the casings also recovered at the crime scene. She also could not determine the identity of the shooter because any DNA or fingerprints contained on the cartridge casings would have burned off due to the high heat exposure when being fired from a gun. Additionally, due to a number of variables such as the weather, how the shooter held the gun, and whether he was moving around, it would be nearly impossible to

determine where the shooter stood based on the location of the recovered cartridge casings.

NOPD Homicide Detective Timothy Bender testified that he assisted lead Detective Jeffrey Vappie in this case, and his job was to document the scene, supervise the crime lab, and collect evidence. On cross-examination, Det. Bender testified that, to his knowledge, they were not investigating an armed robbery. His job was to canvas the apartment complex to determine if any witnesses existed. He spoke to three of the residents at the scene, none of whom mentioned any tattoos. Clarissa Ross, who lived in apartment thirty-eight, recalled at least twelve gunshots and described the shooter's clothing. A male in apartment forty-three, who wished to remain anonymous, witnessed the subject jump over the chain-link fence in the back of the apartment complex. On re-direct, he testified that none of the witnesses said the shooter did not have tattoos.

Lieutenant Kevin Burns, Defendant's only witness, testified that he was assigned to the NOPD Homicide division at the time of the shooting and assisted lead Detective Vappie in gathering evidence. Lt. Burns interviewed Ms. Thomas at University Hospital and collected the decedent's and Ms. Thomas' property, including a watch, four hundred dollars, two cell phones, and decedent's credit cards and driver's license.

After having his recollection refreshed, Lt. Burns testified that Ms. Thomas told him she had gone to the Tara Lane apartments with decedent and another woman named "Kelsey" to buy a small amount of marijuana. He stated that Ms. Thomas was not able to clearly describe the order of events, however the report indicated that Defendant and decedent argued, then defendant shot decedent inside of the car. As Ms. Thomas and Ms. Williams fled, Ms. Thomas realized she had

been shot. The report indicated that Ms. Thomas described the shooter as having two gold teeth on top and three on bottom. At trial, Lt. Burns approached Defendant and noted that he appeared to have two gold teeth on top and two on the bottom, although it appeared that at least one gold tooth had been removed.

On cross-examination, Lt. Burns explained that when he was interviewing Ms. Thomas, she was crying and hysterical, and appeared to be in serious pain. She was also worried that the other woman had been shot. She told Lt. Burns that she, decedent, and Ms. Williams met Defendant at the apartment complex, Defendant made a phone call on Kelsey's phone, argued with decedent, and then began to fire his gun into the vehicle. She then stated that she believed Defendant was shooting at her and Ms. Williams to "eliminate witnesses." When Ms. Thomas realized she was shot, she fell down and "pretended to be dead." However, she was able to see the shooter continue to fire at Kelsey. Ms. Thomas also described the shooter and the clothes he was wearing. On re-direct, Lt. Burns admitted he did not know, nor did he ask, whether Ms. Thomas had been on any drugs or medication when she gave her statement.

After the presentation of the witnesses, the case was given to the jury. After deliberations, the jury found the Defendant guilty of one count of second degree murder and one count of attempted second degree murder, but not guilty of the second count of attempted second degree murder.

ERRORS PATENT

In accordance with La.C.Cr.P. art. 920, we have reviewed this appeal for errors patent. We find that the trial court failed to observe the twenty-four-hour delay between the denial of Defendant's motion for new trial and sentencing, as mandated by La.C.Cr.P. art. 873. Such failure has been deemed to be harmless if a

Defendant does not complain on appeal of his sentence. *State v. Smith*, 2015-0241, p. 5 (La.App. 4 Cir. 1/27/16), 186 So.3d 794, 797; *State v. Berniard*, 2014–0341, pp. 9-10 (La.App. 4 Cir. 3/4/15), 163 So.3d 71, 79-80.

In this case, Defendant filed an oral motion for a new trial on the day of sentencing, which the court denied. The court subsequently sentenced Defendant to the mandatory life term on the count of second-degree murder, and a consecutive sentence of forty-nine years on the count of attempted second-degree murder, both to be served without the possibility of parole, probation, or suspension of sentence. Although the court failed to wait twenty-four hours after the denial of Defendant's motion for a new trial to administer the sentence, Defendant does not complain of the trial court's error on appeal, therefore the error is deemed harmless.

DISCUSSION

Defendant appeals his convictions citing six assignments of error. Each assignment of error will be discussed in numerical order, with the exception of assignment of error number four. Assignment of error number four raises an argument that the evidence was insufficient to support Defendant's conviction. When issues are raised on appeal both 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. Hearold*, 603 So.2d 731, 734 (La. 1992).

Assignment of Error Number 4

The Supreme Court provided the standard for review of a claim of insufficiency of the evidence in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original):

> [T]he relevant question 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 beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.

"Under the *Jackson* standard, the rational credibility determinations of the trier of fact are not to be second guessed by a reviewing court." *State v. Williams*, 2011-0414, p. 18 (La.App. 4 Cir. 2/29/12), 85 So.3d 759, 771.

Defendant does not dispute that Jasper Branch was murdered or that Crystal Thomas was shot. However, Defendant argues the State failed to adequately prove that he was the individual who committed the crime. In so arguing, Defendant notes that only two witnesses made identifications that were certain, and of those two, both gave inconsistent statements that shed doubt on how well they remember the event and on their veracity.

While Ms. Thomas did testify that she could not positively identify Defendant in the photo lineup the night of the shooting, during the trial she recognized Defendant as the shooter and positively identified him at that time. Ms. Williams and Ms. Ross also positively identified Defendant as the shooter both in photographic lineups and in the courtroom at trial. Ms. Williams knew Defendant personally, and, although she had just met Defendant on the day of the shooting, she had been riding in the car and arrived at the crime scene with him that day. Further, Ms. Ross was a resident of the apartment complex and did not know Defendant or any of the victims, but was still able to positively identify Defendant

as the shooter, both in the photographic lineup and in court. All three of the eyewitnesses testified that they were certain Defendant was the shooter.

"The testimony of a single witness, if believed by the trier of fact, is sufficient to support a conviction." *State v. Wells*, 2010-1338, p. 5 (La.App. 4 Cir. 3/30/11), 64 So.3d 303, 306. In this case, three eyewitnesses positively identified Defendant as the perpetrator in the courtroom. The jury heard the testimony and weighed the credibility of the witnesses. Defendant does not demonstrate that the jury acted irrationally when it accepted the testimony identifying him as the assailant. Based on the aforementioned factual evidence and jurisprudential authorities, we find that there was sufficient evidence for the jury to convict the Defendant; thus, this assignment of error has no merit.

Assignment of Error Number 1

In his first assignment of error, Defendant argues that the trial court erred in allowing the admission of "other crimes" evidence, which unfairly prejudiced Defendant in violation of La. C.E. arts. 403 and 404(B).

The first statement Defendant complains of is Ms. Williams' testimony on re-direct that she told Defendant's prior counsel that the reason she refused to return to New Orleans to testify against Defendant was because she was afraid that Defendant's brothers were "looking for her." The State accurately points out that Defendant objected to the admission of this statement on hearsay grounds only, thus preventing Defendant from claiming alternate grounds for objection on appeal. *See State v. Brooks*, 1998-0693 (La.App. 4 Cir. 7/21/99), 758 So.2d 814, 819.

Additionally, it does not appear that the witness attributed any "bad act" or "wrong" to the Defendant himself. She simply stated her fear that individuals other

than Defendant may be "looking for her." *See State v. Bell*, 2015-1264, pp. 9-10 (La.App. 4 Cir. 7/6/16), 197 So.3d 358, 364 (holding that La. C.E. art. 404 was not violated by the introduction of testimony from an eyewitness that she was afraid to testify because she had received threats from individuals other than defendant).

The second statement Defendant complains of is Ms. Williams' testimony that she believed Defendant and decedent met in jail, arguing that the jury could infer that Defendant had a "jail record." The court overruled Defendant's objection when the State asked where the two met. However, there was no reference to any specific crime or act Defendant may have committed, and no indication that Defendant had been arrested or was serving time for any convictions. *See State v. Sanders*, 2012-114, p. 10 (La.App. 5 Cir. 9/11/12), 101 So.3d 994, 1001 (holding that defendant's statement that he did not want to go back to jail was not inadmissible evidence of other crimes or bad acts because it did not refer to any specific crime or bad act committed by defendant and was vague and ambiguous). "[V]ague, non-pointed statements [do not] constitute other crimes evidence." *State v. Harris*, 28,517, p. 8 (La.App. 2 Cir. 8/21/96), 679 So.2d 549, 556.

Lastly, Defendant complains of the State's comment following its objection to Defendant's presentation of decedent's prior bad acts when it stated, "Objection, the victim is not on trial here… We can talk about past convictions if that's where he wants to go," and "what's good for the goose is good for the gander." The State argues that statements made by attorneys are not "evidence" as that term is used in the Code of Evidence. We agree. *See State v. Williams*, 2015-0866, p. 11 (La.App. 4 Cir. 1/20/16), 186 So.3d 242, 249-50. Furthermore, the State points out that Defendant should have requested an admonishment to the jury or moved for a mistrial, neither of which he did, therefore failing to preserve the matter for appeal.

In any event, these appear to be vague, non-pointed statements as there is no reference to any specific crime or act attributed to Defendant.

Even assuming the above references constituted impermissible other crimes evidence and that the objections to these statements were properly preserved for review, they would be reviewed under a harmless error standard. *State v. Copelin*, 2016-0264, p. 22 (La.App. 4 Cir. 12/7/16), 206 So.3d 990, 1005. "[A]n error is harmless if it is unimportant in relation to the whole and the verdict rendered was surely unattributable to the error." *State v. Blank*, 2004–0204, p. 53 (La. 4/11/07), 955 So.2d 90, 133.

In this case, the State presented three eyewitnesses to the shooting, all of whom positively identified Defendant as the perpetrator at trial and testified that they were certain he was the shooter. Whether Defendant may have been in jail previously or whether one witness feared retaliation by Defendant's family did not contribute to the jury's verdict in light of the strength of the State's case. Neither the State nor Defendant adduced any evidence at trial contradicting any of the eyewitnesses' identifications of Defendant as the perpetrator. This assignment of error is without merit.

Assignment of Error Number 2

Defendant next argues that the trial court erred when it failed to provide the grand jury transcripts to Defendant following an in-camera inspection, finding no inconsistencies in previous testimony that would have been subject to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). Defendant asserts that there are discrepancies between Ms. Williams's and Ms. Ross's grand jury and trial testimonies and the failure of the court to allow Defendant access to the grand jury transcripts prevented him from impeaching these witnesses on cross-examination.

The State asserts that Defendant has not provided proof that he was not in possession of the grand jury transcripts and points out that Defendant objected to the State's introduction of the grand jury transcripts at trial. As an initial matter, while there is no substantive proof that Defendant was not in possession of the grand jury transcripts, a review of the record reveals that the court granted Defendant's motion on May 30, 2014, to conduct an in-camera inspection of the transcripts to determine whether *Brady* material existed therein. Defendant inquired about this motion at every subsequent hearing and again the morning of the first day of trial. The court took a small recess and, upon its return, stated that the grand jury transcripts contained "no *Brady*/*Giglio* material suitable for disclosure to the defense." It appears, therefore, that neither the State nor the court supplied Defendant with the grand jury transcripts at any juncture before or during trial.[2]

Secondly, notwithstanding the aforesaid statement, the record affirmatively reflects that Defendant had access to Ms. Thomas' grand jury testimony. In fact, Defendant made a hearsay objection to Ms. Thomas's trial testimony and the State's use of the grand jury transcripts to refresh her recollection as to her prior consistent statement. Under La. C.E. 612(B), once the State utilized the grand jury transcripts to refresh the recollection of Ms. Thomas during her trial testimony, Defendant would have had the right to inspect them, yet apparently did not.[3]

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[2] Appellate counsel appears to have been in possession of the grand jury transcripts as this assignment of error contains detailed statements made during the grand jury proceeding.

[3] La. C.E. art. 612(B) provides, "In a criminal case, any writing, recording, or object may be used by a witness to refresh his memory while testifying. If a witness asserts that his memory is refreshed he must then testify from memory independent of the writing, recording, or object. If while testifying a witness uses a writing, recording, or object to refresh his memory an adverse party is entitled, subject to Paragraph C, to inspect it, to examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."

In any event, the suppression of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment, without regard to the good or bad faith of the prosecution. *Brady*, 373 U.S. at 88. Favorable evidence includes both exculpatory evidence and impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380 (1985); *State v. Knapper*, 579 So.2d 956, 959 (La.1991). To constitute a *Brady* violation three components must be met: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *State v. Cambrice*, 2015-2362, p. 4 (La. 10/17/16), 202 So.3d 482, 485 (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 1948, (1999)).

While grand jury testimony is generally cloaked in secrecy,[4] there are exceptions. In *State v. Peters*, 406 So.2d 189, 190-91 (La.1981), the Louisiana Supreme Court held that grand jury testimony is discoverable if it is favorable to the accused and is material to guilt or punishment under *Brady*. *Peters* further held "that an in-camera inspection by the trial judge is a proper means of accommodating the secrecy of the grand jury and at the same time protecting defendant's constitutional rights of confrontation and due process." *Id.* at 191.

Paragraph C provides, "If it is claimed that a writing or recording contains matters not related to the subject matter of the testimony the court shall examine it in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal."

[4] *See* La. Const. art. 5, § 34(A) (providing for the establishment of one or more grand juries in each parish and mandating that the secrecy of grand jury proceedings shall be provided by law); La.C.Cr.P. art. 434 (mandating the secrecy of grand jury proceedings)

The prior inconsistent statements Defendant asserts on appeal are: (1) that Ms. Williams testified to the grand jury that Defendant was her friend, but in other statements, she said he was not her boyfriend, or that he was her ex-boyfriend; (2) at trial, witnesses characterized Defendant's request to use Ms. Williams phone to place a phone call just before the shooting as a demand or an argument, however Ms. Williams told the grand jury defendant used the word "please"; (3) Ms. Williams testified to the grand jury that two guns were pointed at decedent, yet only referred to one gun in every other statement; and (4) Ms. Ross stated to the grand jury that she went inside her apartment with her children during the argument over the cell phone, however at trial she stated she went into her apartment after Defendant fired the first gunshot.[5]

Statements (1) and (2) do not appear to be inconsistent with Ms. Williams's grand jury testimony. By definition, an ex-boyfriend would not be a current boyfriend, but that is not to say an ex-boyfriend could not still be a friend.[6] Similarly, although Ms. Williams testified to the grand jury that Defendant used the word "please" when asking to use her phone, her testimony at trial that "he

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[5] Defendant also complains that Ms. Williams testified for the first time at trial that she noticed a "bump" in Defendant's pants the day of the shooting, which she assumed to be a gun, but thought nothing of it at the time. The record reveals, however, that she was cross-examined on this matter at trial, therefore no prejudice to Defendant results. Similarly, Defendant complains that Ms. Ross stated for the first time at trial that Defendant looked in her eyes as he ran past her window while shooting, and Defendant cross-examined her also on this new information. In any event, these statements are not necessarily discrepancies, as there was no conflicting testimony presented during the grand jury proceeding.

Defendant also argues that Ms. Ross testified to the grand jury "[a]fter I got inside I heard a gunshot and I didn't hear anymore," which is inconsistent with her testimony at trial. However, further review of Ms. Ross's grand jury testimony reveals that she told the same series of events to the grand jury that she did at trial – that is, she both heard and saw Defendant fire other gunshots and saw him run past her window while shooting at the other victims.

[6] Defendant also cross-examined Ms. Williams thoroughly regarding the extent of her relationship with Defendant.

asked me" to use the phone and her denial that an argument ensued are not inconsistent.

While allegation (4) reveals a discrepancy between the witness's grand jury and trial testimonies, every eyewitness to the shooting testified that once the shooter terminated the phone call, he immediately pulled the gun from his waistband and began firing. During cross-examination, Ms. Ross explained that she took her children inside the apartment during the argument regarding the cell phone, and once she saw the gun she moved as fast as she could inside her apartment. As she was making her way inside, Defendant began firing the gun. Whether Ms. Ross was all the way inside her apartment when the first shot rang out or on her way inside is not the type of inconsistency that could rise to a level of undermining confidence in the outcome of the trial.

Finally, statement (3) does appear to be inconsistent with Ms. Williams's trial testimony. Not only did Ms. Williams testify that she saw "guns" pointed at decedent before he was shot, the state clarified her remark by asking, "[w]hen you say 'the guns at him,' you mean you saw two guys pointing a gun at Jasper?" and she answered, "Yes, ma'am, in his face." Although no follow-up explanation was adduced, it appears Ms. Williams agreed that two men were pointing guns at decedent; however nowhere in the record does any witness corroborate this information in any statement, pre-trial or otherwise, including Ms. Williams. Neither Ms. Thomas nor Ms. Ross ever stated there was a second gunman. It is unclear why Ms. Williams made this statement to the grand jury and Defendant could have used this information at trial to impeach her.

Nevertheless, Defendant fails to show he was prejudiced by the inability to impeach Ms. Williams on this issue.

> [P]rior inconsistent statements are only admitted to impeach or to contradict the witness's trial testimony, i.e., solely to discredit the witness; these statements cannot be used to divulge the content of the prior statement for the purpose of inviting the jury to believe the content of the statement. La.Code Evid. art. 607 D(2).

State v. Cousin, 1996-2973 (La. 4/14/98), 710 So.2d 1065, 1070. Here, Defendant would have been able to admit the prior inconsistent statement solely for the purpose of damaging Ms. Williams's credibility and not for the truth of the statement that another shooter was present at the scene with another gun.

Defendant argues that "[t]he only evidence presented involve the statements of three witnesses, one of whom was so unbelievable the jury didn't even believe she was a victim and found the appellant not guilty on her count." If the jury convicted Defendant on the other two counts in spite of Ms. Williams's "unbelievable" testimony, it does not appear likely that the jury would have rendered a different verdict due to further impeachment of this witness, especially considering the strength of the State's case as a whole, with two other eyewitnesses testifying to the same series of events and confidently identifying Defendant in court as the shooter. Defendant has not shown that the failure to disclose the grand jury transcripts caused prejudice to the extent "that in its absence he [did not] receive a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566 (1995) This assignment of error also lacks merit.

Assignment of Error Number 3

In his third assignment of error, Defendant argues that the State made several improper remarks during closing argument. Specifically, Defendant complains that the State (1) attempted to shift the burden of proof with multiple

references to the defense's lack of witnesses and by stating that if defense counsel "knew" Defendant was innocent, he (defense counsel) should have testified himself; (2) criticized Defendant's trial strategy stating that when defense counsel became frustrated, he resorted to repetitive questioning; (3) insinuated Defendant was violent by pointing out that eleven deputies were guarding the courtroom; and (4) insinuated that Defendant was involved in witness intimidation.

The State asserts that none of the remarks were improper, and the statements Defendant complains of were in response or rebuttal to Defendant's opening and closing arguments.

> The scope of closing argument "shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case. The argument shall not appeal to prejudice. The state's rebuttal shall be confined to answering the argument of the defendant." La. C.Cr.P. art. 774. Prosecutors may not resort to personal experience or turn argument into a plebiscite on crime. *State v. Williams*, 96–1023, p. 15 (La. 1/21/98), 708 So.2d 703, 716. However, prosecutors have wide latitude in choosing closing argument tactics. *State v. Casey*, 99–0023, p. 17 (La. 1/26/00), 775 So.2d 1022, 1036, cert. denied, *Casey v. Louisiana*, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000), citing *State v. Martin*, 539 So.2d 1235, 1240 (La. 1989) (closing argument that referred to "smoke screen" tactics and defense as "commie pinkos" was inarticulate but not improper). Further, the trial judge has broad discretion in controlling the scope of closing arguments. Id. Even where the prosecutor's statements are improper, credit should be accorded to the good sense and fair-mindedness of the jurors who have heard the evidence. *State v. Ricard*, 98–2278, p. 4 (La. App. 4 Cir. 1/19/00), 751 So.2d 393, 396. Even if the prosecutor exceeds the bounds of proper argument, a reviewing court will not reverse a conviction unless "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. *State v. Huckabay*, 2000–1082, p. 30 (La. App. 4 Cir. 2/6/02), 809 So.2d 1093, 1110. See also *State v. Draughn*, 2005–1825 (La. 1/17/07), 950 So.2d 583.

State v. Haynes, 2013-0323, p. 12 (La.App. 4 Cir. 5/7/14), 144 So.3d 1083, 1090.

In this case, the State's comments on the failure of defense to present witnesses appears to be in response to Defendant's opening statements claiming

Defendant was not present at the crime scene. Defendant objected to State's remark that no witness had testified that Defendant was in a different location at the time of the shooting. Although the court initially sustained the objection and admonished the jury that the State bore the entire burden of proof, the State reminded the court that Defendant's theory of the case was that he had not been present during the shooting, but presented no evidence to corroborate that assertion, causing the court to change its ruling.

This court rejected similar defense arguments in *State v. Bailey*, 2012-1662, p. 16 (La.App. 4 Cir. 10/23/13), 126 So.3d 702, 713 finding that the prosecutor's comments concerning the defense failure to call witnesses to support its case "merely restated evidence or lack thereof that was presented during trial."

The State's comment that defense counsel should have testified was in response to defense counsel's assertion in his closing argument that he "knew" Defendant was innocent, which suggested that defense counsel was privy to additional evidence not presented at trial. Similarly, asking the jury to consider why eleven deputies would be present in the courtroom was in response to defense counsel's assertion that it was unfair to Defendant that eleven deputies were present.

Some additional leeway is allowed the prosecutor in making remarks that would ordinarily be inappropriate but are provoked by defense argument. *See State v. Trackling*, 2004-0759, p. 6 (La.App. 4 Cir. 2/22/06), 930 So.2d 60, 65 (remarks made during rebuttal, in response to defense counsel's comments are not improper).

Any implication that Defendant engaged in, or enlisted others to engage in threatening witnesses is arguably harmless and would not have contributed to the

verdict as the jurors heard without objection that both Ms. Thomas and Ms. Williams had been placed into the witness protection program, the implications of which would be generally understood by a reasonable juror.

The State should avoid personal attacks on defense counsel and trial strategy. *State v. Jones*, 2015-0123, p. 44 (La.App. 4 Cir. 12/2/15), 182 So.3d 251, 279. However, such statements generally do not rise to the level that would merit reversal of conviction. *See State v. Dabney*, 2015-0001, pp. 18, 22-23 (La.App. 4 Cir. 9/19/15), 176 So.3d 515, 527, 529 (holding that "instances where the State attacked defense strategy and tactics, branded defense counsel a liar and not worthy of belief, and suggested that the defendant may have killed someone in the past" did not require reversal "in light of the traditional breadth accorded the scope of closing argument by the courts of this state").

We find that the State's remarks during closing and rebuttal arguments, although skirted on the line of improper, do not warrant reversal of Defendant's conviction. We are not "thoroughly convinced" the comments contributed to or influenced the verdict considering the number of eyewitnesses who testified that they were certain Defendant was the shooter. This assignment lacks merit.

Assignment of Error Number 5

Defendant initially argued that the record was incomplete because it did not include the voir dire transcripts or State's Exhibit Seven, thereby denying Defendant a full judicial review. However, the State subsequently supplemented the record with the requested materials pursuant to an order from this Court, and Defendant submitted a supplemental brief rendering moot any prejudice Defendant might have sustained.

Assignment of Error Number 6

Defendant argues that the court erroneously denied his challenges for cause regarding jurors nineteen and ten, and, because he exhausted all of his peremptory challenges, his conviction should be reversed. Juror nineteen stated that her grandfather had been murdered during an armed robbery and that to vote not guilty, she would have to believe Defendant was not guilty, indicating she would shift the burden of proof to Defendant. Juror number ten had family members employed as law enforcement officers and stated he may attribute more credibility to a police officer's testimony.

> Prejudice is presumed when a district court erroneously denies a challenge for cause and the defendant ultimately exhausts his peremptory challenges. *State v. Kang*, 02–2812, p. 3 (La. 10/21/03), 859 So.2d 649, 651; *State v. Robertson*, 92–2660, p. 3 (La. 1/14/94), 630 So.2d 1278, 1280. A district court's erroneous ruling which deprives a defendant of a peremptory challenge substantially violates that defendant's rights and constitutes reversible error. *Kang,* 02–2812, at p. 3, 859 So.2d at 652; *State v. Cross*, 93–1189, p. 6 (La. 6/30/95), 658 So.2d 683, 686; *State v. Bourque*, 622 So.2d 198, 225 (La. 1993), *overruled on other grounds by State v. Comeaux*, 93–2729 (La. 7/1/97), 699 So.2d 16; *State v. McIntyre*, 365 So.2d 1348, 1351 (La. 1978). When a defendant uses a peremptory challenge after a challenge for cause has been denied, the defendant must show: (1) erroneous denial of the challenge for cause; and (2) use of all peremptory challenges. *Kang*, 02–2812, at p. 3, 859 So.2d at 652; *Cross*, 93–1189 at p. 6, 658 So.2d at 686; *Robertson*, 92–2660 at p. 2, 630 So.2d at 1280; *State v. Lee*, 559 So.2d 1310, 1316 (La. 1990), *cert. denied*, 499 U.S. 954, 111 S.Ct. 1431, 113 L.Ed.2d 482 (1991).

State v. Lindsey, 2006-255, pp. 2-3 (La. 1/17/07), 948 So.2d 105, 107.

In the instant case, Defendant exhausted all of his peremptory challenges, and therefore, his objection to the ruling refusing to sustain his challenge for cause is properly before this Court. However, we find that the district court did not err in denying Defendant's cause challenges. La. C.Cr.P. 797 provides in relevant part:

> The state or the defendant may challenge a juror for cause on the ground that:

. . .

> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence.

Furthermore,

> When a juror expresses a predisposition as to the outcome of a trial, a challenge for cause should be granted. *State v. Lindsey*, 06–255, p. 3 (La.1/17/07), 948 So.2d 105, 107–108. If after subsequent questioning, or rehabilitation, the juror exhibits the ability to disregard previous views and make a decision based on the evidence presented at trial, the challenge is properly denied. *Id.*, 06–255, p. 3, 948 So.2d at 108. When assessing whether a challenge for cause should be granted, the district judge must look at the juror's responses during his or her entire testimony, not just "correct" isolated answers or, for that matter, "incorrect," isolated answers. *Id.* A prospective juror's seemingly prejudicial response is not grounds for an automatic challenge for cause, and a district judge's refusal to excuse him on the grounds of impartiality is not an abuse of discretion, if after further questioning the potential juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence. *Id.*, 06–255, p. 4, 948 So.2d at 108.

State v. Washington, 2015-0819, pp. 4-5 (La.App. 4 Cir. 2/17/16), 187 So.3d 71, 74.

Here, juror nineteen appeared rehabilitated when she subsequently replied affirmatively to Defendant's question of the juror's ability to adhere to his legal presumption of innocence. Likewise, juror number ten stated that, although he considered police officers generally more credible, he also stated that every person is an individual and he would not "form [his] opinion of them based on what they do."

Because both jurors appear to have been able to judge the case according to the law, the district court did not err in denying Defendant's challenges for cause. This assignment lacks merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court in its entirety.

AFFIRMED