STATE OF LOUISIANA	*	**NO. 2017-KA-0789**
VERSUS	*	
		COURT OF APPEAL
CARDELL A. HAYES	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 528-975, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
Judge Joy Cossich Lobrano
* * * * * *

(Court composed of Judge Terri F. Love, Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins)

Jenkins, J., Concurs with Reasons

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AFFIRMED.
MARCH 27, 2019.

The defendant, Cardell Hayes, ("Defendant"), appeals his convictions for manslaughter in the death of William Smith ("Smith") and for attempted manslaughter in connection with the injuries to Raquel Smith ("Raquel Smith"). After reviewing the record and applicable law, we affirm the convictions.

On April 28, 2016, the State of Louisiana ("State") filed a true bill indicting Defendant as follows: (1) one count of aggravated criminal damage to a vehicle in violation of La. R.S. 14:55;[1] (2) one count of attempted second degree murder in violation of La. R.S. La. R.S. 14:30.1 and La. R.S. 14:27; and (3) one count of second degree murder in violation of La. R.S. 14:30.1.[2] Defendant pled not guilty to all of the charges. The State filed a motion to invoke the firearm sentencing

[1] La. R.S. 14:55 reads, in pertinent part: "Aggravated criminal damage to property is the intentional damaging of any . . . movable, wherein it is foreseeable that human life might be endangered . . ."

[2] Defendant was also indicted on one count of aggravated assault with a firearm in violation of La. R.S. 14:37.4. The State severed the charge of aggravated assault with a firearm from the indictment on December 6, 2016, and it was subsequently dismissed on July 28, 2017.

provision under La. C.Cr.P. art. 893.1,[3] and allow Smith's family to observe the court proceedings under La. C.E. art. 615.[4]

Trial began on December 6, 2016, at which numerous witnesses testified. On December 11, 2016, the jury, by votes of ten to two, found Defendant guilty of the lesser-included offenses of manslaughter and attempted manslaughter, and not guilty of aggravated criminal damage to a vehicle. Defendant filed a motion for a new trial based on newly discovered evidence, which the district court denied the following day after hearing proffered testimony of an alleged recently-discovered witness.

On April 20, 2017, the court sentenced Defendant to serve fifteen years imprisonment at hard labor on the charge of attempted manslaughter, and twenty-five years imprisonment at hard labor on the charge of manslaughter, both sentences to be served concurrently, and without the benefit of probation, parole, or suspension of sentence, as provided by the firearm sentencing enhancement law under La. C.Cr.P. art. 893.3(E).[5]

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[3] La. C.Cr.P. art. 893.1 provides:
"If the district attorney intends to move for imposition of sentence under the provisions of Article 893.3, he shall file a motion within a reasonable period of time prior to commencement of trial of the felony or specifically enumerated misdemeanor in which the firearm was used."

[4] La. C.E. art. 615(B)(4) exempts a victim's family from a district court's order of witness sequestration.

[5] La. C.Cr.P. art. 893.3(E) provides:
(1)(a) Notwithstanding any other provision of law to the contrary, if the defendant commits a felony with a firearm as provided for in this Article, and the crime is considered a violent felony as defined in this Paragraph, the court shall impose a minimum term of imprisonment of ten years. In addition, if the firearm is discharged during the commission of such a violent felony, the court shall impose a minimum term of imprisonment of twenty years.
(b) A "violent felony" for the purposes of this Paragraph is: second degree sexual battery, aggravated burglary, carjacking, armed robbery, second degree kidnapping, manslaughter, or forcible or second degree rape.

Defendant filed this timely appeal and has assigned the following errors for our review:

1. The district court abused its discretion in denying his motion for new trial;

2. The State failed to prove beyond a reasonable doubt that Defendant did not act in self-defense;

3. The district court abused its discretion when it prohibited Defendant from introducing rebuttal character evidence of Smith;

4. The district court abused its discretion in allowing victim impact testimony during the guilt phase of the trial; and

5. The district court abused its discretion when it suggestively re-read its instructions to the jury.

The record, exhibits, and testimony reveal the following:

On the evening of April 9, 2016, Smith was driving in his Mercedes-Benz SUV with his wife, Raquel Smith, and their friends, Richard and Rebecca Hernandez. They were traveling from the Sake Café on Magazine Street in Uptown New Orleans to the downtown Windsor Court Hotel. Richard was in the front passenger seat while Raquel Smith and Rebecca sat in the back seat behind their respective husbands.

Defendant and his passenger, Kevin O'Neal, were also traveling downtown in a Hummer that abruptly stopped in front of Juan's Flying Burritos near the intersection of St. Andrew and Magazine Streets. Smith stopped directly behind the Hummer. According to Defendant and O'Neal, the Mercedes struck the rear of the Hummer causing Defendant to pull over to the side of the street to exchange

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(2) A sentence imposed under this Paragraph shall be without benefit of parole, probation or suspension of sentence.

information. According to all three passengers in the Mercedes, no contact was made between the vehicles. The Mercedes continued through the intersection, turning slightly left onto Sophie Wright Place with the intention of continuing downtown on Camp Street.

Believing that the Mercedes had left the scene of the accident, Defendant in his Hummer followed behind the Mercedes. Defendant's intention was to obtain the vehicle's license plate number to file a police report. Within a minute or two, the Mercedes stopped in front of the Hummer in the 1800 block of Sophie Wright Place. It is undisputed that Defendant's Hummer struck the rear of the Mercedes. Defendant claims that the accident was not intentional; but this was challenged at trial.

Pierre Thomas, who had been joined by Smith and the others at Sake Café and was headed downtown, heard a loud crash from behind and realized that Smith had been in a car accident. Thomas exited his vehicle and walked to the scene of the accident. He saw that the rear end of Smith's Mercedes was damaged and the back windshield was completely shattered. Retired New Orleans Police Department ("NOPD") Officer Billy Ceravolo, who also had dinner with Smith and the others at Sake Café, had already arrived at the Windsor Court when he received a call that there had been an accident. He left the Windsor Court and went to the scene of the accident.

The following individuals testified at trial and were independent eyewitnesses who were present at the scene while the events unfolded: Stephen

Cacioppo, who lived on Sophie Wright Place near the area where the shooting occurred, and had a clear view of the events as they occurred, and Justin Ross and Abigaelle Levray, who were eating together at the outside patio at the Half Moon Bar, located on the corner of St. Mary Street and Sophie Wright Place.

Raquel Smith, Rebecca Hernandez, and Thomas testified that Smith exited his vehicle and confronted Defendant about the crash, but had retreated from the argument before the shooting began. This testimony was corroborated by Cacioppo and Ross. Raquel Smith testified that she pleaded with her husband, saying that she and Smith "were not like this," they had children, and they would "take care of this." She looked into Smith's eyes and asked him to think about their children. Once she said their children's names out loud, Smith walked away with her. At no time did Raquel Smith see any physical contact between Defendant and her husband.

At approximately 11:30 p.m., Smith was shot and killed by Defendant. Defendant fired his Ruger .45-caliber pistol numerous times at Smith. Dr. Samantha Huber, Chief Forensic Pathologist for the New Orleans Parish Coroner's Office, testified that she performed the autopsy on Smith and that he suffered a total of eight gunshot wounds in which the first one entered the "left lateral side" under his arm and seven bullets entered Smith's back. She testified that his injuries included fractured ribs, vertebrae, and other bones, one bullet lacerated his spinal cord, and bullets also perforated his lungs, spleen, stomach, carotid artery, aorta, and heart. She explained that the trajectory of all the bullets that entered Smith's

back were the same: from his left side, and at a steep angle upward toward his head and shoulders. The lateral wound was nearly level with slightly downward trajectory. From her analysis of the wound pattern, Dr. Huber concluded that the lateral shot entered Smith while he was standing upright, and the remaining seven bullets entered Smith's back while he leaned forward, assuming the shooter was standing upright while shooting.

Raquel Smith testified that as she and Smith retreated toward their vehicle, she believed the altercation had terminated. She then "heard a pop, pop." She was not immediately aware of what had happened, "and then someone screamed, 'They're shooting!' and [she] felt burning all through [her] body." Realizing she had been shot, Raquel Smith collapsed on the opposite side of the Mercedes and played dead. Within seconds she "heard a pop, pop, pop, pop, pop," then "a man screaming, 'You want to F-ing show off for the white boy? Now, look at you now. Look at you now. You want to F-ing show off for the white boy.'" She described the voice as loud and angry.

Rebecca Hernadez also testified that she believed that the argument had ended and the incident diffused. She saw Smith returning to his vehicle "to get his phone to call the police." Rebecca saw Defendant walking toward Smith with a gun, then she heard a shot fired and saw Smith's "body jolt." Smith fell into his vehicle, then Defendant fired additional shots at Smith and into the Mercedes as he laid there. She stated: "I just remember seeing [Defendant] walking towards [Smith] and continue to shoot, and [Smith] wasn't even moving. At that point I just

ran off, and I heard [Defendant] talking over [Smith's] body." She heard Defendant shout, "Look at you now. You were showing off," and "Where's that white boy at?"

NOPD Homicide Detective Robert Bachelder was the first detective to arrive at the scene. NOPD Homicide Detective Bruce Brueggeman, who was assigned as lead detective in the case, first went to police headquarters to speak to Defendant and O'Neal and then went to the crime scene. Det. Bachelder's primary responsibility was to document the crime scene.[6] Det. Brueggeman arrived later and assigned several detectives to canvas the area looking for witnesses.[7]

Defendant justified the killing of Smith claiming that he acted in self-defense. Defendant testified that Smith threatened him, walked to his vehicle to retrieve a gun, and pointed a gun at him. No other witness who testified at trial, whether for the prosecution or the defense, placed a gun in Smith's hand that evening. Smith's holstered gun was later found in the Mercedes wedged between the driver's seat and console after the vehicle was impounded and taken to the police lot.

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[6] Det. Bachelder testified as follows: Nine spent casings were recovered from the scene, all of which were from a .45-caliber weapon. Eight were located on the street near the driver's side of the Mercedes, and one was discovered on the driver's seat inside the Mercedes under Smith's body, leading Det. Bachelder to believe that the shooter was positioned in close proximity to Smith. One bullet/projectile was discovered on the street, and one was lodged in the interior, passenger-side door of the Mercedes. ATF agents and a ballistics-sniffing dog also searched the scene and recovered no further ballistic evidence.

[7] Det. Brueggeman testified that while the investigation was ongoing, a statement appeared in the press publicly accusing Ceravolo of tampering with evidence at the crime scene. However, video surveillance footage placed Ceravolo at the Windsor Court Hotel at the time of the shooting, although Ceravolo was present at the crime scene at some point later.

Defendant also claims that Smith told Defendant, "N-r, you got your gun. Well, I'm going to get mine and I'm going to show you what to do with it. I'm going to show you what to do with it." Defendant claims he observed Smith enter his vehicle while still "tussling with his wife," who kept repeating, "No, baby no." No evidence or testimony at trial collaborated this testimony.

Defendant testified that he heard a gunshot before he fired his weapon at Smith, initially striking Smith in the side. ATF Firearm Examiner Meredith Acosta, who was stipulated as an expert in the field of ballistics and firearms examination, testified that all nine bullet casings found at the scene were fired from Defendant's weapon and no other ballistics evidence was recovered.[8] Additionally, ATF Examiner Acosta testified that gunshot residue results of Smith's hands were inconsistent with someone who had recently fired a gun.[9] St. Tammany Parish Sheriff's Office Crime Lab Deputy Madelyn Collins, a forensic scientist and stipulated as an expert in the field of "trace evidence," including gunshot residue, testified for the defense. In her opinion, Smith likely had either discharged a firearm, had been near a discharged firearm, or contacted a surface that contained gunshot residue.

Defendant later proffered the testimony of a witness by way of a motion for new trial, whose testimony alleged that the witness heard four gunshots from a

[8] Acosta testified that three firearms were recovered at the scene: a Ruger .45-caliber pistol, a Taurus .357-Magnum Revolver, and a Springfield nine-millimeter pistol.

[9] Acosta explained that when a gun is fired, the combustion propels small amounts of the burnt gun powder, or gunshot residue, from the side and/or barrel of the gun. She stated that anyone near a gun when it is fired, has been shot at close range, or handles a gun after it has been fired, can be expected to test positive for gunshot reside.

small-caliber weapon before Defendant's weapon was discharged. Based on the unreliability of the testimony, the court denied the motion for new trial.

Defendant contends that Smith was the aggressor in that he advanced upon him, first throwing alcohol in his face, followed by a punch in the side. Defendant testified that Smith pushed Raquel Smith to the ground when she tried to intervene and that several men were preventing Smith from engaging in further physical contact. However, various witnesses, including Raquel Smith, Rebecca, Richard, Thomas, Cacioppo, and Levray, testified that they did not see any physical contact between Defendant and Smith.

Defendant claims that he was not the aggressor in that he did not intentionally rear-end the Mercedes. This testimony was contradicted by Michael Sunseri, qualified by the court as an expert in the fields of automobile crash reconstruction and crash data retrieval and analysis, who testified that, in his expert opinion, the collision was intentional. He stated that crash data and other evidence showed that Smith did not come to a sudden stop and that Defendant had not applied the full force of his brakes at any time in an attempt to avoid or reduce the impact.[10]

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[10] Sunseri testified as follows: In analyzing the recorded data from the second crash on Sophie Wright Place, the black box in the Mercedes recorded two separate collisions: first a rear impact, followed by a frontal impact about one second later. The Mercedes was travelling at twenty-five MPH five seconds before it was rear-ended by the Hummer, and the brakes were activated one-and-a-half seconds later. By the time the Hummer made impact, the speed of the Mercedes had reduced to two MPH. This data was consistent with coming to a normal stop. It did not appear that the Mercedes had made an abrupt or unexpected stop. The brake lights were activated for four seconds before the rear impact. The model of black box in the Hummer recorded only two-and-a-half seconds of data prior to rear-ending the Mercedes on Sophie Wright Place. When the data began recording, the Hummer was travelling at twenty-three MPH, and at one second prior to impact, the Hummer was travelling at twenty-one MPH. The collected data did not indicate that the driver of the Hummer "slammed" on his brakes or attempted to avoid the collision with the Mercedes. He explained that, generally, if a driver is not paying attention, the accelerator

Raquel Smith was also shot and severely injured. Defendant denied shooting her, claiming that Smith accidentally shot her after pulling his weapon from the Mercedes while aiming at Defendant. However, all nine bullet casings found at the scene were fired from Defendant's weapon as confirmed by ATF Examiner Acosta.

Defendant took the stand on his own behalf and testified as follows:

On the day of April 9, 2016, O'Neal called Defendant and invited him to a house party. Defendant described the house party as "more of a family gathering and just playing games," so he and O'Neal decided to leave; neither of them had consumed any alcohol at the party. As Defendant and O'Neal were driving to retrieve O'Neal's vehicle, Defendant applied his brakes at a red light on Magazine Street and was "bumped" by the vehicle behind him (Smith's Mercedes). Defendant pulled over to the side of the road but the Mercedes "veers to the left and speeds off." Defendant pursued the Mercedes and asked O'Neal to record the license plate number while Defendant called the police. He testified that he was "looking down trying to unlock [his] iPhone," and when he looked up, he noticed the Mercedes was braking. He attempted to "pump [his] brakes to make a complete stop," but accidentally ran into the back of the vehicle.

Defendant testified that he must have been pursuing the Mercedes for less than a minute before the accident, because it was "right around the corner from

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remains active until the brakes are suddenly activated. However, neither the Hummer's accelerator nor the brakes were activated and its speed was likely only reduced inconsequentially due to "air drag and rolling friction." Even using a generous one-and-a-half-second reaction time in the calculation, the driver of the Hummer, assuming he was aware of the presence of the Mercedes, would have been able to stop the Hummer without making contact.

where the first accident happened." Defendant explained that he did not "smash" his brakes because a Hummer is a large, heavy vehicle, and it "could slide and still hit somebody." Instead, he stated, "you really want to pump your brakes to try to get a quick stop." Defendant admitted that "pumping" his brakes had not worked for him in this case, but maintained that he had not hit the Mercedes intentionally.

After the accident, Defendant exited his vehicle and noticed a "Spanish guy" running towards him from the passenger side of the Mercedes. The man removed his shirt and reached into his pocket, and "wrap[ped] like a shiny object in his pocket."[11] Defendant then retrieved the firearm he kept in the door compartment of his vehicle. Defendant stated that the Spanish man "swung at [him] with…whatever he had wrapped up in the shirt," but Defendant moved backwards and told the man to calm down. The man swung at him again and, as Defendant backed up a second time, he was hit in the face by a cup filled with what he believed was alcohol. As he turned to see who threw the cup, Smith punched him in the side. Defendant explained that he did not return to his vehicle and flee because he wanted to stay and "do the right thing."

Defendant testified that after Smith punched Defendant, they began to argue.[12] Defendant further testified that Raquel Smith attempted to intervene. Defendant did not know if anyone was aware that he was in possession of a

[11] Defendant later testified that he "fe[lt] like [the man] had a knife or something because…why would you take off your shirt and go in your pocket and wrap something?"

[12] Defendant accused Smith of being "drunk and loaded," and Smith accused Defendant of intentionally hitting his vehicle. Defendant explained that the collision had been an accident, and accused Smith of rear-ending him first and leaving the scene.

firearm, although he believed that "it was obvious [his gun] was on [his] side." Defendant testified that another "Spanish guy" had attempted to restrain the shirtless man (Richard) while O'Neal was attempting to break up the argument between Defendant and Smith. When O'Neal confronted Smith, Smith threw Raquel Smith to the ground and began shoving O'Neal.

As he attempted to get a better view of O'Neal, he "was swung at or hit maybe three or four more times," although he could not recall where he was struck. Raquel Smith, the "other Spanish guy," and another woman were attempting to restrain Smith. Richard ran over to Smith and said, "Yeah, he got his gun on him, but he's scared. He's not going to do anything with it. He's scared." Defendant claims that Smith then told Defendant, "N-r, you got your gun. Well, I'm going to get mine and I'm going to show you what to do with it. I'm going to show you what to do with it." Defendant believed Smith planned to kill him.

Smith began walking back toward his vehicle, while Raquel Smith was "grabbing on him," saying, "No, baby, no; it's not worth it." At the same time, Richard and the other lady fled the scene. Defendant chose not to retreat because he did not know where O'Neal was and refused to drive away leaving his friend behind.[13] Defendant believed he had only a few seconds until Smith returned from his vehicle with a gun, so he pulled his weapon from his hip and held it down by his side. He did not follow directly behind Smith, but instead walked on an angle "towards the sidewalk," and told Smith, "No, man, no, don't do that."

[13] Additionally, Defendant stated that a taxi was blocking his car in from behind and he believed that he would be shot if he tried to run.

Defendant observed Smith enter his vehicle while still "tussling with his wife," who kept repeating, "No, baby no." Defendant's testimony continued as follows:

> And I just see him, like he steers her off of him and as he turns out the vehicle toward me I see a black weapon in his hand and I fired…everything happened so fast…when I see him spin, I hear a "pop" and I see—I see the weapon and I fired my weapon and it's like when it hit him it like [spun] him, but my gun just poom (phonetic), poom, poom, poom. And I tried to—I was trying to stop my gun from actually shooting that many times, but I didn't expect it to go off that many times in a row and I dropped my gun to my right side.

Defendant testified that he neither wanted nor intended to kill Smith; he would never want to kill anybody. After he fired his weapon, he looked at Smith and said, "Man, breathe, breathe," then screamed for someone to call an ambulance. Defendant removed the magazine from his gun, cleared the weapon, and set it on the hood of his Hummer.

Defendant looked at the rear of his Hummer to assess the damage from the hit-and-run on Magazine Street. When he realized the damage was minor, he sat on his tailgate and cried. He could not understand why they wanted to fight over an accident. Nevertheless, he remained at the scene because he "didn't feel like [he] was wrong." Once the police arrived, Defendant informed them that he was the shooter and "got down on [his] knees."

Defendant testified that as he was being arrested, he walked passed Raquel Smith, who was lying on the ground screaming at him that he had shot her husband, and saw for the first time that she had also been shot. He had not intended to shoot Raquel Smith, and never would have done so intentionally because she had done nothing to him. Once Defendant was taken to the police station, he

learned that Smith, then deceased, was former New Orleans Saints player Will Smith. As a football fan, Defendant was aware Smith was a New Orleans Saints football player, although he did not recognize him at the time of the encounter. Defendant believed the State was going to "try to make me like I just shot and killed this man," and that his life was likely over, so he put his head down and "cried like a baby."

On cross-examination, Defendant denied that he was the aggressor during the incident and said the shooting was a result of Richard's and Smith's behavior, stating, "I have a right to protect myself." Defendant offered no explanation as to why he sustained no injuries from Smith's alleged beating, or why several eyewitnesses testified that no physical contact had taken place. He also could not explain why no other witness saw Richard wrap his shirt around his hand, or heard Richard tell Smith that Defendant had a gun. The State asked Defendant why he had not told anyone before trial that he had seen Smith physically holding a firearm, and Defendant responded that he had never given a full statement to anyone, but offered no explanation as to why he chose to omit that detail from the several statements he did make. The colloquy then proceeded as follows:

> Q: And in no statement did you ever say that [Smith] fired a gun?
> A: No. And I'll answer that question again by saying I never made a full statement to anyone but my lawyers.
> Q: Did you see the gun actually discharged by [Smith]
> A: I heard a pop as he turned towards me with the gun in his hand.
> * * * * *
> Q: [Cacioppo] also testified that the first shots that night were fired by yourself. He got that wrong?
> A: Yes.

Defendant denied that he repositioned himself behind Smith to fire seven additional gunshots, and denied that he fired his weapon directly into the Mercedes. He claimed to be at least five feet from Smith at all times, yet he could not explain why a shell casing was discovered inside the Mercedes underneath Smith's body, or why a bullet struck the interior of the Mercedes passenger door.

Defendant also could not explain why the coroner testified that the bullets entered Smith's back at the opposite angle from which Defendant claims he fired, or why no eyewitness corroborated his version of events. Defendant denied pulling the trigger eight times, and did not "know why [the gun] went off like it went off." Defendant also could not explain why Smith's handgun was discovered in a location other than Smith's hand. Defendant confirmed that he saw Smith fire his weapon and he did not believe that he (Defendant) fired the bullet that struck Raquel Smith. Defendant also denied saying, "That's what you get for showing off for the white boys," after he shot Smith, explaining that no white men had been involved in the incident, and he did not consider the two "Spanish" men white.

On rebuttal, the State re-called ATF Examiner Acosta, who confirmed that nothing at the scene indicated that any weapon other than Defendant's Ruger .45-caliber weapon had been discharged. She explained that the click heard when the slide is pulled back indicates that the "disconnect is working" and that each pull of the trigger will fire only one shot. The model of Defendant's weapon generally requires approximately five pounds of pressure on the trigger to release the firing pin. The weapon also contained a "trigger safety" which had to be pulled

simultaneously with the trigger to fire the weapon: a product feature specifically designed to prevent an accidental shooting. In her opinion, Defendant's weapon could neither have fired on its own nor fired more than one bullet each time the trigger was squeezed. She stated that each bullet would have had to be intentionally fired. Acosta also testified that Smith's gunshot residue test results were not consistent with those of someone who had recently fired a revolver.

The State offered over 100 exhibits, most being photographs of the crime scene and Smith's autopsy. Other exhibits included Sunseri's expert reports, the ballistics report, and the Coroner's Report. The State also played a montage of surveillance footage from several businesses along Magazine Street, Sophie Wright Place, and St. Mary Street for the jury.[14] The Defense offered 12 exhibits, 5 of which were the same as those introduced by the State. Defense exhibits included two crash reports, the recorded 911 call from the night in question, Defendant's Gunshot Residue Expert Deputy Madelyn Collins' report, and the accident report.

ERRORS PATENT

A review of the record does not reveal any errors patent.

[14] At trial, Det. Brueggeman described the events depicted in the surveillance footage. He testified that some of the footage showed a Hummer, followed by a Mercedes, driving down Magazine Street towards downtown. In the 2000 block of Magazine Street, it appeared as though the driver of the Hummer quickly applied his brakes and then immediately released them. In the same timeframe, but shown from a different angle, the Mercedes seems to bump the rear end of the Hummer and "propels the Hummer [forward]." The Mercedes then backed up a few feet and proceeded around the Hummer while the Hummer pulled over to the curb. The Hummer immediately pulled back into the flow of traffic and pursued the Mercedes at close proximity. Det. Brueggeman estimated that the distance between the two cars was less than one car length. He further clarified that, during the composite video surveillance footage of both car accidents that the State had introduced earlier, it appeared to him that the brake lights of the Hummer illuminated just "milliseconds" before rear-ending the Mercedes.

DISCUSSION

"[I]n accordance with the well-settled jurisprudence, '[w]hen 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,* 14-0939, p. 5 (La.App. 4 Cir. 3/11/15), 163 So.3d 132, 135 (quoting *State v. Hearold,* 603 So.2d 731, 734 (La.1992)). Thus, Defendant's second assignment of error, addressing the sufficiency of the evidence, is addressed first.

Assignment of Error Number 2

Defendant asserts that the evidence presented at trial was insufficient to sustain his convictions.

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):

> …the 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. [Emphasis in original].

"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*, 11-0414, p. 18 (La.App. 4 Cir. 2/29/12), 85 So.3d 759, 771.

"Conflicting statements as to factual matters is a question that goes to the weight of the evidence, not sufficiency." *State v. Jones*, 537 So.2d 1244, 1249 (La.App. 4th Cir. 1989). Such decisions rest solely with the jurors who, as triers of fact, may accept or reject, in whole or in part, the testimony of any witness. *Id*. A juror's determination as to the credibility of a witness is a question of fact entitled to great weight, and its determination will not be disturbed unless it is clearly contrary to the evidence. *Id.; State v. Vessell*, 450 So.2d 938, 943 (La. 1984).

In *State v. Wells*, 10-1338, p. 5 (La.App. 4 Cir. 3/30/11), 64 So.3d 303, 306, we stated: "The testimony of a single witness, if believed by the trier of fact, is sufficient to support a conviction." Absent internal contradiction or irreconcilable conflict with the physical evidence, a single witness's testimony, if believed by the fact finder, is sufficient to support a factual conclusion. *State v. Legrand*, 02-1462, p. 5 (La. 12/03/03), 864 So.2d 89, 94. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." *State v. Smith*, 600 So.2d 1319, 1324 (La. 1992). "[T]he *Jackson* standard does not provide a reviewing court with a vehicle for substituting its appreciation of what the evidence has or has not proved for that of the fact finder." *State v. Mack*, 13-1311, pp. 9-10 (La. 5/7/14), 144 So.3d 983, 989. A reviewing court may impinge on the "fact finder's discretion ... only to the extent necessary to guarantee the fundamental due process of law." *State v. Mussall*, 523 So.2d 1305, 1310 (La. l988).

"Second degree murder is the killing of a human being" with the "specific intent to kill or to inflict great bodily harm[.]" La. R.S. 14:30.1(A)(1). Specific intent is "that state of mind which exists when the circumstances indicate that the offender actively desired the physical criminal consequences to follow his act or failure to act." La. R.S. 14:10; *State v. Lindsey,* 543 So.2d 886, 902 (La. l989). "Specific intent is an ultimate legal conclusion to be resolved by the finder of fact." *State v. Govan,* 593 So.2d 833, 835 (La.App. 4th Cir.), *writ denied,* 600 So.2d 654 (La. 1992). Intent may be inferred from the circumstances. "A specific intent to kill can be inferred from someone pointing a gun at close range and pulling the trigger." *State v. James,* 627 So.2d 203, 206 (La.App. 4 Cir. 1993), *writ denied,* 93-3015 (La. 11/18/94), 646 So. 2d 375.

The offense of manslaughter includes the killing of a human being "[w]hen the offender has the specific intent to kill or inflict great bodily harm," but the killing "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. 14:30.1A (1), 31 A(l). Noteworthy, however, is that "sudden passion" and "heat of blood" are not elements of the offense of manslaughter; they are only mitigating factors lessening the culpability of a defendant. *State v. Lombard,* 486 So.2d 106, 110-11 (La. 1986).

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

> (A)(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average

> person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed.

Specifically, Defendant argues in his assignment of error number two that (1) with respect to the manslaughter conviction, the State failed to prove that he was not justified when he shot and killed Smith; and (2) with respect to the attempted manslaughter conviction, the State failed to prove that he had the specific intent to kill Raquel Smith or that he fired the bullet that struck her.

(1) Manslaughter Conviction

Defendant does not deny that he pointed his gun at Smith and fired the bullets that killed him. He argues that, because the homicide was committed in self-defense, it was justified and the State failed to prove that he did not act in self-defense.

"When a defendant asserts that he acted in self-defense in a homicide case, it is settled law that the State bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense." *State v. De Gruy,* 16-0891, p. 18 (La.App. 4 Cir. 4/5/17), 215 So.3d 723, 733, *citing State v. Jefferson*, 04-1960, p. 10 (La.App. 4 Cir. 12/21/05), 922 So.2d 577, 587-88; *State v. Taylor*, 03-1834, p. 7 (La. 5/25/04), 875 So.2d 58, 63.[15]

Under La. R.S. 14:18, "[t]he fact that an offender's conduct is justifiable, although otherwise criminal, shall constitute a defense to prosecution for any crime

[15] "In a non-homicide case, however, the Louisiana jurisprudence is not settled definitively on the issue of who has the burden of persuasion in proving self-defense." *De Gruy*, 16-0891, pp. 18-19, 215 So.3d at 733; *see also State v. Abbott*, 17-0016, p. 19, n. 4 (La.App. 4 Cir. 6/14/17), 222 So.3d 847, 857.

based on that conduct [under certain circumstances].” A homicide is justifiable “when committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.” La. R.S. 14:20(A)(1).

However, pursuant to La. R.S. 14:21, the defense of self-defense is unavailable to an offender “who is the aggressor or who brings on a difficulty.” *See also State v. Abbott,* 17-0016, p. 17 (La.App. 4 Cir. 6/14/17), 222 So.3d 847, 857.

Defendant contends that he was not the aggressor, arguing first that the pursuit of, and subsequent collision with, Smith’s Mercedes was unintentional and not an act of aggression. During his attempt to obtain Smith’s license plate information, Smith slammed on his brakes leaving Defendant without sufficient time to stop his vehicle. Defendant testified that he was unlocking his iPhone while driving and failed to notice Smith was braking.

However, Sunseri, the crash reconstruction expert, testified that Smith’s Mercedes had come to a normal stop before it was hit by the Hummer. According to Sunseri’s analysis, Smith did not mash his brakes or come to a sudden stop. Instead, Defendant’s brakes were activated only one-half second before the collision and with only enough force to reduce his speed by one MPH. This indicated that Defendant had not applied the full force of his brakes in an attempt to avoid or reduce the impact and that the collision was intentional.

As further evidence of aggression, O'Neal testified that Defendant intended to call 911, but changed his mind and asked O'Neal to make the call so Defendant could "focus on the road" contradicting Defendant's testimony that his attention was on his phone just before the collision. Furthermore, Defendant did not apologize for the accident or attempt to explain to Smith that it was unintentional. The evidence indicates that Defendant's response to Smith's initial accusation was, "You hit me first!" From this evidence, a rational juror could have reasonably concluded that Defendant deliberately crashed into Smith's Mercedes.

Defendant next argues that, even if the collision was deemed intentional, he was not the aggressor comparing his case to *State v. Gonday*, 442 So.2d 703 (La.App.1st Cir.1983). There, the defendant's truck was hit by another truck that left the scene of the accident. The defendant chased the other truck and forced it to stop. The defendant got out of his truck armed with a shotgun and ordered his passenger to take away the keys to the other truck so it would not leave again. The driver of the other truck refused to let the passenger take the keys and reached for his handgun in his glove compartment. The defendant shot the other driver claiming he was defending his passenger who was unarmed. The victim admitted knowledge of the fact that the defendant's intent was to stop him and keep him stopped until the accident could be reported to the police. The court of appeal found the defendant's response reasonable and ordered an acquittal. *Id.* at 706.

Here, Defendant asserts that Smith was aware he had struck Defendant's vehicle on Magazine Street and fled the scene. Thus, he should have known

Defendant's intent in pursuing the vehicle was to prevent further flight, relieving Defendant of "aggressor" status. He further argues that Smith became the aggressor when he threw a cup of alcohol in Defendant's face after exiting his vehicle, and remained the aggressor as Smith retrieved his pistol and fired at Defendant.

At the outset, evidence shows that Smith did not think that he had committed a hit and run; the passengers in his vehicle all testified that they did not believe he made contact with the Hummer. Whether the subsequent collision was intentional or not, Defendant admitted he was visibly armed with a loaded gun when he exited his vehicle. Although Defendant testified that he only armed himself after observing Richard remove his shirt and wrap it around "something shiny" he pulled from his pocket, that assertion was contradicted by every other witness including O'Neal. While Richard's shirt was recovered at the scene, no knives or other weapons were found at the scene, other than those belonging to Defendant and O'Neal.

Additionally, no evidence exists that Smith either physically possessed or fired a weapon before he was shot. Photographs taken at the scene show both of Smith's hands were empty. A weapon wedged between the driver's seat and the console was later found by police only after the vehicle was impounded. A total of nine bullets and nine spent casings were recovered from the scene, all fired from Defendant's gun. While ATF Examiner Acosta testified that a revolver would not

eject spent casings, the gunshot residue test results of Smith's hands were inconsistent with one who had just fired a weapon of any kind.

Finally, nearly every eyewitness testified that no physical contact took place between Smith and Defendant. Further, various witnesses testified that Smith had calmed down and was retreating from the altercation just before the shooting. All but one of the bullet wounds Smith sustained were to his back. Thus, viewing the evidence in the light most favorable to the prosecution, a rational juror could reasonably reject Defendant's testimony and find he was the aggressor in the situation.

Nevertheless, assuming Defendant was not the aggressor, he claims that the State did not present sufficient evidence to prove beyond a reasonable doubt that he did not act in self-defense. Defendant's claim of justification is based on his wholly uncorroborated assertion that he shot Smith *after* Smith retrieved his firearm from his vehicle, pointed it at Defendant, and fired. However, no evidence presented at trial supports this scenario.

Rebecca, Thomas, Cacioppo, and Ross testified that it appeared Raquel Smith was able to placate Smith and convince him to retreat from the conflict; Raquel Smith's testimony confirms this. With the exception of Defendant, every eyewitness who testified, including O'Neal, denied hearing Smith say he was going to get his gun.[16]

[16] O'Neal testified that it appeared Smith died while reaching toward his open glove compartment. After the shooting, he asked Defendant "What happened?" Defendant responded only that Smith "said he was going to get a gun," not that Smith had successfully retrieved his gun and fired it.

Dr. Huber testified that one bullet entered Smith's left side in a lateral trajectory, indicating he was standing upright when he was shot, while the remaining bullets entered Smith's back at a steep upward angle, consistent with Smith's photographed position "leaned over" the driver's seat. Thus, it appears Smith was shot first in his left side while standing, facing the sidewalk with his back to his vehicle. Whether Smith then "fell into his vehicle" as Rebecca testified, or was reaching for a weapon, both the crime scene photos and eyewitness testimony indicate that Smith was not in possession of a weapon when he was killed; his firearm was holstered in a secure location.

David Olasky, a private investigator, was retained by Defendant after the incident. He testified that Warnisha "Weedy" Hudson told him that she was on the scene after the accident as supported by surveillance footage from a near-by coffee shop. She stated that the driver's side door of the Mercedes was open and "she remembered seeing a white man reach in there…in the vicinity of the glove compartment and pull what she thought was a [black] gun out of there." She had apparently seen Ceravolo's face on television the next day and "put two and two together and decided that that was who she had seen reaching in there."

After investigating further, however, Olasky doubted the accuracy of some of the things Hudson said. In any event, Hudson did not testify, no other eyewitness corroborated her statement, and Hudson apparently identified the white

man as Ceravolo, which the State proved was an impossibility.[17] Consequently, a rational juror could have rejected Olasky's hearsay testimony, finding that Smith was unarmed when he was killed.

We find that the State presented convincing evidence that Smith had retreated from the altercation with his wife, and the physical evidence shows that Smith was shot once in his side while standing, then seven times in the back, at close range, from an angle consistent with Smith's photographed position lying over his driver's seat. Viewing this evidence in a light most favorable to the prosecution, a rational juror could have found that Defendant's claim that he was in imminent danger of being killed was unreasonable, and that killing Smith was not necessary to prevent whatever harm Defendant thought he faced. Moreover, we do not find any internal contradiction or irreconcilable conflict with the physical evidence requiring us to impinge on the fact finder's discretion and disturb the sound discretion of the trier of fact.[18]

After viewing the evidence in the light most favorable to the prosecution, we find that any rational trier of fact could have found beyond a reasonable doubt that Defendant intended to kill or inflict great bodily harm on Smith, that Defendant did not act in self-defense, and that Defendant was the aggressor who brought on the difficulty. The State presented sufficient evidence to sustain a conviction of the

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[17] Olasky admitted that once he viewed the surveillance footage showing Ceravolo at the Windsor Court both during and just after the shooting, he began to doubt the accuracy of some of the things Hudson said.

[18] *See Legrand*, 02-1462, p. 5, 864 So.2d at 94.

charged crime of second degree murder and to prove that the homicide was not justified. Therefore, we affirm the jury's responsive verdict of manslaughter.[19]

(2) Attempted Manslaughter Conviction

Defendant also argues that the evidence was insufficient to sustain his conviction for the attempted manslaughter of Raquel Smith, arguing that he lacked the specific intent to shoot or harm her. However,

> [t]he doctrine of transferred intent... provides that when a person shoots at an intended victim with the specific intent to kill or inflict great bodily harm and accidentally kills or inflicts great bodily harm upon another person, if the killing or inflicting of great bodily harm would have been unlawful against the intended victim, then it would be unlawful against the person actually/accidentally shot, even though that person was not the intended victim. *State v. Ross,* 2012-0109, pp. 8-9 (La.App. 4 Cir. 4/17/13), 115 So.3d 616, 621, *writ denied,* 2013-1079 (La.11/22/13), 126 So.3d 476; *State v. Jordan,* 97-1756, p. 16 (La.App. 4 Cir. 9/16/98), 719 So.2d 556, 567.

State v. Weathersby, 13-0258, pp. 11-12 (La.App. 4 Cir. 4/16/14), 140 So.3d 260, 268. The jury was properly instructed on this issue.

We find that the State presented sufficient evidence that, when Defendant fired his gun, he had the specific intent to kill or inflict great bodily harm on Smith. Because no evidence exists that any gun other than Defendant's was fired, a rational juror could find that the bullet that struck Raquel Smith's legs was fired by Defendant.[20]

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[19] *See State v. Beaulieu*, 12-0735, p. 14 (La.App. 4 Cir. 8/7/13), 122 So.3d 1050, 1059, *citing State v. Schrader*, 518 So.2d 1024, 1034 (La. 1988) ("Where a defendant is charged with a crime, and the jury returns a responsive verdict, the evidence is sufficient to support the responsive verdict if it is sufficient to support the crime as charged, as long as the defendant did not object to the inclusion of this lesser included offense."). Defendant did not object to the inclusion of manslaughter as a lesser included offense in this case.

[20] Defendant argues that Smith accidentally shot his wife with the revolver that disappeared from the scene after the shooting, and that he could prove this had all the bullet fragments been removed from Raquel Smith's leg. First, no evidence exists that another firearm was at the scene,

For these reasons, Defendant's conviction for the attempted manslaughter of Raquel Smith is likewise affirmed.

Assignment of Error Number 1

Defendant asserts that the district court abused its discretion when it denied his motion for new trial based on newly discovered evidence. La. C.Cr.P. art. 851 provides in pertinent part:

> A. The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
> B. The court, on motion of the defendant, shall grant a new trial whenever any of the following occur:
> * * *
> (1) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty.

"A defendant bears the burden of proof when seeking a new trial as a result of his conviction, previously obtained by the prosecution." *State v. Armstead*, 14-0036, p. 25 (La.App. 4 Cir. 1/28/15), 159 So.3d 502, 519. Appellate review of the ruling of a district court on a motion for a new trial shall be invoked only to consider error of law. La. C.Cr.P. 858; *State v. McKinnies*, 13-1412, p. 9 (La. 10/15/14), 171 So.3d 861, 869. A reviewing court will attach great weight to the exercise of a district court's discretion; however, an abuse of that discretion will be considered an error of law. *Id.,* 13-1412, p. 9, 171 So.3d at 869. "When the

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other than those belonging to Defendant, O'Neal, and Smith; ballistics testing revealed that only Defendant's gun had been fired. Further, a ninth shell casing was found on the ground in the street near where Raquel Smith was shot. This shell casing is the only one that did not correspond to the eight bullets removed from Smith's body that matched the other eight shell casings found at the scene.

allegations of a motion for new trial are not supported by proof, a trial judge properly overrules the motion. Allegations raised in the motion alone are not sufficient, as a defendant has the burden to show that an injustice has been done to him." *Id.*, 13-1412, p. 11, 171 So.3d at 870.

Under La. C.Cr.P. 851, newly discovered evidence must first be determined to be "material." Evidence is material only if it is reasonably probable that the result of the proceeding would have been different had the evidence been disclosed. *State v. Marshall*, 94-0461, p. 16 (La. 9/5/95), 660 So.2d 819, 826 (*citing United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)). "A reasonable probability is one that is sufficient to undermine confidence in the outcome" of the trial. *Marshall*, 94-0461, p. 16, 660 So.2d at 826. In *State v. Watts*, 00-0602, p. 9 (La. 1/14/03), 835 So.2d 441, 449, this court held that a district court should ascertain on a motion for new trial "whether there is new material fit for a new jury's judgment. The only issue is whether the result will probably be different."

Defendant submitted testimony of fifty-three-year-old, Michael Burnside, who resided on Felicity Street, approximately one mile away from the scene. Burnside claimed to have heard shots fired from two separate guns on the night in question: four successive shots from a smaller caliber gun followed by at least eight "booms" from a larger caliber gun. Defendant claims Burnside's testimony corroborated his trial testimony that Smith fired a gun at the scene.

Burnside admitted that he did not know the date on which he heard the shots fired, and that he only associated it with the instant case because the shots sounded like they came from the direction of the river. He recalled seeing a "shrine" for Smith near Magazine Street several days later and read about Smith's death in the newspaper within one or two, or possibly more, days after hearing the shots. Burnside testified that he did not own a television, a phone, a computer, a clock, a watch, or a calendar, and had no indication of the day, date, or time, other than the sound of "church bells" and the position of the sun.

When asked how many shootings he heard on that night, he answered, "I heard one shooting that involved two guns." However, the State presented evidence that gunshots were reportedly fired much closer to Burnside's neighborhood roughly forty-five minutes prior to the instant shooting, which he did not recall. Although he heard gunshots in his neighborhood on a regular basis, he only heard the "boom" of a larger caliber weapon on the night he suspected Smith was killed. The State presented evidence that a .40-caliber gun (which, in Burnside's estimation, made a similar sound as a .45-caliber gun) had been reportedly fired in Burnside's neighborhood on the night of April 14, 2017, just five days prior to the hearing on the motion for new trial. Although Burnside admitted he had not heard the .40-caliber shots, he also could not recall what he had done on April 17, 2017, where he had been, what time he went to sleep, or how long he had been home before he went to sleep.

We find that Burnside's testimony is unreliable and contradicted by eyewitness testimony and the physical evidence. While Burnside heard four shots fired first from a smaller caliber gun, witnesses testified that only one gun was fired, and Smith was never in possession of a gun. Burnside's testimony also contradicts Defendant's claim that Smith fired one shot at him before he returned fire. Moreover, when Burnside was describing the series of large caliber "booms" he heard following the first four shots, he noticed a distinct pause between each "boom," which he credited to the weapon's dramatic recoil that required the shooter to reacquire the target with each deliberate pull of the trigger. Again, this account not only conflicts with eyewitness testimony that the second burst of gunfire was rapid but also with Defendant's claim that when he lost control of his weapon, it fired rapidly and repeatedly.

Given the unreliability of Burnside's testimony, the district court had no method of verifying whether the alleged gunshots were even associated with the instant case. That unreliability was buttressed insofar as Burnside's testimony was blatantly contradicted by evidence introduced by both the State and the defense at trial.

Defendant failed to meet his burden of proving the evidence was of the requisite materiality that, had it been introduced at trial, it would have yielded a different result. *See State v. Tucker*, 13-1631, p. 50 (La. 9/1/15), 181 So.3d 590, 626-27 (holding that uncorroborated evidence "that lacks any indicia of reliability

is not material" and "would not provide reasonable assurance of a different result.").

In addition, Defendant failed to demonstrate that the evidence was not discoverable before the conclusion of the trial, notwithstanding the exercise of reasonable diligence.[21]

For these reasons, the district court did not abuse its discretion in denying Defendant's motion for a new trial. This assignment of error lacks merit.

Assignment of Error Number 3

Defendant asserts that the district court abused its discretion when it prohibited defense counsel from introducing evidence to rebut the State's proof of Smith's good character. Specifically, Defendant alleges that he was prevented from asking Dulymus McAllister about his knowledge of Smith's prior arrest "for abusing [his wife] while out at a bar in Lafayette," to rebut "the extensive testimony of Smith's good character intentionally elicited by the prosecutor on

[21] Defendant claims that his trial counsel received an email from the potential witness on the last day of the trial, but was "preoccupied" at the time, so he did not learn of the existence of the potential witness until the day after the trial concluded. At the hearing, Burnside testified that he did not know when he first reached out to defense counsel, but claimed to have sent several emails not only to defense counsel, but also to the press, the police chief, and to Defendant himself, throughout the course of the investigation and trial, in an attempt to alert them of his observations. In any event, although defense counsel apparently did not inspect these emails until after the trial concluded, the evidence was at least discoverable during the trial with reasonable diligence.

Finally, Defendant did not submit the witness's email as evidence of the date he claimed to have received it. A legal presumption exists "that evidence under the control of a party and not produced by him was not produced because it would not have aided him." La. R.S. 15:432. Consequently, the court cannot verify the date the evidence became "discoverable" to Defendant (or his counsel). Accordingly, Defendant failed to meet his burden of proving that the evidence was not discovered until after trial notwithstanding the exercise of reasonable diligence.

direct examination."[22] In support of this argument, Defendant cites to La. C.E. art. 405(A):

> Except as provided in Article 412, in all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to general reputation only. On cross-examination of the character witness, inquiry is allowable into relevant specific instances of conduct.

We agree with the State that this issue was not preserved for review. The State also noted that these allegations were never validated and were dismissed by the Lafayette District Attorney's Office. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and…[w]hen the ruling is one excluding evidence, the substance of the evidence was made known to the court by counsel." La. C.E. art. 103. Although Defendant alleges that Smith's prior arrest is "probative of the aggression and bad temper that [Smith] has when intoxicated," and that "McAllister had direct personal knowledge of that event," no support is provided for these assertions. Defendant neither proffered Smith's arrest record, any related facts surrounding the incident, or McAllister's potential testimony had Defendant been permitted his line

[22] McAllister is a retired New Orleans Saints player and close friend of Smith, whom the State expressly characterized as a victim-impact witness. McAllister testified that Smith had been drafted in 2004 to play football for the Saints. They eventually became friends and attended functions and charity events together. They lived in the same neighborhood; their children attended the same schools; their wives were friends; and he described Smith as "a caring person." McAllister testified that on April 9, 2016, he had planned to meet Smith and Thomas that evening; however, he decided to stay home.

A review of the record belies Defendant's assertion that McAllister provided "extensive testimony of Smith's good character" on direct examination and that the State opened the door regarding Smith's character. McAllister's testimony on direct examination reveals that he testified about his close friendship with Smith and events that they attended together, and described their bond as teammates. The extent of the "character testimony" McAllister provided on direct examination was limited. McAllister's personal opinion that Smith was a caring person has inaccurately been described by Defendant as "character evidence."

of questioning. "The purpose of an offer of proof is to create a record of the excluded evidence so that the reviewing court will know what the evidence was and will thus be able to determine if the exclusion was improper, and if so, whether the improper exclusion constituted reversible error." *State v Magee*, 11-0574, p. 63 (La. 9/28/12), 103 So.3d 285, 327 (quoting *State v. Adams*, 537 So.2d 1262, 1265 (La.App. 4 Cir. 1/17/89)). Consequently, Defendant's claims were not properly preserved for review.

Because this issue was not preserved for appellate review, we find this assignment of error to be without merit.

Even if this assignment of error had been preserved for appellate review, we find no abuse of discretion by the district court in excluding evidence of Smith's prior arrest record. Pursuant to *Wells,* 11-0744, p. 20, 191 So.3d at 1143, "[A]cts committed by the victim against third parties is not admissible," quoting *State v. Montz*, 632 So.2d 822, 825 (La.App. 4th Cir. 1994). Moreover, on November 2, 2016, the district court granted the State's motion *in limine* to exclude the prior arrest record of Smith without objection by Defendant. The State argued that evidence of Smith's prior arrest was inadmissible under La. C.E. art. 404 because Defendant admitted he did not know the identity of Smith when he shot him; therefore, he could not have known of Smith's arrest, making it irrelevant to Defendant's claim of self-defense. The district court granted the State's motion, finding the information inadmissible. Defendant relies on La. C.E. art. 405(A),

which allows inquiry into "*relevant* specific instances of conduct" on cross-examination; obviously the district court found the evidence irrelevant as we do.

In any event, even assuming the court erred in excluding testimony of Smith's prior arrest, and assuming the error had been preserved for review, any error was harmless in light of the overwhelming eyewitness, expert, and physical evidence presented at trial.

Assignment of Error Number 4

Defendant maintains that the district court abused its discretion by allowing victim impact testimony during the guilt phase of the trial, as it is "statutorily confined to the sentencing phase," and it likely contributed to the jury's guilty verdict. Defendant further asserts that the State failed to provide the requisite pre-trial notice of its intent to present victim impact testimony.

La. C.Cr.P. 841(A) provides:

> An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.

The State called McAllister as its first witness. Defense counsel immediately stated, "At this time we'd object because an order of sequestration was issued and McAllister was in court for opening statements, Judge, after you issued an order for sequestration." The State responded, "Judge, he's not a fact witness in this case. He's here for victim impact." Defense counsel then argued, "But he was not

allowed for any exceptions, Judge, whether he's a fact witness or not." After an off-the-record, sidebar conference, the court overruled Defendant's objection.

La. C.Cr.P. art. 841(C), states that the "necessity for and specificity of objections are governed by the Louisiana Code of Evidence," which provides in pertinent part:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and ... [w]hen the ruling is one admitting evidence, a timely objection or motion to admonish the jury to limit or disregard appears of record, stating the specific ground of objection.

La. C.E. art 103; *State v. Allen*, 03-2418, p. 24 (La. 6/29/05), 913 So.2d 788, 806.

Defendant objected to the testimony of McAllister based on the State's failure to sequester him during opening statements, not on the grounds that he was being called by the State exclusively as a victim impact witness.[23] Similarly, Defendant did not object to the lack of notice of the State's intention to present

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[23] La. C.E. art. 615 provides in pertinent part:

> A. As a matter of right. On its own motion the court may, and on request of a party the court shall, order that the witnesses be excluded from the courtroom or from a place where they can see or hear the proceedings, and refrain from discussing the facts of the case with anyone other than counsel in the case. **In the interests of justice, the court may exempt any witness from its order of exclusion.**

(Emphasis added).

"The purpose of the sequestration article is to prevent witnesses from being influenced by the testimony of earlier witnesses, and to strengthen the role of cross-examination in developing the facts…resolution of sequestration problems is within the sound discretion of the district court and that such determinations will not be disturbed on appeal absent an abuse of that discretion." *State v. Jasper*, 14-0125, p. 15 (La.App. 4 Cir. 9/17/14), 149 So.3d 1239, 1250. "In such a situation the court should take appropriate measures to minimize the possibility of prejudice, such as permitting the [non-sequestered witness] only if he testifies prior to all other fact witnesses." *Id.*, 14-0125 at p. 15, 149 So.3d at 1249. Here, although McAllister was not sequestered appropriately during opening statements, any possible prejudice was likely minimized, as he was the first witness called in the instant case.

victim impact testimony during the guilt phase of the trial. Consequently, this assignment of error has arguably not been properly preserved for review, and is not properly before us.[24] *See State v. Clark*, 12-0508, p. 89 (La. 12/19/16), 220 So.3d 583, 657, *cert. granted, judgment vacated on other grounds*, 138 S.Ct. 2671, 201 L. Ed. 2d. 1066 (2018) ("Thus, even though the defendant raised a contemporaneous objection to one portion of the testimony at issue, at no point did he inform the district court of the ground about which he now complains."). This assignment of error is meritless.

Even if this issue had been preserved for appeal, "some facts about the victim, including some personal characteristics, are frequently developed at the guilt phase of the trial (on issues such as self defense and justification) and may be considered by the jury at the penalty phase." *State v. Bernard*, 608 So.2d 966, 971 (La. 1992).

In any event, even assuming the court erred in allowing McAllister to testify, and assuming the error had been preserved for review, any error was harmless in light of the overwhelming eyewitness, expert, and physical evidence presented at trial. This assignment of error lacks merit.

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[24] It is noted that when McAllister described Smith as "caring," the defense objected calling it "character evidence," while the district court overruled the objection by stating that this testimony was "victim impact." Even if one concludes that the objection preserved this issue on appeal, the error is harmless as discussed above. Other than two objections based on hearsay, the only other objection came in response to the question: "in addition to yourself, has there been a number of New Orleans Saints who have come out and supported Mr. Smith today?" The objection was to the mention of other Saints, wherein defense counsel stated: "are we trying to prejudice the jury?" The state responded "victim impact," and the objection was overruled. This question did not call into question Smith's character. *See supra* note 22.

Assignment of Error Number 5

Finally, Defendant asserts that the district court abused its discretion when it suggestively reread its instructions to the jury and provided "more re-instruction than the jury requested in its note."

During its deliberations, the jury requested the following four instructions: reasonable doubt; second degree murder; self-defense; and the burden of proof when self-defense is argued. The court read those instructions. The court stated, "Those are the four instructions that the jurors have requested. Ladies and Gentlemen, would you like for me to reread anything or any other instructions." A juror then asked for the responsive verdict instructions. After complying, it asked the jurors: "Does anyone need me to read the attempt instruction again?" Instead, a juror asked for a reading of self-defense one more time. The court complied. Then the court asked: "Does anyone need for me to reread aggressor doctrine? Intent? Identification?" In response, a juror asked for a rereading of transferred intent and the court complied. Finally, the court asked: "We have the other definitions of intent, the other counts, identification, aggressor doctrine? Does anyone need…" At this time the court was interrupted by a juror who asked that the instruction for aggressor doctrine be reread. The court complied and read the aggressor doctrine, after which a juror asked to "read that one more time." The court complied and read again the aggressor doctrine. No objections were lodged to any of the court's instructions.

Defendant claims that this was "unduly suggestive inasmuch as it offered the jury further guidance on a principle of law that would neutralize [self-defense]." Defendant asserts that the court took "a proactive role in the deliberation process," thereby depriving him of a fair trial.

Because Defendant neither objected to the court's recitation of the jury instructions, nor to any of the instructions that were reread, this alleged error has not been preserved for review. *See State v. Rouser*, 14-0613, p. 12 (La.App. 4 Cir. 1/7/15), 158 So.3d 860, 869 ("An alleged error in the jury instruction is not preserved for appeal in the absence of a contemporaneous objection. La. C.Cr.P. 841.").

Even if this issue was properly before us, Defendant misrepresents the colloquy between the court and the jurors in re-reading certain portions of the jury charges.[25] Moreover, we do not find any error committed by the lower court in its reading of instructions, which wholly complied with La. C. Cr. P. art. 808 and was not a La. C. Cr. P. art. 806 prohibited charge. In addition, Defendant failed to demonstrate that the court's instructions to the jury contributed to its verdict.

[25] A review of the record does not support Defendant's suggestion that the court read an instruction that was not specifically requested by a juror or that the court misrepresented the law in any of its charges. Although the court did inquire if the jury wanted the aggressor doctrine reread, it was merely included in a list of instructions the court offered to reread if requested (which also included intent and identification), all of which had been included in the court's initial jury charge. *See State v. Ducksworth*, 496 So.2d 624, 634 (La.App. 1st Cir.1986) (holding that it was proper for the court to charge the jury a second time as to the aggressor doctrine when a juror requested further instructions on self-defense, even over the defendant's objection, where the instructions had been given in the initial jury charge without objection and evidence presented at trail reasonably supported the charge). Moreover, the jury may have expected that the aggressor doctrine would be read in conjunction with the self-defense instruction given the interrelated nature of the charges, especially considering the jury asked the court to read it twice before returning to deliberate.

CONCLUSION

We find that the evidence presented at trial was sufficient to sustain Defendant's convictions for manslaughter and attempted manslaughter and the other errors assigned by Defendant were either meritless or not preserved for appeal. Therefore, Defendant's convictions and sentences are affirmed.

AFFIRMED.