NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 1025

STATE OF LOUISIANA

VS.

JARVIS HASTEN

****

JUDGMENT RENDERED: DECEMBER 21, 2007

****

ON APPEAL FROM THE
EIGHTEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 687-06, DIVISION D
PARISH OF IBERVILLE, STATE OF LOUISIANA

HONORABLE WILLIAM C. DUPONT, JUDGE

****

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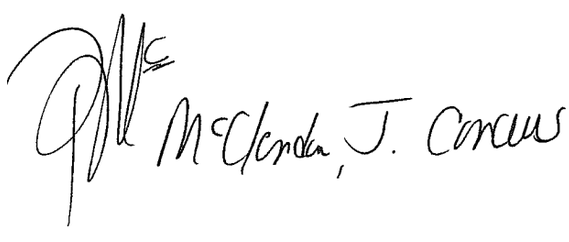
ATTORNEY FOR DEFENDANT/APPELLANT
JARVIS HASTEN

BEFORE: GAIDRY, MCDONALD AND MCCLENDON, JJ.



MCDONALD, J.

The defendant, Jarvis Hasten, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. The defendant entered a plea of not guilty. Following a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motion for new trial. The defendant waived sentencing delays and was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant now appeals, raising the following assignments of error:

1. The verdict is contrary to the law and evidence, in that, the State did not prove beyond a reasonable doubt that the defendant did not act in self-defense.

2. The trial court's limiting of the prior specific acts of the victim was prejudicial error.

3. The trial court's ruling disallowing the defense to question both the police officers and the primary State's witness, Mr. Ronald Videaux,[1] regarding an incident wherein he had previously hidden a gun from these same officers at this same location was prejudicial error.

4. The trial court erred in not granting a mistrial when the State adverted to the confessions of the defendant in the opening statement where there had been no pretrial ruling on the admissibility of the statements in contravention of La. Code Crim. P. art. 767, and also where they were not with the benefit of his **Miranda** rights.

5. The trial court erred in allowing the State to make mention and introduce items of evidence which were not turned over to the defense prior to the trial.

6. The trial court erred in allowing the prosecution to ask Ms. Shanetha Alexander, a defense witness, about the arrests, all of which were not convictions, of the defendant in the presence of the jury without requiring a mandatory **Johnson** hearing prior to this line of questioning.

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[1] In his brief, the defendant refers to this witness as Ronald "Videaux" as opposed to Vito. We will refer to this witness as Vito, as that is consistent with the record.

7. The trial court erred in denying the motion for new trial filed on all of the above bases and on the additional basis of the new and material **Brady** evidence discovered by the State and the defense after the trial of the matter.

8. The trial court erred in allowing State witnesses to testify regarding their opinion of whether the offense was committed in self-defense, as this was the ultimate issue to be decided by the jury.

9. The trial court erred in allowing the State to introduce gruesome photographs of the victim through the Chief of Police, Kevin Ambeau, even though there was no evidentiary purpose for the introduction of the photographs.

10. The trial court erred in allowing Chief Kevin Ambeau to testify to his version of the defendant's statement, where the best evidence of the statement was the videotaped statement itself.

In the alternative, presupposing that this court will not find any reversible errors, the defendant argues that the cumulative effect of the errors constitutes grounds for reversal. Finally, the defendant asks this court to review the record for error pursuant to La. Code Crim. P. art. 920(2). For the following reasons, we reverse the conviction, vacate the sentence, and remand for a new trial.

STATEMENT OF FACTS

On or about April 28, 2006, near 11:00 p.m., Officer Sterling Redditt of the St. Gabriel Police Department heard gunshots. The sound of gunshots was coming from the direction of B&D Mini Mart, located less than a quarter of a mile from Officer Redditt's location. Officer Redditt responded to the scene and radioed dispatch.

Officer Redditt parked in the driveway of the defendant's trailer home, located behind B&D Mini Mart, and observed Jordan Clark (the victim) lying on his back on the ground outside of the trailer. On the scene and in his statement upon arrest, the defendant admitted to shooting the victim but

claimed that he did so in self-defense. The defendant specifically indicated that while standing in his doorway, he was approached by the victim. At the victim's request, they walked toward the rear of the trailer to talk. When the defendant attempted to walk away, the victim followed, stood face-to-face with the defendant, and pressed what the defendant insisted to be a gun against the defendant's side. According to the defendant, the victim threatened to kill the defendant right before the defendant fired his gun at the victim, shooting him twice.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant argues that the evidence is insufficient to sustain his conviction for second degree murder because the State failed to prove beyond a reasonable doubt that defendant did not act in self-defense. While noting that a second weapon was not found at the scene, the defendant, by contrast, notes the victim's violent reputation and the fact that State witness Ronald Vito had the opportunity to remove a gun from the victim's body.[2]

We note initially that issues are raised in this appeal contesting the sufficiency of the evidence and alleging one or more trial errors. In such a case, the reviewing court should first determine the sufficiency of the evidence. The reason for reviewing sufficiency first is that the accused may be entitled to an acquittal under **Hudson v. Louisiana**, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), if a rational trier of fact, viewing the evidence in accordance with **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct.

[2] In his argument for this assignment of error, the defendant also notes that the victim was banned from entering the defendant's property at the time of the offense. However, this information was not presented to the jury and, therefore, will not be included in the sufficiency of the evidence assessment. The defendant, below and in assignment of error number seven, contends that a late discovery of this information constitutes grounds for a new trial. As later noted, assignment of error number seven, along with others, is pretermitted due to the reversal of the conviction.

2781, 61 L.Ed.2d 560 (1979), in the light most favorable to the prosecution, could not reasonably conclude that all of the essential elements of the offense have been proven beyond a reasonable doubt. When the entirety of the evidence, including inadmissible evidence that was erroneously admitted, is insufficient to support the conviction, the accused must be discharged as to that crime, and any discussion by us of the trial error issues as to that crime would be pure dicta since those issues are moot.

On the other hand, when the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must then consider the other assignments of error to determine whether the accused is entitled to a new trial. If the reviewing court determines that there has been trial error (which was not harmless) in cases in which the entirety of the evidence was sufficient to support the conviction, then the accused will be granted a new trial, but is not entitled to an acquittal even though the admissible evidence, considered alone, might be insufficient. **State v. Hearold**, 603 So.2d 731, 734 (La. 1992).

The constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia**, requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. La. Code Crim. P. art. 821. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove," every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. **State v. Wright**, 98-0601, p. 2 (La. App. 1st

Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732.

The crime of second degree murder, in pertinent part, "is the killing of a human being: (1)[w]hen the offender has a specific intent to kill or to inflict great bodily harm[.]" La. R.S. 14:30.1A(1). Specific criminal intent is that "state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Thus, specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. **State v. Buchanon**, 95-0625, p. 4 (La. App. 1st Cir. 5/10/96), 673 So.2d 663, 665, writ denied, 96-1411 (La. 12/6/96), 684 So.2d 923. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. Delco**, 2006-0504, p. 4 (La. App. 1st Cir. 9/15/06), 943 So.2d 1143, 1146, writ denied, 2006-2636 (La. 8/15/07), 961 So.2d 1160. In the instant case, the defendant does not deny shooting the victim or that the victim died as a result of the wounds inflicted. Instead, the defendant argues that he shot the victim in self-defense after he felt his life was threatened.

When the defendant in a homicide prosecution claims self-defense, the State must prove beyond a reasonable doubt that the homicide was not committed in self-defense. Louisiana Revised Statutes 14:20A(1) provides that 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. On appeal, the relevant inquiry is whether or not, after viewing the evidence in the light most favorable to the prosecution, a rational fact finder could have found beyond a reasonable doubt that the defendant did not act in self-defense. **State v. Williams**, 2001-0944, pp. 5-6 (La. App. 1st Cir. 12/28/01), 804 So.2d 932, 939, writ denied, 2002-0399 (La. 2/14/03), 836 So.2d 135.

According to State witness Dr. Alfredo Suarez, an expert in forensic pathology, the victim suffered a close-range, fatal gunshot entry wound to the left lateral chest wall (exiting through the third and fourth rib). Dr. Suarez noted that the victim would have died from this shot alone. A second gunshot entered the victim's mouth and exited behind the left angle of the mouth. The second shot was described as downward, as it took place while the shooter was standing above the victim's head.[3] The gunshot to the chest would have caused the victim to fall down, and thus, was concluded to be the first shot. Dr. Suarez confirmed that the absence of tattooing indicates that the defendant was at least two and one-half to three feet away from the victim when he fired the gunshots.

St. Gabriel Police Chief Kevin Ambeau seized the defendant's weapon from the kitchen counter of the defendant's trailer. After the scene was secured, Chief Ambeau, Officer Redditt, and other officers canvassed the area, including the immediate area between the trailer and the store and the area circling the trailer, for evidentiary items such as another weapon. No other weapon was found.

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[3] According to testimony presented at the trial, the victim was taller than the defendant.

The defendant's videotaped statement was played during the trial. According to the defendant, the victim said "holla at me" as he led the defendant behind the trailer. The defendant further stated:

> So I'm thinking he gonna holla at me so, we face to face and now we face to face so, he pulled a gun out his back pocket, exactly his back pocket and pointed it in my side. And I started, just started like man please, man please don't man come on man, what I ever did you man come on man, please bro it ain't gotta be all this. So as I'm holding his gun, trying to argue with him. I'm having my hand on my gun the hold [sic] time. So I'm pulling my gun out, so he thinking I'm not gonna do nothing. He just got the pistol in my side like man don't do, man don't make me um, pop you bro. Don't make me shoot you bro, so I shot him and that's the bottom line.

The defendant stated that he shot the victim a second time because he did not know where the first bullet hit the victim and he thought that the victim might shoot him back.

State witness Devon Green, the defendant's friend, was present when the victim approached the defendant. According to Green, Ronald Vito arrived with the victim, but left when the victim and the defendant began to converse. Green stated that he was "more sure than not sure" that the victim had a gun. Green and the defendant were outside of the trailer when the victim approached and called the defendant to the side. Green observed the victim grab the defendant and "they were scuffling like and he was putting something in his side, Jarvis' side." Green stated that the object looked like a gun. Green heard the defendant state something to the effect, "Man, don't kill me." After the defendant shot the victim, Green began to flee. As he was running, he saw the victim raise his hand and another shot was fired. Green saw Vito trying to help the victim. The State attempted to impeach Green by reading portions of his statement to the police, including the following response to a question regarding his visual observations, "I don't know if it was a gun or not so I broke out running. While I was running I

heard a shot, pow, a couple shots, two or three." In his trial testimony, Green explained that he was looking and running. He confirmed that the second shot occurred after the victim fell to his knees. In his statement to the police Green responded, "no," when questioned as follows by the police, "Did you see the shooting?" Green testified that he lied to the police out of fear, specifically saying, "people was telling me they had a hit on me." Green also testified that he was familiar with the victim's reputation as a dangerous and violent person.

State witness Ronald Vito, a friend of both the victim and the defendant, was in the immediate area at the time but did not see the shooting. Due to Vito's knowledge of the victim's background and the fact that he did not believe that the defendant was capable of shooting anyone, Vito initially thought that the victim had shot the defendant when he heard the gunshots. Vito approached the victim after he was shot and tried to help him. According to Vito, he told the victim to "get up" and instructed a bystander to call the police. Vito used his cell phone to call 911 for an ambulance. When the police came, Vito walked away from the scene. Vito believed that the confrontation between the defendant and the victim was "over a little money or something like that." Vito, a convicted felon, admitted that he had the opportunity to remove a gun from on or near the victim's person, but stated that he would not have done so. He repeatedly testified that he did not observe or remove a gun from the scene.

Defense witness Shanetha Alexander has two children who were fathered by the victim and one child who was fathered by the defendant. At the time of the offense, the defendant was living with Alexander. According to Alexander, the victim had a reputation for being a violent person and the

defendant was aware of such at the time of the offense. Alexander also testified that Vito was not trustworthy.

Defense witness Sean Redditt testified that he picked up Green and Vito from the police station after the offense. According to Redditt, Vito stated that he left a bottle of gin at the defendant's residence and asked Redditt to take him to retrieve it. Redditt observed Vito walk to the back of the trailer and when he returned his pocket was bulging. Vito informed Redditt that someone must have taken the gin. During cross-examination, Redditt confirmed that he was good friends with the defendant and his family and would do anything to keep him out of jail. On redirect, he stated that his testimony was truthful.

The guilty verdict in this case indicates the jury rejected the defendant's claim that he shot the victim in self-defense. The officers thoroughly canvassed the area and the defendant's weapon was the only weapon recovered from the scene. While admitting that he had the time and opportunity to do so, Vito repeatedly stated that he did not see or remove a weapon from the victim's body or the scene. The evidence indicates that the defendant shot the victim a second time after he fell to the ground. Thus, even assuming that the defendant initially felt threatened by the victim, the second shot occurred when the victim clearly posed no threat to the defendant. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given is not subject to appellate review. Thus, an appellate court will

not reweigh the evidence to overturn a fact finder's determination of guilt. **Williams**, 2001-0944 at p. 6, 804 So.2d at 939.

Considering the testimony presented, we find the State established beyond a reasonable doubt that the defendant did not act in self-defense. Thus, we find no error in the jury's rejection of the defendant's claim of self-defense. Viewing the evidence in the light most favorable to the prosecution, we find that it supports the jury's decision. Based on the foregoing, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant argues that the trial court erred in limiting testimony on prior acts of the victim where there was evidence of an overt act by the victim. The defendant specifically notes that the testimony of Shanetha Alexander was limited to exclude specific violent acts by the victim. The defendant claims that this resulted in a deprivation of his right to a fair trial and to present a defense. The defendant contends that the testimony would have established the defendant's state of mind at the time of the offense, in support of the self-defense claim. According to the defendant, Alexander would have testified as to her own and the defendant's knowledge of the victim's prior bad acts.

At the outset, we note that the trial judge did allow the introduction of general reputation evidence regarding the victim's character. Through the examination of State and defense witnesses, the defendant introduced evidence of the victim's general reputation for being dangerous and violent. During the direct examination of Alexander, the defense attempted to elicit testimony to show the victim had a reputation for carrying a firearm. The foundation for such testimony was established by Alexander's testimony that she was aware of the victim's reputation for violence and had discussed this

reputation with the defendant. The trial court sustained the State's objection, noting that evidence of general reputation, and not specific acts, would be admissible. The defense attorney objected to the court's ruling and noted that he was seeking to introduce evidence of a previous act involving firearms and violence between the victim and someone other than the defendant and the defendant's knowledge of that act.[4] The defense added that the victim was involved in several acts of violence, including incidents where one person was shot and where two persons were stabbed. The trial court refused to allow evidence of specific acts of violence between the victim and someone other than the defendant.

Evidence of a person's character generally is not admissible to prove that the person acted in conformity with his or her character on a particular occasion. La. Code Evid. art. 404A. However, there are specific exceptions to this general rule. Relevant here is the exception with respect to evidence of the dangerous character of the victim of a crime. Such evidence is admissible when the accused offers evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense charged. La. Code Evid. art. 404A(2). Thus, in order to introduce any evidence regarding the victim's character, it had to first be shown that the victim made some hostile demonstration or overt act at the time of the offense charged. During the cross-examination of Green, upon the State's objection to the defense attorney's attempt to elicit testimony concerning the defendant and the victim's relationship, the trial court found that sufficient testimony had been presented to establish the commission of an overt act by the victim at the time of the offense.

[4] The defense, specifically, moved for a mistrial regarding the trial court's ruling.

The term "overt act," as used in connection with prosecutions where the plea of self-defense is involved, means any act of the victim that manifests to the mind of a reasonable person a present intention on his part to kill or do great bodily harm. **State v. Loston**, 2003-0977, pp. 11-12 (La. App. 1st Cir. 2/23/04), 874 So.2d 197, 205-06, writ denied, 2004-0792 (La. 9/24/04), 882 So.2d 1167. To meet the "overt act" requirement of Article 404, this court has held the defendant must introduce "appreciable evidence" in the record relevantly tending to establish the overt act. **State v. Miles**, 98-2396, pp. 7-8 (La. App. 1st Cir. 6/25/99), 739 So.2d 901, 906, writ denied, 99-2249 (La. 1/28/00), 753 So.2d 231; **State v. Brooks**, 98-1151, p. 10 (La. App. 1st Cir. 4/15/99), 734 So.2d 1232, 1237, writ denied, 99-1462 (La. 11/12/99), 749 So.2d 651. Once the defense has introduced such appreciable evidence, the trial court cannot exercise its discretion to infringe on the fact-determining function of the jury by disbelieving this defense testimony and denying the accused a defense permitted him by law. **Miles**, 98-2396 at pp. 7-8, 739 So.2d at 906.

Where a proper foundation is laid, dangerous character may be shown in support of a plea of self-defense by general reputation in the community or by prior threats against the defendant or specific acts that were known to the defendant at the time of the offense. **State v. Jackson**, 419 So.2d 425, 428 (La. 1981). The admissibility of a victim's character trait depends on the purpose for which the evidence is offered. Once evidence of an overt act on the part of the victim has been presented, evidence of threats and of the victim's dangerous character is admissible for two distinct purposes: (1) to show the defendant's reasonable apprehension of danger which would justify the conduct; and (2) to help determine who was the aggressor in the conflict. Only evidence of general reputation and not specific acts is admissible in

order to show whom the aggressor was in the conflict. Evidence of prior specific acts of the victim against a third party is inadmissible for this purpose. When evidence of a victim's dangerous character is offered to explain defendant's reasonable apprehension of danger, evidence of specific acts may be introduced to show the accused's state of mind only if it is shown that the accused knew of the victim's reputation at the time of the offense. **Loston**, 2003-0977 at pp. 13-14, 874 So.2d at 206-07.

In **Brooks**, 98-1151 at pp. 11-13, 734 So.2d at 1238-39, this court found that the victim's active pursuit, with three friends, of the defendant and his female friend, the victim's threat of "war" directed at the defendant, and the victim's lunging at the defendant after warning shots had been fired constituted an overt hostile act, for purposes of determining the admissibility of evidence of the victim's allegedly violent character. This court held the trial court had improperly weighed the inconsistent testimony of the witnesses rather than allowing the jury to decide the weight to be accorded to the evidence. As such, given the testimony of the defendant and the eyewitness, there was "appreciable evidence" of an overt act justifying the admission of victim character evidence. In **Jackson**, 419 So.2d at 426-27, the victim, while cursing at the defendant, advanced toward the defendant with her hand behind her back even after the defendant fired a warning shot and a second shot aimed low, hitting the victim in the leg. The supreme court held that in light of the defendant's and another eyewitness's testimony regarding the victim's aggressive acts toward the defendant, the trial court had erred in precluding the admission of victim character evidence on the basis there was no appreciable evidence of an overt act by the victim. The Court noted that the relevant inquiry in that case was not whether or not the victim actually had a weapon behind her back, but whether or not the

defendant could reasonably believe she did. The Court concluded the defendant could have reasonably believed that she was in imminent danger of death or great bodily harm. As in the instant case, no weapon was discovered on or near the victims in Brooks and Jackson. **Jackson**, 419 So.2d at 427-430; **Brooks**, 98-1151 at p. 12, 734 So.2d at 1238.

According to the defendant and Green, the victim approached the defendant and summoned him toward the back of the trailer. As the defendant and the victim scuffled and argued, the victim pressed an object believed to be a gun against the defendant's side and verbally threatened to shoot the defendant. As concluded by the trial court, we find that the threshold of appreciable evidence to establish an overt act by the victim which would manifest, in the mind of a reasonable person, a present intention on his part to kill or do great bodily harm, was met based on the defendant's statements and the testimony of Green. We have previously concluded that the evidence herein supported the jury's decision to reject the plea of self-defense. Nonetheless, it is inappropriate to speculate as to the impact Alexander's testimony regarding the defendant's knowledge of specific acts of violence by the victim may have had on the jury's critical assessment of the reasonableness of the defendant's apprehension of serious harm. The defendant's constitutional right to present a defense was impaired. Thus, we find reversible error in the trial judge's refusal to allow testimony as to specific acts of violence known by the defendant and committed by the victim. This assignment of error has merit. The substantial curtailment of a defendant's right to present evidence of his defense cannot be regarded as harmless. See **Jackson,** 419 So.2d at 431 (on rehearing); See also **Brooks**, 98-1151 at p. 16, 734 So.2d at 1240 n.6 (citing **State v. Lee**, 331 So.2d 455, 461 (La. 1975); La. Code Crim. P. art. 921.

Thus, we reverse the conviction, vacate the sentence, and remand for a new trial in accordance with law and the views expressed herein.

OTHER ASSIGNMENTS

Having found reversible error, we pretermit a discussion of assigned errors numbers four, five, seven, eight, and ten. However, we note the following regarding the remaining assignments of error numbers three, six, and nine, since the issues are highly likely to recur.

Assignment of Error Number Three

In assignment of error number three, the defendant argues that the trial court erred in not allowing the defendant to question Vito and the police about a prior incident wherein Vito hid a gun from the police. The defendant notes that Vito, admittedly, had the opportunity to remove a gun from the scene in the instant case. The defendant further notes that the officers did not search Vito's residence or vehicle for such a weapon. The defendant argues that his right to present a defense was curtailed in this regard.

As noted herein, Vito repeatedly denied removing the gun from the scene. During the cross-examination of Officer Redditt, the defense asked the following question: "Have you as an officer at St. Gabriel ever had an occasion involving Ronald Vito that you investigated where he had hid a gun from officers?" The State objected before the officer could respond. Having concerns as to possible prejudice, the trial court sustained the objection but noted, "I truly believe that they can ask him (Vito) if he's ever hidden a gun from police before." The trial court warned the State to be prepared to revisit the issue if Vito took the stand. During the cross-examination of Vito, the defense asked the following question: "Now, Mr. Vito, this whole issue about you taking a gun and hiding it from the police,

you've done that same thing before, right?" After the State's objection, the defense presented argument pursuant to La. Code Evid. art. 607D. The trial court sustained the State's objection, stating that such testimony would not be admissible unless the witness was convicted of a crime regarding such an incident. During redirect examination, the State reiterated Vito's status as a convicted felon and asked him if he would have picked up a gun knowing he was a convicted felon. Vito responded, "No, sir, wouldn't pick up no gun." The defense argued that the State opened the door for further questioning. The defense sought to question Vito, in order to impeach the above-quoted testimony, regarding a prior incident wherein he held and fired a gun. The trial court did not allow such questioning on re-cross.

The Sixth Amendment of the United States Constitution and Article I, § 16 of the Louisiana Constitution guarantee the accused in a criminal prosecution the right to present a defense. See **Washington v. Texas**, 388 U.S. 14, 15, 87 S.Ct. 1920, 1921, 18 L.Ed.2d 1019 (1967). The essential purpose of confrontation is to secure for the defendant the opportunity of cross-examination. **Davis v. Alaska**, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1109-10, 39 L.Ed.2d 347 (1974).

As a general rule, a party may attack the credibility of a witness by examining him or her concerning any matter having a reasonable tendency to disprove the truthfulness of his or her testimony. La. Code Evid. art. 607C; **State v. Smith**, 98-2045, p. 3 (La. 9/8/99), 743 So.2d 199, 201. The scope and extent of cross-examination is within the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. **State v. Garrison**, 400 So.2d 874, 878 (La. 1981).

Although La. Code Evid. art. 607 permits a party to attack the credibility of a witness by examining him concerning any matter having a

reasonable tendency to disprove the truthfulness of his testimony, this grant is necessarily subject to the relevancy balance of La. Code Evid. art. 403. La. Code Evid. art. 607D(2) provides that the credibility of a witness may be attacked by extrinsic evidence, "unless the court determines that the probative value of the evidence on the issue of credibility is substantially outweighed by the risks of undue consumption of time, confusion of the issues, or unfair prejudice." See also La. Code Evid. art. 403.

Based on the proffer in the record, it appears that the trial court may have abused its discretion in prohibiting the attack of Vito's credibility.[5] Vito testified that he, as a convicted felon, would not pick up a gun. Evidence that Vito previously possessed and secreted a gun from the police, despite the above-noted testimony, is highly probative and presents little, if any, risk of confusion of the issues. Thus, while we reverse the conviction and remand for a new trial on other grounds, we note that the defendant's constitutional right to present a defense was impaired as argued in assignment of error number three.

Assignment of Error Number Six

In assignment of error number six, the defendant argues that the trial court erred in allowing the State to question defense witness Alexander about the defendant's prior arrests without a pretrial hearing pursuant to **State v. Johnson**, 389 So.2d 372 (La. 1980). The defendant argues that he was portrayed as a bad person as a result of the questioning and further argues that some of the arrests were mischaracterized. The defendant also notes that the State asked about an arrest for a drug offense, a crime which

[5] In addition to testimonial evidence sought from Officer Redditt and Vito, it appears that the defendant planned to proffer and seal further evidence. Such evidence was not made a part of the record on appeal and the existence or content thereof is not mentioned in the defendant's appeal brief.

has no relevance to the specific trait involved in the instant offense. The defendant concludes that the testimony was highly prejudicial.

Alexander, a character witness, testified that defendant was living with her at the time of the offense and that he is the father of one of her children. Alexander stated that the defendant was not a violent person. During the cross-examination of Alexander, the State elicited the following testimony:

> Q. You know, Mr. Myles asked you about Jarvis Hasten's character. Let's talked [sic] about his character. Do you know that he was arrested for distribution?
>
> A. Yes.
>
> Q. Distribution of what?
>
> A. Cocaine.
>
> Q. I mean, that's a good -- right here in jail. This is before this killing. He went to jail for drugs, selling drugs, right?
>
> A. Uh-huh (affirmative).
>
> Q. Huh? How many times?
>
> A. Two, three.
>
> Q. Two, three times for selling drugs? Mr. Hasten over there?

At this point, the defense attorney lodged an objection. The objection was overruled and the line of questioning continued. Following the objection, the State carefully phrased further questioning using such language as, "you've heard" or "you ever heard." However, the State also used the language "do you remember." The defense attorney later moved for a mistrial based on this testimony, citing **Johnson**. The trial court denied the motion, noting that the defendant opened the door to such testimony.

In **State v. Bagley**, 378 So.2d 1356, 1358 (La. 1979) the Court stated:

> When a defendant chooses to place his character at issue by introducing evidence of his good character, the State is

> permitted to rebut such evidence either by calling witnesses to testify to the bad character of the defendant, or by impeaching the defense witnesses' ability to testify to the defendant's character. This Court has adopted the position that the cross-examination of a character witness may extend to his knowledge of particular misconduct, prior arrests, or other acts relevant to the particular moral qualities as are pertinent to the crime with which the defendant is charged. The purpose of such inquiries is to expose the witnesses' possible lack of knowledge regarding the character of the defendant, or the witnesses' standard of evaluation. (Citations omitted.)

In **Johnson**, 389 So.2d at 375 and 377, the Louisiana Supreme Court recognized the potential for abuse of character witness cross-examination posed by its interpretation of La. R.S. 15:479-81[6] (it is not reversible error for the prosecution to question a defense character witness about his knowledge of prior arrests of the defendant) and adopted certain safeguards for future cases. The Court ruled that on cross-examination, a character witness should not be asked "if he knows" that the accused has committed other crimes, but rather, whether he "has heard" that the defendant has committed particular acts inconsistent with the reputation vouched for on direct. **Johnson**, 389 So.2d at 376-77. Further, the Court ruled that the trial judge, before permitting the prosecuting attorney to cross-examine the character witness on rumors of misconduct of the accused, should question the prosecutor in the absence of the jury, as to whether he has credible grounds for asking the question. **Johnson**, 389 So.2d at 376-77. The **Johnson** Court adopted the following guidelines to assist trial judges in determining whether the prosecutor has reasonable grounds for cross-examining the character witness about convictions, arrests or other misconduct of the accused:

> (1) that there is no question as to the fact of the subject matter of the rumor, that is, of the previous arrest, conviction, or other pertinent misconduct of the defendant;

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[6] Repealed by 1988 La. Acts No. 515, § 8.

> (2) that a reasonable likelihood exists that the previous arrest, conviction or other pertinent misconduct would have been bruited about the neighborhood or community prior to the alleged commission of the offense on trial;
>
> (3) that neither the event or conduct nor the rumor concerning it occurred at a time too remote from the present offense;
>
> (4) that the earlier event or misconduct and the rumor concerned the specific trait involved in the offense for which the accused is on trial; and
>
> (5) that the examination will be conducted in the proper form, that is: 'Have you heard,' etc., not 'Do you know,' etc.

If the conclusion is reached to allow the interrogation, the jury should be informed of its exact purpose either at the conclusion thereof or in the charge. **Johnson**, 389 So.2d at 376.

Due to the defendant's failure to make a contemporaneous objection on the particular grounds the court found troublesome, the court in **Johnson** did not allow the defendant before it to avail himself of the safeguards it adopted in that decision. **Johnson**, 389 So.2d at 377. Subsequent to **Johnson**, the Louisiana Supreme Court indicated that in order to preserve the issue of a trial court's failure to conduct a **Johnson** hearing for review, a defendant must tender a contemporaneous objection to the court's failure to conduct such a hearing. See **State v. Smith**, 430 So.2d 31, 44 n.8 (La. 1983). The Louisiana Supreme Court also later ruled that even though **Johnson** delineated numerous safeguards regulating the prosecution's cross-examination of character witnesses, the ultimate question was whether or not the prosecution's cross-examination unduly prejudiced the defendant before the jury. See **State v. Sepulvado**, 93-2692, p. 12 (La. 4/8/96), 672 So.2d 158, 167, cert. denied, 519 U.S. 934, 117 S.Ct. 310, 136 L.Ed.2d 227 (1996).

Arguably, the defense was not unduly prejudiced by the State's cross-examination of Alexander. See **State v. Asberry**, 99-3056, p. 8 (La. App.

1st Cir. 2/16/01), 808 So.2d 472, 478, writ denied, 2001-0749 (La. 3/8/02), 810 So.2d 1154. The cross-examination at issue was in direct response and in rebuttal to the testimony elicited from Alexander by the defense concerning the defendant's good character. A witness may be cross-examined on any matter relevant to any issue in the case. La. Code Evid. art. 611B. Character witnesses may be cross-examined concerning relevant specific instances of conduct. See La. Code Evid. art. 405A. La. Code Evid. art. 608C provides: A witness who has testified to the character for truthfulness or untruthfulness of another witness may be cross-examined as to whether he has heard about particular acts of that witness bearing upon his credibility." The State has the right to rebut testimony elicited from a witness by the defense. See **State v. Koon**, 96-1208, p. 25 (La. 5/20/97), 704 So.2d 756, 771-72, cert. denied, 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1997). Nonetheless, as the instant conviction is reversed on other grounds, and remanded for a new trial, out of an abundance caution, we note that the trial court should comply with the safeguards of **Johnson** on remand if so requested by the defendant.

Assignment of Error Number Nine

In assignment of error number nine, the defendant argues that the trial court erred in admitting gruesome photographs of the victim. The defendant contends that the photographs had no evidentiary purpose. The defendant notes that Dr. Suarez had already testified when the photographs were admitted. The defendant concludes that the only purpose for the introduction of the photographs was to incite the jurors' emotions.

In the case of photographic evidence, any photograph that illustrates any fact, sheds any light upon any factor at issue in the case, or reliably represents the person, place or thing depicted is admissible, provided its

probative value outweighs any prejudicial effect. **State v. Casey**, 99-0023, p. 18 (La. 1/26/00), 775 So.2d 1022, 1037, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000). The State is entitled to the moral force of its evidence, and postmortem photographs of murder victims are admissible to prove corpus delicti, to corroborate other evidence establishing cause of death, as well as location, and placement of wounds, and to provide positive identification of the victim. **Koon**, 96-1208 at p. 34, 704 So.2d at 776; **State v. Maxie**, 93-2158, p. 11 (La. 4/10/95), 653 So.2d 526, 532 n.8. Thus, photographs of the victim at the murder scene are generally admissible to prove corpus delicti, corroborate other evidence and to establish cause of death, identity, or the number, location and severity of wounds. A trial court's ruling on the admissibility of such evidence will be disturbed only if the prejudicial effect of the evidence outweighs its probative value. The fact that the photographs are gruesome does not of itself render them inadmissible. **State v. Davis**, 92-1623, p. 24 (La. 5/23/94), 637 So.2d 1012, 1026, cert denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359 (1994).

Herein, only one photograph of the deceased was admitted. It was introduced during the testimony of Chief Ambeau, who viewed the victim's body at the scene and during the autopsy. It was admitted for identification purposes and as evidence of the victim's death. The single photograph was clearly probative and relevant to the identity and cause of death of the victim, and as to whether the defendant possessed the requisite intent to kill. Accordingly, we find no error or abuse of discretion by the trial court in admitting this photograph. We find that assignment of error number nine lacks merit.

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record for such error, whether or not such a request is made by a defendant. Under La. Code Crim. P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. Except as previously noted herein, after a careful review of the record in these proceedings, we do not note any further reversible errors. See **State v. Price**, 2005-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc) (petition for cert. filed at La. Supreme Court on 1/24/07, 2007-K-130).

REVERSE CONVICTION AND VACATE SENTENCE. REMAND FOR A NEW TRIAL.