APPENDIX "A"

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SUBJECT: 2018-KA-0973
STATE OF LOUISIANA V. REGINALD JONES
MATTER AFFIRMED

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STATE OF LOUISIANA	*	**NO. 2018-KA-0973**
VERSUS	*	
		COURT OF APPEAL
REGINALD JONES	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 530-889, SECTION "D"
Honorable Paul A. Bonin, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Terri F. Love, Judge Joy Cossich Lobrano, Judge Paula A. Brown)

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AFFIRMED
FEBRUARY 27, 2019

Defendant was charged with aggravated assault with a firearm, possession of a firearm by a convicted felon, and obstruction of justice after allegedly threatening to kill his neighbor with a gun. A jury found defendant guilty as charged. Following a multiple bill hearing, the trial court adjudged the defendant a third and fourth habitual offender and sentenced him to twenty years.

Defendant appeals contending that the trial court erred by denying his motion for post-verdict judgment of acquittal, as there was insufficient evidence to support his convictions. Defendant also asserts that his Fifth Amendment rights were violated by mention of his prior criminal history and ordering him to submit to fingerprinting at the multiple bill hearing. Defendant lastly contests his guilt as a habitual offender, maintaining that the evidence submitted was insufficient.

We find that the trial court did not err by denying defendant's motion for post-verdict judgment of acquittal, as sufficient evidence was presented to support his convictions. Defendant failed to show that mentioning his previous criminal history constituted a violation of rights. As to the multiple bill hearing, defendant did not admit to being a habitual offender. Therefore, the trial court's alleged failure to advise him of the right to remain silent was harmless error. Fingerprints

are a non-testimonial form of identification and ordering defendant to submit them was not error. The fingerprint testimony and evidence was sufficient to support the habitual offender adjudication. Accordingly, the convictions and sentence of defendant are affirmed.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Louis Jones ("Mr. Jones"), the victim, was confronted by the defendant, a neighbor, Reginald Jones ("Defendant") on September 12, 2016. Defendant allegedly brandished a firearm and threatened to kill Mr. Jones.

As a result of the confrontation, Defendant was charged by bill of information with aggravated assault with a firearm and possession of a firearm by a convicted felon, in violation of La. R.S. 14:37.4 and La. R.S. 14:95.1, respectively. Defendant appeared for arraignment and pled not guilty to the charges. The trial court found insufficient probable cause to substantiate the charges at the preliminary hearing. Defendant withdrew his not guilty plea and pled guilty to aggravated assault with a firearm and was sentenced to five years at hard labor. The State also entered a *nolle prosequi* as to the possession of the firearm charge. The same date, the State filed a multiple offender bill and Defendant pled guilty thereto. The trial court then vacated the five-year sentence and set a date for sentencing.

Subsequently, Defendant moved to withdraw his guilty plea. The State joined the defense's motion and the trial court ordered that Defendant's guilty plea be withdrawn. The State thereafter filed an amended bill of information charging Defendant with aggravated assault with a firearm, possession of a firearm by a convicted felon, as well as obstruction of justice, in violation of La. R.S. 14:130.1. Defendant pled not guilty to the amended bill.

A jury found Defendant guilty as charged as to all counts. Defendant filed a motion for post-verdict judgment of acquittal, which the trial court denied. The trial court sentenced Defendant to ten years at hard labor on the convictions for obstruction of justice and aggravated assault with a firearm. The trial court also sentenced Defendant to ten years at hard labor without the benefit of probation, parole, or suspension of sentence, as to the felon in possession of a firearm charge. However, the trial court waived any fees and costs as to all three counts. All sentences were ordered to run concurrently, with credit for time served.

After sentencing, the State filed a multiple offender bill of information. The trial court adjudicated Defendant a quadruple offender as to his convictions for aggravated assault with a firearm (count one) and obstruction of justice (count three) and a triple offender as to the conviction for felon in possession of a firearm (count two). The trial court then vacated the previous sentences and resentenced Defendant to twenty years for each count, to run concurrently, without the benefit of probation, parole, or suspension of sentence as to the felon in possession of a firearm charge. Defendant's appeal followed.

TESTIMONY AND EVIDENCE

Mr. Jones was living with his ex-wife, Brenda Jones, with whom he had an on-again off-again relationship, at 2542 Elder Street. Defendant lived two houses down from Mr. Jones and Brenda. Mr. Jones testified that at approximately 9:00 a.m., Defendant approached him on the street as he was walking home from purchasing cigarettes at a gas station on Franklin Avenue. Mr. Jones stated that Defendant appeared to be retrieving the garbage can and stopped him "like he wanted to fight," said "something about [how] I disrespected him and ... he's going to do this and that to me." Defendant stated that Mr. Jones disrespected him

when Mr. Jones was arguing with Brenda outside their home one night. Mr. Jones testified that he had "said something" during his argument with his ex-wife and Defendant "took it like [he] was speaking about him [Defendant]." Mr. Jones said that during this encounter, Defendant moved towards him as if he was going to hit him, but Mr. Jones moved out of the way and continued home. Mr. Jones denied telling Defendant he was "going to go after him," but conceded that they continued to argue as he walked away.

Upon returning home, Mr. Jones began watching television, but then observed Defendant on his surveillance video standing in his driveway. When Mr. Jones exited his house, he noticed Defendant had "something in his hand" resembling a "pistol." He was ten to twenty feet away from Defendant when he observed the gun.[1] Defendant then said he was "going to blow [Mr. Jones'] head off." Mr. Jones stated he was terrified, but maintained his composure. He then overheard someone call Defendant back and said to "leave the old man alone." Mr. Jones went back inside his home and resumed watching television. Mr. Jones did not call the police to report the incident, but when Brenda returned from work at approximately 2:00 p.m., he advised that her that the "neighbor down the street" was "act[ing] a fool." Mr. Jones showed her the surveillance video, and Brenda called 911.[2] Mr. Jones informed the police that Defendant pulled a gun on him and made him nervous. Mr. Jones stated that he had no previous altercations with

[1] Mr. Jones stated he had "been around guns" when he served as a marksman in the military.
[2] In the audio, Brenda advised the 911 operator that her neighbor, Reginald Jones, threatened her husband with a pistol on her property. She stated she was not present and at work at the time, but wanted to make a record of the incident. Mr. Jones also spoke on the tape and told the operator that at approximately 10:30 a.m., Defendant said he was going to "blow [his] f*cking head off."

Defendant. Mr. Jones identified the surveillance tapes[3] and himself on the officer's body-cam video.[4]

Mr. Jones was also shown an affidavit that was provided to the prosecution by defense counsel the morning of trial.[5] He testified that he did not write the statements listed on the affidavit, but acknowledged his signature thereon. Mr. Jones said Defendant brought the document to his home and drove them both to a "fax store" to have it signed before a notary. He stated that Defendant indicated that if he signed the affidavit it would help Defendant resolve the matter. Mr. Jones explained: "I've been with this mess for so long, I just wanted to end it, and

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[3] The surveillance tapes (two from different cameras) depict Mr. Jones walking and returning from Franklin Avenue, Defendant and Mr. Jones' interaction on the street, and Defendant subsequently approaching the house and pointing a black gun at Mr. Jones in his driveway.

[4] The body cam video depicts Trooper Leboeuf's conversations with Mr. Jones. In the video, Mr. Jones stated that Defendant accused him of disrespecting him and subsequently went to his house holding pistol in his right hand. Mr. Jones stated Defendant pointed the gun at him, called him a "motherf*cking b*tch a** n*gga," and said that he would "f*ck [him] up." Mr. Jones described the firearm as a black twenty-two pistol.

[5] The affidavit provides, in part:

> 1. I, Louis Jones, of 2542 Elder Street, New Orleans, LA 70122, am over 18 years of age and competent to testify.
> 2. Defendant Reginald Jones and I live in the same neighborhood.
> 3. We live on the same street and know one another so well that I have eaten at his mother's dinner table.
> 4. One day last year, we both were having a bad day. His mother had died and I was dealing with some personal challenges.
> 5. We exchanged some unpleasant words and such led to the Defendant trying to scare me with a water pistol. The matter ended without any violence or anyone getting hurt.
> 6. Someone saw what happened and called police. I was not that person.
> 7. This is a classic case of over-reaction regarding something harmless.
> 8. I never thought this would lead to my neighbor getting arrested and placed in jail.
> 9. I now believe, and am certain, that no firearms were involved and no crimes were committed.
> 10. I will not, nor ever would, testify against my neighbor over something so trivial.
> 11. I have informed the State Prosecutor to end this over-reaction, to close this unnecessary prosecution because I will NOT testify for the State.
> 12. I am disappointed that the Prosecutor has not dropped all charges and ended this matter.
> 13. This criminal case should end immediately and any continuation with it by the State is unjustified!

he told me this would end it, you know, so I was just trying to end it." He stated that some of the content on the affidavit was correct, but that several statements were false, including the fifth statement that Defendant only tried to scare him with a "water pistol;" the ninth statement that "no firearms were involved and no crimes were committed;" and the eleventh statement that he "informed the State Prosecutor to end this over-reaction, to close this unnecessary prosecution because [he] will not testify for the State."[6]

On cross-examination, Mr. Jones testified that when Defendant was in the front of his driveway he did not initially observe a gun, but that he saw the pistol when Defendant moved closer towards him. When questioned whether he was sure the gun was an actual pistol or a water gun, Mr. Jones responded he was "no expert on guns."[7] He admitted the only time he observed Defendant with a gun was the day of the incident. Mr. Jones acknowledged he did not "cower or duck" when Defendant pointed the gun at him, stating: "I know the Lord above, and if it was my point in time to go, it would have been my time to go." He said he was terrified though he "didn't show it." Mr. Jones also testified that Defendant had apologized to him and that he had accepted the apology. He testified that he signed the affidavit even though some of the attestations were untrue because he wanted "everything to be over with... [and] didn't want to see the young man go to jail."[8]

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[6] Mr. Jones also stated that he told Defendant that "number five" was not true, but Defendant still had him sign the affidavit. He was unsure if he advised Defendant that "number ten" was false, he said "didn't really look at it [the affidavit] thoroughly... it was a quick thing done."

[7] Mr. Jones testified on redirect that on the day of the incident he told both the police and his ex-wife that Defendant pulled a pistol on him.

[8] On redirect, Mr. Jones again stated that he executed the affidavit because Defendant said "to sign this piece of paper and it [the case] goes away."

Brenda testified that when she returned from work, Mr. Jones advised her that Defendant had approached him outside their home with a gun. She stated upon viewing the surveillance video, she "kn[e]w it was a gun" that Defendant brandished at Mr. Jones. Brenda called the police. Brenda testified that at no point did Mr. Jones advise her that the incident did not happen or instruct her not to call the police. On cross-examination, Brenda conceded that the gun Defendant was holding "could have been" a toy gun and she could not tell from the surveillance tape "whether it's a toy gun or a real gun." On redirect, however, Brenda noted that Mr. Jones had informed her the day of the incident that Defendant was holding a gun.

Trooper Sean LeBoeuf responded to the 911 call. At the time of the incident, he was employed as a patrolman by the New Orleans Police Department. Trooper LeBoeuf testified that when he arrived on the scene, Mr. Jones advised him that he and his neighbor had an argument and it escalated to a point during which the neighbor went to Mr. Jones' house with a gun. Trooper LeBoeuf identified the body camera video, depicting his conversation with Mr. Jones. Trooper LeBoeuf viewed and collected the video surveillance footage from Mr. Jones' residence. He then went to Defendant's house on the corner of Elder Street and Franklin Avenue, where a woman advised him that Defendant was not home, but that she would contact him. Trooper LeBoeuf eventually spoke with Defendant later that day. Trooper LeBoeuf identified the body-cam video of his interaction with Defendant.[9] Trooper LeBoeuf testified that he never recovered a

[9] Defendant stated that approximately a week prior, Mr. Jones and his wife were having an argument and when the wife said to respect her neighbors and he was being too loud, Mr. Jones said "f*ck them." Defendant said that he approached Mr. Jones and said to leave him out of their business. He stated they got into an argument and before Mr. Jones walked away said he "got

pistol.

Trooper LeBoeuf admitted, on cross-examination, that he did not obtain a warrant to search Defendant's truck or house for a firearm. He also testified that he did not recover bullets or shell casings from Defendant's person. Trooper LeBoeuf testified that Defendant insisted during his interview that he had a water gun, not a real gun, and because Defendant was a felon and it "would be dumb for him to carry a gun." Defendant also advised Trooper LeBoeuf that he had thrown the gun in the Peoples Avenue Canal. Trooper LeBoeuf stated that the police did not search the canal for the disposed water gun. The canal was not searched because of woody overgrowth and because there was a shortage of manpower. He believed the surveillance video and Mr. Jones and Brenda's description of the incident was sufficient evidence to close the case.

ERRORS PATENT

A review of the record reveals a patent error with regard to Defendant's sentence. After the trial court adjudicated Defendant a fourth felony offender as to his convictions for aggravated assault with a firearm (count one) and obstruction of justice (count 3) and a third felony offender as to the conviction for felon in possession of a firearm (count two), the trial court imposed the following sentences: [10]

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something" for him. Defendant then went to Mr. Jones' house and said if Mr. Jones "kept playin' with [him], [he'd] hurt [him]." The officer advised he had to place him under arrest for assault because he pulled a gun on Mr. Jones. Defendant denied having a gun and said it was a water pistol. When the officer asked him if he could show him the water gun, Defendant said he threw the water gun in Peoples Canal.

[10] Prior to conducting the multiple bill hearing the trial court imposed an illegally lenient sentence for the felon in possession of a firearm charge when it neglected to impose a fine. La. R.S. 14:95.1(B) mandates imprisonment "at hard labor for not less than ten nor more than twenty years without the benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars" for those convicted of being a felon in possession of a firearm. However, because the trial court subsequently vacated the

> And so as to Count 1, I sentence you to serve 20 years in the custody of the Department of Corrections, credit for time served.
>
> As to Count 2, I sentence you to serve 20 years in the custody of the Department of Corrections, credit for time served.
>
> As to Count 3, I sentence you to serve 20 years in the custody of the Department of Corrections, credit for time served. All sentences are to run concurrent one with the other.
>
> ***
>
> One second. Hold on. Come back, Mr. Jones. As to Count 2, I'm going to have to revise that sentence.
>
> As to Count 2, vacate what I said earlier. I'm sentencing him -- under the law, it's 20 years without benefit of probation, parole, or suspension of sentence on that count. And all counts are to run concurrent.

The trial court failed to specify that Defendant's twenty-year sentences regarding his fourth felony offender convictions for counts one and three were to be served "without benefit of probation or suspension of sentence" as required per La. R.S. 15:529.1(G). Nevertheless, La. R.S. 15:301.1(A) self-activates, providing that the sentence is deemed to contain the provisions relating to the service of the sentence without the benefit of parole, probation, and/or suspension of sentence. *State v. James*, 07-1578, p. 6 (La. App. 4 Cir. 6/25/08), 988 So. 2d 807, 811. Thus, we need not vacate and remand for correction.[11]

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sentences imposed after adjudicating Defendant a third and fourth felony offender, any error in the trial court's failure to impose a fine was harmless.

[11] As to his third felony offender adjudication for count two, the trial court also restricted his parole eligibility and La. R.S. 15:529.1(G) only provides that sentence be served without probation or suspension of sentence. However, La. R.S. 14:95.1(B) mandates imprisonment "at hard labor for not less than ten nor more than twenty years without the benefit of probation, parole, or suspension of sentence" for those convicted of being a felon in possession of a firearm. Because the underlying conviction for convicted felon in possession of a firearm restricts parole eligibility, the conditions imposed by the penalty enhancement necessarily incorporates such a condition of the sentence. *State v. Bruins*, 407 So. 2d 685, 687 (La. 1981) ("[t]he penalty

POST-VERDICT JUDGMENT OF ACQUITTAL

Defendant contends that the trial court erred in denying his motion for post-verdict judgment of acquittal.

A post-verdict judgment of acquittal "shall be granted only if the court finds that the evidence, viewed in a light most favorable to the state, does not reasonably permit a finding of guilty." La. C.Cr.P. art. 821(B). This standard

> is similar to the standard for appellate review of the sufficiency of evidence to support a defendant's conviction that the court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.

State v. Williams, 04-1377, pp. 7-8 (La. App. 4 Cir. 12/1/04), 891 So. 2d 26, 30. Thus, "[a] motion for post-verdict judgment of acquittal raises the question of sufficiency of the evidence." *State v. Simmons*, 07-0741, p. 15 (La. App. 4 Cir. 4/16/08), 983 So. 2d 200, 208.

The well-settled standard for reviewing convictions for sufficiency of the evidence was outlined by this Court in *State v. Haynes*, 13-0323, pp. 7-8 (La. App. 4 Cir. 5/7/14), 144 So. 3d 1083, 1087-88:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 588 So.2d 757 (La. App. 4 Cir. 1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. *State v. Mussall*, 523 So.2d 1305 (La. 1988). The reviewing court is not permitted to consider just the evidence most

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increase is computed by reference to the sentencing provisions of the underlying offense" and the "conditions imposed on the sentence are those called for in the reference statute").

> favorable to the prosecution but must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *Mussall*, 523 So.2d at 1310. "[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).
>
> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. *State v. Shapiro*, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from *Jackson v. Virginia*, but rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. *State v. Wright*, 445 So.2d 1198 (La. 1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. *State v. Jacobs*, 504 So.2d 817 (La. 1987). If a rational trier of fact reasonably rejects the defendant's hypothesis of innocence, that hypothesis falls; and, unless another one creates reasonable doubt, the defendant is guilty. *State v. Captville*, 448 So.2d 676 (La. 1984).
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> "A factfinder's credibility decision should not be disturbed unless it is clearly contrary to the evidence." *State v. McMillian*, 2010–0812, p. 6 (La. App. 4 Cir. 5/18/11), 65 So.3d 801, 805.

Here, Defendant was convicted of aggravated assault of a firearm, felony possession of a firearm, and obstruction of justice. Aggravated assault with a firearm is an assault committed with a firearm. La. R.S. 14:37.4(A). An assault is "an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery." La. R.S. 14:36. "Battery is the intentional

use of force or violence upon the person of another." La. R.S. 14:33. A firearm is defined in La. R.S. 14:37.4(B) as "an instrument used in the propulsion of shot, shell, or bullets by the action of gunpowder exploded within it." La. R.S. 14:37.4(B). "To convict a defendant of aggravated assault with a firearm, the State has to prove the defendant made an attempt to commit a battery, or intentionally placed the victim in reasonable apprehension of receiving a battery by the discharge of a firearm." *State in Interest of C.B.*, 52,245, pp. 3-4 (La. App. 2 Cir. 6/27/18), 251 So. 3d 562, 566. "A discharge of the firearm is not an element of the offense." *Id.*, 52,245, p. 4, 251 So. 3d at 566.

A Firearm

La. R.S. 14:95.1(A) states that "[i]t shall be unlawful for any person who has been convicted of . . . any violation of the Uniform Controlled Dangerous Substances Law, which is a felony ... to possess a firearm."[12] The prohibition on the possession of firearms by a convicted felon, however, does not apply to "any person who has not been convicted of any felony for a period of ten years from the date of completion of sentence, probation, parole, or suspension of sentence." La. R.S. 14:95.1(C). Thus, to support a conviction for possession of a firearm by a convicted felon, the State must prove the "defendant: (1) possessed a firearm; (2) was previously convicted of an enumerated felony; (3) possessed the firearm within ten years of the previous conviction and; (4) had the general intent to commit the crime." *State v. Contreras*, 17-0735, p. 9 (La. App. 4 Cir. 5/30/18), 247 So. 3d 858, 867.

[12] La. R.S. 14:95.1(D) provides that for "the purposes of this Section, 'firearm' means any pistol, revolver, rifle, shotgun, machine gun, submachine gun, black powder weapon, or assault rifle which is designed to fire or is capable of firing fixed cartridge ammunition or from which a shot or projectile is discharged by an explosive."

Defendant challenges the firearm requirement. Specifically, Defendant contends that the State failed to establish beyond a reasonable doubt that he possessed a "real gun." Defendant notes that he advised the investigating officers that the gun was a toy gun; that the affidavit, signed by Mr. Jones, indicated that the gun was a water pistol and no firearms were involved; and Brenda, Mr. Jones' ex-wife, testified that she could not identify the object in Defendant's hand. Defendant avers that no firearm was discovered and no weapons expert testified that he possessed a firearm.

However, a review of the evidence and the testimony demonstrates that the State presented sufficient proof to demonstrate that Defendant possessed a firearm. Mr. Jones testified that Defendant threatened to shoot him while holding "something in his hand" that "looked like a pistol." Subsequent to the incident, Mr. Jones also informed his ex-wife, Brenda, and the investigating officer, Trooper LeBoeuf, that Defendant pointed a gun at him. Trooper LeBoeuf's and Brenda's testimony corroborated Mr. Jones'. Moreover, while Mr. Jones said he was not an expert on guns, he had experience with guns while he was serving in the military. Although Brenda testified on cross-examination that she could not tell from the surveillance video whether Defendant was holding "a toy gun or a real gun," she also testified on direct examination that she knew it was a gun. As noted above, Brenda also stated that Mr. Jones told her Defendant was holding a gun the day of the incident.

Even if the jury found Brenda's testimony inconsistent, evaluating the credibility of a witness falls squarely within the province of the jury, which may accept or reject the testimony of a witness in whole or in part. It is not the role of the court of appeal to assess the credibility of witnesses or to reweigh the evidence.

See State v. Swanzy, 10-0878, pp. 10-11 (La. App. 4 Cir. 2/16/11), 61 So. 3d 114, 120. Further, the jury had the opportunity to view the body camera video of Trooper LeBoeuf, wherein Mr. Jones also described the item in Defendant's hand as a pistol, and video surveillance of the incident, wherein Defendant appears to point a gun at Mr. Jones.

Additionally, with regard to the affidavit, Mr. Jones stated that the document was provided to him by Defendant and that he only signed the affidavit in an attempt to resolve the case and help Defendant avoid prison. Further, Mr. Jones explicitly testified that the attestations therein indicating that no firearms were involved in the encounter and that the gun was a "water pistol" were false. The jury was entitled to accept Mr. Jones' testimony rather than the hearsay statements attributed to him in the affidavit drafted by Defendant days before trial.

Furthermore, while Defendant informed the police that the gun at issue was a water pistol, he could not produce the toy gun because he threw it in the canal, which indicates an attempt to dispose of a genuine firearm. Mr. Jones' and Brenda's testimony also indicates that Defendant was in possession of a gun. The jury was permitted to accept their testimony and disregard Defendant's self-serving statement to Trooper LeBoeuf. Moreover, Mr. Jones testified that Defendant said he was going to "blow" his head off, which is inconsistent with someone carrying a water gun.

The fact that no firearm was recovered and no firearms expert testified at trial is not fatal. Again, Trooper LeBoeuf stated Defendant threw the evidence in an overgrown, wooded canal. Trooper LeBoeuf also testified he did not know of any test that could have indicated Defendant was in possession of a gun because a gunshot residue test is utilized only when a gun has been fired.

Viewing all the evidence in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that Defendant possessed a real gun and; thereby, convict him of possession of a firearm by a convicted felon and aggravated assault with a firearm. Accordingly, Defendant's assertion that the State presented insufficient evidence to establish the existence of a firearm lacks merit.

Obstruction of Justice

Defendant also claims that the State could not prove that he obstructed justice by disposing of the gun when it was not reasonable to for him to think that a criminal investigation would result from his dispute with Mr. Jones.

La. R.S. 14:130.1 defines obstruction of justice and states in relevant part:

> A. The crime of obstruction of justice is any of the following when committed with the knowledge that such act has, reasonably may, or will affect an actual or potential present, past, or future criminal proceeding as described in this Section:
>
> (1) Tampering with evidence with the specific intent of distorting the results of any criminal investigation or proceeding which may reasonably prove relevant to a criminal investigation or proceeding. Tampering with evidence shall include the intentional alteration, movement, removal, or addition of any object or substance either:
>
> (a) At the location of any incident which the perpetrator knows or has good reason to believe will be the subject of any investigation by state, local, or United States law enforcement officers[.]

"[T]he knowledge requirement in La. R.S. 14:130.1(A) is met if the perpetrator merely knows that an act 'reasonably may' affect a 'potential' or 'future' criminal proceeding." *State v. Powell*, 15-0218, p. 11 (La. App. 4 Cir. 10/28/15), 179 So. 3d 721, 728, quoting *State v. Jones*, 07-1052, p. 9 (La. 6/3/08), 983 So. 2d 95, 101;

State v. Tatum, 09-1004, p. 12 (La. App. 5 Cir. 5/25/10), 40 So. 3d 1082, 1090. "The defendant must also have tampered with evidence 'with the specific intent of distorting the results' of a criminal investigation." *Id.*, quoting La. R.S. 14:130.1(A)(1). "Nothing beyond 'movement' of the evidence is required by the statute if accompanied by the requisite intent and knowledge." *Id.*, quoting *Jones*, 07-1052, p. 10, 983 So. 2d at 101.

Here, as noted above, Trooper LeBoeuf testified that in the course of the investigation, Defendant advised him he threw the gun in the Peoples Avenue Canal. Defendant also admitted to disposing of a "water pistol" in the body-cam video offered into evidence. Moreover, Defendant told Trooper LeBoeuf that he would not possess a real gun because he was previously convicted of a felony.

"Jurisprudence indicates that a prior conviction, alone, is sufficient to find that a defendant had the knowledge required by the statute." *Powell*, 15-0218, pp. 11-12, 179 So. 3d at 728. In *Jones*, this Court found the defendant possessed the requisite knowledge he was obstructing a potential criminal proceeding in part because defendant was on probation for a drug offense and possession of marijuana would constitute a violation thereof. The Court stated:

> Here, the defendant moved the marijuana from his person to the ground, with the knowledge that a future criminal proceeding reasonably might be affected by this action, i.e., there might be a future criminal proceeding if the police found drugs on his person. Finally, defendant was on probation for a drug offense and possession of marijuana constituted a violation of the special conditions of his probation. He was clearly attempting to avoid a future criminal proceeding revoking his probation, as he stated that the reason he dispossessed himself of the marijuana was that he was on probation. Therefore, [the knowledge] requirement of La. R.S. 14:130.1(A) is met.

Jones, 07-1052, pp. 9-10, 983 So. 2d at 101.

Further, "the investigation need not have been underway at the time of the obstruction for the statute to have been violated—i.e., the obstruction must only be committed with the knowledge that the act reasonably may affect 'an actual or *potential* present, past, or *future* criminal proceeding.'" *Powell*, 15-0218, p. 12, 179 So. 3d at 728, quoting La. R.S. 14:130.1(A) (emphasis in original).

In the present case, Defendant admitted to discarding the gun, which established that he secluded a piece of evidence with the intent to distort the results of an investigation. In fact, because Defendant disposed of the gun and the police were unable to recover it, he was able to assert at trial that the weapon was a water gun. Also, Defendant insisted to Trooper LeBoeuf it would be "dumb" to carry firearm based on a prior conviction, which, as in *Jones*, further evidenced that Defendant knew possession of a gun could affect potential criminal proceedings against him. A reasonable juror could therefore conclude that by disposing of the gun in the canal, Defendant was attempting to avoid future criminal proceedings. Accordingly, we find that sufficient evidence existed to support his conviction for obstruction of justice.

No Probable Cause

Defendant also claims that there was insufficient evidence to support his convictions because the trial court found there was no probable cause to substantiate the charges at his preliminary hearing. However, "[t]he primary function of the preliminary examination is to determine if there is probable cause to believe a defendant has committed a crime in order to hold him on his bond obligation for trial." *State v. Baham*, 13-0901, p. 3 (La. 6/28/13), 117 So. 3d 505, 507. La. C.Cr.P. art. 296 provides, in relevant part:

> If the defendant has not been indicted by a grand jury for the offense charged, the court shall, at the preliminary examination, order his release from custody or bail if, from the evidence adduced, it appears that there is not probable cause to charge him with the offense or with a lesser included offense. If the defendant is ordered held upon a finding of probable cause, the court shall fix his bail if he is entitled to bail.

The State was only required to present a prima facie case. *State v. Lewis*, 09-0350, p. 5 (La. App. 4 Cir. 12/16/09), 28 So. 3d 548, 552. "If the evidence does not support probable cause, the court must order defendant's release from custody or bail." *Id.* A finding of no probable cause does not result in a judicial dismissal, as "[t]he State may still proceed against the defendant." *Id.* Thus, the trial court's finding of no probable cause at the preliminary hearing results only in the release of custody and/or bail. It does not affect the ability of the State to prosecute Defendant nor is it relevant to Defendant's subsequent conviction.

Defendant also contends that the trial court erred in declining to modify the verdict to simple assault, a lesser included verdict of aggravated assault with a firearm. La. C.Cr.P. art. 821 allows the trial court to "modify the verdict and render a judgment of conviction on the lesser included responsive offense" in lieu of granting a post-verdict judgment of acquittal.[13] However, Defendant then avers that there is insufficient evidence to establish simple assault because there is no evidence that Mr. Jones was in reasonable apprehension of receiving a battery or that Defendant attempted to commit a battery. The trial court did not enter a

[13] La. C.Cr.P. art. 814 does not set out legislatively authorized responsive verdicts for the aggravated assault with a firearm. La. C.Cr.P. art. 815 therefore applies and provides the verdict is responsive if the offense is a lesser and included offense. *State v. Dufore*, 424 So. 2d 256, 258 (La.1982). Lesser and included offenses "are those in which all of the essential elements of the *lesser* offense are also essential elements of the *greater* offense charged." *State v. Porter*, 93-1106, p. 6 (La. 7/5/94), 639 So. 2d 1137, 1140, n.6. Simple assault is responsive to aggravated assault with a firearm. *See* 17. La. Civ. L. Treatise, Criminal Jury Instructions §10:37 (3d ed.).

verdict of simple assault[14] or otherwise modify the verdict because there was sufficient proof to sustain the convictions.

DEFENDANT'S PREVIOUS CRIMINAL HISTORY

Defendant asserts that the trial court erred in allowing the prosecution to refer to his previous criminal history during trial and in closing arguments when he invoked his Fifth Amendment privilege and elected not to take the stand at trial.

The State referenced Defendant's prior conviction for possession of cocaine in relation to his felon status for the charge of the possession of a firearm by a convicted felon. The State introduced a certified copy of Defendant's 2006 guilty plea for cocaine possession and the parties stipulated as to its authenticity and that the conviction qualified as a "valid predicate for [La. R.S. 14:]95.1." The State was permitted to introduce evidence relating to his previous conviction as proof thereof is an essential element of the crime of felon in possession of a firearm. Further, because the defense did not object to the introduction of Defendant's drug conviction and in fact stipulated thereto, Defendant failed to preserve this issue for appellate review. *See* La. C.Cr.P. art. 841(A) ("[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence"); *State v. Brooks*, 98-0693, p. 9 (La. App. 4 Cir. 7/21/99), 758 So. 2d 814, 819 (a defendant must make known the grounds for his objection, and he is limited on appeal to those grounds articulated at trial).

Defendant's prior convictions for drug possession and negligent homicide were also raised at the sentencing hearing and the multiple offender hearing.

[14] Nevertheless, there is testimony wherein the jury could find that Defendant attempted to batter Mr. Jones or placed him in reasonable apprehension of receiving a battery. Mr. Jones testified Defendant stood outside his home with a gun and threatened to shoot his head off. Mr. Jones noted that that he did not "jump back" and was able to keep his composure but said he was "terrified." Mr. Jones also reported to Trooper LeBoeuf that Defendant's actions made him nervous.

However, previous criminal activity is a proper factor for the trial court to consider at the sentencing phase. *See* La. C.Cr.P. art. 894.1 (providing guidelines for sentencing and lists several non-exclusive factors for a court to evaluate in determining the appropriate sentence to be imposed, including defendant's prior criminal record); *State v. Ballett*, 98-2568, p. 25 (La. App. 4 Cir. 3/15/00), 756 So. 2d 587, 602 (holding that the trial court is entitled to consider the defendant's entire criminal history in determining the appropriate sentence to be imposed); La. R.S. 15:529.1 (providing enhanced sentences for repeat felony offenders).

The closing arguments were not included in the record for appeal. As noted by the State, counsel for Defendant did not designate that the closing arguments be part of the record. *See* La. C.C.P. art. 914.1(A) (providing that the "party making the motion for appeal shall, at the time the motion is made, request the transcript of that portion of the proceedings necessary, in light of the assignment of errors to be urged"). He also did not file a motion to supplement the record with the closing statements. The trial transcript does not indicate that any objections were made to the prosecution's closing statements. As such, to the extent that the State allegedly improperly referred to Defendant's prior crimes in closing statements, the allegation concerning the impropriety thereof was waived and Defendant cannot raise the issue on appeal. As Defendant failed to establish that his Fifth Amendment rights are implicated by the prosecution's reference to his prior convictions at trial and sentencing, his assertion lacks merit.

MULTIPLE BILL HEARING

Defendant's remaining assignments of error regarding the multiple bill hearing will be addressed concurrently.

"To obtain a multiple offender conviction, the State is required to establish

both the prior felony conviction and that the defendant is the same person convicted of that felony." *State v. Payton*, 00-2899, p. 6 (La. 3/15/02), 810 So.2d 1127, 1130, quoting *State v. Neville*, 96-0137, p. 7 (La. App. 4 Cir. 5/21/97), 695 So. 2d 534, 538-39. "There are various methods available to prove that the defendant is the same person convicted of the prior felony offense, such as testimony from witnesses, expert opinion regarding the fingerprints of the defendant when compared with those in the prior record, or photographs in the duly authenticated record." *State v. Wolfe*, 99-0389, p. 4 (La. App. 4 Cir. 4/19/00), 761 So. 2d 596, 600.

Here, to establish Defendant was a multiple offender, the State introduced several exhibits, including a print-out from the Department of Public Safety and Corrections, Probation and Parole Division, showing Defendant was convicted of possession of cocaine in the 18th Judicial District Court of Iberville Parish, in Case Nos. 1723-05 and 611-06A, and that probation was set to expire on those convictions on November 6, 2011, and on August 18, 2014, respectively.[15] The State also introduced the fingerprints of Defendant, taken earlier that day; the certified conviction packet, and arrest register for the negligent homicide for Case No. 393-173 from the Orleans Parish Criminal District Court; the certified conviction packet in Case No. 173-05 from the 18th District Court of Iberville Parish for possession of cocaine; the certified documents in Case No. 611-06A from the 18th District Court of Iberville Parish for possession of cocaine; and the

[15] Agent Kenneth Temple, a probation and parole officer, identified this exhibit in open court. The print-out establishes that the predicate convictions for drug possession fall within the ten year cleansing period prescribed by La. R.S. 15:529.1(C).

arrest register of the instant case.[16] Officer Kevin Bell, whom the trial court accepted as an expert in the examination and analysis of latent fingerprints, compared the fingerprints contained in the certified package of documents from Defendant's prior convictions and the arrest registers, and matched them to fingerprints taken of Defendant the day of the multiple bill hearing.[17]

Right to Remain Silent

Defendant alleges that the trial court erred in failing to advise him of his right to remain silent during the multiple bill hearing. La. R.S. 15:529.1(D)(3) provides:

> When the judge finds that he has been convicted of a prior felony or felonies, or if he acknowledges or confesses in open court, after being duly cautioned as to his rights, that he has been so convicted, the court shall sentence him to the punishment prescribed in this Section, and shall vacate the previous sentence if already imposed, deducting from the new sentence the time actually served under the sentence so vacated. The court shall provide written reasons for its determination. Either party may seek review of an adverse ruling.

However, as to these requirements, this Court in *State v. Jones*, 14-1118, p. 10 (La. App. 4 Cir. 4/1/15), 165 So. 3d 217, 224, recently stated that they "'should not serve as technical traps for an unwary but otherwise conscientious judge.'" (quoting *State v. Cook*, 11-2223, p. 1 (La. 3/23/12), 82 So. 3d 1239, 1240 (per

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[16] The certified copies of Defendant's conviction for negligent homicide and his two convictions for possession of cocaine show that Defendant pled guilty to the charges and was represented by counsel. *See State v. Francois*, 02-2056, p. 6 (La. App. 4 Cir. 9/14/04), 884 So. 2d 658, 663 (if the defendant denies the multiple offender allegations then the burden is on the State to prove (1) the existence of a prior guilty plea, and (2) that defendant was represented by counsel when the plea was taken). Defendant does not raise any infringement of his rights, or a procedural irregularity in the taking of the guilty plea on appeal such that it would shift the burden back to the State to prove the constitutionality of the plea. As will be discussed later herein, Defendant's arguments regarding his adjudication as a multiple offender relate to the quality of the fingerprints and the training and qualifications of Officer Bell.

[17] Officer Bell noted the fingerprints contained in the certified conviction for negligent homicide in Case No. 393-173 were not legible. However, Officer Bell was able to match the certified packet with the arrest date and charges contained in the arrest register of Defendant.

curiam)). Therefore, "appellate courts are permitted to review records to determine whether a '[d]efendant's interests were fully protected and any technical non-compliance with the statutory directives . . . was harmless.'" *Id.*, quoting *Cook*, 11-2223, p. 2, 82 So. 3d at 1240-1241. "'Generally, a trial court's failure to advise the defendant of his right[s] ... is considered harmless error, when the defendant's multiple offender status is established by competent evidence offered by the [prosecution] at a hearing, rather than by admission of the defendant.'" *Jones*, 14-1118, p. 10, 165 So.3d at 225, quoting *State v. Hayes*, 12-0357, p. 13 (La. App. 4 Cir. 1/23/13), 108 So. 3d 360, 368. "This review is often performed 'in light of the documentary proof introduced by the [prosecution] at the hearing that the defendant is the person who pled guilty to the predicate offenses, and in light of the defendant's own admissions in his testimony at trial.'" *Id.*, quoting *State v. Brown*, 11-1656, pp. 1-2 (La. 2/10/12), 82 So. 3d 1232, 1233-34 (per curiam).

"A criminal defendant need not be informed of these rights, however, following that defendant's decision to deny the allegations contained in the multiple bill and to proceed to a full adjudication by formal hearing of the defendant's habitual offender status." *Jones*, 14-1118, p. 11, 165 So. 3d at 225. Moreover, the habitual offender law only affords the advisement of rights protection to those "that confess their status as habitual offenders." *Id.*

In the present case, Defendant contested the allegations in the multiple bill. The formal hearing was held and the prosecution introduced competent evidence that established Defendant was a third and fourth felony offender. Defendant did not admit or confess that he was a multiple offender. Thus, any failure on part of the trial court to advise Defendant of his right to remain silent was harmless.

Fifth Amendment Privilege

Defendant also contends that the trial court erred by compelling him to submit to fingerprinting in violation of this Fifth Amendment privilege against self-incrimination and the right to remain silent.

At the beginning of the multiple bill hearing, the State advised the trial court that Officer Bell was "prevented by somebody in the audience from fingerprinting" Defendant and asked the trial court to order Defendant to submit to fingerprinting. The trial court so ordered. Defendant did not object to the trial court's order and responded "Yes, Your Honor." The record reflects that Defendant's fingerprints were then taken by Officer Bell.

Because Defendant did not object the trial court's ruling, he is precluded from raising the issue on appeal. Nonetheless, it is well established that "[f]ingerprint evidence is a non-testimonial means of identification and does not violate defendant's privilege against self-incrimination." *State v. McCullom*, 480 So. 2d 430, 432 (La. App. 4th Cir. 1985). Thus, Defendant's Fifth Amendment rights were not violated by being fingerprinted by Officer Bell in open court.

Fingerprint Evidence and Testimony

Defendant maintains that the trial court erred in adjudicating him a multiple offender based on "faded, non-existent, and miniscule" fingerprints and unqualified opinion testimony.

The fingerprints Defendant claims are insufficient to establish his prior conviction are contained in the documents related to his possession of cocaine plea in Case No. 611-06A. On cross-examination by defense counsel, Officer Bell conceded that the fingerprints in S-6 were not the same size as the prints taken on the day of the hearing. Officer Bell also acknowledged that the fingerprints in S-6

are lighter than those contained on the fingerprint card. However, Officer Bell testified on several occasions that he used a magnifying glass to assist him in comparing and matching the fingerprints. Moreover, Officer Bell testified as to his training and qualifications in analyzing latent fingerprints.

An expert may be qualified "by knowledge, skill, experience, training, or education." La. C.E. art. 702. "Courts may also consider whether a witness has previously been qualified as an expert." *State v. Ferguson*, 09-1422, p. 25 (La. App. 4 Cir. 12/15/10), 54 So. 3d 152, 166. "[T]he trial judge has wide discretion in the area of the qualifications of an expert witness, and such discretion will not be disturbed on appeal in the absence of manifest error." *State v. Chapman,* 410 So. 2d 689, 704 (La. 1981).

Officer Bell testified at the hearing that he took four different classes, which combined amounted to 144 hours in training, to obtain professional certification to become a latent fingerprint examiner. Officer Bell stated he had been accepted as an expert in the field of fingerprint identification more than seventy times and never been denied qualification as an expert by a trial judge. Officer Bell further testified that in all the proceedings in which he had been involved, no counter-expert had challenged his fingerprint analysis nor has anyone challenged his credentials. He also said that he analyzed fingerprints eight hours a day, five days a week. Accordingly, Officer Bell's experience and training qualified him in the field of fingerprint and the trial court did not err in accepting him as an expert.

Defendant also contests Officer Bell's ability to analyze fingerprints because he admitted at the hearing to having "vision issues." The vision problems to which Defendant refers is Officer Bell's admission that he wore glasses. He stated that he had worn glasses since high school and while he believed he was far-sighted, he

was unsure. However, Officer Bell's necessity for glasses given his far or near-sightedness failed to render him incapable or unqualified to provide an opinion regarding fingerprint identification.[18]

We find that Officer Bell's testimony and the exhibits offered by the State were sufficient to adjudicate Defendant a fourth felony offender as to his convictions for aggravated assault with a firearm and obstruction of justice and a third felony offender as to his conviction for possession of a firearm by a convicted felon.

DECREE

For the above-mentioned reasons, we find that the trial court did not err by denying Defendant's motion for post-verdict judgment of acquittal, as sufficient evidence was presented to support his convictions. Defendant's failed to show any mention of his previous criminal history constituted a violation of his Fifth Amendment rights. As to the multiple bill hearing, Defendant did not admit to being a habitual offender. Therefore, the trial court's alleged failure to advise him of the right to remain silent was harmless error. Ordering Defendant to submit to fingerprinting at the multiple bill hearing was not a violation, as fingerprints are non-testimonial identification. The fingerprint testimony and evidence was sufficient to support a habitual offender adjudication. Accordingly, the convictions and sentence of Defendant are affirmed.

AFFIRMED

[18] Defendant also suggests in his brief that he was improperly adjudicated a multiple offender because Officer Bell did not use "mechanical means" in assisting him in analyzing fingerprints. Presumably, Defendant is referring to Officer Bell's testimony that a computer program, specifically the Automated Fingerprint Identification System, was employed to "pull" Defendant's fingerprints, but not was used to compare them. Officer Bell testified the computer only provided suggestions and could not match fingerprints. He also stated that his analysis and fingerprint identification were more accurate than the computer.

APPENDIX "B"

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 530-889 SECTION "D"

STATE OF LOUISIANA

versus

REGINALD JONES

Verdict Form

Aggravated Assault with a Firearm – La. R.S. 14:37.4

We, the jury, find the defendant, Reginald Jones

Guilty as charged of aggravated assault with a firearm

Or

Guilty of aggravated assault

Or

Guilty of simple assault

Or

Not guilty

_____

Signed by the Foreperson

New Orleans, Louisiana, April 2, 2018

We, the jury, find the defendant Reginald Jones, guilty of aggravated assault with a firearm

Amelie R. LeBreton
Podel 41
New Orleans, LA
April 2, 2018

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 530-889 SECTION "D"

STATE OF LOUISIANA

versus

REGINALD JONES

Verdict Form

Possession of a Firearm or Concealed Weapon by a Felon – La. R.S. 14:95.1

We, the jury, find the defendant, Reginald Jones

Guilty as charged of possession of a firearm or concealed weapon by a felon

Or

Guilty of attempted possession of a firearm or concealed weapon by a felon

Or

Not Guilty

_____

Signed by the Foreperson

New Orleans, Louisiana, April 2, 2018

We, the jury, find the defendant Reginald Jones

guilty as charged of possession of a firearm or concealed weapon by a felon.

Amelie R. LeBreton
Pade 14
New Orleans, LA

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 530-889 SECTION "D"

STATE OF LOUISIANA

versus

REGINALD JONES

Verdict Form

Obstruction of Justice – La. R.S. 14:130.1

We, the jury, find the defendant, Reginald Jones

Guilty as charged of obstruction of justice

Or

Guilty of attempted obstruction of justice

Or

Not guilty

_____

Signed by the Foreperson

New Orleans, Louisiana, April 2, 2018

We, the jury, find the defendant, Reginald Jones, guilty as charged of obstruction of justice.

Amelie R. LeBreton
Padel 41
New Orleans, LA

APPENDIX "C"

State v. Jones

Supreme Court of Louisiana

March 16, 2020, Decided

No. 2019-K-00533

Reporter
2020 La. LEXIS 931 *; 2019-00533 (La. 03/16/20);

STATE OF LOUISIANA VS. ***REGINALD JONES***

Notice: THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE FOURTEEN DAY REHEARING PERIOD.
DECISION WITHOUT PUBLISHED OPINION

Prior History: **[*1]** IN RE: ***Reginald Jones*** - Applicant Defendant; Applying For Writ Of Certiorari, Parish of Orleans Criminal, Criminal District Court Number(s) 530-889, Court of Appeal, Fourth Circuit, Number(s) 2018-KA-0973.

*State v. **Jones**, 2019 La. App. LEXIS 358 (La.App. 4 Cir., Feb. 27, 2019)*

Judges: Bernette J. Johnson, John L. Weimer, Jefferson D. Hughes, III, Scott J. Crichton, James T. Genovese, William J. Crain, James H. Boddie.

Opinion

Writ application denied.

End of Document

SUPREME COURT OF LOUISIANA

O R D E R

Acting under the authority of Article V, Sections 1 and 5 of Constitution of 1974, and the inherent power of this Court, and considering the ongoing spread of Coronavirus Disease 2019 (COVID-19) in Louisiana, Governor John Bel Edwards' declaration of a public health emergency in Proclamation Number 25 JBE 2020, President Donald Trump's declaration of a national emergency on March 13, 2020, Governor John Bel Edwards' extension of emergency provisions in Proclamation Number 74 JBE 2020, and the need to amend the Order of this Court dated May 15, 2020,

IT IS HEREBY ORDERED THAT:

All filings which were or are due to this Court between Thursday, March 12, 2020 through Monday, June 15, 2020 shall be considered timely if filed no later than Tuesday, June 16, 2020. Parties who are unable to meet this deadline due to the COVID-19 emergency may submit motions for extensions of time, supported by appropriate documentation and argument.

Given under our hands and seal this 5th day of June A. D., 2020, New Orleans, Louisiana.

FOR THE COURT:

Bernette J. Johnson

Chief Justice Bernette J. Johnson

APPENDIX "D"

SUPREME COURT

STATE OF LOUISIANA

Docket No.:_____

STATE OF LOUISIANA

versus

REGINALD JONES

Appeal From
Criminal District Court Orleans Parish,
Case No.: 530-889, Section D
By Hon. Judge Phillip Bonin

APPLICATION FOR WRIT
ON BEHALF OF REGINAL JONES,
THE DEFENDANT

A CRIMINAL CASE

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Pro Hac Vice & Lead Counsel for Applicant

On the Application:
RICKEY NELSON JONES

RULE X, SECTION 1(a) CONSIDERATIONS APPLICABLE

1. The decision of the Louisiana Court of Appeal, Fourth Circuit, conflicts with a decision of the United States Supreme Court, namely, Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). (Part 1 of Rule X)
2. The Louisiana Court of Appeal, Fourth Circuit, has erroneously applied the Constitution of the United States, namely, the Fourteenth Amendment, and such has sent a sickly man (See. Part IV below) to jail for 20 years due to a harmless incident with his neighbor, despite the complete failure of the State to prove that there was a Firearm, as defined by statute. (Part 4 of Rule X)

STATEMENT OF THE CASE

On November 9, 2017, the State and Defense stipulated that there was NO Probable Cause in the case (the criminal court found likewise). (Appendix, page 1). Nonetheless, defendant was offered a plea on the day before his Trial. After the public defender urged him to accept the plea one day before Trial, he did. However, he requested that the Criminal District Court permit him to withdraw his plea due to the poor preparation of his counsel. On March 15, 2018, a hearing was conducted and the court found the public defender unprepared for Trial and granted defendant's request (Appendix, page 2). In response, the State aggressively tried the defendant, and he was found "Guilty" by a non-unanimous

jury (10 to 2)[1] of three crimes, namely, Aggravated Assault With A Firearm (La. R.S. 14:37.4), Possession of a Firearm or Concealed Weapon by a Felon (Ls. R.S. 14:95.1), and Obstruction of Justice (La. R.S. 14:130.1). (Appendix, page 3). Defendant filed a Motion for Post-Verdict Judgment of Acquittal" on April 24, 2018, and it was Denied. Defendant was sentenced to 10 years imprisonment on May 4, 2018. Five days later, defendant filed a Motion for Appeal, which was not signed within the law-mandated 72 hours. The State proceeded with a Habitual Offender (La. R.S. 15:529.1) Hearing on August 2, 2018, and defendant was convicted and sentenced to 20 years imprisonment. The Court signed defendant's Motion for Appeal on August 6, 2018 and denied his Motion to Reconsider Sentence. On October 6, 2018, defendant filed his Original Brief with the Louisiana Court of Appeal, Fourth Circuit. On February 27, 2019, the Court of Appeal "Affirmed" the Criminal District Court of Orleans Parish. (Appendix, page 6). On March 7, 2019, defendant filed his Application for Rehearing. On March 15, 2019, the Court of Appeal "Denied" the Application for Rehearing. (Appendix, page 33)

OVERSIGHT/ERRORS BY APPELLATE COURT

[1] On Monday, March 16, 2019, the United States Supreme Court decided to consider overturning a criminal conviction by 10-to-2 jury vote in Louisiana in the case of Evangelisto Ramos. This occurs four months after the Louisiana Voters amended the State Constitution to prohibit non-unanimous verdicts in criminal cases. Also, the U.S. Supreme Court has already held that the sixth amendment requires unanimous verdicts in federal criminal cases. The 10-to-2 jury vote against defendant herein is further support for the defendant's argument about the prosecutions' failures (as recognized by two jurors) and the need for acquittal.

[1] When the appellate court concluded that there was sufficient evidence to support defendant's conviction of aggravated assault with a firearm (as well as the other charges), it relied on evidence which was **not** constitutionally sufficient due to [1] no proof of a firearm beyond a reasonable doubt per statutory definition and [2] the prosecution's stipulation of no probable cause for the charges. Hence, proceeding to evaluations of sufficiency or insufficiency of evidence were constitutionally incorrect.

[2] Never proving a firearm beyond a reasonable doubt, as defined by Louisiana Statute, rendered conviction on the other charges factually impossible and constitutionally incorrect.

SUMMARY OF ARGUMENT

[I] When the appellate court affirmed the lower court's conviction and sentence of defendant, it overlooked {i} the constitutionally **in**sufficient evidence presented by the prosecution and {ii} the State's stipulation of no probable cause for the charges. Therefore, proceeding to evaluations of sufficient of evidence were in error. This is magnified since "constitutionally sufficient evidence" serves as a condition to embarking on sufficiency of evidence evaluations due to the "profound judgment about the way in which law should be enforced and justice administered [in this country]." In re Winship, 397 U.S. at 361; Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[II] Due to counts two and three's inseparable connection to count one,

the prosecution's failure to prove a Statutory Firearm beyond a reasonable doubt rendered it impossible to prove counts two and three. The appellate court's oversight regarding count one "bled" into its oversight on counts two and three. Such is evident in the Court of Appeal using the State's failed attempt to prove a Statutory Firearm, beyond a reasonable doubt, as the basis of its analysis to support the convictions on counts two and three.

ARGUMENT & FACTS

[I]

Consistent with Louisiana Statute, the appellate court stated, at page 12, of its Opinion that "A Firearm is defined in La. R.S. 14:37.4(B) as 'an instrument used in the propulsion of shot, shell, or bullets by the action of gunpowder exploding within it." Nonetheless, the appellate court proceeded to present evidence from the case that did **not** prove, beyond a reasonable doubt, that the defendant possessed "an instrument used in the propulsion of shot, shell, or bullets by the action of gunpowder exploding within it." On pages 13-14, the appellate court referenced [i] the key witness' testimony that the defendant threatened to shoot him while holding something that **looked like** a pistol; however, that same witness testified later he was not sure what was in defendant's hand. He also signed (and had notarized) an affidavit swearing that no firearms were involved, and defendant merely tried to scare him with a water pistol![2] [ii] The remaining witnesses were not present and/or acknowledged not

[2] Of course, the State sought to undermine the affidavit and threatened Mr. Jones (its key witness) with perjury, actually referencing that possibility during the trial. The State's

knowing what defendant had. [iii] A grainy video only showed a black object in defendant's hand, the same object the key witness, who was right in front of defendant and had marksman experience from the military, honestly admitted he did NOT know what it was and was **certain** no firearm was involved in the encounter. [iv] The Trooper who responded to the call testified he did not find a gun and does not know of **any** test that could have indicated defendant was in possession of a gun. None of this evidence proves, beyond a reasonable doubt, that defendant possessed a firearm as defined by La. R.S. 14:37.4(B). One can only conclude a rational trier of fact could find defendant possessed a real gun by abandoning proof beyond a reasonable doubt of the specifics outlined in La. R.S. 14:37.4(B) about what constitutes a firearm. A firearm must be "an instrument used in the propulsion of shot, shell, or bullets by the action of gunpowder exploding within it." There cannot be uncertainty, extrapolation, assumptions, guessing, or preponderance of the evidence on this central fact if defendant is to be found "Guilty" and sentenced to twenty years in prison. Miles v. United States, 103 U.S. 304, 26 L.Ed. 481 (1881); Davis v. United States, 160 U.S. 469, 40 L.Ed. 499 (1895); Holt v. United States, 218 U.S. 245, 54 L.Ed. 1021 (1910); Wilson v. United States, 232 U.S. 563, 58 L.Ed. 728 (1914); Jackson v. Virginia,

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key witness, in self-preservation mode, then claimed to have not read the affidavit closely, to not have agreed with certain statements in the affidavit, to signing it just to end this case, etc. However, he never said he did not read and understand the affidavit before signing it under the penalties of perjury, plus getting it notarized. In other words, perjury by the Prosecution's key witness occurred either when signing the affidavit before Trial or on the witness stand. Whichever it was, his testimony was untrustworthy and unreliable to prove a Statutory Firearm, especially being the only

443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)

MORE LAW

In State v. Green, 588 So.3d 757 (La. App. 1991), the appellate court said something in one of its own decisions that is central in this case. It said the following at page 758, "Nevertheless, the reviewing court may not disregard its duty to consider whether the evidence is constitutionally sufficient simply because the record contains evidence that tends to support each fact necessary to constitute the crime." *(emphasis added).* Of course, something can always be found in a criminal case to support the crime(s) charged since the State would not bring the case if that were not so. However, the court's analysis cannot stop there. "Constitutionally Sufficient Evidence" must always govern. Here, the impossibility of anything offered by the prosecution proving, beyond a reasonable doubt, "an instrument used in the propulsion of shot, shell, or bullets by the action of gunpowder exploding within it" means a firearm was never before the jury for consideration, and therefore, evaluating sufficiency of evidence is "placing the cart before the horse." The criminal court **never** should have submitted this to the jury due to the constitutionally insufficient evidence of a firearm as defined by statute. Moreover, the United States Supreme Court undergirds State v. Green in the case of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61L.Ed.2d 560 (1979). It said at page 315, "The standard of proof

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witness to have a close-up encounter with defendant to see the alleged "firearm." Further, he testified he did not know what was in defendant's hand.

beyond a reasonable doubt,... plays a vital role in the American scheme of criminal procedure, because it operates to give 'concrete substance' to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. At the same time by impressing upon the factfinder the need to reach a subjective state of **near certitude of the guilt** of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *(emphasis added).* If there are doubts about a firearm from the key witness for the prosecution, the one with marksman experience, the one closest to the defendant to see the object, and the only one personally experiencing the object, there cannot be proof beyond a reasonable doubt, i.e., "certitude of the guilt." It is not just evaluating sufficiency of evidence; the evidence evaluated cannot be in doubt since that would depart from the "rational" directive a factfinder must exercise. This is precisely what Jackson v. Virginia condemned. It said the following,

> The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A 'reasonable doubt,' at a minimum, is one based upon reason. Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction.... Under *Winship,* which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand. Jackson, 443 U.S. at 317-318.

Moreover, In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970),

informed us also accordingly,

> [A] person accused of a crime... would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with **utmost certainty**. (emphasis added) In re Winship, 397 U.S. at 363-364.

The appellate court used a kind of preponderance of the evidence standard since the prosecution's clear failure to prove a firearm, as defined by statute, beyond a reasonable doubt (i.e., utmost certainty) "fell off the radar" in the court's analysis.

Stipulation of No Probable Cause for Charges

Closely connected to the prosecution's failure to prove a firearm (as defined by statute) beyond a reasonable doubt are [i] the criminal court finding and [ii] the prosecution's stipulation. Specifically, this was [i] the finding of insufficient probable cause for the charges by the criminal court and [ii] the stipulation of no probable cause in the case for the charges by the State. (Appendix, page 1). The appellate court used State v. Baham, 117 So.3d 505 (La., 2013), to support trying someone despite the criminal court's finding of insufficient probable cause. While that case, arguably, gives some support for that, it does not support the State stipulating to NO probable cause in the case for charges. The State v. Baham Case is distinguished for two important reasons: {i} the State did not stipulate and {ii} there was no central fact in serious doubt upon which all the

charges rested. When the prosecution stipulated that there was no probable cause in the case to charge defendant, it did not limit the stipulation, meaning no probable cause in the sense of no probable cause here! This is precisely why defendant's counsel objected when the court set a Trial Date nonetheless. (Appendix, page 1). Black's Law Dictionary defined stipulation as "Voluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate need for proof...." There is no such thing as a general stipulation. There can be no reconciliation between stipulating to no probable cause in the case by the State and then the defendant being charged, tried, and sentenced to 20 years imprisonment for those same "no-probable-cause-for-charges-in-the-case" Charges. This kind of contradictory stuff jeopardizing a citizen's constitutional right to not be deprived of his liberty without due process of law cannot stand, especially when there are lingering doubts after the trial about there ever being a Statutory Firearm involved. This counters a near century-and-a-half of established constitutional principles of protecting defendants against any and all contradictory criminal proceedings that deprive them of their liberty. Miles v. United States, 103 U.S. 304, 26 L.Ed. 481 (1881); Davis v. United States, 160 U.S. 469, 40 L.Ed. 499 (1895); Holt v. United States, 218 U.S. 245, 54 L.Ed. 1021 (1910); Wilson v. United States, 232 U.S. 563, 58 L.Ed. 728 (1914); Brinegar v. United States, 338 U.S. 160, 93 L.Ed. 1879 (1949); Holland v. United States, 348 U.S. 121, 99 L.Ed. 150 (1954)

[II]

Without proof beyond a reasonable doubt of a firearm, as defined by statute, counts two and three "collapse upon themselves." Possession of a Firearm or Concealed Weapon by a Felon cannot "stand" without a Firearm. Obstruction of Justice cannot arise where defendant discarded no firearm. The prosecution rested its entire case on the existence of a firearm despite stipulating that there was no probable cause for charging the defendant in this case. No doubt, the prosecution knew it had **no** firearm, **no** evidence of any firearm with "utmost certainty," and made **no** search for a firearm.[3] However, it still "propped" counts two and three upon a firearm for support. No firearm means no support, and counts two and three, of necessity, collapse upon themselves. The appellate court missed this completely by analyzing these counts based on the State proving a Statutory Firearm when it clearly did not. Of course, with this kind of mistake, it found evidence for conviction on counts two and three. However, without evidence of a Statutory Firearm, the appellate court's finding cannot be correct. Proceeding to support the criminal court's conviction and sentence nonetheless violated fundamental constitutional due process for the defendant.

Appropriate for Review

This case is appropriate for review because if a United States Citizen can be deprived of his liberty for 20 years when [i] he seeks to scare a neighbor with an object because the neighbor frightened him in a harmless neighborhood

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[3] The Trooper gave some reason no search was done for the toy in the location defendant told them he discarded it. The State decided to go to Trial without being

argument; [ii] the neighbor and defendant acknowledged in multiple ways that no firearm was involved; [iii] the Prosecution never proved a firearm as defined by Louisiana Statute; [iv] the Prosecution never did a search for anything to prove a firearm, and [v] the Prosecution stipulated to no probable cause in the case prior to Trial, the due process clause of the Fourteenth Amendment of the United States Constitution is undermined significantly, and a near century and a half of legal precedent is ignored. Assuming, speculating, and guessing have no place in criminal trials because they cannot provide the "utmost certainty" demanded by In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Also, Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61L.Ed.2d 560 (1979), prohibits a trial **ritual** with a criminal defendant's fundamental right to liberty, and when such occurs, the lower courts cannot be supported. Proof beyond a reasonable doubt is indispensable Fourteenth Amendment Due Process, and when absent in a state criminal trial, it cannot constitutionally stand. Jackson, 443 U.S. at 317-318

Basis For Priority Review

While the condition of a defendant is often not relevant, the defendant herein used a cane during his trial due to various ailments and is now in a wheelchair. The ailments are as follows: [i] Asthma, [ii] Chronic Obstructive Pulmonary Disease, [iii] Type 2 Diabetes, [iv] Congestive Heart Failure, [v] Obstructive Sleep Apnea, [vi] Hypertension/High Blood Pressure, [vii]

Hyperlipidemia/High Cholesterol, [viii] Chronic Back, Neck, & Knee Pain requiring the use of a Cane and wheelchair, and [vix] Neuropathy (in 7/2018, a Dr. Ridley of DOC "Cleared" the Applicant for medical care). With the defendant deprived of fundamental constitutional due process and incarcerated for twenty years in his mid-fifties, while ill, there is insult added to the constitutional "injury" and the real likelihood of his life ending in prison.

[III] Verification

The Applicant, Reginald Jones, Defendant/Inmate, verifies the truth of all allegations in this application and that a copy has been mailed to the Court of Appeal, Fourth Circuit, and the District Attorney for Orleans Parish.

WHEREFORE, the Applicant/Defendant/Inmate respectfully requests [1] that the Writ be granted, [2] that acquittal of all charges be summarily decided due to the clarity of the law and facts, and [3] that defendant be immediately released from prison.

Reginald Jones 3-29-19
Reginald Jones Date
Defendant/Applicant/Inmate

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CERTIFICATE OF SERVICE

Applicant, Reginald Jones, the Defendant/Inmate, hereby gives notice, via his attorneys, that on this 29th day of March, 2019, he served [1] the original, a duplicate, and seven copies of his Application for Writ to the Louisiana Supreme Court (Priority Mail, Confirmation Delivery), [2] a copy to the Clerk, Court of Appeal, Fourth Circuit, and [3] a copy on Ms. Irena Zajickova, Assistant District Attorney, Parish of Orleans, 619 S. White Street, New Orleans, Louisiana 70119 (First Class). ALSO, Applicant certifies, via his attorneys, that the District Attorney was notified per Rule X, Section 2, of the filing of this Writ to the Louisiana Supreme Court.

3-29-19

Reginald Jones — Date
Applicant/Inmate

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