

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 1020

STATE OF LOUISIANA

VERSUS

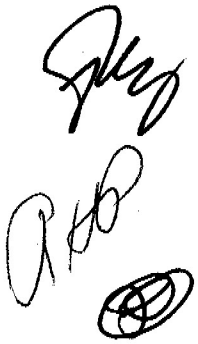
JOSHUA PHILLIP DEAN

Judgment Rendered: December 22, 2010

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Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case Number 507,564
Honorable David W. Arceneaux, Presiding

* * * * *



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* * * * *

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

GUIDRY, J.

The defendant, Joshua Phillip Dean, was charged by bill of information with two counts of attempted first degree murder, in violation of La. R.S. 14:30(A)(1) and 14:27. He pled not guilty. Following a trial by jury, the defendant was convicted as charged. The defendant moved for post-verdict judgment of acquittal and for a new trial. The trial court denied both motions. The defendant was sentenced to imprisonment at hard labor for fifty years, without the benefit of probation, parole, or suspension of sentence, on each count. The court ordered that the sentences be served consecutively. The defendant moved for reconsideration of the sentences. The trial court denied the motion. The defendant now appeals, urging the following assignments of error by counseled and pro se briefs:

Counseled:

1. The trial court erred in denying the defendant's motion for a new trial.
2. The trial court erred in denying the defendant's motion to reconsider sentences.

Pro se:

1. The trial court committed reversible error patent on the face of the record when it allowed the state to amend the substance of the bill of information to charge a new offense after the start of trial.
2. The evidence at trial was insufficient to identify the defendant as the perpetrator of the crimes for which he was convicted.
3. The trial court erred in admitting, over the defendant's objection, testimony regarding a photograph depicting the defendant with guns in his hand and waistband.

Finding no merit in any of the assigned errors, we affirm the defendant's convictions and sentences.

FACTS

On June 5, 2008, at approximately 11:00 p.m., Shannon Brunet left the High Tides Bar in Houma, Louisiana, with his friends, and went to a café, where he stayed until 1:30 a.m. Thereafter, Brunet left the café, deciding that he would walk

to the nearby residence of his ex-girlfriend. As he walked down New Orleans Boulevard, Brunet heard a vehicle approach. The vehicle drove up alongside Brunet, and the passenger pointed a gun out of the window. Aiming directly at Brunet, the passenger fired a single shot. Brunet fell to the ground, and the vehicle immediately sped away. According to Brunet, there was no confrontation and/or dialog between him and the occupants of the vehicle prior to the shooting.

Later that same morning, Freddie Kelly was also shot by the passenger of a vehicle. Kelly, an offshore worker, routinely rode his bicycle for exercise on his off days. He preferred riding in the early morning hours because the traffic was minimal and his family was asleep. At approximately 3:30 a.m., Kelly was riding in the area near Legion Avenue when a vehicle approached him. The passenger in the vehicle asked Kelly for directions to Williams Avenue. As Kelly turned around to gesture in response, the passenger pointed a gun directly at Kelly's heart and fired a single gunshot. Kelly attempted to jump off of his bicycle to avoid being hit, but he was unsuccessful. Kelly sustained a single gunshot wound that left him paralyzed from his waist down. The vehicle immediately left the scene.

Both shootings were immediately reported to the police. Meanwhile, at approximately 3:30 a.m., the defendant contacted his ex-girlfriend, Brittany Breaux, and asked her to pick him up. Breaux picked up the defendant and Dwayne Lee by Maple Park. According to Breaux, the defendant told her he had just shot two people and asked her to drive over to the area where one of the shootings occurred. The defendant told Breaux he wanted to see if the victim's bicycle was still out there. Breaux complied. Next, Breaux drove the defendant and Lee over to New Orleans Boulevard. At some point thereafter, Breaux dropped Dwayne Lee off, and she and the defendant continued to ride around. Eventually, Breaux and the defendant became involved in a verbal altercation, which ended with the defendant throwing Breaux's cellular telephone out of the

vehicle. The defendant also threw a beer bottle towards Breaux's vehicle after he exited it. Breaux eventually went to the police and advised them of the information the defendant had relayed to her regarding the shootings.

In connection with the police investigations, the defendant and Dwayne Lee were developed as suspects in both shootings. Both men were arrested. The defendant denied any participation in the shootings. Dwayne Lee, on the other hand, confessed to his participation in the incidents and identified the defendant as the shooter. Lee admitted that he was the driver and the defendant was the passenger in the vehicle that approached each of the victims.

Kristy Aleman,¹ the defendant's live-in girlfriend, was also questioned following the defendant's arrest. Aleman provided two different statements. At approximately 8:14 a.m., Aleman provided her first statement. In this statement, Aleman claimed she and the defendant were together on the night before the shootings. She stated the defendant left home at approximately 11:00 p.m. and returned approximately 30 to 45 minutes later. According to Aleman, the defendant was in bed with her when she went to sleep at approximately 12:30 a.m. She stated she did not wake up until the following morning, when the police arrived at the residence looking for the defendant. Aleman stated that she did not know if the defendant went anywhere else during the time she was asleep, but he was still in bed when she awoke the following morning.

In her second statement, at approximately 10:30 a.m., Aleman provided the same details leading up to her falling asleep around 12:30 a.m. However, this time, she stated that the defendant must have left after she fell asleep because he

¹ In the trial transcript, this witness's name is spelled "Cristy Alleman." However, in her statement to the police, the witness signed her name "Kristy Aleman."

woke her up at around 4:00 a.m. and told her he had shot two people. She claimed the defendant stated that he had shot one individual in the shoulder, but he was unsure where he hit the other individual. He explained that he had shot the individuals because he was angry with Aleman. According to Aleman, the defendant advised that he had put the weapon he used in the shootings (a small 9 millimeter handgun) under the right corner of the shed located in the backyard of their residence.

The aforementioned information was placed in an affidavit for a search warrant. A warrant was issued, allowing a search of the defendant's residence and any other detached structures on the Gouaux Avenue property. Upon executing the warrant, the Houma Police Department officers recovered a small 9 millimeter handgun from beneath the right corner of the storage shed behind the defendant's home.

**COUNSELED ASSIGNMENT OF ERROR 1
DENIAL OF MOTION FOR A NEW TRIAL**

By this assignment of error, the defendant contends the trial judge erred in denying his motion for a new trial despite new evidence suggesting that Dwayne Lee was actually the shooter. In his motion, the defendant alleged that a new trial was warranted because there were two witnesses, Andrew T. Vargas and Malcolm Smith, who would testify that Dwayne Lee made a statement, while incarcerated at Angola, confessing that he shot one or more of the victims in this case.

The motion for new trial is based upon the supposition that injustice has been done the defendant, and, unless such is shown to have been the case, the motion shall be denied, no matter upon what allegations it is grounded. La. C.Cr.P. art. 851. In order to obtain a new trial based on newly discovered evidence, the defendant has the burden of showing (1) the new evidence was discovered after trial, (2) the failure to discover the evidence at the time of trial

was not caused by lack of diligence, (3) the evidence is material to the issues at trial, and (4) the evidence is of such a nature that it probably would have produced a different verdict. State v. Smith, 96-0961, p. 7 (La. App. 1st Cir. 6/20/97), 697 So.2d 39, 43; see also La. C.Cr.P. art. 851(3).

At the hearing on the motion for a new trial, counsel for the defendant advised the court that while being housed at Angola Penitentiary, Dwayne Lee had a conversation with Andrew Vargas wherein he indicated that he was the person who shot one of the individuals. Counsel also noted that Malcolm Smith had been in the same room and overheard the conversation between Lee and Vargas. Counsel advised that Vargas had been released from prison and could not be located at the time of the hearing. Counsel presented a written statement from Vargas. The statement was dated January 6, 2009, and was witnessed by several other inmates. Before ruling on whether the statement would be allowed into evidence, the court allowed defense counsel to question Dwayne Lee regarding the alleged statement.

In his testimony, Lee admitted that he was acquainted with both Vargas and Smith. Lee also admitted that he engaged in general discussions with Vargas regarding his case, but he denied ever stating that he was the shooter of either victim. Lee testified he never discussed his case with Smith. When questioned regarding how Vargas and Smith would know information regarding the details of the case, Lee advised that the defendant was also housed in the same area at Angola as he, Vargas, and Smith. Lee further explained that he previously had provided a written affidavit (which was introduced into evidence at the defendant's trial) stating that the information provided to the police in connection with his confession during interrogation was not true. In the affidavit, Lee stated that he and the defendant had nothing to do with the shootings. At the trial, and again at the hearing on the new trial motion, Lee explained that this affidavit was prepared

by the defendant. Lee claimed the defendant threatened him and pressured him to sign the affidavit.

Malcolm Smith testified he was acquainted with both the defendant and Lee. He met the men while housed at Angola. Smith testified that he overheard Lee tell Vargas that he shot one of the victims and the defendant shot the other. He claimed Lee stated that the defendant shot one of the victims at a party and that later that same day, Lee shot the other while he was driving.

Over the state's objection, the court allowed the written statement signed by Andrew Vargas to be introduced into evidence. In the statement, Vargas claims Lee told him and Smith that he was incarcerated because "he shot two people." Vargas claimed Lee described, in detail, the events that led up to the shootings. According to Vargas's statement, Lee stated that he and the defendant were in the area where Brunet was shot when they observed a man urinating outside. The defendant yelled at the man and a verbal altercation ensued. During the argument, the man pulled a knife on the defendant, and the defendant walked away. Later, when the defendant and Lee were driving on New Orleans Boulevard, they observed the man walking. Lee claimed he shot at the man. According to Vargas, Lee told him, "I was just joking when I shot at him; I just wanted to scare him!" Vargas also stated that Lee admitted to shooting the second victim as the victim rode down Legion Avenue on a bicycle.

Following argument by counsel, the court denied the motion. The court noted that this alleged "newly discovered evidence" would have been the only evidence that pointed to Lee as the shooter. All of the other evidence presented at the trial pointed to the defendant. The court noted that the first victim, Brunet, although unable to identify any of the occupants of the vehicle, specifically indicated that he was shot by the passenger. Kelly, the second victim, testified that the driver of the vehicle was a white male and the shooter (the passenger) was an

Indian male. The court then noted that Lee was “obviously” a Caucasian male, and the defendant appeared to be of Indian descent. The court further noted that the physical characteristics of these men were obviously apparent to the jury. The court also noted that the evidence presented at the trial clearly established that the defendant was the passenger in the vehicle driven by Lee. Finally, the court pointed out that, according to Smith’s testimony, Lee indicated that he shot the second victim simply because the defendant had shot somebody “so he wanted to shoot somebody too.” This information, the court noted, is in direct contrast to the evidence presented at the trial, because Kelly, the victim in the second shooting, identified the defendant, the Indian male, as the individual who shot him.

Considering the foregoing, the court concluded that the evidence presented by the defendant at the hearing on the motion for a new trial was “apparently another effort [by the defendant] to fabricate evidence in an effort to thwart the jury verdict[,]” and it “absolutely would not have changed the verdict of guilt in this case.”

After a careful review of the record, we do not find that the defendant has met all the requisites for the granting of his motion for new trial based upon newly discovered evidence. We find no merit in the defendant’s argument that the uncorroborated testimony of two inmates, whose credibility is highly questionable, if presented, would have produced different verdicts in this case. As the trial court noted, this new evidence would have been the only evidence suggesting that anyone other than the defendant was the shooter. The evidence at the trial clearly established that Lee was the driver of the vehicle at the time of each of the shootings, and that the shots were fired by the passenger. Also, Breaux and Aleman both told the police the defendant told them that he shot two people on the night in question. Although Aleman later changed her story, the recorded telephone conversations between her and the defendant clearly show that the

defendant was the shooter and Aleman was aware of this fact. Given this direct evidence establishing the defendant's identity as the shooter, it is unlikely that the uncorroborated inmate testimony claiming that Lee allegedly indicated that he did one or both of the shootings would have produced a different verdict. Therefore, considering the incredible nature of the testimony and evidence presented at the hearing, we find no abuse of discretion in the trial court's denial of defendant's motion for new trial. This assignment of error is meritless.

**COUNSELED ASSIGNMENT OF ERROR 2
DENIAL OF MOTION TO RECONSIDER SENTENCE**

In this assignment of error, the defendant contends the trial court erred in imposing excessive sentences and in denying his motion for reconsideration of the sentences. Specifically, the defendant argues maximum sentences were not warranted in this case because he is not the worst type of offender. He asserts that of the twenty aggravating circumstances listed in the sentencing guidelines of La. C.Cr.P. art. 894.1, twelve are inapplicable in this case. Thus, he contends there were not sufficient aggravating circumstances to justify the imposition of maximum sentences in this case. The defendant further asserts the trial court failed to give adequate mitigating consideration to the fact that he was only twenty-years-old at the time of the offenses, and there was no evidence that he had any prior arrests or convictions. He argues that imposition of consecutive, fifty-year sentences is equivalent to imposition of a life sentence and amounts to "nothing more than a needless imposition of pain and suffering."

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. State v. Lanieu, 98-1260, p. 12 (La. App. 1st Cir. 4/1/99), 734 So.2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So.2d 962. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate

review. State v. Sepulvado, 367 So.2d 762, 767 (La. 1979). A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. State v. Dorthey, 623 So.2d 1276, 1280 (La. 1993). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. State v. Hogan, 480 So.2d 288, 291 (La. 1985). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. State v. Lobato, 603 So.2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. La. C.Cr.P. art. 894.1. The trial court need not cite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. State v. Herrin, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness must consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. State v. Watkins, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. State v. Lanclos, 419 So.2d 475, 478 (La. 1982).

A person convicted of attempted first degree murder faces a sentence at hard labor for not less than ten nor more than fifty years, without benefit of parole, probation, or suspension of sentence. See La. R.S. 14:27(D)(1)(a) & 30(C). As he notes, the defendant herein received the maximum sentence on each conviction. Generally, maximum sentences are reserved for the worst offenders. State v. Easley, 432 So.2d 910, 914 (La. App. 1st Cir. 1983). The Louisiana Supreme

Court has emphasized that the only relevant question on review of a sentence is whether the trial court abused its broad sentencing discretion, and not whether the sentence imposed may appear harsh or whether another sentence might be more appropriate. See State v. Cook, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959 (per curiam), cert. denied, 519 U.S. 1043, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996).

Prior to imposing sentence, the trial court reviewed the facts of the case and noted:

Particularly, the court would note that the evidence in this case indicated that these crimes for which Mr. Dean was convicted were about as random as criminal activity could get. There was some very slight indication by evidence that one victim, Mr. Brunet, had had words with Mr. Dean earlier in the evening before he was shot by Mr. Dean. The evidence also indicated that there was absolutely no connection between Mr. Dean and the second victim who was shot minutes later that same night, that being Mr. Kelly.

There was absolutely no justification for either shooting and in the case of Mr. Kelly positively, absolutely no indication of any possible reason why he would have been shot, but for the fact that he was in the wrong place on Mr. Dean's time. Mr. Kelly is apparently now confined to a wheelchair as a result of injuries suffered in the shooting by Mr. Dean.

Fortunately, Mr. Brunet appears to have made a complete recovery but, as good as his recover [sic] was, Mr. Kelly's recovery was not.

The court has also considered that these were two shootings in the same night.

Those factors are the principal reasons why the sentence which the court has decided to impose the court feels is justified.

The defendant now complains that the sentences are excessive because he is not the worst offender, nor did he commit the worst type of offenses. However, our review of the record and evidence contained therein indicates otherwise. The defendant engaged in a senseless, unprovoked shooting spree, which resulted in serious injury to the two innocent victims. The consecutive sentences were justified by the dangerous propensities exhibited by the defendant on this occasion. He clearly poses a risk to the safety of the public.

Considering the circumstances of the offenses, we find that the trial court did not manifestly abuse its discretion in imposing the statutory maximum sentences upon the defendant. The maximum sentences are neither grossly disproportionate to the severity of the offenses, in light of the harm to the victims, nor so disproportionate as to shock our sense of justice. The factual circumstances and nature of the instant offenses (shooting the unarmed victims without any provocation) are clearly among the worst attempted murder offenses found in the jurisprudence. The defendant, who showed absolutely no regard for the law or for human life, is certainly the worst type of criminal offender and poses an unusual risk to public safety. Therefore, considering the extremely violent nature of the instant offenses, and the extensive injuries suffered by the victims, we do not find the sentences to be unconstitutionally excessive. Although the trial court did not articulate all of the aggravating and/or mitigating factors considered, the sentences are clearly supported by the record. The trial court did not err in denying the defendant's motion for reconsideration of the sentences.

This assignment of error is without merit.

**PRO SE ASSIGNMENT OF ERROR 1
AMENDMENT OF THE BILL OF INFORMATION**

In this assignment of error, the defendant contends that the trial court erred in allowing the state to substantively amend the bill of information during the trial. The record reflects that the original bill of information, filed July 18, 2008, charged the defendant and Dwayne Lee with two counts of attempted first degree murder and provided as follows:

DID THEN AND THERE unlawfully and intentionally attempt to kill one, Freddie Kelly, and the said defendants were engaged in the perpetration or attempted perpetration of an assault by drive-by-shooting, when the said [defendant] and Dwayne Cody Lee had a specific intent to *kill or to inflict great bodily harm* to the said Freddie Kelly, in violation of La. R.S. 14:27 (14:30A(1)).]

COUNT TWO: DID THEN AND THERE unlawfully and intentionally attempt to kill one, Shannon Brunet, and the said defendants were engaged in the perpetration or attempted perpetration of an assault by drive-by-shooting, when the said [defendant] and Dwayne Cody Lee had a specific intent to *kill or to inflict great bodily harm to* the said Shannon Brunet, in violation of La. R.S. 14:27 (14:30A(1))[.] [Emphasis added.]

On December 2, 2008, after the jury was selected, but prior to opening statements, on the urging of the trial judge, the state filed an amended bill of information that deleted the language “or to inflict great bodily harm[.]”² Counsel for defendant indicated he had no objections to the amendment. The amended bill of information was filed and the defendant was rearraigned. On appeal, the defendant now argues that such a substantive change in the bill constituted a defect and warrants reversal of his conviction.

Louisiana Code of Criminal Procedure article 487(A) provides:

An indictment that charges an offense in accordance with the provisions of this Title shall not be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, misspelling, or improper English, or because of the use of any sign, symbol, figure, or abbreviation, or because any similar defect, imperfection, omission, or uncertainty exists therein. The court may at any time cause the indictment to be amended in respect to any such formal defect, imperfection, omission, or uncertainty.

Before the trial begins the court may order an indictment amended with respect to a defect of substance. After the trial begins a mistrial shall be ordered on the ground of a defect of substance.

In a jury trial, trial begins when the first prospective juror is called for examination. La. C.Cr.P. art. 761.

“A ‘defect of substance’ as contemplated by Article 487 of the Code of Criminal Procedure is intended to mean a defect which will work to the prejudice of the party accused.” City of Baton Rouge v. Norman, 290 So.2d 865, 870 (La.

² Although specific intent to inflict great bodily harm may support a conviction for murder, such intent is insufficient to support a conviction for attempted murder. See State v. Hongo, 96-2060, pp. 2-3 (La. 12/2/97), 706 So.2d 419, 420.

1974); see also State v. Harris, 478 So.2d 229, 231 (La. App. 3 Cir. 1985), writ denied, 481 So.2d 1331 (La. 1986). The purpose of requiring the state to file an amendment to the indictment before trial is to provide the defendant with adequate notice of the charge so that he may properly prepare his defense. When the indictment against him provides sufficient notice of the crime with which he is charged, a defendant suffers no prejudice. See State v. Young, 615 So.2d 948, 951 (La. App. 1st Cir.), writ denied, 620 So.2d 873 (La. 1993).

At the outset, we note that the defendant did not object to the amendment of the bill of information. In fact, the record reflects that the counsel for the defendant specifically indicated that the defense had no objection to the amendment. La. C.Cr.P. art. 841(A) provides, in pertinent part, that “[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence.” The defendant’s failure to object to the amendment of the bill of information, or to request a continuance, or to move for a mistrial precludes relief on this claim. See State v. Johnson, 2008-1156, pp. 11-12 (La. App. 5th Cir. 4/28/09), 9 So.3d 1084, 1092, writ denied, 2009-1394 (La. 2/26/10), 28 So.3d 268. Moreover, under the particular facts of this case, the defendant failed to prove any prejudice flowing from the amendment of the bill of information. Our review of the record in this case reflects that the amendment to the bill of information was merely to clarify the charges. While the amendment deleted a portion of the description of the actions constituting the offenses, it did not change the offenses charged. The original bill of information informed the defendant of the nature and cause of the accusations against him in sufficient detail to allow him to prepare for trial. Such an amendment, even if considered erroneous, was harmless beyond a reasonable doubt. State v. Leonard, 05-1382, p. 12 (La. 6/16/06), 932 So. 2d 660-667-668; see also La. C.Cr.P. art. 921.

Therefore, the trial court committed no error in allowing the amendment after the commencement of trial. Thus, this assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR 2 SUFFICIENCY OF THE EVIDENCE

In this assignment of error, the defendant challenges the sufficiency of the evidence used to convict him of attempted first degree murder. He specifically argues that the state's evidence, which consisted of uncredible witnesses and unreliable identification testimony, failed to negate the possibility of misidentification. In support of his argument, the defendant points out that Brunet was unable to positively identify him as the shooter; Kelly initially selected someone other than the defendant from a photographic lineup; there was no ballistics evidence to connect the gun recovered from the defendant's residence to the offenses at issue; Aleman and Breaux were not credible witnesses; and, the recorded conversations should not have been considered because they were not properly introduced.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see also La. Code Cr.P. art. 821(B); State v. Mussall, 523 So.2d 1305, 1308-09 (La. 1988).

When analyzing circumstantial evidence, La. R.S. 15:438 provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the Jackson constitutional sufficiency standard. On appeal, the reviewing court "does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory

explanation of the events.” Rather, the court must evaluate the evidence in a light most favorable to the state and determine whether the possible alternative is sufficiently **reasonable** that a rational juror could not have found proof of guilt beyond a reasonable doubt. State v. Mitchell, 99-3342, p. 7 (La. 10/17/00), 772 So.2d 78, 83.

Ultimately, all evidence, both direct and circumstantial, must be sufficient under Jackson to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. State v. Shanks, 97-1885, pp. 3-4 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 159. 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). Specific intent may be proved by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as defendant's actions or facts depicting the circumstances. State v. Cummings, 99-3000, p. 3 (La. App. 1st Cir. 11/3/00), 771 So.2d 874, 876.

In the instant case, the defendant was convicted of attempted first degree murder. Louisiana Revised Statute 14:30(A)(1) provides as follows:

First degree murder is the killing of a human being:

(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, assault by drive-by shooting, first degree robbery, second degree robbery, simple robbery, terrorism, cruelty to juveniles, or second degree cruelty to juveniles.

Under La. R.S. 14:27(A), a person is guilty of an attempt to commit an offense when he has a specific intent to commit a crime and “does or omits an act for the purpose of and tending directly toward the accomplishing of his object.”

The gravamen of the crime of attempted murder, whether first or second degree, is the specific intent to kill and the commission of an overt act tending

toward the accomplishment of that goal. State v. Huizar, 414 So.2d 741, 746 (La. 1982). Although specific intent to inflict great bodily harm may support a conviction for murder, such intent is insufficient to support a conviction for attempted murder. See State v. Hongo, 96-2060, pp. 2-3 (La. 12/2/97), 706 So.2d 419, 420.

Where the key issue in a case is the defendant's identity as the perpetrator, rather than whether or not the crime was committed, the state is required to negate any reasonable probability of misidentification in order to meet its burden of proof. State v. Millien, 2002-1006, pp. 2-3 (La. App. 1st Cir. 2/14/03), 845 So.2d 506, 509. However, positive identification by only one witness may be sufficient to support a defendant's conviction. State v. Coates, 2000-1013, p. 3 (La. App. 1st Cir. 12/22/00), 774 So.2d 1223, 1225.

In the instant case, the facts and circumstances surrounding the commission of the offenses are essentially undisputed. The defendant does not contest that the offenses were committed. Rather, he only challenges the state's evidence of his identity as the shooter. Our review of the record in this case reveals that the evidence of the defendant's identity as the shooter was overwhelming. Dwayne Lee testified he was with the defendant on the morning of the shootings and provided a detailed description of their activities before and after the shootings. Lee testified that he and the defendant were riding around in Lee's vehicle when they saw an unidentified man urinating on the side of the road. Lee was driving and the defendant was the passenger. The defendant and the man eventually became engaged in a verbal altercation. The defendant and Lee left the area and went to the defendant's house. The defendant armed himself with a gun, which he showed to Lee. Lee and the defendant drove back towards the area where they had encountered the man. Upon seeing a man walking down the street, the defendant fired a single gunshot out of the passenger window of the vehicle. Lee drove

away. According to Lee, he was not aware that the defendant was going to shoot the man, and the defendant never discussed why he shot him.

Lee testified that he and the defendant went back to the defendant's house, got into the defendant's vehicle, and left again. They drove back toward the scene of the shooting. Later, as the men drove to the east side of town, the defendant's vehicle stopped working. The men got a ride back to the defendant's residence to get Lee's vehicle. Lee explained that he and the defendant did not discuss the previous shooting incident at all. Lee claimed he was afraid. Lee and the defendant were riding back towards the defendant's house, when they observed an older man riding a bicycle. According to Lee, the defendant shot out of the passenger window again as Lee continued to drive. Lee denied any dialog between the defendant and the man on the bicycle. Lee claimed he drove back to the defendant's residence and dropped him off. Lee claimed he was at home when the defendant called him and told him to come back. Lee complied because he was afraid of the defendant. This time, Lee did not drive; he walked back towards the defendant's residence. The defendant met Lee along the way. The defendant then called Brittany Breaux and asked her to pick him up. The defendant, Lee, and Breaux rode around for a little while before eventually returning Lee to his residence.

On cross-examination, Lee testified that he assumed that the first man the defendant shot was the same man who had been urinating in the street. Lee denied that he and the defendant ever orchestrated a plan to shoot either of the individuals. He claimed that he was not aware that the defendant was going to shoot either man.

Lee testified that he provided a full confession regarding the shootings to the police upon his arrest. He also acknowledged that on November 5, 2008, he signed an affidavit indicating that his confession was a result of police coercion.

In the affidavit, Lee claimed he was under the influence of drugs and alcohol when initially questioned by the police. He claimed that, “[a]fter hours of denying the evidence the detectives claimed they had against [him], I finally told them what they wanted me to say so that they would let me get some sleep.” On re-direct examination, Lee testified that the affidavit was prepared at the defendant’s request when the two men were housed together in Angola. According to Lee, he signed the affidavit because he was afraid of the defendant.

Kristy Aleman, the defendant’s then fiancée, also testified at the trial. Aleman admitted that she previously provided several inconsistent statements to the police regarding the defendant’s actions on the morning in question. Aleman agreed that she initially indicated that the defendant was in bed with her and that she was unsure if he ever left the residence after 12:30 a.m. She also acknowledged that she later told the police the defendant woke her up at 4:00 a.m. and told her he shot two people. During her testimony, Aleman even acknowledged that she once told the police that she was responsible for the shooting. Aleman claimed that her initial statement was truthful, and that the subsequent statements were not. When asked how she knew the defendant was suspected of shooting two people in order to include this information in her allegedly fabricated statement, Aleman claimed the police told her this information. Aleman further explained that she fabricated the statements about the defendant’s confession to her because she wanted to get the defendant in trouble. She claimed she also made up her claim that the defendant told her he put the gun under the shed. She claimed the defendant never told her anything about hiding a gun.

To impeach Aleman’s testimony, the state introduced various recorded conversations that took place between Aleman and the defendant while he was in jail awaiting trial. In one of the conversations, the defendant can be heard telling

Aleman that "they found the gun." When Aleman denied that the defendant ever told her he shot the victims, another conversation was played wherein the defendant told Aleman that he was going to say he acted in self-defense. During another call, when Aleman questioned the defendant about being with his ex-girlfriend on the morning of the shooting, the defendant admitted, "Brittney [sic] was a mess up. Just like I messed up and shot those people." At another time, the defendant told Aleman, "I don't know what I was thinking. I damn near took somebody's life." During one of the recorded conversations, Aleman advises the defendant that she provided the police with two different statements. When the defendant expresses frustration with Aleman for making the second statement, she stated, "I could just tell them that I made that statement cause I was pissed at you for being with Brittney [sic]."

Brittany Breaux testified that when she picked up the defendant and Lee on the morning in question, the defendant told her he had shot two people. She further testified that as they rode around, Lee repeatedly stated that the defendant was "crazy."

Both victims provided detailed descriptions of the gun the shooter pointed at them. Detective Travis Theriot of the Houma Police Department testified that Aleman also provided a description of the gun in her statement. Theriot further testified that the gun recovered from beneath the defendant's shed fit the descriptions provided by Aleman and the victims as the weapon used in the shootings.

Detective Jude McElroy of the Houma Police Department testified that he was responsible for recording the statements Aleman provided in connection with the investigation. McElroy denied ever threatening and/or coercing Aleman. He also denied advising Aleman of the information contained in the statements.

Aleman freely provided the information and he typed it. After she provided her statements, McElroy allowed Aleman to review and sign the statements.

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. State v. Taylor, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. The reviewing court is not permitted “to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence.” State v. Marcantel, 2000-1629, p. 9 (La. 4/3/02), 815 So.2d 50, 56. It is not the function of an appellate court to assess the credibility of witnesses or reweigh the evidence to overturn a factfinder’s determination of guilt. See State v. Houston, 98-2658, p. 5 (La. App. 1st Cir. 9/24/99), 754 So.2d 256, 259. When a case involves circumstantial evidence, and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty, unless there is another hypothesis that raises a reasonable doubt. State v. Smith, 2003-0917, p. 5 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 799.

After reviewing the trial testimony and evidence, we conclude that the identification of the defendant as the person who fired the shots at the victims was established beyond a reasonable doubt. It is the function of the jury to determine which witnesses are credible. It is obvious from the verdicts rendered that the jury found Lee to be credible and accepted his unequivocal identification of the defendant as the shooter. Considering the other evidence introduced as corroboration for Lee’s testimony (most importantly, the defendant’s own words on the recorded telephone conversations), we find the jury’s verdicts were reasonable. Faced with the overwhelming evidence of the defendant’s identity, the jury obviously rejected any theory of mistaken identity. In reviewing the evidence,

we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See State v. Ordodi, 2006-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662. Furthermore, an appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the factfinder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. State v. Calloway, 07-2306, pp. 11-12 (La. 1/21/09), 1 So.3d 417, 422-423 (per curiam).

Considering the foregoing, we find that there was sufficient evidence to support the attempted first degree murder convictions and to establish the defendant's identity as the shooter. Therefore, viewing all the evidence in the light most favorable to the state, and giving deference to the credibility determinations of the jurors, a rational trier of fact could have concluded beyond a reasonable doubt, and to the exclusion of any reasonable hypothesis of innocence, that the defendant was guilty of the charged offenses. The evidence was sufficient to negate any reasonable probability of misidentification. This assignment of error lacks merit.

**PRO SE ASSIGNMENT OF ERROR 3
ADMISSION OF TESTIMONY REGARDING PREJUDICIAL
PHOTOGRAPH**

In his final *pro se* assignment of error, the defendant argues the trial court erred in allowing the prosecutor to question Kristy Aleman regarding a photograph that was displayed on the wall of her bedroom depicting the defendant with one gun in his hand and one in his waistband. He maintains any evidence relating to his possession of a weapon was irrelevant and violated La. C.E. art. 404(B), which prohibits the use of evidence of other crimes or bad acts to show bad character of the defendant or that he acted in conformity therewith. The defendant further argues that the probative value of this testimony was outweighed by its prejudicial effect.

Although Kristy Aleman initially told the police exactly where the defendant hid his handgun, at the trial, Aleman denied ever observing the defendant in possession of a gun. She testified that she did not even know the defendant owned a gun. In response, the prosecutor asked Aleman about the picture in question. Counsel for the defendant objected. The trial court overruled the objection and allowed the line of questioning. Aleman then admitted that there was a picture of the defendant with two guns in his possession on the bedroom wall.

Except under certain statutory or jurisprudential exceptions, evidence of other crimes or bad acts committed by the defendant is inadmissible at trial. See State v. Jackson, 625 So.2d 146, 148-49 (La. 1993) (citing La. C.E. art. 404(B)(1)). The erroneous admission of "other crimes" evidence is subject to harmless-error analysis. See State v. Morgan, 99-1895, p. 5 (La. 6/29/01), 791 So.2d 100, 104 (per curiam). The test for determining harmless error is whether the verdict actually rendered in the case was surely unattributable to the error. Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); see also Morgan, 99-1895 at p. 6, 791 So.2d at 104.

Even if we were to conclude that Aleman's testimony regarding the photograph of the defendant with the possession of guns was an inadmissible reference to other bad acts by the defendant in this case, any error in allowing the evidence was clearly harmless beyond a reasonable doubt. See State v. Leonard, 05-1382 at p. 12, 932 So. 2d at 667-668; see also La. C.Cr.P. art. 921. Even absent evidence that the defendant was previously in possession of multiple guns, the defendant's participation in the shootings in this case was clear. The evidence presented at the trial established that the defendant shot the unarmed victims, told several others what he had done, hid the gun behind his house, and later strategized that he would urge a claim of self-defense. Thus, it is clear that the defendant's convictions were unattributable to the introduction of any other crimes or bad acts

evidence. This assignment of error lacks merit. For the foregoing reasons, we affirm the defendant's convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED.