NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 0563

STATE OF LOUISIANA

VERSUS

DEDRICK LEONARD

Judgment Rendered: NOV 0 1 2013

* * * * *

On Appeal from
19th Judicial District Court,
In and for East Baton Rouge Parish,
State of Louisiana
Trial Court No. 11-10-0140, Sec. 7

The Honorable Don Johnson, Judge Presiding

* * * * *

Hillar Moore,
District Attorney
Leila Braswell,
Assistant District Attorney
Baton Rouge, Louisiana

Attorneys for Plaintiff/Appellee,
State of Louisiana

Sherry Watters
New Orleans, Louisiana

Attorney for Defendant/Appellant,
Dedrick Leonard

* * * *

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

CRAIN, J.

The defendant, Dedrick Leonard, was charged by bill of information with attempted armed robbery, a violation of Louisiana Revised Statutes 14:27 and 14:64 (count 1), and attempted second degree murder, a violation of Louisiana Revised Statutes 14:27 and 14:30.1 (count 2). Following a bench trial, he was found guilty as charged and received concurrent hard labor sentences of fifteen years without benefit of probation, parole, or suspension of sentence for attempted armed robbery and fifteen years for attempted murder. On appeal, the defendant asserts that the trial court erred in finding that he knowingly and voluntarily waived his right to a jury trial, and that the evidence was insufficient to support the convictions. We affirm.

FACTS AND PROCEDURAL HISTORY

Herman Jordan, an employee of the United States Postal Service, was delivering mail on Maple Street in Baton Rouge when he heard "the sound that a shotgun makes when you rack it, to chamber it." He turned around and saw "a young man" pointing a shotgun at his chest. The assailant stated, "Give it up." Jordan pushed the weapon down and away from his chest with his right hand, but the assailant fired the weapon, striking Jordan's leg. The assailant then ran down the street with the weapon. Jordan was later able to identify the weapon used by the assailant, but was unable to identify the assailant.

Eric Pickett, a resident of Maple Street, testified that he saw the shooting but could only describe the assailant as a young, black male who ran "to the last house on the end" after the shooting. Baton Rouge Police Department Detective Ira Roberts investigated the incident and learned that the property where the assailant ran after the shooting was Keriakus Smith's residence. Detective Roberts went to the Smith residence and spoke to Smith's girlfriend, Teifa Collins, who advised that no one was present in the home and consented to a search. While guarding the rear of the

residence, Detective Roberts saw a shotgun underneath the house. The gun would later be identified as the weapon used in the crime.

After interviewing Smith and Collins, Detective Roberts developed a suspect known by the nickname "Nu Nu." While Detective Roberts was inside the Smith residence, Smith's mother received a telephone call that was audible to the detective because the telephone was on speakerphone. The caller identified himself as "Nu Nu." The caller told Smith's mother to have Smith or someone else "get the gun from underneath the house." At trial Detective Roberts testified that the caller's voice sounded like the defendant.

The defendant did not testify at trial, but made statements in a videotaped interview that was played. During the interview, the defendant told Detective Roberts that he was "Nu Nu," but, without prompting, denied shooting anyone. Detective Roberts testified that prior to the interview, neither he nor anyone else to his knowledge had told the defendant that the incident involved a shooting. The defendant also conceded he knew Smith and Collins but claimed he had never been on Maple Street.

Smith testified and confirmed that he and the defendant were friends. Smith lived on Maple Street at the time of the offense and saw the defendant at the house on that day. In contrast to statements he made during the investigation, Smith testified at trial that the defendant did not have a gun with him. He claimed not to remember what he told detectives or the prosecutor prior to trial and stated, "I ain't seen [the defendant] pull no trigger. I ain't seen him shoot nobody." Smith acknowledged that he had spoken to the prosecutor in the presence of an investigator only hours before giving his testimony.[1]

Mike Vicari, an investigator with the East Baton Rouge Parish District Attorney's Office, testified that he was present when Smith was interviewed.

According to Vicari, Smith stated that the defendant rode to Smith's house on a bicycle and had a gun. When asked what he intended to do with the gun, the defendant told Smith that he "intended to get a lick." Smith then stated that after hearing shots the defendant returned to his house and asked to come inside, but Smith refused to let him in.

JURY TRIAL WAIVER

The defendant argues that the trial court erred in finding that he knowingly and voluntarily waived his right to a jury trial. The right to trial by jury in felony and certain misdemeanor cases is protected by both the federal and state constitutions. *See* U.S. Const. amend VI; La. Const. art. I, §§ 16, 17. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury but no later than forty-five days prior to the trial date and the waiver shall be irrevocable. La. Const. art. I, § 17(A); *see also* La. Code Crim. Pro. art. 780A. A waiver of trial by jury is valid only if the defendant acted voluntarily and knowingly. *See State v. Kahey,* 436 So. 2d 475, 486 (La. 1983). A waiver of this right is never presumed. *State v. Brooks,* 01–1138, (La. App. 1 Cir. 3/28/02), 814 So. 2d 72, 76, *writ denied,* 02–1215 (La. 11/22/02), 829 So. 2d 1037. However, no special form is required for a defendant to waive his right to a jury trial. *State v. Coleman*, 09-1388 (La. App.1st Cir. 12/12/10), 35 So. 3d 1096, 1098, *writ denied*, 10-0894 (La. 4/29/11), 62 So. 3d 103. Prior to accepting a waiver, the trial court is not obligated to conduct a personal colloquy inquiring into the defendant's educational background, literacy, and work history. *State v. Allen*, 05-1622 (La. App. 1 Cir. 3/29/06), 934 So. 2d 146, 154.

At a preliminary examination hearing on May 25, 2011, and after defense counsel advised that her client had made his determination as to his mode of trial, the trial court engaged in the following colloquy with the defendant:

[Court]: You – you graduated from high school?

---

[1] Smith was in custody for burglary at the time of his testimony.

[Defendant]: Yes, sir.

[Court]: Have any kind of disability? Not that you're aware of?

[Defendant]: Not that I'm aware of.

[Court]: Your lawyer tells me that you don't want to have a jury of your peers come in from the community and listen to what the State has to present at a trial; that you would prefer to have one juror, and that would be me. You have the benefit and the right to have twelve jurors.

[Defense counsel]: Judge, I don't mean to interrupt you. I believe that he wants a jury trial.

[Court]: Very well.

[Defense counsel]: But I have explained to him that if he changes his mind, we're going to pick a status date in early August, which would be forty-five days prior to his trial date, in case he changes his mind.

[Court]: Very well. He'll have until that date, and then he'll select his mode of trial. All right. So, what else we need to – to accomplish here?

[Defense counsel]: We need to pick a status date in early August to do discovery and as - to make a final determination as to mode of trial.

The minutes for a status conference on February 6, 2012 indicate "[t]he [d]efense waived right to jury trial for bench trial." The transcript from that conference reflects the following:

[Minute clerk]: Is it going to be a jury trial, or –

[State]: It's a waive jury trial.

[Defense counsel]:Thank you.

The record on appeal was supplemented with a transcript of a status conference held on August 11, 2011. At that time, defense counsel advised the trial court that the defendant had made a decision regarding his mode of trial. The defendant was sworn and the following exchange took place:

[Court]: You want to have a jury trial or you want me to try your case?

[Defendant]: A judge trial.

[Court]: You understand you don't have to have a judge trial?

[Defendant]: Yes, sir.

[Court]: What are the charges? A twelve-person jury is required, huh?

[State]: Yes, your Honor. It's attempt[ed] second-degree murder, as well as an attempt[ed] armed robbery.

[Court]: Ten of those jurors would have to vote to find you not guilty or guilty. If you give up your right to your jury trial, then you're only going to have one juror and that's going to be me. And State's going to have to present evidence at your trial to prove beyond a reasonable doubt that you committed these crimes. If they are successful at that, I'm going to find you guilty. If, however, they fail at that responsibility, I'm going to find you not guilty. Knowing what your rights are, you want to give up your right to your jury trial and have me hear your case?

[Defendant]: Yes, sir.

[Court]: And how old are you?

[Defendant]: 18.

[Court]: You graduated from high school?

[Defendant]: Yes, sir.

[Court]: You read and write and understand? You confused about – are you confused about anything?

[Defendant]: The rights? Got this feeling (inaudible).

[Court]: Did I confuse you about your right to your jury trial?

[Defendant]: No, sir.

[Court]: All right. I'll set it out for bench trial.

We find that the defendant knowingly, intelligently and voluntarily waived his right to a trial by jury in this matter. At the preliminary examination hearing, the trial court questioned the defendant about his educational background, inquired as to whether he had any disability, and explained the right to jury trial. At a subsequent status conference, the defendant stated he wanted a judge trial. The trial court asked the defendant if he understood that he did not have to waive his right to a jury trial, and the defendant answered affirmatively. The court further explained that the

defendant had a choice between ten jurors having to find him guilty or the trial court having to find him guilty and that the State would have to present evidence at trial to prove beyond a reasonable doubt that he committed the charged crimes. The court then again asked the defendant if wanted to give up his right to a jury trial and have the court hear his case, and the defendant answered affirmatively.[2] This assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE

In his second assignment of error, the defendant contends that the evidence presented was insufficient to support the convictions because the State failed to prove he was the assailant who shot the victim during an attempted armed robbery.

In reviewing claims challenging the sufficiency of the evidence, this court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed 2d 560 (1979). *See also* La. Code Crim. Pro. Art. 821B; *State v. Mussall*, 523 So. 2d 1305, 1308-09 (La. 1988). The *Jackson* standard, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. *State v. Petitto*, 12-1670 (La. App. 1 Cir. 4/26/13), 116 So. 3d 761, 766; *State v. Patorno,* 01-2585 (La. App. 1 Cir. 6/21/02), 822 So. 2d 141, 144. When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. *State v. Wright*, 98-0601 (La. App. 1 Cir. 2/19/99), 730 So. 2d 485, 487, *writ denied*, 99-0802 (La. 10/29/99), 748 So. 2d 1157, and *writ denied sub nom*, *State ex rel. Wright v. State*, 00-0895 (La. 11/17/00), 773 So. 2d 732. When analyzing

[2] We also recognize that the waiver complied with the 45-day pretrial deadline set forth in Article I, §17(A) of the Louisiana Constitution. The waiver occurred on August 11, 2011, several months prior to the commencement of the trial on May 16, 2012.

circumstantial evidence, Louisiana Revised Statute 15:438 provides that the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. *Petitto*, 116 So. 3d at 766; *Patorno,* 822 So. 2d at 144. The facts then established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. *Wright*, 730 So. 2d at 487.

Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. La. R.S. 14:27A. Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1A(1). The offense is also committed by the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of armed robbery. La. R.S. 14:30.1A(2). Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon. La. R.S. 14:64A.

Specific criminal intent is that "state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). Though intent is a question of fact, it need not be proved as a fact. It may be inferred from the circumstances of the transaction. *State v. Henderson*, 99-1945 (La. App. 1 Cir. 6/23/00), 762 So. 2d 747, 751, *writ denied*, 00-2223 (La. 6/15/01), 793 So. 2d 1235. Specific intent is an ultimate legal conclusion to be resolved by the fact finder and

may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. *Henderson*, 762 So. 2d at 751. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. *Henderson*, 762 So. 2d at 751.

Smith's pre-trial statements described the defendant arriving at Smith's house on Maple Street on the day of the offense with a gun that he intended to use "to get a lick." The victim described the shooting, and witnesses saw the assailant run into the yard at the Smith residence. Smith advised the State that he heard the shot, and the defendant then asked to come inside the house, but Smith refused to let him. The weapon used in the offense was discovered under the Smith residence by a detective and was identified by the victim. While Detective Roberts was inside the Smith residence, he listened to a telephone call from "Nu Nu," the defendant's nickname, who requested that someone "get the gun from underneath the house." During questioning, the defendant claimed that he "never shot nobody," although he had not previously been informed that the incident involved a shooting.

The defendant argues that the evidence suggested that Smith may have been the perpetrator because a neighbor, Pickett, described the event as occurring when the "young guy that lived down the street, come running behind [the victim] with a shotgun." However, Pickett later explained that he did not know Smith or the shooter and that he just "figured that [the shooter] lived down the street," but he did not know. Smith denied that he was the assailant during his testimony.

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. *See State v. Moten*, 510 So. 2d 55, 61 (La. App. 1 Cir.), *writ denied*, 514 So.

2d 126 (La. 1987). The trial court reasonably rejected the defendant's hypothesis of innocence.

This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. *State v. Lofton*, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So. 2d 1365, 1368, *writ denied*, 97-1124 (La. 10/17/97), 701 So. 2d 1331. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. *Petitto*, 116 So. 3d at 770; *State v. Young*, 99–1264 (La. App. 1 Cir. 3/31/00), 764 So. 2d 998, 1006. Where 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. *Petitto*, 116 So. 3d at 770; *Young*, 764 So. 2d at 1006. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder 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 (La. 1/21/09), 1 So. 3d 417, 418 (*per curiam*).

After a careful review of the record and evaluating the evidence in a light most favorable to the State, we conclude that a rational trier of fact could have concluded that the State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of attempted armed robbery and attempted second degree murder. This assignment of error is without merit.

REVIEW FOR ERROR

The defendant requests that this court examine the record for error under Louisiana Code Criminal Procedure article 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under Louisiana Code Criminal Procedure article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and

proceedings without inspection of the evidence.

After a careful review of the record, we find that the trial court erred in failing to specify that the fifteen-year hard-labor sentence for attempted murder was imposed without benefit of probation, parole, or suspension of sentence. *See* La. R.S. 14:27.D(1)(a). A minute entry indicates that the sentences on both counts were without benefit of probation, parole, or suspension of sentence, but the sentencing transcript reveals that the attempted murder sentence did not specify those restrictions. However, the failure of the trial court to specifically state those restrictions in no way affects the statutory requirement that the sentence for the attempted murder conviction must be served without benefit of probation, parole, or suspension of sentence. *See* La. R.S. 15:301.1A. We find no further errors.

CONVICTIONS AND SENTENCES ON BOTH COUNTS AFFIRMED.