NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 0635

STATE OF LOUISIANA

VERSUS

LARRY MILES

Judgment Rendered: DEC 27 2013

* * * * *

TMH

On Appeal from the
23rd Judicial District Court,
In and for the Parish of Ascension,
State of Louisiana
Trial Court No. 27,616

Honorable Thomas J. Kliebert, Jr., Judge Presiding

* * * * *

Ricky L. Babin
District Attorney
Donald D. Candell
Assistant District Attorney
Gonzales, LA

Attorneys for Plaintiff-Appellant,
State of Louisiana

Mary E. Roper
Baton Rouge, LA
Jennifer Van Metre
Gonzales, LA

Attorneys for Defendant-Appellant,
Larry Miles

Kuhn, J. dissents with reasons. by TMH
J. Theriot concurs

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

The defendant, Larry Miles, was charged by bill of information with two counts of attempted manslaughter, violations of La. R.S. 14:27 and 14:31(A). He pled not guilty and, following a jury trial, he was found guilty as charged on both counts. The defendant filed a motion for post-verdict judgment of acquittal. After a hearing, the trial court granted the motion and filed written reasons into the record. The State now appeals, designating one assignment of error. For the following reasons, we affirm the trial court's ruling reversing the defendant's convictions.

FACTS

On March 22, 2008, Shedrick Mumphrey and Joseph Duncan, Jr., were installing a stereo in Shedrick's car on St. Vincent Street in Donaldsonville, Ascension Parish. The defendant drove up to Shedrick's car and asked Shedrick if he was the one who shot at him the day before. Shedrick told the defendant to mind his own business and leave him alone. After exchanging heated words, Shedrick and the defendant engaged in a fistfight. When the fight ended, Shedrick and the defendant headed to their respective cars. As Shedrick sat in his car, a gunshot rang out. Shedrick grabbed his AK-47 rifle from his car and fired six-to-eight rounds toward the defendant's car. The defendant sped away. Two people who were outside were struck in the leg by gunfire. Both survived their injuries. Several witnesses testified at trial that some of the people at the scene, including the defendant, had a gun.

Darren Demby testified that, as he walked out of a barber shop, he saw the defendant get out of his car, get into a fight, then get back in his car. When the defendant was in his car, "another individual" started shooting at the defendant, who fled the scene. Darren never saw the defendant with a weapon, and he denied seeing any guns sticking out of the defendant's car. However, after having his

memory refreshed about his police statement, Darren testified that it looked like an AK-47 rifle was being held out the window by an unknown passenger in the car that the defendant was driving. In his statement to the police, Darren said that shots were fired from that AK-47 rifle sticking out of the window.

Tyrol Leblanc testified the shooting incident happened by her house. She stated the incident involved the defendant, Shedrick, and someone she knew only as "Jessie." Shedrick was working on his car in front of Tyrol's house. She saw the defendant pull his car near Shedrick, park and get out of his car, and then start arguing with Shedrick. Tyrol asked the defendant to move his car because there were children around. The defendant complied, and Shedrick began firing his gun. Tyrol seems to suggest in her testimony that Jessie and the defendant also had guns or that they scuffled over a single gun. The following pertinent exchange between Tyrol and the prosecutor on direct examination took place:

> Q. Okay, and what did you see [the defendant] do when he parked his vehicle?
> A. First they was [sic] arguing. And before you know it, the other boy drove up and came out with a big long gun. The gun was about this long (indicating), wrapped up in a dirty white T-shirt.
> * * *
> Q. And this guy was the guy you called Jessie?
> A. Yes, sir.
> Q. Okay, now, when [the defendant] arrived, did you see him get out of his vehicle?
> A. Yes, sir.
> Q. Okay, did you hear him say anything?
> * * *
> A. I can't remember word-by-word, but it was a lot of obscene language and threaten [sic] words, you know like fighting words. I just can't remember what particular words, but it was a lot of threatening and fighting and obscene language.
> Q. And that obscene, threatening, fighting language was directed towards whom?
> A. Shedrick.
> * * *
> Q. All right, and after he said these threatening and obscene words to [Shedrick], what happened?
> A. Then the other guy, they were [sic] just kept constantly talking and when I told [the defendant] to, you know, like move the car from in front my door cause they got a lot of kids and, when he did that, Shedrick opened fire.

Q. Okay, what happened with the guy that got out the car with the long gun?
A. He was, you know, out there too. He was saying a lot of threatening words.
Q. To whom?
A. To Shedrick.
Q. So this guy named Jessie drives up and starts saying threatening words to [Shedrick] with the long gun?
A. Uh-huh (affirmative).
Q. Okay.
A. Oh, he had the long gun.
Q. Who?
A. [The defendant].
Q. [The defendant] had the long gun?
A. Uh-huh (affirmative).
Q. When did you see [the defendant] with the long gun?
A. When he got out the car.
Q. Okay.
A. First he got out the car on his own, then he went back to the car and come up with something, looked like a shotgun. A long, long gun wrapped up in a dirty T-shirt.
Q. Okay, and what did you see next?
A. He was like going towards him and him and Jessie was like, you know, trying to pull for the gun, and when they was doing that I took all the kids and I made 'em came [sic] in the house, and when I come back outside, the way it look like, he was trying to take the gun and leave cause he probably thought the police was coming. But after I went in the house and come back, that's when they start shooting.
Q. Okay, did you actually see [the defendant] and [Shedrick] engage in a fight?
A. No.

* * *

Q. Do you remember saying anything about them fighting to the police in 2008?
A. To be honest with you, I can't remember, sir.
Q. But that is your statement, huh?
A. Yes, sir. Yes, sir.
Q. Okay, and what did you say right here?
A. They was [sic] out there fighting.

* * *

Q. Okay, so that's what it looked like to you.
A. Yes, sir. After I told [the defendant] to get out my yard, because I had kids, he really did listen. He got in the car, and when he got in the car Shedrick went to shooting at the car.
Q. Okay. What happened to the gun that [the defendant] had?
A. I don't know.
Q. Did Melanie, your sister, take the gun and run in the house with them?
A. No, sir.
Q. Okay.
A. Everything happened so fast that day.

Detective Johnny Darville, with the Ascension Parish Sheriff's Office, testified that he interviewed the defendant on the same day of the shooting later in the day. The interview was recorded, and the recording was played for the jury. In the interview, the defendant stated that he approached Shedrick (a/k/a "Spooky") to ask him whether he had shot at the defendant the night before. They exchanged words and then began fighting. When the fight was over, the defendant's brother drove up and told the defendant to get in his car and leave. The defendant got in his car and, as he was heading toward Fourth Street, he heard gunshots. The defendant did not see who was shooting as he sped away.

Joseph Duncan, Jr., testified he was hooking up the stereo in Shedrick's car when the defendant drove up with a small gun pointed out the window of his car. Joseph told the defendant to put the gun down and fight. The defendant complied and he and Shedrick engaged in a fistfight. After the fight, the defendant went back to his car. Shedrick ran to his car, grabbed a gun, and started shooting at the defendant's car. Joseph testified he saw no one else with a gun.

Cheryl Duncan testified she saw a large crowd outside, and that someone had a "long gun," but she did not know who actually had it. Then she saw Jessie and the defendant "trying to get the gun from one another," but Melanie Leblanc took the gun away from both of them. Melanie wrapped the gun in a shirt and took it down the street. Cheryl called 911. Gunshots where heard on the recorded 911 call that was played for the jury.

Kendra Bell testified she saw the defendant and Shedrick argue and get in a fistfight. She began grabbing children to bring them inside, because she saw Jessie across the street with a gun wrapped up in a T-shirt. She did not see any other guns and she did not see anybody shoot a gun.

Shedrick testified that he had charges pending against him arising out of the March 22, 2008 shooting incident. He was charged with three counts of attempted

second degree murder, two counts of negligent injuring, and illegal use of a weapon. In exchange for his truthful testimony, the State offered to dismiss the pending attempted murder charges against him. Shedrick testified he was currently incarcerated after receiving a seven-year sentence on an unrelated conviction for possession of cocaine and marijuana. Shedrick stated that on the day of the shooting incident, the defendant drove up and accused him of shooting at the defendant on a previous occasion. They exchanged words and got into a fistfight. While they were fighting, someone unknown to Shedrick pulled up in a car, approached Shedrick, put an AK-47 rifle to his face, and told him he was going to kill him. Shedrick backed up and then went to sit in his car. While in his car, Shedrick heard a gunshot. Shedrick grabbed his AK-47 rifle from behind his passenger seat, got out of his car, and fired his weapon six to eight times toward the defendant, who was driving away. Shedrick then dropped his gun at the scene and drove away, planning to leave town. However, his aunt called him and told him that a child had been shot, and that Shedrick needed to turn himself in. Shedrick complied. Shedrick further testified that the defendant was never in possession of a gun during the incident.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR

In its sole assignment of error, the State argues the trial court erred in granting the defendant's motion for post-verdict judgment of acquittal. Specifically, the State contends the trial court erred in supplementing its opinion for that of the unanimous jury verdict where the jury had no reasonable doubt of the defendant's guilt.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not,

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 **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in La. Code Crim. P. art. 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144. Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051.

The defendant was charged with two counts of attempted manslaughter. Louisiana Revised Statute 14:31 outlines the elements of the crime of manslaughter, providing in pertinent part:

> A. Manslaughter is:
>
> (1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or
>
> (2) A homicide committed, without any intent to cause death or great bodily harm.

> (a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Article 30 or 30.1, or of any intentional misdemeanor directly affecting the person[.]

Attempt is defined in La. R.S. 14:27, and provides in pertinent part as follows:

> A. 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.
>
> B. (1) Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.

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). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503 (La. 11/25/96), 684 So.2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982). Deliberately pointing and firing a deadly weapon at close range are circumstances that support a finding of specific intent to kill. **State v. Broaden**, 99-2124 (La. 2/21/01), 780 So.2d 349, 362, cert. denied, 534 U.S. 884, 122 S.Ct. 192, 151 L.Ed.2d 135 (2001); **State v. Glover**, 47,311 (La. App. 2d Cir. 10/10/12), 106 So.3d 129, 135, writ denied, 2012-2667 (La. 5/24/13), 116 So.3d 659.

A motion for post-verdict judgment of acquittal raises the question of the sufficiency of the evidence. **State v. Hampton**, 98-0331 (La. 4/23/99), 750 So.2d 867, 880, cert. denied, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999). 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. Code Crim. P. art. 821(B).

In its written reasons for granting the motion for post-verdict judgment of acquittal, the trial court stated in pertinent part:

> The testimony of one eye witness that [the defendant] struggled over a gun and the testimony of another eye witness that [the defendant] held a gun is direct evidence that [the defendant] possessed a gun during the altercation at issue and is circumstantial evidence that (a) he discharged the gun and that (b) he fired the gun that injured the two bystanders. Thus, when the state uses such testimony as evidence of guilt, the state's evidence must exclude any reasonable hypothesis that someone other than [the defendant] fired a weapon that injured the two bystanders. [Citations omitted.]
>
> The jury was presented with scant testimony that [the defendant] possessed a weapon during the altercation at issue and absolutely no evidence that [the defendant] discharged the weapon. In fact, the State's own witness and alleged victim, [Shedrick], unequivocally testified under oath that he never saw the [d]efendant with a weapon, but rather, that he himself possessed and discharged several rounds from an AK-47 during the altercation. Therefore, under the circumstances present in this case, it cannot be excluded as a reasonable hypothesis that [Shedrick] fired the weapon that injured the two bystanders. Thus, the evidence remains insufficient to convince a rational trier of fact that the State proved beyond a reasonable doubt that [the defendant] had the specific intent to kill the two bystanders wounded by the gun fire.
>
> Additionally, considering the complete lack of evidence that the [d]efendant fired the gun, the Court finds that the State did not prove beyond a reasonable doubt that the [d]efendant was guilty of the lesser included responsive verdict of two counts [a]ggravated [b]attery[.]...
>
> Therefore, the Court in viewing the evidence in the light most favorable to the prosecution, finds the evidence legally insufficient to convince a rational trier of fact that the State proved the requisite specific intent to kill beyond a reasonable doubt, or that the [d]efendant committed the lesser responsive verdict of aggravated battery. [Citations omitted.]

To the extent the State did not prove its case against the defendant beyond a reasonable doubt, we agree with the trial court. There was conflicting testimony that the defendant even possessed a gun at the time of the shooting. For example, Tyrol testified the defendant got out of his car with "the long gun" wrapped in a dirty T-shirt. Joseph testified the defendant drove up near Shedrick, holding a

small gun out of the window. When Joseph told the defendant to put the gun up, the defendant complied, got out of his car and engaged in a fistfight with Shedrick. Cheryl testified she saw a "long gun" but did not know who had it. She further testified she saw the defendant and Jessie fighting over a gun when Melanie approached and took the gun from them. Kendra Bell testified that Jessie had a gun wrapped in a T-shirt, and that she saw no other guns. Shedrick testified that while he was in a fistfight with the defendant, someone pulled up in a car, got out with an AK-47, put the gun to Shedrick's face, and threatened to kill him. Shedrick testified that he never saw the defendant with a gun. He also admitted that he (Shedrick) was the person who fired his AK-47 six-to-eight times after he heard a shot when he got back in his car. In Shedrick's statement to the police on the day of the shooting, he stated three people approached him, including the defendant, with AK-47s. Shedrick continued in his statement that he shot his weapon six-to-eight times, and he was not sure if they fired back at him.

More importantly, however, there was absolutely no testimony that the defendant fired a weapon. The only consistent testimony and evidence established that Shedrick repeatedly fired a weapon. According to Shedrick, he allegedly heard a single shot while he was in his car, which prompted him to shoot his gun, but he had no idea where the shot came from or who fired it. Shedrick testified that he fired his weapon at the defendant and his associates, at which time the defendant was ducking and turning the corner in his vehicle. The 911 call from Cheryl was played for the jury. Cheryl told the 911 operator that the defendant had a gun and "they're about to shoot." Moments later, Cheryl said that Melanie had the long, rifle-like gun, and that she was bringing the gun into her house. Cheryl then began to describe the colors of the vehicles that were at the scene. A few seconds later, eight gunshots rang out. Cheryl told the operator she did not know who shot the gun, but that it looked like someone had been shot.

Deputy Todd Bourgeois, with the Ascension Parish Sheriff's Office, testified he found eight rifle shell casings in front of 1112 St. Vincent Street. The shells were in the front yard and "kind of on the sidewalk" in front of the residence. Detective Gerald Whealton, crime scene analyst with the Ascension Parish Sheriff's Office, testified he collected the eight shell casings, which were all fired from the same weapon that had a 7.62 x 39 cartridge. The weapon was never located. Detective Whealton also stated that such rounds were usually fired from an automatic rifle, and they were consistent with being fired from an AK-47 rifle. However, none of the testimony indicated that it was the defendant who fired a gun.

The State seemed resigned to the notion that the defendant never shot a weapon during the incident, but argued that when the defendant initiated the fight with Shedrick, that set into motion a chain of events that led to Shedrick firing a weapon and hitting two innocent bystanders. For example, during opening statements, the prosecutor stated:

> While the fight was going on -- and we will show you, actually play you some 911 tapes, which will almost put you on St. Vincent Street, to show you what [the defendant] created by his fight with [Shedrick], and his friends bringing guns to that fight in the middle of the street. It resulted in shootings of guns which hurt innocent people. That's what this is about. It's about criminal consequences that are flowing from the fight that [the defendant] sought [Shedrick], engaged [Shedrick] in, and resulted in AK-47's indiscriminately being fired up-and-down the street[.]

After an extensive explanation of the law under La. R.S. 14:31(A)(2), namely the felony murder/misdemeanor manslaughter rule, the prosecutor described the State's theory of the case:

> We believe that after you hear and see all the evidence that we present, that you will find that [the defendant] was engaged in the perpetration or the attempted perpetration of a felony or an intentional misdemeanor, and as a result of those criminal consequences, okay, shots were fired and innocent people were injured, and he is the person to be held accountable for it. Okay? He is the person to be held accountable for it.

During closing argument, the prosecutor seemed to indicate the State was prosecuting the defendant because he had provoked a fight. The prosecutor argued:

> I believe . . . that probably the defense will concede that those two people were shot. The question is: Why were they shot, and who's responsible for them being shot? That's what we're here for, ladies and gentleman, to determine who is responsible . . . for bullets indiscriminately flying down the street and hurting, darn near killing people. That's the big question for you. . . . This is [sic] human beings being shot at in our streets. And it's taking responsibility for what you cause. Okay? . . . You seek out and want to fight and confront people in broad daylight, when they are not doing anything to you at the time. You threaten to kill them, your friends and everybody else comes to back you up and threaten to kill them, and a gun is fired, and innocent people are injured or killed? Injured here, not killed; thank [G]od somebody wasn't killed. The question you must determine is who is responsible for that. The prosecution says it's [the defendant].

The prosecutor concluded in rebuttal closing argument, "It's a question of do we hold people accountable for causing mayhem? It's really that simple."

Culpability based on some foreseeable connected series of events, or proximate cause, has been repeatedly addressed and rejected in the jurisprudence. The Louisiana Supreme Court has interpreted the felony murder/misdemeanor manslaughter rule to require that a direct act of a defendant cause the death of the victim, and has refused to hold persons criminally culpable for setting in motion chains of events that ultimately result in the deaths (injuries in this case) of others. See **State v. Small**, 2011-2796 (La. 10/16/12), 100 So.3d 797, 805-08. The only person who repeatedly and indiscriminately fired a weapon at the scene of this incident was Shedrick, and he admitted that he had done so. While the defendant certainly brought friends with weapons to a fight on a neighborhood street, he did not cause Shedrick to shoot his gun, and the law simply does not hold him criminally responsible under this factual scenario, for the two people that Shedrick apparently shot. In other words, the defendant's decision to engage in a fistfight with Shedrick is not a direct link to Shedrick's firing of his AK-47.

We particularly note that throughout the State's opening statement and closing argument, as well as the trial court's jury charges, the jurors were repeatedly exposed to and informed of the incorrect law. In its charges to the jury, for example, the trial court stated in pertinent part:

> Attempt is defined as follows: Any person who, having a specific intent to commit a crime, does or admits [sic] an act for the purpose of, and tending directly towards the accomplishing of his object, is guilty of an attempt to commit the offense intended. It shall be immaterial whether under the circumstances he would have actually accomplished his purpose. Mere preparation to commit a crime is not sufficient to constitute an attempt.
>
> Manslaughter: Manslaughter is a homicide committed without any intent to cause death or great bodily harm, when the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Article 30 or 30.1, or any of the intentional misdemeanors directly affecting the person.
>
> Thus, *in order to convict the defendant of attempted manslaughter, you must find the following: . . . that [the defendant] had a specific intent to kill* [the victims], and that the attempted killing took place while [the defendant] was engaged in the commission or attempted commission of simple battery, aggravated assault, aggravated assault with a firearm, or illegal use of weapons or dangerous instrumentalities. (Emphasis added.)

The portion of the manslaughter statute relied on by the State is the section that specifically negates the requirement of the intent to kill. See La. R.S. 14:31(A)(2). Under La. R.S. 14:31(A)(2)(a), the defendant is guilty of manslaughter if a homicide is committed while the offender, who has no specific intent to cause death (or great bodily harm), is engaged in either a felony not enumerated in the first and second degree murder statutes or an intentional misdemeanor. An attempted murder or manslaughter, as noted by the trial court in its reasons for judgment, requires the specific intent to kill. See **State v. Butler**, 322 So.2d 189, 192 (La. 1975); **State in Interest of Hickerson**, 411 So.2d 585, 587 (La. App. 1st Cir.), writ denied, 413 So.2d 508 (La. 1982). See also **Glover**, 106 So.3d at 135. An attempted manslaughter under La. R.S. 14:31(A)(2) would not require the specific intent to kill or cause great bodily harm, making it

incongruent with the specific intent requirement of intent in La. R.S. 14:27. See **State v. Temple**, 394 So.2d 259, 264 n.3 (La. 1981); **State v. Garner**, 241 La. 275, 285 n.3, 128 So.2d 655, 659 n.3 (1961).

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. 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 which raises a reasonable doubt. See **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

The conflicting testimony and physical evidence introduced at trial in the instant matter convinces us that a rational factfinder could not have concluded that the evidence excluded the reasonable hypothesis that the defendant never fired a weapon. While there was some indication the defendant may have possessed a gun at some point, there is simply no evidence, testimonial or otherwise, that he discharged a weapon at the scene. Further, a rational factfinder could not have concluded that the evidence excluded the reasonable hypothesis that the defendant did not have the specific intent to kill the two victims who were shot.

We have carefully reviewed the entire record and conclude the jury acted irrationally in finding the defendant guilty of two counts of attempted manslaughter. The evidence introduced at trial did not establish beyond a reasonable doubt that the defendant fired a weapon, or even that his engaging in a

fistfight with Shedrick was the direct cause of the two victims being shot. While we are mindful not to substitute our judgment of what we think the verdict should have been for that of the jury, we must conclude the jury engaged in impermissible speculation in determining the defendant's guilt. See **Mussall**, 523 So.2d at 1311. Under the facts of this case, we conclude that any rational trier of fact, after viewing all of the evidence as favorably to the prosecution as a rational factfinder can, would necessarily have a reasonable doubt as to the defendant's guilt. No rational trier of fact could have found the essential elements of the crime of attempted manslaughter beyond a reasonable doubt. Furthermore, no rational trier of fact could have found that under these circumstances, the defendant, to the exclusion of everyone else, was the person who shot the victims. See **Id.** at 1311-1312.

Accordingly, the trial court did not err in granting the defendant's post-verdict judgment of acquittal.

POST-VERDICT JUDGMENT OF ACQUITTAL AFFIRMED.

STATE OF LOUISIANA

VERSUS

LARRY MILES

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2013 KA 0635

KUHN, J., dissenting.

I believe the trial court erred in granting defendant's post-verdict judgment of acquittal. The law is well settled that the standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, 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 ***State v. Ordodi***, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660. The trial court did not apply that standard and, therefore, should be reversed on appeal.

The jury concluded that defendant possessed a weapon and believed the testimony of those witnesses who stated they saw defendant with a weapon pointed at Mumphrey. The jury could have reasonably inferred that the four to six cartridges Deputy Bourgeois recovered, which were not confirmed as having been from the AK-47 that Mumphrey shot, were, in fact, fired from the weapon defendant was seen pointing at Mumphrey. The trial court erred in substituting its opinion for that of the unanimous jury. I would reverse the trial court and reinstate the jury's verdict. Accordingly, I dissent.