**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 KA 0730

STATE OF LOUISIANA

VERSUS

TRAVIS MONTRELL GRIFFIN

Judgment Rendered: JAN 22 2015

GH
WJC by GH

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court Number 11-10-0025

Honorable Donald R. Johnson, Judge

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**BEFORE: McDONALD, CRAIN, AND HOLDRIDGE,[1] JJ.**

[1] **Holdridge, J.**, serving as Supernumerary Judge *pro tempore* of the Court of Appeal, First Circuit, by special appointment of the Louisiana Supreme Court.

JMM McDonald, J. agrees in part and dissents with assigned reasons.

**HOLDRIDGE, J.**

The defendant, Travis Montrell Griffin, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1, and attempted first degree murder, a violation of La. R.S. 14:27 and 14:30. He pled not guilty and not guilty by reason of insanity and, following a jury trial, was found guilty as charged on both counts. For the second degree murder conviction, the defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; for the attempted first degree murder conviction, he was sentenced to ten years imprisonment without benefit of parole, probation, or suspension of sentence. The sentences were ordered to run concurrently. The defendant now appeals, designating three assignments of error. We affirm both convictions and the sentence for the second degree murder conviction. We amend the sentence for the attempted first degree murder conviction and affirm as amended.

**FACTS**

On the evening of July 9, 2010, Kennesha Thomas, her sisters, and some friends rented a hotel room at the Belle of Baton Rouge Casino & Hotel to celebrate the July birthdays of Kennesha and Kelli (one of her sisters). The defendant, a cousin of the Thomas sisters, was at the hotel room, along with his fourteen-year-old younger brother, Dee Dee. Later that night, Kennesha's boyfriend, Mikeal Johnson, arrived at the hotel room. Mikeal was with his uncle, thirty-year-old Devone Johnson, Sr., and Devone's five-year-old son, D.J. At some point after the defendant had left the room to get something to eat, Devone and Dee Dee exchanged heated words in the hallway outside of the room. Devone grabbed Dee Dee by his neck and threw him to the ground. Dee Dee got to his feet, prepared to fight, but several people intervened, and Mikeal, Devone, and D.J. left the hotel. Shortly thereafter, hotel management asked Kennesha and her party

to leave.

Devone, along with Mikeal and D.J., drove his car to a Wendy's restaurant for some food, then drove to Kennesha's house on Videt Polk Drive. Devone was dropping off Mikeal, who was going to sleep at Kennesha's house. Kennesha had not arrived yet, so Devone and Mikeal waited outside for her. D.J. was in the back seat of Devone's car. At some point in the evening, the defendant learned of the incident between Devone and Dee Dee. When the defendant left the hotel, he got a ride with Alvin Posey, who drove the defendant to his house on Fairfield Drive. Shortly thereafter, Kelli drove to the defendant's house. The defendant got into Kelli's car, along with Kennesha and others, and rode with them to Videt Polk Drive. When Kelli arrived at her house, the defendant got out of the car and began shooting at Devone with a .40 caliber semi-automatic Glock pistol. Devone was struck once in the chest. Devone managed to get in his car and drive away while the defendant was still shooting at his car. Before reaching the end of the street, Devone crashed into a utility pole, causing a blackout in the neighborhood. Devone died of his injuries a short time later. D.J. was not shot. The defendant left the scene with Kelli and the others (except for Kennesha) in her car. The defendant was apprehended by a U.S. Marshal ten days later and interviewed by Sergeant Roger Corcoran, with the East Baton Rouge Sheriff's Office.

Kennesha and Kelli testified they did not see Devone get shot because they had already gone inside the house when the shooting started. Kourtney Thomas testified that when she arrived in Kelli's car, she saw Devone standing by his car, looking like he was ready to fight. She saw the defendant walk toward Devone. As she began walking toward the house, Kourtney heard a confrontation, followed by gunshots. Kourtney saw the defendant firing a gun as Devone tried to get in his car. Kourtney testified that when she yelled there was a baby in the car, the defendant stopped shooting. Mikeal testified that no words were exchanged

between the defendant and Devone, and that Devone did not have a gun. According to Mikeal, the defendant began shooting at Devone immediately upon exiting Kelli's car.

The defendant did not testify at trial.

**ASSIGNMENT OF ERROR NO. 1**

In his first assignment of error, the defendant argues the jury erred in returning a guilty verdict for the second degree murder of Devone. Specifically, the defendant contends that for the killing of Devone he should have been found not guilty and not guilty by reason of insanity.[2]

In Louisiana, a legal presumption exists that a defendant is sane at the time of the offense. La. R.S. 15:432. To rebut the presumption of sanity and avoid criminal responsibility, the defendant has the burden of proving the affirmative defense of insanity by a preponderance of the evidence. La. Code Crim. P. art. 652; **State v. Silman**, 95-0154 (La. 11/27/95), 663 So.2d 27, 32. Criminal responsibility is not negated by the mere existence of a mental disease or defect. To be exempted of criminal responsibility, the defendant must show he suffered a mental disease or defect that prevented him from distinguishing between right and wrong with reference to the conduct in question. La. R.S. 14:14; **Silman**, 663 So.2d at 32. The determination of sanity is a factual matter. All the evidence, including expert and lay testimony, along with the defendant's conduct and actions before and after the crime, should be reserved for the fact finder to establish whether the defendant has proven by a preponderance of the evidence that he was insane at the time of the offense. **State v. Williams**, 2001-0944 (La. App. 1st Cir. 12/28/01), 804 So.2d 932, 942, writ denied, 2002-0399 (La. 2/14/03), 836 So.2d 135.

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[2] The defendant does not address his attempted first degree murder conviction in this assignment of error.

When a defendant who affirmatively pled the defense of insanity claims that the record evidence does not support a finding of guilty beyond a reasonable doubt, doubt, the appellate court applies the standard set forth in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), to determine whether any rational fact finder, viewing the evidence in the light most favorable to the prosecution, could conclude that the defendant had not proved by a preponderance of the evidence that he was insane at the time of the offense. **State v. Williams**, 2007-1407 (La. 10/20/09), 22 So.3d 867, 875.

The defendant's claim here is baseless. Three doctors testified at trial and none of them found the defendant was insane at the time of the offense (or at any time). The defendant produced no evidence at all of insanity, so the presumption of sanity was never destroyed. See **State v. Lee**, 395 So.2d 700, 702-04 (La. 1981). The evidence, in fact, clearly established that, despite some cognitive issues, the defendant was sane and knew right from wrong on the night he shot and killed Devone.

The trial court appointed Dr. Dennis Kelly and Dr. John Thompson to the sanity commission requested by the defendant. State's witness Dr. Kelly, a staff psychiatrist at the Eastern Louisiana Mental Health System, testified at trial that the defendant had received no treatment for mental health issues for the year he was in parish prison prior to trial. The defendant informed Dr. Kelly that he had never been an inpatient in a psychiatric hospital. In elementary school, the defendant had been treated with Ritalin for what appeared to be attention deficit disorder symptoms. Beyond that, the defendant had no previous history of treatment for psychiatric difficulties. The defendant related to Dr. Kelly that he had a history of abusing of alcohol and marijuana and that he had suffered a head injury in the past. The defendant had not had any seizures or significant cognitive problems as a result of that injury. The defendant told Dr. Kelly he had recently

experienced episodes where he would hear his name or "some sort of instructions." The defendant had not heard voices anytime in the past and was vague about exactly what he was hearing, so Dr. Kelly did not find these episodes significant or severe, particularly in light of the defendant never having requested treatment from prison official for these alleged symptoms.

After gathering background information, Dr. Kelly conducted a mental status examination of the defendant. Dr. Kelly explained that this was a structure examination used to determine if a patient's thoughts are logical and linear, and to gauge whether he is reasonably oriented and coherent, and whether he has any mood or anxiety problems. The defendant did not indicate he was having any anxiety or depression, and he had basic factual orientation regarding current events. Dr. Kelly found the defendant to be clear of any significant psychiatric problems. Dr. Kelly had the defendant recount the events surrounding the shooting. Dr. Kelly did not find any element of mental illness impinging on the defendant's thought process the day of the shooting, or that affected the way he behaved or his perception of things on that day. It was Dr. Kelly's opinion that the defendant was not insane at the time of the offense.

During his case-in-chief, defense counsel called Dr. Marc Zimmerman, a psychologist, to testify about his mental evaluation of the defendant. Dr. Zimmerman met with the defendant twice, but did not prepare any written report of his findings. Dr. Zimmerman testified the defendant completed the eighth grade, his intelligence is in the lower average or the upper below-average range, and he has an executive function deficit. Dr. Zimmerman explained that this deficit meant the defendant had problems with his organization and planning and that he had difficulty with impulse control. Without answering whether or not he thought the defendant was insane at the time of the offense, Dr. Zimmerman concluded that the "diagnosis [we would], probably, put on him would be cognitive disorder, not

otherwise specified."

On cross-examination by the State, Dr. Zimmerman indicated the defendant did not report any history of mental illness, except for attention deficit hyperactivity disorder (ADHD). Dr. Zimmerman testified that he did not ask the defendant if he was drinking or smoking marijuana on the day he shot Devone. The prosecutor then asked, "Wouldn't you think that would be an important question to ask him when trying to render an opinion as to what was going through his mind at the time of the offense?" Dr. Zimmerman responded, "I'm not rendering an opinion as to what was going on in his mind." The doctor explained, instead, that he was rendering an opinion as to the defendant's "neuropsychological status." Shortly thereafter, the following exchange took place:

> Q. In your opinion, does Travis Griffin know that it's wrong to shoot people?
> A. If I were to or if anyone were to come up or walk up to him and ask him that, he would say yes, it's wrong to shoot people.
> Q. Okay. But your position is that he has impulse control problems?
> A. Yes, he does.
> . . . .
> A. He does have a diagnosable condition, medical condition.
> Q. And that being cognitive disorder?
> A. That's correct.
> Q. And that would be what you would call his mental deficit?
> A. I think that's probably the most appropriate diagnosis for it.
> Q. But you cannot say today whether or not that mental deficit rendered him incapable of distinguishing right from wrong on July 9, 2010, when he shot Devone Johnson, can you?
> A. I cannot.

Defense counsel rested his case, and the State called rebuttal witness, Dr. Thompson, a forensic psychiatrist who had been appointed to the sanity commission. According to Dr. Thompson, who had met with the defendant twice, the defendant's recounting of events on the day of the shooting revealed that he was very upset about Devone beating up one of his brothers, and that he (the defendant) had to do something about it. When the defendant confronted Devone, Devone moved toward his car. The defendant thought Devone might have a gun,

so he shot in Devone's direction eight or nine times. Dr. Thompson noted that while the defendant had a history of attention deficit disorder, he did not have schizophrenia or bipolar disorder or a history of being out of touch with reality. Regarding the legal issue of insanity, the following exchange took place:

> A. I did see some of the things that Dr. Zimmerman talked about, in that he -- I do a short screen for intellectual functioning, and his intellectual functioning was what we call in the -- similar to what Dr. Zimmerman found, in that it was, kind of, in the low-average range, but it, certainly, wasn't impaired to the point where he doesn't -- he could not understand right from wrong with respect to his behavior. And he may not have perfect executive functioning, and executive functioning really refers to what's happening in your frontal lobe or the part of your brain that allows you to process information and think, and it's called executive functioning because executives need executive function to be able to pull a bunch of information together. Well, you don't necessarily need perfect executive function to be able to determine whether you're in a gun battle and whether you're shooting somebody and someone might die in that process. I mean, I think he was, certainly, capable of understanding that when I discussed it with him.
> Q. So, in your opinion, did the defendant know the difference between right and wrong on the day of the shooting?
> A. Yes, he did. He was, certainly, capable of distinguishing right from wrong with respect to his conduct.
> Q. And does the defendant suffer from any mental disease or defect that would impair his ability to tell the difference between right and wrong?
> A. In my opinion, he does not.
> Q. You heard Dr. Zimmerman talk about the defendant's impulse pulse [sic] control problem.
> A. Yes.
> Q. Did you observe an impulse control problem with the defendant?
> A. In my evaluation, I didn't -- I didn't see -- he reported having attention deficit disorder and reported that from childhood, but in the evaluation process itself, he was-- he was not on any of that medication at the time I saw him, to my recollection. Let me just check to make sure of that. But he was pretty calm during the evaluation. He didn't appear to be fidgeting in his chair or moving around in his chair. So, he's been -- he's been prescribed albuterol before and he was not taking any psychiatric meds at the time. So, he wasn't, you know, really fidgeting or jumping around or someone that jumped from topic to topic. He used a lot of street language, and so -- and his communication style was a little bit more stilted, and so, he used three-word phrases or sentences instead of longer sentences, but I didn't really see a lot of attention deficit symptoms during my evaluation or impulse control issues. And from what I recall in the jail, he did okay in the jail. I don't know that they were having major problems with him with impulsive problems.
> Q. You, also, heard Dr. Zimmerman talk about him being a bad

decision maker?
A. Yes.
Q. Is being a bad decision maker a mental defect?
A. No. I would say we are all bad decision makers at some point in our life, so -- but it doesn't necessarily mean that you have a mental disorder. What we're really looking for in the mental disorders is are there a constellation of symptoms that clearly fit a serious mental disorder, such that it would impair the person's ability to distinguish right from wrong, because remember, you have to be incapable of distinguishing right from wrong. Louisiana's insanity test, because I teach fellows this stuff all the time, is not an impulse test. It's a test of thought. It's do you know right from wrong; it's not can you control your impulses. That test, called the irresistible impulse test, is used in many states, but not in Louisiana.

Dr. Thompson drafted a written report of his evaluation of the defendant. When asked about his written determination of the defendant's sanity, Dr. Thompson provided the following response:

> It's my opinion that Mr. Griffin was capable of distinguishing right from wrong with respect to his conduct on the day of the alleged offense, as I've stated before, 7/9/10. Mr. Griffin described his whereabouts and actions on the day of the alleged offense, he did not report signs or symptoms of a major mental illness that would impair his ability to distinguish between right and wrong with respect to his conduct. His actions on the day of the alleged offense appear to be goal-directed and coherent. There was a clear rational motive for his behavior, but there was no, what we call, psychotic motive or a motive that was bizarre or unusual in his mind that he was acting on.

On cross-examination, when Dr. Thompson was asked if he disagreed with anything Dr. Zimmerman had testified to, Dr. Thompson responded:

> No, I don't -- I don't disagree with -- I mean, he, basically, said that he didn't address the issue of sanity at the time of the offense. I mean, he didn't address the issue of whether [defendant] could distinguish right from wrong, and that was my primary role, so I focused on that. It wouldn't surprise me that Travis had some executive functioning issues, based on the testing that I performed on him and the way I saw him interact, that he would not be -- you know, he might not be functioning at the highest level he could function, but I didn't see him functioning at a level that would impair his ability to distinguish right from wrong.

Based on the foregoing, wherein none of the doctors who testified found the defendant was insane at the time of the offense, any rational factfinder could have found that the defendant did not prove by a preponderance of the evidence that he

was insane at the time of the offense. The defendant might have had a cognitive disorder, or impulse control issues, but such mental deficits do not rise to the level of insanity. The defendant's criminal responsibility was not negated by the mere existence of a mental disease or defect. See **State v. Sopczak**, 02-235 (La. App. 5th Cir. 6/26/02), 823 So.2d 978, 986, writ denied, 2002-2471 (La. 3/21/03), 840 So.2d 548. See also **State v. Johanson**, 332 So.2d 270, 272 (La. 1976) (a defense on the ground of insanity does not include a defense based on irresistible impulse).

The appellate court does not assess the credibility of witnesses or reweigh evidence. **State v. Smith**, 94-3116 (La. 10/16/95), 661 So.2d 442, 443. A reviewing court accords great deference to a jury's decision to accept or reject the testimony of witnesses in whole or in part. **State v. Robinson**, 2002-1869 (La. 04/14/04), 874 So.2d 66, 79, cert. denied, 543 U.S. 1023, 125 S.Ct. 658, 160 L.Ed.2d 499 (2004). The jury heard the testimony of the three doctors, as well as evidence that the defendant left the scene after the shooting and could not be found by law enforcement for about ten days thereafter. The defendant was arrested on July 19, 2010. He did not turn himself in voluntarily but was apprehended by a U.S. Marshal. Flight and attempt to avoid apprehension indicate consciousness of guilt, and therefore, are circumstances from which a juror may infer guilt. See **State v. Fuller**, 418 So.2d 591, 593 (La. 1982). Weighing that testimony with the expert opinion testimony of the doctors, the jury's guilty verdict was entirely reasonable. See **State v. Johnson**, 43,935 (La. App. 2nd Cir. 2/25/09), 3 So.3d 697, 704.

This assignment of error is without merit.

**ASSIGNMENTS OF ERROR NOS. 2 and 3**

In his second assignment of error, the defendant argues the evidence was insufficient to support the conviction for second degree murder. Specifically, the defendant contends he is guilty of manslaughter because of the presence of the

mitigating factors of sudden passion or heat of blood at the time of the killing.

In his third assignment of error, the defendant argues the evidence was insufficient to support the conviction for attempted first degree murder. Specifically, the defendant contends the State failed to prove that he had the specific intent to kill D.J., Devone's five-year-old son who was in the back seat of the car.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV, § 1; 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. at 319, 99 S.Ct. at 2789. See La. Code Crim. P. art. 821(B); **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 Article 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.

***Second Degree Murder Conviction***

As applicable here, 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. 14:30.1(A)(1). Guilty of manslaughter is a proper responsive verdict for a charge of second degree murder. La. Code Crim. P. art. 814(A)(3). Louisiana Revised Statute 14:31(A)(1) defines manslaughter as a homicide which would be either first degree murder or 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 factfinder 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. The existence of "sudden passion" and "heat of blood" are not elements of the offense but, rather, are factors in the nature of mitigating circumstances that may reduce the grade of homicide. **State v. Maddox**, 522 So.2d 579, 582 (La. App. 1st Cir. 1988). Manslaughter requires the presence of specific intent to kill or inflict great bodily harm. See **State v. Hilburn**, 512 So.2d 497, 504 (La. App. 1st Cir.), writ denied, 515 So.2d 444 (La. 1987). It is the defendant who must establish by a preponderance of the evidence the mitigating factors of sudden passion or heat of blood to reduce a homicide to manslaughter. See **State ex rel. Lawrence v. Smith**, 571 So.2d 133, 136 (La. 1990); **State v. LeBoeuf**, 2006-0153 (La. App. 1st Cir. 9/15/06), 943 So.2d 1134, 1138, writ denied, 2006-2621 (La. 8/15/07), 961 So.2d 1158. See also **Patterson v. New York**, 432 U.S. 197, 210, 97 S.Ct. 2319, 2319, 53 L.Ed.2d 281 (1977).

The defendant does not deny that he shot Devone. He argues, rather, that upon arriving at the Thomas residence, he was confronted by Devone, and that Devone's previous violent behavior toward Dee Dee and his confrontation of him (the defendant) was sufficient provocation to have triggered heat of passion to support a verdict of manslaughter. The defendant notes in brief that several witnesses testified the shooting did not start until they were either in the house or "several minutes" after the defendant arrived and was confronted by Devone. Kourtney testified she heard a confrontation between the defendant and Devone. The defendant suggests that this testimony contradicted Mikeal, who testified that the defendant began shooting as soon as he exited the car.

About one hour had passed from the time the defendant first heard of

Devone's fracas with Dee Dee to when the defendant confronted Devone. The defendant left the hotel room with Alvin Posey, armed himself[3] at some point following his departure from the hotel, then got into Kelli's car to ride with the Thomas sisters to the house on Videt Polk Drive to confront Devone. Devone did not have a gun (or any weapon) when the defendant confronted him. Thus, whether the defendant shot Devone at close range one minute after getting out of the car or immediately upon exiting the car, the jury could have reasonably concluded that the defendant had the specific intent to kill Devone and that there was no evidence of sudden passion or heat of blood. 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). While there may have been a confrontation or words exchanged just prior to the shooting, it is the defendant who brought about the circumstances he found himself in at the time of the shooting. The passage of time; the defendant arming himself; the defendant seeking out Devone; and the defendant shooting an unarmed man are all factors that establish a deliberate, planned attack by the defendant rather than a shooting committed in sudden passion or heat of blood immediately caused by provocation by Devone sufficient to deprive the defendant of his self-control and cool reflection. See **State v. Delco**, 2006-0504 (La. App. 1st Cir. 9/15/06), 943 So.2d 1143, 1148-51, writ denied, 2006-2636 (La. 8/15/07), 961 So.2d 1160 (where, despite the verbal altercation between the defendant and the victim prior to the shooting, the jury could have reasonably concluded that an average person would not have been deprived of his self-control and cool reflection where the defendant could have closed and locked his door and contacted the police after the

[3] If the defendant is to be believed in his taped interview that he did not even own a gun, then a valid inference would be the defendant armed himself that night with someone else's gun.

victim exited the residence but, instead, retrieved his gun and followed and shot the victim).

When a case involves circumstantial evidence and the jury 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). It is clear from the guilty verdict that the jury rejected the theory that the defendant was so angry when he shot Devone, or was so provoked by Devone just prior to the shooting, that he was deprived of his self-control and cool reflection. Moreover, even if Devone and the defendant did exchange words just prior to the shooting, the defendant would still be guilty of second degree murder. Questions of provocation and time for cooling are for the jury to determine under the standard of the average or ordinary person with ordinary self-control. If a man unreasonably permits his impulse and passion to obscure his judgment, he will be fully responsible for the consequences of his act. **State v. Leger**, 2005-0011 (La. 7/10/06), 936 So.2d 108, 171, cert. denied, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007). Mere words or gestures, no matter how insulting, will not reduce a homicide from murder to manslaughter. **State v. Mitchell**, 39,202 (La. App. 2nd Cir. 12/15/04), 889 So.2d 1257, 1263, writ denied, 2005-0132 (La. 4/29/05), 901 So.2d 1063. See **State v. Charles**, 2000-1611 (La. App. 3rd Cir. 5/9/01), 787 So.2d 516, 519, writ denied, 2001-1554 (La. 4/19/02), 813 So.2d 420 (an argument alone will not be sufficient provocation to reduce a murder charge to manslaughter). See also **State v. Tran**, 98-2812 (La. App. 1st Cir. 11/5/99), 743 So.2d 1275, 1292, writ denied, 99-3380 (La. 5/26/00), 762 So.2d 1101.

The jury heard the testimony and viewed the evidence presented to it at trial and found the defendant guilty as charged. The defendant did not testify. In the

absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). Moreover, the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. 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. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). The guilty verdict indicates the reasonable determination by the jury that, for whatever reason the defendant had, he shot Devone in the chest with the specific intent to kill him and in the absence of the mitigating factors of manslaughter. See **Delco**, 943 So.2d at 1149-51.

After a thorough review of the record, we find that the evidence supports the jury's unanimous guilty verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the second degree murder of Devone Johnson, Sr. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

*Attempted First Degree Murder Conviction*

First degree murder is the killing of a human being when the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of one of a list of enumerated felonies. See La. R.S. 14:30(A)(1). First degree murder is also the killing of a human being when the offender has the specific intent to kill or to inflict great bodily harm upon a victim who is under the age of twelve. La. R.S. 14:30(A)(5). 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. 14:27(A).

In order for an accused to be guilty of attempted murder, a specific intent to kill must be proven beyond a reasonable doubt. Although a specific intent to inflict great bodily harm may support a conviction of murder, the specific intent to inflict great bodily harm will not support a conviction of attempted murder. **State in Interest of Hickerson**, 411 So.2d 585, 587 (La. App. 1st Cir.), writ denied, 413 So.2d 508 (La. 1982). See **State v. Butler**, 322 So.2d 189, 192 (La. 1975). See also **State v. Fauchetta**, 98-1303 (La. App. 5th Cir. 6/1/99), 738 So.2d 104, 108, writ denied, 99-1983 (La. 1/7/00), 752 So.2d 176.

Specific 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 defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982). The existence of specific intent is an ultimate

legal conclusion to be resolved by the trier of fact. **State v. McCue**, 484 So.2d 889, 892 (La. App. 1st Cir. 1986). As noted, deliberately pointing and firing a deadly weapon at close range indicates specific intent to kill. See **Broaden**, 780 So.2d at 362.

The defendant contends he was not aware that five-year-old D.J. was in the back seat of the car at the time of the shooting. The defendant notes in brief that Mikeal testified that the top of D.J.'s head could not be seen over the top of the back seat where he was sitting. Also, Kourtney testified she did not see D.J. from the back of the car, but only saw D.J. in the car when she got to the carport. Finally, according to the defendant, Kourtney testified that as soon as she yelled there was a child in the car, he stopped shooting; as such, there was no evidence he had the specific intent to kill D.J.

The testimony and physical evidence at trial established that the defendant fired at least thirteen shots from a .40 caliber handgun at Devone and at Devone's car. Mikeal testified D.J. was not in a car seat, so his head could not be seen over the top of the back seat. Mikeal further testified, however, that if you were on the side of Devone's car, you would be able to see D.J. According to Mikeal, D.J. was on the passenger side in the back seat. Kourtney testified that she saw the child in "the front seat." Kourtney also testified that after the shooting started, when she "yelled they had a baby in the car, he had completely stopped shooting. It wasn't any shots after that." Based on the eyewitness testimony of the shooting, namely by a few of the Thomas sisters, it is not clear how the defendant approached Devone when he shot him, or what the defendant did after Devone got in the car. In other words, it is not clear whether the defendant was on the side of the car when he shot Devone and could see D.J. in the car, or was behind the car when he shot Devone and could not see the child. It is also not clear whether the defendant had stopped shooting when Devone got in the car, or whether he kept shooting at

the car as Devone drove away. For example, while Kennesha and Kelli both testified that they did not hear the gunshots until they had walked into the house, Mikeal testified that as soon as Kelli parked in the driveway, the defendant immediately got out of the car from the back door of the driver's side and started shooting.

Following is that relevant testimony by Mikeal on direct examination:

> Q. And did you, also, mark on here which spot on the car Travis got out of?
> A. Yes, sir.
> Q. And which door would that have been?
> A. It was the left back door behind the driver.
> . . . .
> Q. Okay. And you say where he stopped. Please tell the ladies and gentlemen of the jury what he did when he got out of the car.
> A. Soon as the car pulled inside the driveway, it came to a stop. The door flew open and he started shooting immediately, like he was still sitting in the car almost and he started shooting, getting out of the car. And he was, like, as if he was walking down on my uncle while he was in the car. He was walking down the driveway, still opening up fire towards the car and he wind up at the middle of the street right there.
> Q. And where he was in the middle of the street there, was he still -- is that where the last shots were fired from?
> A. Yes, sir.

Mikeal also testified that Devone and the defendant did not fight when the defendant got out of the car. According to Mikeal, there were no words exchanged between the two men, and Devone did not have a gun at any time throughout that night.

In his interview with the police, the defendant stated that he did not know the child was in the car. The defendant also stated in the interview, however, that he knew D.J. was with Devone because he had seen them both in the hotel room. The defendant was not in the hotel room when Devone and D.J. (and Mikeal) left, but the defendant explained in the interview that he thought Devone was bringing D.J. home.

The jury heard all of the testimony and viewed all of the evidence presented

to it at trial and, notwithstanding any alleged inconsistencies, it found the defendant guilty of the attempted first degree murder of D.J. As noted, the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **Taylor**, 721 So.2d at 932. The jury could have chosen to believe Mikeal's version of the events, which suggested that the defendant shot Devone soon after he had begun shooting since Devone was shot in the chest. While wounded, Devone got in the car and, as he drove away, it appears the defendant kept shooting at the car. It was not unreasonable for the jury to conclude that the defendant knew both Devone and D.J. were in the car, and that the defendant repeatedly fired at the car with the intent to kill both of its occupants. Kourtney had testified that when she yelled there was a baby in the car, the defendant stopped shooting; but the jury could have reasonably concluded, assuming the truth of Kourtney's statement, that the defendant stopped shooting, not because he had been made aware of a child in the car, but because he ran out of bullets.[4] Based on the foregoing, the jury could have inferred the defendant had the specific intent to kill D.J.

After a thorough review of the record, we find that the evidence supports the jury's unanimous guilty verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the attempted first degree murder of D.J. See **Calloway**, 1 So.3d at 418.

This assignment of error is without merit.

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[4] The standard magazine for a .40 caliber Glock handgun has a thirteen-round capacity. Perhaps the defendant had an extended magazine, but since the gun was never found, the number of bullets available to the defendant at the time of the shooting remains conjecture.

## SENTENCING ERROR

For a first degree murder conviction (non-capital), the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. La. R.S. 14:30(C)(2). If the offense so attempted is punishable by death or life imprisonment, he shall be imprisoned at hard labor for not less than ten nor more than fifty years without benefit of parole, probation, or suspension of sentence. La. R.S. 14:27(D)(1)(a). In sentencing the defendant to ten years imprisonment for the attempted first degree murder conviction, the trial court failed to provide that the sentence was to be served at hard labor.[5] Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence, La. Code Crim. P. art. 920(2) authorizes consideration of such an error on appeal. Further, La. Code Crim. P. art. 882(A) authorizes correction by the appellate court.[6] We find that correction of this illegally lenient sentence does not involve the exercise of sentencing discretion and, as such, there is no reason why this court should not simply amend the sentence. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277. Accordingly, since a sentence at hard labor was the only sentence that could be imposed, we correct the sentence by providing that it be served at hard labor.

## CONCLUSION

For the foregoing reasons, both of the defendant's convictions and his sentence for second degree murder are affirmed. The sentence for the attempted first degree murder conviction is amended to provide that it be served at hard labor,

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[5] The minutes reflect the trial court sentenced the defendant to hard labor. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

[6] An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. La. Code Crim. P. art. 882(A).

and, as amended, the sentence is affirmed.

**SECOND DEGREE MURDER CONVICTION AND SENTENCE AFFIRMED; ATTEMPTED FIRST DEGREE MURDER CONVICTION AFFIRMED; ATTEMPTED FIRST DEGREE MURDER SENTENCE AMENDED, AND AS AMENDED, AFFIRMED..**

STATE OF LOUISIANA COURT OF APPEAL

VERSUS FIRST CIRCUIT

TRAVIS MONTRELL GRIFFIN NUMBER 2014 KA 0730

**McDonald, J.**, dissenting in part.

I disagree with the majority's affirmance of the defendant's conviction and sentence for the attempted first degree murder of "D.J." Johnson, Jr., the child in the back seat of the car driven by his father, Devone Johnson, Sr. I do not think the record demonstrates that the State proved the "specific intent" element of the offense beyond a reasonable doubt. Thus, I would reverse the defendant's conviction and sentence for attempted first degree murder.