

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 1050

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TMH*

STATE OF LOUISIANA

VERSUS

WAYNE CARL THOMAS

Judgment Rendered: MAR 06 2015

**Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, State of Louisiana
Trial Court Number 03-10-0155**

Honorable Richard D. Anderson, Judge Presiding

**Hillar C. Moore, III
Cristopher J.M. Casler
Baton Rouge, LA**

**Counsel for Appellee,
State of Louisiana**

**Robert Glass
New Orleans, LA**

**Counsel for Defendant/Appellant,
Wayne Carl Thomas**

BEFORE: WHIPPLE, C.J., McCLENDON AND HIGGINBOTHAM, JJ.

WHIPPLE, C.J.

Defendant, Wayne Carl Thomas, was charged by bill of information with attempted second degree murder, a violation of LSA-R.S. 14:27 and 14:30.1 (count one), and with conspiracy to distribute a schedule IV controlled dangerous substance (alprazolam), a violation of LSA-R.S. 14:26 and 40:969(A) (count two). He pled not guilty and, following a jury trial, was found guilty as charged. The trial court subsequently denied defendant's motions for new trial and postverdict judgment of acquittal, and sentenced defendant to forty years at hard labor, without benefit of parole, probation, or suspension of sentence (count one), and to five years at hard labor (count two). The trial court ordered these sentences to be served concurrently. Defendant now appeals, alleging in two related assignments of error that the trial court erred in denying his motions for new trial and postverdict judgment of acquittal because the evidence presented at trial was insufficient to support his convictions. For the following reasons, we affirm the defendant's convictions and sentences.

FACTS

On the evening of December 9, 2009, Jonathan Cador picked up his friend Vartkes Kaltekechian (the victim) to give him a ride home. Cador had previously arranged to purchase one hundred alprazolam pills from an individual named Joshua Lewis at the F.Y.E. music store on Constitution Avenue in Baton Rouge. Cador drove Kaltekechian and himself to that location in his mother's Mazda Tribute.

Upon arriving in the store parking lot, Cador recognized Lewis, who was sitting in the driver's seat of a nearby vehicle. Cador exited his own vehicle and entered the passenger's side of the vehicle in which Lewis was located. Lewis tossed Cador the alprazolam pills, and Cador began to count the money he owed for the transaction. Cador briefly looked up to see an approaching individual, who

was wearing a black hoodie. When he looked back down to continue counting the money, Cador heard approximately three gunshots. The individual in the hoodie then opened the passenger door of the vehicle in which Cador was sitting, put a gun in his face, and told him to drop the money. Cador got out of the vehicle, and the individual entered. Ultimately, Lewis and the individual drove away from the scene. Cador ran inside the store and told someone to call 911. He also personally called 911. Kaltekechian suffered gunshot wounds to his neck and chest and is now a quadriplegic.

Upon making contact with the police, Cador reported the license plate number of the vehicle that Lewis and the shooter occupied. Detectives discovered that the license plate belonged to a Nissan Altima owned by Sierra Thaxton. Upon being pulled over by the police, Thaxton stated that she had loaned her vehicle to Lewis and "Slim" (defendant) on the date of the incident. In exchange for her vehicle, Thaxton was allowed to drive defendant's car.

The police ultimately found Lewis in Houston. Lewis informed the detectives that when Cador contacted him looking to buy alprazolam, he contacted defendant, from whom he bought the pills. He said that defendant accompanied him to the store and exited the vehicle prior to the planned drug transaction. Immediately following the shooting, defendant reentered the vehicle, and they drove to a nearby area where defendant discarded his gun. They then returned Thaxton's vehicle to her, and defendant dropped Lewis off at his dorm room.

INSUFFICIENT EVIDENCE

In related assignments of error, defendant contends that the trial court erred in denying his motions for new trial and postverdict judgment of acquittal, which were predicated on an argument of insufficient evidence. He alleges that no rational juror could have found him guilty beyond a reasonable doubt.

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 LSA-C.Cr.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(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-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.

In arguing against the sufficiency of the evidence introduced at trial, defendant does not appear to take issue with his conviction for conspiracy to distribute alprazolam, nor does he appear to argue that an attempted second degree murder did not occur. Rather, he simply argues that it was irrational for the jury to conclude that he was the individual who perpetrated the attempted second degree murder. He states that it was absurd to conclude that a large-scale seller of drugs (as he was alleged to be) would go to the scene of a mid-level dealer's transaction, only to then shoot someone who was not involved in the transaction. Thus, defendant's main claim is that the state failed to prove his identity as the shooter beyond a reasonable doubt.

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 generally will not second-guess those determinations. State v. Hughes, 2005–0992 (La. 11/29/06), 943 So. 2d 1047, 1051; State v. Davis, 2001–3033 (La. App. 1st Cir. 6/21/02), 822 So. 2d 161, 163–64.

In the instant case, the jury was presented with both circumstantial and direct evidence regarding defendant's identity as the person involved in the drug transaction and the shooting. First, Thaxton testified that on the evening of the incident, she loaned her vehicle to Lewis and defendant. Further, Lewis testified at trial that he secured the pills from defendant and that defendant rode with him in Thaxton's vehicle to the store. Lewis stated that immediately prior to the transaction, defendant exited the Thaxton vehicle. As Lewis was counting the money during the transaction, he witnessed defendant walk up to Cadon's vehicle and begin to shoot. Within seconds of the gunshots, Lewis observed Cadon exit the Thaxton vehicle, followed by defendant reentering it. After they drove away from the F.Y.E. store, Lewis stopped in the area of some nearby hotels so that defendant could discard the weapon.

Moreover, the victim testified at trial that defendant opened the door of the vehicle in which the victim was waiting and told the victim that he was robbing him and that if the victim did not give him money, he would shoot him. The victim stated that he told defendant to shoot him, and he did. Notably, several weeks prior to trial, and then again at trial, the victim identified defendant as the person who shot him. Defendant did not testify at trial.

Despite defendant's contention that it would be irrational for the jury to conclude that he was guilty of these offenses, there was overwhelming and largely uncontroverted evidence that defendant was the person who sold Lewis the pills to

sell to Cador and who also shot the victim.¹ The jury heard that Lewis had pled guilty to conspiracy to distribute alprazolam in conjunction with the incident that occurred on December 9, 2009, and the jury obviously still chose to believe all or part of his testimony.

As the trier of fact, the jury 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 fact finder'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.

Viewed in the light most favorable to the state, the evidence presented at trial established that defendant participated in a drug transaction with Lewis in order for Lewis to then participate in a subsequent transaction with Cador. Further, as the transaction proceeded, defendant shot Kaltekechian twice, injuring him severely. After a thorough review of the record, we cannot say that the jury's determination of defendant's guilt was irrational under the facts and circumstances presented to them. See Ordodi, 946 So. 2d at 662. This assignment of error is without merit.

CONCLUSION

For the above and foregoing reasons, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.

¹The only evidence mitigating in defendant's favor regarding the identity of the shooter came from Cador, who testified that he could neither confirm nor deny defendant's identity as the shooter.