

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 KA 0870

STATE OF LOUISIANA

VERSUS

THADDIUS BROTHERS

Judgment Rendered: NOV 01 2017

\* \* \* \* \*

On Appeal from the  
19th Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
No. 03-15-0596

The Honorable Michael R. Erwin, Judge Presiding

\* \* \* \* \*

Hillar C. Moore, III  
District Attorney  
Dylan C. Alge  
Assistant District Attorney  
Baton Rouge, Louisiana

Appellee,  
State of Louisiana

Bruce G. Whittaker  
New Orleans, Louisiana

Defendant/Appellant,  
Thaddius Brothers

\* \* \* \* \*

BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

ahj  
TMT  
GA

**PENZATO, J.**

The defendant, Thaddius Brothers, was charged by grand jury indictment with second degree murder, a violation of Louisiana Revised Statutes 14:30.1. He entered a plea of not guilty and, following a jury trial, was found guilty as charged. The defendant was then sentenced to a term of life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. He now appeals, challenging the sufficiency of the evidence introduced by the State in support of his conviction. For the following reasons, we affirm the defendant's conviction and sentence.

**FACTS**

During the early morning hours of August 13, 2010, Baton Rouge Police Department officers were dispatched in response to a report of a nonresponsive male, later identified as the victim, David Mitchell, at an apartment complex on North Marque Ann Drive and West La Margie Avenue. The victim's body was located on the side of the apartment complex, and there were spots of blood located from the area near the victim's vehicle in the apartment complex parking lot to the location where the victim was found on the side of the complex. He was not wearing shoes, but a pair of slippers were located near his vehicle. Also located were a set of keys and the victim's driver's license. A white Firebird was parked near the victim's vehicle, and a spent projectile was located inside of the Firebird's broken taillight. Detectives recovered another spent projectile in front of the apartment complex. The bullets located in front of the apartment and in the Firebird's taillight were tested and compared to pieces of a projectile removed from the victim. Forensic scientist Charles Watson, Jr., determined that based on his observations, at least four shots were fired and it was "very possible" that all were fired from the same firearm.

The coroner testified that the victim had been shot three times and that the cause of his death was multiple gunshot wounds to his torso and extremities. According to the coroner's testimony, the "kill shot" was that to the victim's upper back which exited through his right lateral chest region.

In September and October of 2010, detectives received information from two sources, Calvin Moore and Darrell Butler, identifying the defendant as the shooter. In 2014, Baton Rouge Police Department Detective John Dauthier was assigned to investigate cold-case homicides. Detective Dauthier received a call from Baton Rouge Police Department Burglary Division stating that Courtney Lewis was under arrest and had information about a cold case. Detective Dauthier interviewed Lewis and an arrest warrant for the defendant was subsequently obtained.

#### **SUFFICIENCY OF THE EVIDENCE**

In his sole assignment of error, the defendant challenges the sufficiency of the evidence presented by the State in support of his conviction. Specifically, he contends that the only evidence establishing his identity as the perpetrator of the offense was hearsay. The defendant argues that the videotaped statements of Moore, Butler, and Lewis were made out of court, were not under oath, and were subsequently denied during trial.

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, 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. See La. Code Crim. P. art. 821(B); **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **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 into Louisiana Code of Criminal Procedure article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, Louisiana Revised Statutes section 15:438 provides that the factfinder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585 (La. App. 1st 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. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 487, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 & 2000-0895 (La. 11/17/00), 773 So.2d 732.

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. **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.

The crime of second degree murder, in pertinent part, "is the killing of a human being: (1)[w]hen the offender has a specific intent to kill or to inflict great bodily harm[.]" La. R.S. 14:30.1A(1). "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 proven as a fact. It may be inferred from the circumstances of the transaction. Thus, specific intent 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. Specific intent is an ultimate legal conclusion to be resolved by the factfinder. **State v. Buchanan**, 95-0625 (La. App. 1st Cir. 5/10/96), 673 So.2d 663, 665, writ denied, 96-1411 (La. 12/6/96), 684 So.2d 923. Specific intent to kill may be inferred from a defendant’s act of pointing a gun and firing at a person. **State v. Delco**, 2006-0504 (La. App. 1st Cir. 9/15/06), 943 So.2d 1143, 1146, writ denied, 2006-2636 (La. 8/15/07), 961 So.2d 1160.

Kilwana Johnson, a resident of the apartment complex where the victim was shot, testified at trial. According to Johnson, on the night of the shooting, she heard two or three shots fired and heard someone say, “Give it here, give it here.” She also heard a “shuffle” noise.

Moore testified at trial. At the time of trial, he was incarcerated. Moore admitted hearing about an incident on Marque Ann Drive and giving a statement to detectives, but testified that his original recorded statement was not true. In Moore’s original statement, he told detectives that three shots were fired from a pistol on the night of the incident. Moore also identified the defendant as the shooter in a photographic lineup during his original interview. Although Moore admitted at trial that he approached a detective on his own to provide the information, he claimed that he was pressured to give the statement. Baton Rouge Police Department Sergeant Duke Staples testified that after arresting Moore in September 2010, Moore told him that he had information about a homicide and asked to speak to homicide detectives. Officer Staples denied pressuring Moore

into giving the statement. The State did not play Moore's recorded statement at trial.

Butler<sup>1</sup> also testified at trial. According to Butler's testimony, he did not see anything on the night of the shooting and his original statement given to detectives was false. In Butler's original statement, he told detectives that he was outside when the shooting occurred and saw what happened. A recording of Butler's original statement was played for the jury. According to Butler's recorded statement, he lived across the street from the apartment complex where the victim was shot. Butler stated that the victim was running from an apartment to his car, which Butler described as a Jaguar. The defendant crept down and met the victim by the side of his door and told the victim to, "give it up." The defendant then grabbed the victim's shirt and began shooting. Butler stated that the defendant shot "like four times." The victim ran to the corner of the apartment complex and fell down. Butler identified the defendant as the shooter in a photographic lineup and stated that he "seen him myself [sic] with my own eyes." At trial, Butler denied witnessing the shooting and explained that he blamed the shooting on the defendant so he could get out of jail.

Lewis, who was incarcerated at the time of trial, testified that he did not remember anything from the night of the shooting and that when he talked with detectives in October 2014,<sup>2</sup> he "told them what they said they wanted [him] to say." Lewis's recorded statement was played at trial. During his statement, he explained that he lived in the apartment complex where the shooting occurred. Lewis stated that he was not under the influence of any alcohol or drugs at the time of the shooting and that he was one-hundred percent sure of what he saw. He also

---

<sup>1</sup> The witness is also referred to as Gerald Butler in the record.

<sup>2</sup> Although the record refers to the interview of Lewis as occurring in October 2010, the video was recorded on October 16, 2014; Detective Dauthier refers to the death of the victim as being four years earlier than when the video was made; and at the end of the video, Detective Dauthier states that the date is October 16.

stated that he knew both the defendant and the victim prior to the night of the shooting. According to Lewis, around 1:30 or 2:00 a.m., he heard the defendant say, "give it up." He turned his lights off, looked outside of his window, and saw the defendant leading the victim to the parking lot with a pistol. Lewis walked out to the stairwell and saw another man, "Two-Two," who told him that the victim was being robbed. Lewis then saw the defendant point the pistol at the victim who lunged toward the defendant in an attempt to take the pistol. When the victim lunged toward the defendant, the defendant shot him in his chest. The victim grabbed his chest and ran, but the defendant walked behind him and shot the victim two more times in his back. The defendant then stood over the victim before running away. Shortly thereafter, another man drove into the apartment complex, observed the victim, and contacted law enforcement. After law enforcement had secured the area, the defendant returned to the scene wearing different clothing and asked Lewis if he saw the shooting. Lewis told the defendant, "I see and don't see" in an attempt to "throw [the defendant] off." Lewis clarified that because the defendant's back was turned away from him, the defendant would not have known that Lewis witnessed the shooting. According to Lewis, the defendant attempted to rob the victim because he thought that he "had something" based on the vehicle that he was driving, which was a Jaguar. However, Lewis explained, the Jaguar actually belonged to someone to whom the victim sold marijuana. Lewis opined that the victim was at the apartment complex that night to visit a woman who lived there. He explained that although he did not initially report his knowledge of the shooting, he subsequently decided to do so because the defendant was going to be released from jail, and he did not want the defendant to harm him or his family. He also stated that the defendant had killed another one of his friends. Lewis clearly stated that he was giving the information freely and voluntarily and denied receiving any assistance in exchange for his statement. Detective Dauthier

testified that he conducted the interview of Lewis, and no threats were made to Lewis regarding his statement, nor did Detective Dauthier give Lewis the impression that he would receive any favored treatment in exchange for his statement. Detective Dauthier further noted that Lewis requested to speak with detectives and voluntarily provided the information after his arrest.

The defendant argues that the evidence was insufficient to support the verdict because proof of his identity as the shooter was based on uncorroborated hearsay statements of recanting witnesses. Louisiana Code of Evidence article 801(D)(1)(a) provides that a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is “inconsistent with his testimony, provided that the proponent has first fairly directed the witness’ attention to the statement and the witness has been given the opportunity to admit the fact and where there exists any additional evidence to corroborate the matter asserted by the prior inconsistent statement[.]” The defendant, in effect, is suggesting that because the witnesses’ testimony was not corroborated, it was inadmissible hearsay under Article 801(D)(1)(a). Contrary to the defendant’s argument, the prior statements made by Moore, Butler, and Lewis were not hearsay. As the Louisiana Supreme Court explained in **State v. Stokes**, 2001-2564 (La. 9/20/02), 829 So.2d 1009, 1010 (per curiam):

A prior statement by a witness which is “[o]ne of identification of a person made after perceiving the person,” is non-hearsay when the witness appears and is cross-examined on the statement. La. [Code Evid.] art. 801D(1)(c). Such a statement may be used assertively, as substantive evidence of guilt, and may be established through the testimony of one to whom the statement was made. This is so even if the witness denies making an identification or fails or is unable to make an in-court identification.

When a non-party witness’s credibility is attacked through prior inconsistent statements incriminating the accused, the hearsay evidence is generally not admissible for its assertive value as substantive evidence of guilt. An exception to



this general rule exists for cases in which the witness's prior inconsistent statement also constitutes a prior statement of identification for purposes of Louisiana Code of Evidence article 801(D)(1)(c), Louisiana's counterpart of Federal Rules of Evidence 801(d)(1)(C). If at trial the eyewitness fails to remember or denies that he made the identification, the previous statements of the eyewitness can be proved by the testimony of a person to whom the statement was made, and the statement can be given substantive effect because it is not hearsay under La. Code Evid art. 801(D)(1)(c). **State v. Johnson**, 99-3462 (La. 11/3/00), 774 So.2d 79, 80 (per curiam). See **United States v. Brink**, 39 F.3d 419, 426 (3rd Cir. 1994).

In the instant matter, Butler and Lewis's previous statements were not proved by the testimony of a person to whom the statements were made. Instead, their own previous statements were preserved for the record by way of a videotaped interview they gave at the police station while incarcerated for other offenses. During their recorded interviews, both Butler and Lewis identified the defendant as the shooter. These videotapes were played at trial. Accordingly, the videotaped statements of Butler and Lewis identifying the defendant as the shooter were not only non-hearsay under 801(D)(1)(c), but were used substantively by the State to establish the defendant's identity as the shooter. See **State v. Miner**, 2014-0939 (La. App. 4th Cir. 3/11/15), 163 So.3d 132, 136-37, writ denied, 2015-0651 (La. 2/26/16), 187 So.3d 466 (where the victim's trial testimony that he did not know who stabbed him was directly contradicted by his two videotaped interviews, which were shown to the jury at trial and used as substantive evidence of the defendant's identity as the attacker, wherein he unequivocally identified the defendant as his attacker.) It is clear, therefore, that Butler and Lewis's statements identifying the defendant as the shooter were properly admitted into evidence at trial and sufficient to establish his identity as the person who shot the victim.

A thorough review of the record indicates that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, the defendant's identity as the perpetrator of second degree murder. Although Moore, Butler, and Lewis recanted their original statements, their trial testimonies were directly contradicted by their recorded statements during which all three positively identified the defendant as the shooter. The investigating officers and detectives testified that they did not coerce the witnesses into making statements or promise them anything in return for their statements. Thus, the jury had conflicting statements to consider and clearly chose to believe the witnesses' original statements. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **State v. 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 credibility of witnesses will not be reweighed on appeal. **State v. James**, 2002-2079 (La. App. 1st Cir. 5/9/03), 849 So.2d 574, 581.

The verdict rendered in this case indicates that the jury rejected the defendant's theory that Moore, Butler, and Lewis misidentified him as the person who 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 that 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). No such hypothesis exists in this case. Further, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them.

See **Ordodi**, 946 So.2d at 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the factfinder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Mire**, 2014-2295 (La. 1/27/16), \_\_So.3d\_\_, \_\_, 2016 WL 314814 (per curiam); **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Based on the foregoing reasons, this assignment of error lacks merit.

**CONVICTION AND SENTENCE AFFIRMED.**