NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 1765

STATE OF LOUISIANA

VERSUS

EMANUEL BROWN

Judgment Rendered: May 6, 2011

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 02-04-0126

Honorable Richard D. Anderson, Judge

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

The defendant, Emanuel Brown, was charged by bill of information with two counts of attempted second degree murder (counts 1 and 3), violations of La. R.S. 14:30.1 and 14:27; and three counts of attempted armed robbery (counts 2, 4, and 5), violations of La. R.S. 14:64 and 14:27. The defendant pled not guilty and, following a jury trial, was found guilty as charged on all counts. The defendant filed a postverdict judgment of acquittal, which was denied. For the conviction for the attempted second degree murder of Dallas Byrd (count 1), the defendant was sentenced to fifty years at hard labor without benefit of parole, probation, or suspension of sentence; for the conviction for the attempted armed robbery of Dallas Byrd (count 2), the defendant was sentenced to forty-nine years at hard labor without benefit of parole, probation, or suspension of sentence; for the conviction for the attempted second degree murder of Troy Godeaux (count 3), the defendant was sentenced to fifty years at hard labor without benefit of parole, probation, or suspension of sentence; for the conviction for the attempted armed robbery of Troy Godeaux (count 4), the defendant was sentenced to forty-nine and one-half years at hard labor without benefit of parole, probation, or suspension of sentence; and for the conviction for the attempted armed robbery of Ergin Dale Crochet, Jr. (count 5), the defendant was sentenced to forty-nine and one-half years at hard labor without benefit of parole, probation, or suspension of sentence. The sentences were ordered to run concurrently to each other but consecutively to any other time served. The defendant now appeals, designating one assignment of error. We affirm the convictions and sentences.

FACTS

Dallas Byrd worked at Icon, a lounge on Highland Road in Baton Rouge. On October 12, 2001, at about 2:30 a.m., Byrd finished his shift and walked out the back of Icon toward his car. As he approached the driver's side of his car, two

men, who were crouched down, stood up. The man in front pointed a gun at Byrd and demanded his money. As Byrd turned to run away, the gunman shot him. Byrd stumbled and fell, and the two men ran. Byrd survived his injuries and testified at trial that the two men were black. The person who shot him was almost six feet tall and thinner than his accomplice. Byrd could not identify either man because they were wearing bandanas over their faces. The person who shot Byrd was also wearing a blue hoodie. At the scene where Byrd was shot, police officers with the Baton Rouge Police Department recovered a .45 caliber bullet and a .45 auto cartridge case. The bullet, which had exited Byrd's body, was lodged in Byrd's shirt.

Troy Godeaux worked for Tiger Steam Cleaning, which cleaned restaurant hood systems on grills. On the night of December 10, 2001, Godeaux was working at Superior Grill after closing time and after the manager had left. Godeaux was cleaning the grill hood with a pressure washer when two men entered Superior Grill and yelled at Godeaux to get his attention. Godeaux testified at trial that as he turned, he saw two black men pointing guns at him and demanding that he open the manager's office for them. Godeaux did not have the keys to the office, which was locked. One gun was black and the other gun was silver. The taller, thinner man had the silver gun. Both men wore hooded sweatshirts and had bandanas on their faces. Godeaux, who was holding the pressure washer wand, sprayed the two men with water. The man with the silver gun shot Godeaux. The man who shot Godeaux then kicked in the office door. He fired his gun two more times, including at an inner door inside the office, which he was unable to breach. The two men then left Superior Grill. Godeaux was unable to identify the shooter. He testified that the person with the silver gun did all of the shooting. Inside Superior Grill, police officers with the Baton Rouge Police Department recovered three .45 auto cartridge cases and three .45 caliber bullets, including one bullet lodged in the

door inside the manager's office.

On December 23, 2001, at about 1:00 a.m., Sergeant Craig Tibbetts, with the Baton Rouge Police Department, was on patrol with his K-9, Donté. Sergeant Tibbetts testified at trial that he saw a car in the parking lot of Lone Star Steakhouse & Saloon (Lone Star). He pulled into the parking lot and circled the entire perimeter of Lone Star. Finding nothing of concern, Sergeant Tibbetts then let Donté out to stretch in a small grassy area at the back corner of Lone Star. Next to the grassy area were several fairly tall bushes. Donté alerted near the area with the bushes and began walking in the parking lot. As Sergeant Tibbetts turned to tell Donté to go back to the grassy area, a man wearing a black and tan jacket ran through the parking lot from the area of the bushes. Sergeant Tibbetts then saw another man emerge from behind the bushes wearing a black shirt and dark pants and run in the same direction as the first man. Both men ran across the parking lot, jumped a fence, crossed a railroad track, and began skirting their way around the back of a Wal-mart. Having observed all of their actions, Sergeant Tibbetts drove to the Wal-mart, which was still open at that time of night. Sergeant Tibbetts observed the man in the jacket enter Wal-mart. The other man in the black shirt, who was quite some distance behind the first man, had not made it inside of Wal-mart. Sergeant Tibbetts observed him walking underneath the lighted walkway of Wal-mart. The man took off his black shirt and removed a handgun from his waistband. He threw the gun on the ground, then threw his shirt on top of the gun. Sergeant Tibbetts stopped the man, who was identified as the defendant, and took him into custody.[1] Sergeant Tibbetts retrieved the defendant's shirt and gun. The gun had a full magazine of eight rounds and one round in the chamber. It was also determined that the manager, Crochet, was in Lone Star preparing to leave.

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[1] At this point in the investigation, the defendant was not arrested for attempted robbery. He received a summons for illegally carrying a weapon and was released.

The handgun that the defendant had on his person and discarded just prior to being stopped by Sergeant Tibbetts was a silver Smith & Wesson .45 automatic. All of the bullets and cartridge cases found at both the Byrd and Godeaux crime scenes (Icon parking lot and inside Superior Grill) were fired from the defendant's handgun. It was also determined that the defendant's accomplice was Dantroid Collins, who was in possession of a 9mm handgun.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NUMBER 1

In his sole assignment of error, the defendant argues the evidence was insufficient to support all five convictions. Specifically, the defendant contends the State did not prove he had the specific intent to kill Byrd (count 1) or Godeaux (count 3). He further contends the State failed to prove the identity of the defendant as one of the perpetrators who, while armed, attempted to rob Byrd (count 2) or Godeaux (count 4). Finally, the defendant contends the State failed to prove that he, while armed, attempted to rob Crochet (count 5) because his actions of merely being outside of Lone Star did not amount to an attempt.

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. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See La. C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (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, p. 5 (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, pp. 5-6 (La. 11/29/06), 943 So.2d 1047, 1051.

Louisiana Revised Statutes 14:64 provides in pertinent part:

> A. Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

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. See La. R.S. 14:30.1(A)(1). 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, 193 (La. 1975); see also **State v. Fauchetta**, 98-1303, p. 7 (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).

Because the defendant in his brief presents essentially the same arguments regarding the attempted second degree murders of Byrd and Godeaux, (which results in our virtually identical treatment of the issues), we address the attempted second degree murder convictions (count 1 and count 3) together. Similarly, the defendant presents the same arguments regarding Byrd's and Godeaux's identification of the defendant as one of the persons who attempted to rob them. Accordingly, we address the attempted armed robbery convictions (count 2 and count 4) together.

Byrd testified at trial that when one of the armed robbers pointed a gun at him, he screamed and ran. He thought he startled them because "they kind of went like that." The defendant contends there is no basis to conclude Byrd would have been shot "if he had complied by standing still and turning over his money." The defendant also contends that by Byrd's own testimony "he startled the men and the one with the gun reacted by firing a single shot that struck" Byrd. The defendant further contends there was not specific intent to kill because if the men wanted to kill Byrd, a fatal shot could have easily been fired as Byrd "lay helpless on the ground."

Godeaux testified at trial that he was working with a pressure washer when

the two men attempted to rob him. When he saw the two guns, he sprayed them with the pressure washer wand. The pressure washer was capable of 3,000 psi. However, since the pressure washer was set at a lower pressure, Godeaux managed to spray the robbers only with a fan of water. Godeaux testified that it "seemed to just irritate them than effectively defend me. Then they shot me right after that." The defendant contends "the shooting was plainly a reaction from the shooter to being sprayed with the pressure washer" and that the shooters easily could have killed Godeaux "with a second shot before they left if they had wanted him dead." Regarding both Byrd and Godeaux, the defendant opines that "[v]ictims often do not react calmly, and armed robbers often over-react [sic] to a perceived threat."

Byrd testified that as he was turning to run, the shot was fired, and he was hit underneath his armpit.[2] Godeaux testified that his injuries left him with a chronic pain condition. The bullet passed through his intestines. He had a foot of his small intestine, the whole right side of his large intestine, and his appendix surgically removed. He spent almost two weeks in the hospital and is in ongoing treatment.

In essence, the defendant, while not going so far as to claim self-defense, suggests that the unpredictable reactions of Byrd and Godeaux to having a gun pointed at them contributed to their being shot.[3] If the defendant as the aggressor cannot claim the right of self-defense, then he necessarily cannot claim the right of anything less than self-defense. See La. R.S. 14:21. That is, if the aggressor cannot rightfully shoot his victim who threatens the aggressor's life, then surely the aggressor cannot rightfully shoot his victim who has only startled him or acted unpredictably.

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[2] At sentencing, the trial court described the extent of Byrd's injuries from being shot. The bullet shattered two vertebra and damaged his liver. Byrd was unconscious for over a week in ICU. He spent four weeks in the hospital and underwent nine months of rehabilitation.

[3] However, we note that money was not demanded from Godeaux.

In any event, whether the defendant was startled or reacted to the actions of his victims, and whether the defendant could have assured the death of his victims by shooting them again when they were on the ground, is of no moment. The law is clear that deliberately pointing and firing a deadly weapon at close range indicates specific intent to kill. See **State v. Robinson**, 2002-1869, p. 8 (La. 4/14/04), 874 So.2d 66, 74, cert. denied, 543 U.S. 1023, 125 S.Ct. 658, 160 L.Ed.2d 499 (2004). The defendant did not merely "wing" his victims by shooting them, for example, in the leg. He shot both of them in areas that could have just as likely resulted in death. It was reasonable for the jury to infer that the defendant, in shooting Byrd and Godeaux in the torso area at close range with a .45 handgun, intended to kill his victims.[4] See **Cousan**, 684 So.2d at 390; **Graham**, 420 So.2d at 1127-1128.

Regarding the convictions for attempted armed robbery, the defendant correctly points out that neither Byrd nor Godeaux identified the defendant as one of the two men involved in the attempted armed robberies on October 12, 2001 and December 10, 2001. Byrd and Godeaux both testified they could not identify the defendant as one of the robbers because both robbers had most of their faces covered with bandanas and hoods. However, it was established at trial that the

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[4] The evidence strongly suggests that the defendant shot both victims, since he was in possession of the .45 handgun, as testified by Sergeant Tibbetts and Godeaux, and the bullets that struck the victims were fired from the defendant's handgun. However, even had the defendant's accomplice shot the victims, under principles of accessorial liability, the defendant would have also been guilty of the attempted second degree murders of Byrd and Godeaux. The parties to crimes are classified as principals and accessories after the fact. La. R.S. 14:23. Principals are all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime. La. R.S. 14:24. Only those persons who knowingly participate in the planning or execution of a crime are principals. An individual may be convicted as a principal only for those crimes for which he personally has the requisite mental state. See **State v. Pierre**, 93-0893 (La. 2/3/94), 631 So.2d 427, 428 (*per curiam*); **State v. Wiley**, 2003-884 (La. App. 5th Cir. 4/27/04), 880 So.2d 854, 863-64, writ denied, 2004-1298 (La. 10/29/04), 885 So.2d 585 (where the defendant's co-defendant shot and killed the victim during an armed robbery, the court found that under the principle of assessorial liability, it was reasonable to conclude the defendant was guilty of murder since the risk that an armed robbery, or any robbery, may escalate into violence and death is clearly a foreseeable consequence which every party to the offense must accept no matter the intent). See also **State v. Smith**, 2007-2028, pp. 10-13 (La. 10/20/09), 23 So.3d 291, 297-300 (*per curiam*).

bullet that struck Byrd, the cartridge case found near Byrd, and the three bullets and three cartridge cases found in Superior Grill where Godeaux was shot, were all fired from the .45 handgun that the defendant was in possession of when he was stopped by Sergeant Tibbetts.

The defendant also points out in his brief that when he was arrested, he had neither a hooded sweatshirt nor a bandana. Pursuant to a search warrant, police officers searched the defendant's residence for evidence related to the crimes, and did not find a hooded sweatshirt or a bandana at the residence.

While the .45 handgun the defendant had in his possession matched all of the bullets and cartridge cases found at both crime scenes where the victims were shot, the defendant argues that there is "simply no way of excluding the possibility that the handgun was bought and sold more than once" between the attempted armed robbery at Superior Grill on December 10, 2001, and the defendant's arrest on December 23, 2001. The defendant adds that the State failed to exclude the reasonable hypothesis that he came into possession of the handgun after the attempted armed robbery at Icon on October 12, 2001.

Sergeant John Colter, with the Baton Rouge Police Department, testified at trial that the .45 handgun the defendant had in his possession was originally registered to someone in Washington State in 1994. Sergeant Colter stated that the .45 handgun could have been sold "twice or three times or four times or ten times since that first purchase." However, he also noted that between 1994 and December 23, 2001, there is no transfer record of that weapon.

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 jury's verdicts reflected the

reasonable conclusion that, based upon the evidence viewed in the light most favorable to the prosecution, the defendant was one of the armed robbers at Icon and Superior Grill. While the items, such as a bandana or hooded sweatshirt, were not found at the defendant's residence,[5] the jury could have reasonably concluded that he disposed of those items in any number of places. He also could have kept them at his girlfriend's house, where the defendant was ultimately arrested for the instant offenses. However, the police had only an arrest warrant for the defendant and not a search warrant, so they were unable to search his girlfriend's house. While Sergeant Colter suggested the .45 handgun could have been sold several times over seven years, there was nothing in the record to suggest the defendant had acquired the handgun from someone within thirteen days or less from the attempted armed robbery at Superior Grill on December 10, 2001. The defendant did not testify and presented no rebuttal testimony. See **Moten**, 510 So.2d at 61-62. In finding the defendant guilty, the jury clearly rejected the defense theory of misidentification based on the hypothesis that the defendant came into possession of the .45 handgun subsequent to the attempted armed robberies.

Finally, the defendant argues that the evidence was insufficient to convict him of attempted armed robbery of Crochet at Lone Star because he did not have a bandana or hooded sweatshirt when he was stopped by Sergeant Tibbetts; there is no way to exclude the possibility that the handgun was bought and sold more than once between the attempted armed robbery on December 10, 2001, and his arrest on December 23, 2001; and that the evidence failed to exclude the reasonable hypothesis that the defendant and Collins "had walked in the vicinity of the Lone Star on their way somewhere else."

Whether the defendant had a bandana or hooded sweatshirt when Sergeant

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[5] Sergeant Tillmon Cox, with the Baton Rouge Police Department, testified at trial that the residence they searched might have been the defendant's grandmother's or some other relative's house.

Tibbetts stopped him has no bearing on this particular attempted armed robbery. Regardless of what the defendant was wearing, he was discovered at 1:00 in the morning hiding outside of Lone Star in some bushes. Similarly, whether the handgun was bought and sold several times has no bearing on this particular armed robbery attempt. Regardless of who owned the gun in the past, the defendant was discovered in possession of the gun after running from Lone Star to Wal-mart.

As previously noted, 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 **Moten**, 510 So.2d at 61. In finding the defendant guilty, the jury clearly rejected the hypothesis that the defendant and Collins were merely walking in the vicinity of Lone Star on their way somewhere else when Sergeant Tibbetts arrived. The testimony at trial established that the defendant alighted from the bushes next to Lone Star when Sergeant Tibbett's dog alerted to him. The jury's verdict reflected the reasonable conclusion that the defendant was hiding in the bushes armed with a .45 handgun at 1:00 in the morning, waiting to rob the Lone Star manager when he left the restaurant. Lying in wait with a dangerous weapon with the intent to commit a crime shall be sufficient to constitute an attempt to commit the offense intended. La. R.S. 14:27(B)(1). See **Ordodi**, 2006-0207 at p. 11, 946 So.2d at 660. We note, as well, that after being discovered, the defendant fled from the scene. Flight following an offense reasonably raises the inference of a "guilty mind." **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984).

Regarding all five convictions, the jury heard the testimony and viewed the evidence presented to it at trial and found the defendant guilty on all counts. 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, pp. 5-6 (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, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which 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).

After a thorough review of the record, we find that the evidence negates any reasonable probability of misidentification and supports the jury's unanimous guilty verdicts on all five counts. 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 two counts of attempted second degree murder and three counts of attempted armed robbery. See **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (*per curiam*).

The assignment of error is without merit.

CONCLUSION

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

CONVICTIONS AND SENTENCES AFFIRMED.