NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1247

STATE OF LOUISIANA

VERSUS

ROBERT EDWARDS SCOTT, JR.

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 02-08-0620, Section VI
Honorable Richard M. "Chip" Moore, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered February 11, 2011

PARRO, J.

Defendant, Robert Edwards Scott, Jr., was charged by bill of information with four counts of attempted second degree murder, violations of LSA-R.S. 14:30.1 and LSA-R.S. 14:27. He pled not guilty and, after a trial by jury, was found guilty on each of all four counts of the responsive offense of attempted manslaughter. See LSA-R.S. 14:31; LSA-R.S. 14:27; LSA-C.Cr.P. art. 814(A)(4). After denying defendant's motions for new trial and for post-verdict judgment of acquittal, the trial court sentenced defendant to twenty years of imprisonment at hard labor on each count, all sentences to be served concurrently.[1] Defendant has now appealed, raising insufficiency of the evidence as his sole assignment of error. For the following reasons, we affirm the convictions and sentences imposed.

FACTS

On the evening of December 26, 2007, Monica Dunbar and three of her friends, Zachary Jackson, Larissa Griffin, and Taylor Crawford, decided to go out to a nightclub. Monica drove them all to Club Rags in Baton Rouge, Louisiana, where they arrived at approximately 10:00 to 10:30 p.m. They danced, listened to music, and socialized with friends for a "couple" of hours. However, Zachary, Larissa, and Taylor then became embroiled in a fight with another group of young women that included Kristina McCaleb and Melanesia (Mel) Stewart, who were sitting at a nearby table. The fight ensued when Mel, who had a history of not getting along with Taylor, threw a drink at Zachary, splashing both Zachary and Larissa with the liquid. Security guards responded quickly to the fight and escorted Zachary, Larissa, and Taylor, as well as Kristina and Mel, out of the club, telling them they all had to leave the premises. Monica joined her friends outside, and they all got into her car and left. At the same time, Kristina and Mel got into a red car, with Kristina driving, and also left.

[1] Defendant notes in his brief that the trial court did not state during sentencing that he was to be given credit for time served. However, such credit is automatically given to a defendant under LSA-C.Cr.P. art. 880 without the necessity or formality of the trial court having to so state. See **State v. Arnold**, 07-0362 (La. App. 1st Cir. 9/19/07), 970 So.2d 1067, 1074, writ denied, 07-2088 (La. 3/7/08), 977 So.2d 904. Moreover, the criminal commitment document contained in the record reflects that defendant was actually given credit for the time he served prior to sentencing.

Both cars traveled north on Plank Road and stopped side by side at a red traffic light at the intersection of Plank Road and Mohican Street. The women continued arguing back and forth between the cars. Larissa and Taylor saw defendant get out of a white truck at the intersection and walk toward their car, but he got back into his truck when the light turned green. Both cars continued traveling up Plank Road a short distance, then turned onto Evangeline Street, a four-lane thoroughfare. Monica's car was in the right lane directly behind the red car. Shortly before turning, Monica noticed a white truck tailgating her car and mentioned it to her friends.

Once on Evangeline Street, the red car sped up and drove off. Almost immediately, the white truck pulled up in the right lane beside Monica's car and Taylor screamed, "He's got a gun." The women looked over and saw defendant pointing a gun at them and then heard several gunshots. They attempted to dodge the bullets as best they could, but Zachary, Larissa, and Taylor were each hit by multiple bullets and were bleeding. Monica, who was not injured, initially sped up in an attempt to get away, but then abruptly slammed on her brakes. The white truck sped away.

At that point, the situation in the car was chaotic, with no one thinking clearly. Larissa told Monica to go to the hospital, but she replied that she did not know where the hospital was located. All of the women were fearful that defendant would return. Larissa called her boyfriend, who was at the Savoy Plaza apartment complex on Wooddale Boulevard where Zachary, Larissa, and Taylor also lived. He thought she was joking about the shooting and said for them to just come back to the apartment.

The women were panicked and did not know what to do. Monica ultimately drove several miles to Savoy Plaza, rather than going to either a hospital or a police station. Once the women arrived at the apartment complex, Taylor called 911. In response to the call, the Baton Rouge City Police and emergency medical technicians were dispatched at 12:55 a.m. Detective Clarence McGarner interviewed Monica, the only uninjured victim, about the shooting.

Taylor, who sustained two gunshot wounds, was transported by ambulance to

Baton Rouge General Hospital Mid-City. Zachary, who was shot four times, and Larissa, who was shot nine times, were both taken by ambulance to Earl K. Long Hospital. It was later determined that there were at least eleven bullet holes in the victims' car.

Based on information he received, Detective McGarner identified defendant as a suspect. Later, on the day of the shooting, he visited the three injured victims separately at the hospital and presented them with photographic lineups containing defendant's photograph. Each of the injured victims independently identified defendant as the person who fired the gun at them. Detective McGarner also presented the photographic lineup to Monica, who likewise identified defendant as the armed assailant. In each instance, Detective McGarner changed the position of defendant's photograph in the lineup. Additionally, shortly after the shooting, the police observed a white pickup truck that belonged to defendant's father parked at the residence where defendant lived.

After learning there was a warrant for his arrest, defendant surrendered himself to the Baton Rouge City Police later that afternoon and gave a recorded audio statement. In the statement, defendant admitted he was close friends with Kristina and Mel and was at Club Rags at the time they got into the fight with the victims. However, he denied being involved in the altercation. He also claimed that, once Kristina and Mel were ejected from the club, he left at the same time and went directly home. He indicated that he drove home on the interstate in his father's white pickup truck via a route that did not take him past either the intersection of Plank Road and Mohican Street or Evangeline Street. According to defendant, he then visited with a friend who lived nearby and had a few drinks, before going to IHOP about 1:00 a.m.

Detective McGarner also questioned defendant about a statement one of the security guards at Club Rags overheard defendant make to Mel as they left the nightclub. According to Detective McGarner, the guard overheard defendant say to Mel, "Come on, let's go, I got something for them." Defendant denied making such a statement. He said he did make a statement to Mel about getting a "dude" who had hit

one of the females during the earlier fight, but denied he was referring to the victims when he made that statement.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that he committed the four counts of attempted manslaughter of which he was convicted. Specifically, he argues not that the state failed to establish the requisite elements of attempted manslaughter, but rather that the state failed to prove beyond a reasonable doubt his identity as the perpetrator of the offenses in question.

The standard of review for the sufficiency of evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime and the defendant's identity 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; **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 **Jackson** standard of review incorporated in LSA-C.Cr.P. art. 821 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, assuming every fact to be proved that the evidence tends to prove, in order to convict, the trier of fact must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Riley**, 91-2132 (La. App. 1st Cir. 5/20/94), 637 So.2d 758, 762. 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 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).

Defendant was convicted in this case of four counts of attempted manslaughter. He argues on appeal that the state's evidence was insufficient to establish that he was

the person who attempted to kill the four victims. Where the key issue is the defendant's identity as the perpetrator of the crime, rather than whether or not the crime was committed, the state is required to negate any reasonable probability of misidentification in order to carry its burden of proof. **State v. Johnson**, 99-2114 (La. App. 1st Cir. 12/18/00), 800 So.2d 886, 888, writ denied, 01-0197 (La. 12/7/01), 802 So.2d 641. Positive identification by only one witness is sufficient to support a conviction. **State v. Davis**, 01-3033 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163. Moreover, it is the trier of fact who weighs the respective credibility of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 05-0992 (La. 11/29/06), 943 So.2d 1047, 1051.

The defendant did not testify at trial. However, his recorded statement, which included his denial that he was the perpetrator of the instant offenses, was introduced into evidence and heard by the jury. To prove defendant's identity as the perpetrator of the instant offenses, the state presented evidence from Detective McGarner that all four of the victims separately identified defendant in photographic lineups as the person who fired multiple gunshots at them. These identifications were made within hours of the shooting. Furthermore, each of the identifications was made separately while the victims were at different locations.

Each of the victims also testified at trial and identified defendant in court as the person who fired a gun at them on Evangeline Street. During each victim's respective testimony, each victim indicated that she saw the shooter's face before he fired the gun and that she was positive defendant was the same person. In fact, each of the four victims testified that she was one hundred percent certain of her identification of defendant. Taylor went even further by stating she was "a thousand percent positive" defendant was the shooter. She also testified she saw defendant twice on the day of the shooting; she first saw him when he got out of his truck at the traffic light on Plank Road and, next, when he shot at them. She said she recognized him immediately when he stepped out of the truck because she went to middle school with him and was on

the track team with him. Larissa also indicated that she saw defendant shortly before the shooting when he got out of his truck at the traffic light. She testified that she again saw his face immediately before he began shooting at them.

While defendant does not dispute that Monica, Zachary, Larissa, and Taylor were victims of attempted manslaughter, he strongly disputes their identification of him as the armed assailant. Specifically, he argues that the victims may have identified him as their assailant merely because they saw him earlier at Club Rags with Kristina and Mel, because he broke up the fight that occurred at the nightclub, or because he looked familiar to them because they either previously knew him or had seen him somewhere else. He asserts that the victims possibly may have assumed, since he assisted Kristina and Mel to their car at Club Rags, that he was the person who followed them in the white truck.

Further, defendant suggests that the identifications given by the victims were not reliable, both because they had been drinking alcohol at Club Rags and because they attempted to take cover when they saw the assailant's gun, preventing them from getting a good look at the shooter. He also notes that there were inconsistencies between the victims' respective statements as to whether the assailant was wearing glasses. In his own recorded statement, defendant also indicated that he wore his glasses while driving.

As additional support of his misidentification claim, defendant contends it was totally irrational for Monica to drive to the apartment on Wooddale Boulevard after the shooting, rather than to a hospital or police station. He asserts that she did so in order for the women to discard unspecified items they were not supposed to have. This contention presumably is meant as an attack upon the credibility of the victims.

Similarly, defendant notes that, although Larissa testified at trial that she saw defendant getting out of his truck at a traffic light on Plank Road prior to the shooting, she failed to include this information in her statement to Detective McGarner. Based on this omission, he contends that she gave this testimony at trial merely to bolster her

credibility by establishing that she got a good look at defendant's face before the shooting. Additionally, Kristina McCaleb, who was driving the red car on the day of the shooting, testified at trial as a defense witness. She indicated that, while stopped at a traffic light on Plank Road, she did not see defendant.

Finally, defendant points out that there was no physical evidence linking him to the crimes, and notes in particular that no tests were conducted by the police on his clothing, on the recovered shell casings, or on the truck he drove on the day in question. He further contends that the police also knew at least some of the victims may have previously known him or had seen him, and this information should have caused the jury to question the legitimacy of the identification procedures used. He implies that the jury's decision may have been influenced by their sympathy for the female victims, since three of them sustained serious injuries from multiple bullet wounds.

Based on our careful review of the evidence, we conclude that a rational trier of fact could have found that the state negated any reasonable probability of misidentification. There was testimony at trial that, due to Taylor's screamed warning about seeing a gun, the victims all looked toward the assailant and got a look at his face before he began shooting at them. Further, Taylor indicated that she recognized defendant immediately because she had gone to school with him.[2] Contrary to defendant's assertion that she identified him as the shooter on this basis, the jury may have concluded that the prior acquaintance made defendant more easily recognizable to her when she saw him at the time of the shooting. Moreover, the record reflects that each of the victims identified defendant with certainty as their assailant.

Although defendant suggests the reliability of the victims' identifications was questionable because they had been drinking alcohol at Club Rags, the record does not support this claim. In fact, Larissa specifically testified that she had no drinks at Club Rags. Additionally, Monica stated that she did not drink much and was well aware of

[2] Defendant argues in his brief that two of the victims previously knew defendant as a result of attending school with him. However, Taylor was the only victim who testified at trial that she previously knew defendant, although Zachary did indicate she had seen him on prior occasions with Kristina and Mel.

what was going on.

As noted by defendant, Larissa testified at trial that she saw defendant shortly before the shooting when he got out of his truck at the traffic light on Plank Road, although she did not include this information in the recorded statement she gave to the police on the day of the shooting. However, Larissa explained that she did not tell Detective McGarner about this incident because she thought nothing of it at the time and did not consider it important. Regardless, defendant's argument that Larissa added this information merely to bolster her credibility ignores the fact that Taylor also testified that she saw defendant get out of his truck at a traffic light on Plank Road.

With respect to his claim that it was irrational for Monica to drive to the apartment complex on Wooddale Boulevard after the shooting, rather than to a hospital or police station, defendant does not explain how that action had any impact whatsoever on the later identifications made by the victims. In any event, while it undoubtedly was an irrational action, the victims clearly were not acting in a rational state of mind at the time. They had just endured a barrage of gunshots, the car was riddled with holes, and three of the victims had sustained multiple wounds and were bleeding. Under these chaotic circumstances, the jury reasonably could have accepted the testimony indicating that Monica drove to the apartment complex because she panicked and was in a state of confusion.

The record contains no support for defendant's argument that one or more of the victims identified him as their assailant merely because they recognized him from having attended school with him, or because of his association with Kristina and Mel. Likewise, the record is devoid of support for defendant's claim that the victims identified him because he broke up their fight with his friends, Kristina and Mel. Defendant said nothing in the recorded statement he gave to Detective McGarner about breaking up the fight, nor did anyone else testify that he did so.

The jury heard all of the testimony and viewed all of the evidence presented to it at trial, including both the victims' testimonies identifying defendant as the armed

assailant and defendant's denial in his recorded statement that he was involved in the shooting. Defense counsel had an opportunity to fully cross-examine the victims on all aspects of their testimony and did so vigorously, questioning them, among other subjects, on their identifications of defendant and alleged inconsistencies in their testimony and prior statements to the police. The jury also heard defendant's closing arguments attacking the victims' credibility and reliability, and alleging the police investigation was inadequate. After hearing all of the evidence and testimony, the jury found defendant guilty of the instant offenses. In doing so, it is clear the jury rejected defendant's theory of misidentification and accepted the victims' testimonies that he was the armed assailant who shot at them.

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. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **Lofton**, 691 So.2d at 1368. 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.

After a thorough review of the record, we find that the evidence supports the guilty verdicts. Each of the victims positively identified defendant as the armed assailant, both in photographic lineups conducted shortly after the shooting, as well as at trial. While even the testimony of a single witness is sufficient to support a conviction, defendant was identified in this case by all four victims. See **Davis**, 822 So.2d at 163. As previously noted, the guilty verdicts returned in this case indicate the jury accepted the testimony of the victims and rejected the defense's theory of misidentification. See **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655

So.2d 448, 453. We cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the jury and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Thus, we are convinced that viewing all of 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 defendant was the perpetrator of the instant offenses.

This assignment of error lacks merit.

REVIEW FOR ERROR

Although he did not designate it as an assignment of error, defendant requests that this court review the record for errors pursuant to LSA-C.Cr.P. art. 920. Such a request is unnecessary, as this court routinely reviews all criminal appeals for such errors, whether or not such a request is made by a defendant. See **State v. White**, 96-0592 (La. App. 1st Cir. 12/20/96), 686 So.2d 96, 98. Under LSA-C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence.

Our examination of the record reveals that, on the morning scheduled for sentencing, defense counsel filed a motion for new trial and a motion for post-verdict judgment of acquittal. Instead of the customary orders usually attached to motions setting them for hearing, defense counsel attached an order to each motion stating that the respective motions were granted. The trial court signed the attached orders that day. However, when the sentencing hearing began later that day, the state noted that the defense had filed two motions that morning that needed to be addressed, at which point defense counsel agreed that the motions should be "dispensed with prior to sentencing." The parties then argued the merits of the motions, after which the trial

court orally denied both of them.[3]

Based on our review, we conclude that the actions of the trial court, as well as of the respective parties, clearly indicate the court did not intend to grant either a new trial or a post-verdict judgment of acquittal, but signed the orders in question, assuming they were orders for "show cause" hearings. The transcript and the minutes for the sentencing hearing reflect that defendant's motions for new trial and post-verdict judgment of acquittal actually were heard and denied by the trial court. As such, the orders granting the new trial and the post-verdict judgment of acquittal were inadvertent and constitute ministerial errors. See **State v. Williams**, 01-0554 (La. 5/14/02), 817 So.2d 40, 47-48; **State v. Smallwood**, 09-86 (La. App. 5th Cir. 7/28/09), 20 So.3d 479, 492, writ denied, 09-2020 (La. 9/24/10), 45 So.3d 1065. The fact that even defendant knew the trial court never intended to grant the motions is demonstrated by his appeal of the convictions after the orders granting the motions were inadvertently signed. See **Williams**, 817 So.2d at 47.

A review of the record further shows that the trial court erred in sentencing defendant without waiting at least twenty-four hours after denying his motions for new trial and post-verdict judgment of acquittal, as required by LSA-C.Cr.P. art. 873.[4] However, in **State v. White**, 404 So.2d 1202, 1204-05 (La. 1981), the Louisiana Supreme Court held that such an error is harmless in cases where the defendant has not contested the sentence imposed nor cited any prejudice, and the violation of the twenty-four hour delay requirement was only noted on review for error. Compare **State v. Augustine**, 555 So.2d 1331, 1334 (La. 1990) (where the defendant was

[3] On appeal, defendant notes that the record contains an order granting the motion for new trial, but makes no reference to the order granting the motion for post-verdict judgment of acquittal. In any event, defendant did not assign error to the discrepancy between the written order granting his motion for new trial and the trial court's oral denial of that motion, but merely requested that this court clarify this discrepancy.

[4] Louisiana Code of Criminal Procedure article 873 does not explicitly require a twenty-four hour delay in sentencing after the denial of a motion for a post-verdict judgment of acquittal, as it does after the denial of a motion for new trial or in arrest of judgment. However, this court previously has applied the twenty-four hour delay required by LSA-C.Cr.P. art. 873 to motions for a post-verdict judgment of acquittal. See **State v. Coates**, 00-1013 (La. App. 1st Cir. 12/22/00), 774 So.2d 1223, 1226; **State v. Jones**, 97-2521 (La. App. 1st Cir. 9/25/98), 720 So.2d 52, 53.

entitled to resentencing if he noted the Article 873 violation or contested the sentence imposed). In reaching its holding in **White**, the supreme court stated that, "C.Cr.P. Art. 921 mandates that this court *not* reverse a judgment because of an 'error, defect, irregularity or variance which does not affect substantial rights of the accused.'" **White**, 404 So.2d at 1204-05. In the instant case, defendant has not contested his sentences, assigned error to the trial court's failure to observe the twenty-four hour delay, nor cited any prejudice resulting from the failure to delay sentencing. Further, we have reviewed the record and find no indication defendant was prejudiced by the error. Thus, the record does not demonstrate any reversible error occurred. See **White**, 404 So.2d at 1204-05; **State v. Hebert**, 08-0003 (La. App. 1st Cir. 5/2/08), 991 So.2d 40, 48, writs denied, 08-1526 and 08-1687 (La. 4/13/09), 5 So.3d 161.

CONVICTIONS AND SENTENCES AFFIRMED.