NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 1520

STATE OF LOUISIANA

VERSUS

BLAIR ANDERSON

Judgment Rendered: March 25, 2011

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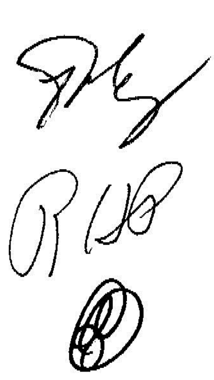

Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case Number 496,482
Honorable David Arceneaux, Presiding

* * * * * *

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* * * * * *

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

GUIDRY, J.

The defendant, Blair Anderson, was charged by bill of information with aggravated assault with a firearm, a violation of La. R.S. 14:37.4. The defendant pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed a motion for postverdict judgment of acquittal, which was denied. The defendant was sentenced to five years at hard labor. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

Philip Baker was married to Tonya Baker and lived on Amelia Street in Houma, Terrebonne Parish, Louisiana. In 2004 or 2005, Philip and Tonya separated, but remained married. At that time, Tonya began having a relationship with the defendant. While Tonya saw the defendant, she also lived with Philip "off and on." Philip knew the defendant and was aware that his wife was also involved in a relationship with the defendant. At some point in the past, all three had lived together.

On August 31, 2007, Tonya was living with Philip. She had been at the house for about a week. At about 7:45 a.m. that day, the defendant entered Philip's house and walked into the bedroom where Philip and Tonya were lying in bed. Philip testified at trial that the defendant said angrily, "I'm going to get you," then left. Philip further testified that later that day, between 12:00 p.m. and 1:00 p.m., a truck pulled up outside of his house. Believing it was the defendant, Philip headed to the front door to go outside to fight the defendant. Before Philip could get outside, he heard two or three gunshots. Philip testified that when he got outside, he saw a handgun coming from around the truck, and he saw the defendant getting in the passenger side of the truck. However, Philip did not see the defendant with a gun. Philip testified that the driver of the truck had bushy hair and that the truck did not belong to the defendant. At least two bullet holes were on the side of the front door

of Philip's house. Philip testified he had prior convictions for possession with intent to distribute marijuana and possession with intent to distribute "pain pills."

About a week after the shooting, Philip went to the office of Barron Whipple (defense counsel in this case) and signed a dismissing affidavit. Philip testified at trial that he was not sure the shooter was the defendant, so he wanted to drop the charges.

Officer Joseph Renfro, with the Houma Police Department, testified at trial that he went to Philip's house the day of the shooting to investigate. Officer Renfro stated Philip told him the defendant told him (Philip) that morning he was going to get a gun and was coming back to get him. Philip also told Officer Renfro that he looked outside and saw the shooter when the shots were being fired. Philip identified the shooter by name, Blair Anderson. Philip told Officer Renfro the defendant had a black revolver and described him as a black man with a missing left leg which, in fact, accurately described the defendant.

Chastity Ivy, a third-grade teacher at Covenant Christian Academy, testified at trial that she witnessed the shooting. Her school is directly across the street from Philip's house. She testified that she was in her classroom when she heard what sounded like a gunshot. She stepped from her classroom and looked through a glass door in the hallway. She observed across the street a black man with one leg by the back of a gray Ford truck. She saw the man move toward the front of the truck, point a gun over the top of the truck, and fire another shot. She did not see the shooter's face. The man then got in the passenger side of the truck, and the truck pulled away. She testified the man did not have his left leg. Chastity gave a statement to Officer Renfro.

Tonya Baker testified at trial as a defense witness. According to Tonya, when the defendant walked in the bedroom that morning, he said nothing to either one of them, then left. She testified that when the truck pulled up in the afternoon, she went

to open the door. She heard someone ask for "Phil." Philip pushed Tonya out of the way and moved toward the door. Tonya looked through a living room window and "watched everything." She testified she heard gunshots, but did not see a gun. She stated she saw a man run from behind the bed of the truck and get into the passenger side. The truck then took off. She testified that the person who got into the truck was not the defendant.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the evidence was insufficient to support the conviction. Specifically, the defendant contends that the State failed to prove all of the elements of aggravated assault with a firearm, because neither Philip nor Tonya testified that he or she was in reasonable apprehension of receiving a battery when the gunshots were fired.[1]

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 La. C.Cr.P. art. 821(B); State v. Ordodi, 06-0207, 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

[1] In his counseled brief, the only issue on appeal is whether the defendant, by discharging a firearm, placed Philip in reasonable apprehension of receiving a battery. Appellate counsel does not argue the issue of the identity of the defendant as the shooter. In fact, appellate counsel states in his brief: "There is no dispute that Anderson discharged the gun." Appellate counsel further states in his brief:

> Generally speaking, without any evidence to show that Anderson was defending himself or another when he discharged his firearm, a charge for aggravated assault with a firearm [is] warranted. However, if the alleged victim is unaware that a gun had been fired or he [was] not apprehensive or fearful in spite of the weapon being fired, then aggravated assault with a firearm is not the appropriate charge. [Footnotes omitted.]

standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that, in order to convict, the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 01-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144.

Aggravated assault with a firearm is an assault committed by the discharge of a firearm. La. R.S. 14:37.4(A). An assault is "an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery." La. R.S. 14:36.

The defendant asserts in his brief that the "assault" element was not proven by the State. According to the defendant, nothing in Philip's testimony indicated that he was "scared, fearful or apprehensive," or that he was placed in reasonable apprehension of receiving a battery by the defendant's actions.

We do not agree. Several times throughout his testimony, Philip indicated that he was frightened or feared for his safety when he heard the gunshots. For example, during direct examination, the following exchange between the prosecutor and Philip took place:

> Q. So when you were in the house you did look outside and see the truck pulling up crazy in the yard. Is that right?
>
> A. When you look out my window they got curtains, and you can see the silhouette of a truck pull up right there. And when I seen that I jumped up -- like I say, I knew he was mad, so I was going outside ready to fight until I heard pops.
>
> Q. So you were concerned about your safety.
>
> A. Yes, sir.

On cross-examination, the following exchange between defense counsel and Philip took place:

> Q. Okay. Well, I'm just going to say to you that your [police] statement, which is introduced into evidence that you gave that day, said that two shots were fired. Would you say yes or no?

A. The statement that I gave that day?

Q. Yeah.

A. Well, then -- well, I just seen what I wrote, and it said two.

Q. Okay. Could there have been three, four, five or six shots?

A. All I know is I was -- it could have been four, five or six like you say, I was getting shot at, I wasn't really counting how many shots.

Later during cross-examination, the following exchange took place:

Q. Prior to these shots being fired into your house, did you feel like you was fixing to be put in danger of somebody touching you or battering you?

A. Say again, sir.

Q. I said prior to these shots being fired into your house, did you have any fear from anyone threatening to hurt you or batter you in any way?

A. Did I have any fear of it? From that morning, yes, sir.

Q. From that morning six hours earlier.

A. From the morning incident, yes, sir.

The jury heard all of the testimony and viewed all of the evidence presented to it at trial and, notwithstanding any inconsistencies, it found the defendant guilty as charged. 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).

It is clear from the finding of guilt that the jury concluded the testimony of Philip, Officer Renfro, and Chastity Ivy was more credible than the testimony of Tonya. 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, 03-1980, p. 6 (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). Further, the testimony of the victim alone is sufficient to prove the elements of the offense. State v. Orgeron, 512 So. 2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So.2d 113 (La. 1988). The testimony and evidence at trial clearly established that the defendant shot at or near Philip as Philip was coming out of his house. Philip was aware gunshots were being fired in his direction and made clear in his testimony that he feared for his safety.

After a thorough review of the record, we find that the evidence supports the jury's 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 aggravated assault with a firearm. See State v. Calloway, 07-2306, pp. 1-2 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

The assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.