NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 KA 2124

STATE OF LOUISIANA

VERSUS

CALVIN WAYNE MITCHELL

Judgment Rendered: June 11, 2010

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Appealed from the
16th Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
Case No. 2006-169650

The Honorable John E. Conery, Judge Presiding

* * * * * * * *

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BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

GAIDRY, J.

The defendant, Calvin Wayne Mitchell, was charged by bill of information with attempted second degree murder (Count 1), a violation of La. R.S. 14:30.1 and 14:27; assault by drive-by shooting (Count 2), a violation of La. R.S. 14:37.1; and possession of a firearm by a convicted felon (Count 3), a violation of La. R.S. 14:95.1. The defendant pled not guilty to the charges and, following a jury trial, he was found guilty as charged on all three counts. For the attempted second degree murder conviction (Count 1), he was sentenced to twenty-five years; for the assault by drive-by shooting conviction (Count 2), he was sentenced to five years; and for the possession of a firearm by a convicted felon conviction (Count 3), he was sentenced to ten years. The sentences were ordered to run concurrently. The State subsequently filed a habitual offender bill of information. A hearing was held on the matter, and the defendant was adjudicated a third-felony habitual offender. The trial court vacated the twenty-five-year sentence for attempted second degree murder and sentenced the defendant to fifty years at hard labor. The defendant now appeals, designating two assignments of error. We affirm the convictions. We vacate the habitual offender adjudication and remand for re-adjudication. We further vacate all three sentences and remand for re-sentencing.

FACTS

On February 28, 2006, at about 6:00 p.m., Eddie Payton and his cousin, Justin Richardson, were in Payton's front yard on Third Street in Franklin, St. Mary Parish. Also in the front yard were Payton's sister, Ivy; Ivy's friend, Patrice Granger; and Payton's young niece and nephew. A white two-door Monte Carlo driven by Curtis Caesar pulled up in front of

Payton's house. The defendant was in the front-passenger seat, and Kierra Johnson was in the back seat. The house was to the right of the car so that the passenger side of the car was facing Payton's house.

Payton testified that the passenger rolled down the window and motioned for Payton to come to the car. As Payton began walking toward the car, the passenger, armed with a 9mm handgun, shot at him three times. One shot hit Payton in his right small toe. Payton was not armed. Two shots hit the side of Payton's house. One bullet remained embedded in a wall of the house, and another bullet went through the wall and came to rest in a bag of clothes in a bedroom. Payton could not identify the defendant in court as the shooter, but testified that the person who shot him was the passenger of the car, and the passenger had short "dreads," a white T-shirt, and gold teeth. The defendant was wearing a white T-shirt and had gold teeth. Caesar was wearing a black shirt and did not have gold teeth.

Richardson testified at trial that he had never seen the defendant before. He identified the shooter as the front-seat passenger, who had on a white T-shirt, gold "in the front," and an afro that looked "like dreads." According to Richardson, the term "dreads" meant short hair. Subsequently, Richardson was shown by the police a photo array of six suspects. Richardson picked out the defendant as the shooter.

Ivy Payton testified at trial that the shooter was the front-seat passenger, and that he had on a white T-shirt, gold teeth, and short nappy hair. She stated that his hair was "twisted up." Ivy could not pick out the defendant as the shooter in a photo array shown to her by the police. She explained she was unable to pick out the defendant because he did not have "dreads" at that time.

Patrice Granger testified at trial that the shooter was the front-seat passenger, and that he had gold teeth. She stated that his hair was "short twists, it wasn't dreads." Granger identified the defendant in court as the shooter.

Kierra Johnson testified at trial that she was in the back seat riding with Caesar, who was driving, and the defendant, who was the front-seat passenger. The defendant was her boyfriend. When they stopped in front of Payton's house, the defendant shot out of the window two times. She identified the defendant in court as the shooter. She iterated that she was sure the defendant was the shooter and that Caesar never shot.

Caesar testified at trial that for this incident he had already pled guilty to assault by drive-by shooting and aggravated battery, but that he had not yet been sentenced. Caesar testified that he was the shooter, not the defendant. Caesar stated he shot at Payton in retaliation for an altercation Payton had previously had with one of Caesar's relatives. Caesar admitted that prior to trial he had told the prosecutor that defendant was the shooter. However, he decided to tell the truth at trial, which was that he (Caesar) was the shooter. He explained that he shot over the defendant through the passenger window.

The defendant had prior felony convictions for distribution of cocaine and simple escape. The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in charging the jury that it could convict him as a principal, specifically as an aider and abettor to the actual shooter since the bill of information indicated the defendant was the shooter. The defendant maintains he was denied due process because he was not given notice that he

was being tried for committing "the crime in this way," namely as an aider and abettor rather than the actual shooter.

In charging the defendant with attempted second degree murder, the bill of information indicates the defendant had the specific intent to commit second degree murder "by attempting to kill [Payton] and did some act or omitted some act for the purpose of and tending directly toward the accomplishing of that object." The bill of information also charges the defendant committed the crime of assault by drive-by shooting "by the use and shooting of a firearm facilitated through the use of a motor vehicle with the intent to either kill, cause harm to or frighten [Payton]."

In his opening statement, Vincent Borne, the prosecutor, stated that the defendant was the shooter. Mr. Borne informed the jury that Caesar was driving, Johnson was in the back seat, and the defendant was the front-seat passenger. As they drove by a residence on Third Street in Franklin, the defendant, armed with a handgun, fired two to three shots, and one of the shots hit Payton in his foot.

Caesar testified at trial that for his involvement with this incident, he had pled guilty to assault by drive-by shooting and aggravated battery. He had not been sentenced yet. During Mr. Borne's direct examination of Caesar, Caesar testified that, in retaliation for an altercation between one of his relatives and someone else, "I pulled a gun and I shot three times." Mr. Borne, seemingly surprised by Caesar's claiming to be the shooter for the first time, spent much of the rest of his direct examination inquiring why Caesar's trial testimony was in direct conflict with what Caesar had previously told Mr. Borne. The relevant portions of this colloquy between Mr. Borne and Caesar are as follows:

Q. Okay. Now you understand --

A. I understand what we went over --

Q. Okay.

A. -- but --

Q. You understand you previously told me something totally opposite of what you're telling me now.

A. Yes, sir, because being that the fact, when we first got picked up, I tried to take my charge for what happened, but with all the fuss being that the guy had golds in his mouth and a white t-shirt, they didn't want me to come straight with it.

* * * * *

Q. [The defendant] was in the passenger seat?

A. Yes, sir.

Q. So now you're here, after you gave a statement to us before that Mr. Mitchell shot, now you're saying you shot?

A. I did shoot.

Q. You did shoot?

A. Yes, sir.

Q. Okay. Did Mr. Mitchell shoot?

A. No, sir.

Q. He was sitting in the front seat, right, he was s[it]ting in the front seat?

A. Yes, sir.

Q. Okay. You produced the gun?

A. It was my gun.

Q. Okay. You shot over him?

A. I shot over him through the passenger window.

* * * * *

Q. Now do you remember talking to me about this case prior to now?

A. Yes, sir, I remember talking [sic] you other than what I'm telling everybody right now.

Q. So do you remember telling me that he was in the passenger seat, he produced the gun and he shot two or three times?
A. I remember that.

Q. You told me that, now you're telling us something different.

A. I'm telling y'all the truth. It says do I swear to tell the truth, the whole truth, and that's what I'm doing.

Q. So the truth is what you're telling us now versus --

A. Yes, sir.

Q. -- what you told us before.

A. Yes, sir.

* * * * *

Q. And you're changing your story 180 degrees from what you told me when I spoke to you prior to trial; is that correct?

A. Yes, sir. I'm telling you the truth.

Q. Now you're telling me the truth, but you [w]ere lying then when you talked to me.

A. Yes, sir.

During closing arguments, Mr. Borne maintained that the defendant was the shooter. However, since Caesar had stated to Mr. Borne for the first time at trial that it was he who was the shooter, and not the defendant, Mr. Borne pointed out in closing that the defendant, whether he was the shooter or not, was still guilty under the law of principals:

> They want to have it the other way. They're going to say Mr. Caesar, Mr. Caesar did everything, although it's countered by all the witnesses, even if you buy that, buy Mr. Caesar's flip-flop right in front of us, Mitchell is still guilty as a principal to Assault By Drive-By Shooting, Attempted Second Degree Murder or one of the responsive verdicts, Aggravated Battery or Attempted Manslaughter, you need to determine that, and Possession of a Firearm by a Convicted Felon, because he aided and abetted in the commission of this crime.
>
> Even if you believe Mr. Caesar, after he flip-flopped in front of us, don't forget that.

Following closing arguments, the trial court charged the jury with the law. Without objection by either party, the trial court included an instruction on the law of principals. See La. R.S. 14:24.

Initially we note that defense counsel did not lodge a contemporaneous objection to the trial court's instruction on the law of principals. Absent an objection during the trial, a defendant may not complain on appeal of an allegedly erroneous jury charge or the failure to give a jury instruction. See *State v. Tipton*, 95-2483, p. 7 (La. App. 1 Cir. 12/29/97), 705 So.2d 1142, 1147; see also La. Code Crim. P. arts. 801(C), 841 & 920(2). Accordingly, the issue is not properly preserved for appellate review. *State v. Dilosa*, 2001-0024, p. 17 (La. App. 1st Cir. 5/9/03), 849 So.2d 657, 671, writ denied, 2003-1601 (La. 12/12/03), 860 So.2d 1153.

Also, during the prosecutor's closing argument wherein he discussed the law on principals and that, assuming Caesar was the shooter, the defendant was still guilty of the charges as an aider and abettor, defense counsel did not lodge a contemporaneous objection. La. Code Crim. P. art. 774 provides that closing arguments in criminal cases should be restricted to the evidence admitted, to the lack of evidence, to conclusions of fact that may be drawn therefrom, and to the law applicable to the case. The defendant failed to preserve this issue for review by failing to object. La. Code Crim. P. art. 841. See *State v. Harris*, 2001-2730, p. 23 (La. 1/19/05), 892 So.2d 1238, 1255, cert. denied, 546 U.S. 848, 126 S.Ct. 102, 163 L.Ed.2d 116 (2005).

Defense counsel's failure to object notwithstanding, the law is clear that prosecutors are allowed considerable latitude in choosing closing argument tactics. As the trial record indicates, the prosecutor's theory of the case remained consistent throughout the trial, that is, that the defendant was the shooter. In closing, the prosecutor argued the defendant was the shooter, but that in light of the unexpected testimony by Caesar that he (Caesar) was the shooter, then whether the defendant was the actual shooter or not, the

defendant would still be guilty as a principal. Insofar as the prosecutor was responding in his closing argument to testimonial evidence he had heard for the first time at trial by discussing the law applicable to the case, the argument regarding the law on principals was not improper. See *Harris*, 2001-2730 at pp. 23-24, 892 So.2d at 1255. See also *State v. West*, 319 So.2d 901, 906 (La. 1975).

Furthermore, there is absolutely no requirement that an indictment (or bill) denominate the accused as "principal." That the accused is charged for the offense itself, and not charged as an accessory after the fact, irrefutably evidences that he is charged as a principal. *State v. Peterson*, 290 So.2d 307, 308 (La. 1974). Moreover, if the defendant felt there was insufficient information in the bill of information, he could have requested a bill of particulars which, according to our review of the record, he did not. *Peterson*, 290 So.2d at 308-09.

Accordingly, this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the evidence was insufficient to support the conviction for attempted second degree murder. Specifically, the defendant contends the evidence did not establish he had the specific intent to kill Payton. The most the evidence established, it is argued, is that the defendant committed an aggravated battery.[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

[1] The defendant does not contest the sufficiency of the evidence to support the assault by drive-by shooting conviction or the possession of a firearm by a convicted felon conviction.

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. Code Crim. 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, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

La. R.S. 14:30.1 provides, in pertinent part:

> A. Second degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm[.]

To sustain a conviction for attempted second degree murder, the State must prove that the defendant intended to kill the victim and that he committed an overt act tending toward the accomplishment of the victim's death. See La. R.S 14:27; 14:30.1. Although the statute for the completed crime of second degree murder allows for a conviction based on "specific intent to kill or to inflict great bodily harm," attempted second degree murder requires specific intent to kill. *State v. Bishop*, 2001-2548, p. 4 (La. 1/14/03), 835 So.2d 434, 437.

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, p.

13 (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 the defendant. *State v. Graham*, 420 So.2d 1126, 1127 (La. 1982).

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.

In this assignment of error, the defendant does not contest his identity as the shooter. Instead, he argues that the evidence did not show he had the specific intent to kill Payton. The most the evidence established, according to the defendant, was an aggravated battery since he intended only to injure or scare Payton.

The trial testimony of several eyewitnesses established that the front-seat passenger of the white Monte Carlo, identified as the defendant, shot at Payton two or three times at close range with a 9mm handgun. One of the shots hit Payton in his foot. Two of the bullets fired from that gun hit the side of the house of which Payton was standing in front. One of the bullet holes was about two feet below a window. The other bullet hole was about four feet from the ground. A juror could have reasonably inferred that the relatively low, straight trajectories of these bullets, which hit the house, strongly suggested the shots were intended to strike the victim, as opposed to

shots fired in the air as warning shots or to scare the victim. Also, the shot that struck Payton's foot clearly evidenced an intent by the defendant to shoot, rather than to warn or scare, his victim.

The guilty verdict indicates the jury concluded that the defendant, in shooting, and shooting at, Payton, who was standing within a few feet of him, intended to kill Payton. Deliberately pointing and firing a deadly weapon at close range are circumstances which will support a finding of specific intent to kill. *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). See *State v. Neal*, 2000-0674, p. 10 (La. 6/29/01), 796 So.2d 649, 657, cert. denied, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002). The theory that the defendant intended only to injure or scare Payton was apparently rejected by the jury.

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 the attempted second degree murder of Eddie Payton.

This assignment of error is without merit.

SENTENCING ERROR

Under La. Code Crim. P. art. 920(2), which limits our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence, we have discovered several sentencing errors. The defendant was adjudicated a third-felony habitual offender based on proof of two of the defendant's predicate convictions, distribution of cocaine and simple escape. These convictions were entered by the defendant's

guilty pleas on the same day, November 18, 2003. For purposes of habitual offender adjudication, La. R.S. 15:529.1(B) provides that multiple convictions obtained on the same day prior to October 19, 2004, shall be counted as one conviction. The trial court erred in counting the defendant's predicate convictions as two separate convictions instead of a single conviction. The defendant should have been adjudicated a second-felony habitual offender. See La. R.S. 15:529.1(A)(1)(a). Accordingly, we vacate the defendant's adjudication as a third-felony habitual offender. Further, we vacate the fifty-year at hard labor attempted second degree murder enhanced sentence. The matter is remanded to the trial court for re-adjudication and re-sentencing for the attempted second degree murder conviction, which sentence is being enhanced for purposes of habitual offender status.

According to the sentencing transcript, the defendant was sentenced to five years for his assault by drive-by shooting conviction. Under the assault by drive-by shooting provision, the defendant may be imprisoned "with or without hard labor." La. R.S. 14:37.1(B). Accordingly, we vacate this sentence and remand to the trial court, which is to, upon resentencing, designate whether this sentence is to be served with or without hard labor.[2]

For his possession of a firearm by a convicted felon conviction, the defendant was sentenced to ten years. Whoever is found guilty of violating the possession of a firearm by a convicted felon provision shall be imprisoned at hard labor for not less than ten nor more than fifteen years without benefits and be fined not less than one thousand dollars nor more

[2] The commitment order indicates the sentence is to be served at hard labor. Also, the minutes indicate the sentence is to be served at hard labor. When there is a discrepancy between the minutes and the transcript, the transcript prevails. *State v. Lynch*, 441 So.2d 732, 734 (La. 1983).

than five thousand dollars. La. R.S. 14:95.1(B).[3] Accordingly, we vacate this sentence and remand to the trial court for resentencing.

CONVICTIONS AFFIRMED; HABITUAL OFFENDER ADJUDICATION VACATED AND REMANDED FOR RE-ADJUDICATION; ALL THREE SENTENCES VACATED AND REMANDED FOR RESENTENCING.

[3] The trial court failed to impose a fine and failed to deny parole eligibility.