NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0137

STATE OF LOUISIANA

VERSUS

JAMES ANTHONY JOHNSON, JR.

Judgment rendered December 22, 2010.

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 01-07-0003
Honorable Donald Johnson, Judge

* * * * * *

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JAMES ANTHONY JOHNSON, JR.

* * * * * *

BEFORE: KUHN, PETTIGREW, JJ., AND KLINE, J. *pro tempore*.[1]

[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

PETTIGREW, J.

The defendant, James Anthony Johnson, Jr., was charged by bill of information with possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1. The defendant pled not guilty. He waived his right to a jury trial and, following a bench trial, was adjudged guilty as charged. The defendant was sentenced to ten years at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

At about midnight on September 9, 2006, Joyce Mullins and the father of her baby, Stephen Chrisentry, were at a gathering in the parking lot of the apartments on Ann Marie Drive in Baton Rouge, Louisiana, to celebrate the defendant's birthday. Sheila Hubbard lived in one of the apartments. On occasion, the defendant stayed with Hubbard. All were drinking beer. Chrisentry and the defendant had been friends for some time.

The defendant and Chrisentry became involved in horseplay. As the roughhousing continued, they became more physical with each other. According to Mullins and Chrisentry, who both testified at trial, the defendant produced a gun from his person and shot Chrisentry in the abdomen. Chrisentry was not armed. The defendant then left the scene. Chrisentry spent the next month in the hospital recovering from his wound.

Hubbard testified at trial that Chrisentry and Mullins drank a lot of alcohol at the defendant's party. Hubbard also indicated that Mullins was smoking marijuana. Mullins testified that she and Chrisentry were not drinking prior to the shooting, and she did not smoke marijuana that night. Hubbard testified she did not witness the shooting because she was in her apartment at the time. However, when she went back outside following the shooting, Mullins was about one hundred feet from the scene of the shooting. Hubbard testified that she did not know who shot Chrisentry. Defense witness Ricky Nelson testified at trial that he attended the party and that Chrisentry and

Mullins were drunk. Nelson did not witness the shooting because he had gone to the store to get beer. He testified he had not seen the defendant with a gun that night.

Deputy Willie Stewart, with the East Baton Rouge Sheriff's Office, testified that he responded to the shooting. At the scene, he found a .380 bullet casing on the ground. The defendant was apprehended and arrested the following day. Deputy Stewart **Mirandized** the defendant and asked him where the gun was that he used in the shooting. The defendant responded that he threw the gun in the river. Within about a minute, the defendant changed his story and told Deputy Stewart that the gun was in a black bag, which was in between a stack of his clothes on a chair in Hubbard's bedroom. Deputy Stewart found the gun, which was a .380, in the place described by the defendant. Hubbard testified that the gun found in her room was not hers and that she did not know where it came from.

The defendant was subsequently taken to the Sheriff's Office where he provided a statement, which was videotaped. In his brief statement, the defendant did not say that he shot Chrisentry. He offered only that he and Chrisentry were engaged in horseplay and that it was an accident.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in allowing the introduction of fingerprint evidence without a **Daubert** hearing. Specifically, the defendant contends that fingerprint evidence by the State's expert to establish the defendant's predicate conviction should have required a **Daubert** hearing to determine the reliability of the expert's methodology.

Preliminary questions concerning the competency or qualification of a person to be a witness or the admissibility of evidence shall be determined by the court. La. Code Evid. art. 104. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. La. Code Evid. art. 403. The trial court is vested with wide discretion in determining the competence of an expert witness, and its ruling on the qualification of

the witness will not be disturbed absent an abuse of discretion. **State v. Trahan**, 576 So.2d 1, 8 (La. 1990).

Louisiana Code of Evidence article 702 dictates the admissibility of expert testimony as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Notably, the supreme court has placed limitations on this codal provision in that, "expert testimony, while not limited to matters of science, art or skill, cannot invade the field of common knowledge, experience and education of men." **State v. Stucke**, 419 So.2d 939, 945 (La. 1982).

In **State v. Foret**, 628 So.2d 1116 (La. 1993), the Louisiana Supreme Court adopted the test set forth in **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), regarding proper standards for the admissibility of expert testimony that requires the trial court to act in a gatekeeping function to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. **State v. Chauvin**, 2002-1188, p. 5 (La. 5/20/03), 846 So.2d 697, 700-701. To assist the trial courts in their preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and can properly be applied to the facts at issue, the Supreme Court suggested the following general observations are appropriate: 1) whether the theory or technique can be and has been tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error; and 4) whether the methodology is generally accepted by the relevant scientific community. **Daubert**, 509 U.S. at 592-594, 113 S.Ct. at 2796-2797. Thus, Louisiana has adopted **Daubert's** requirement that in order for technical or scientific expert testimony to be admissible under Article 702, the scientific evidence must rise to a threshold level of reliability. **Daubert's** general "gatekeeping" applies not only to testimony based upon scientific knowledge, but also to testimony based on "technical" and "other specialized knowledge." **Kumho Tire Co., Ltd. v. Carmichael**, 526 U.S. 137, 141, 119 S.Ct.

1167, 1171, 143 L.Ed.2d 238 (1999); **Independent Fire Ins. Co. v. Sunbeam Corp.**, 99-2181, p. 13 (La. 2/29/00), 755 So.2d 226, 234. The trial court may consider one or more of the four **Daubert** factors, but that list of factors neither necessarily nor exclusively applies to all experts or in every case. **Kumho Tire**, 526 U.S. at 141, 119 S.Ct. at 1171. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determinations. **Kumho Tire**, 526 U.S. at 142, 119 S.Ct. at 1171. The purpose of a **Daubert** hearing is to determine the reliability of an expert's methodology, not whether the expert has the proper qualifications to testify. See **State v. Vidrine**, 2008-1059, p. 20 (La. App. 3 Cir. 4/29/09), 9 So.3d 1095, 1107, writ denied, 2009-1179 (La. 2/26/10), 28 So.3d 268.

Prior to opening statements at the bench trial in this case, defense counsel moved for a **Daubert** hearing regarding the fingerprint evidence the State would introduce to establish the defendant's predicate conviction. According to defense counsel, despite his being aware that fingerprint analysis has been uniformly accepted for over seventy years, since the State's proof of the predicate conviction was an essential element of the crime of possession of a firearm by a convicted felon, and fingerprint analysis was a key to that burden of proof, the defendant should be afforded a **Daubert** hearing.

In denying the motion, the trial court stated in pertinent part:

> Whether or not we are going to revisit fingerprint analysis, the error rate in fingerprint analysis, whether or not today's technology is such that that science could be no longer acceptable.
>
> Even though there is [sic] some cracks that seemingly are on the surface of this science, those cracks are not -- at least from this court's interpretation -- developed such to the extent that this type of analysis would be considered flawed or suspect or lacking weight and credibility.
>
> The defense will have the right to examine fully the science through the testimony of the witness. The application of the methods, if the defense wish [sic]. In other words, the defense will have full right of cross-examination, which would include any questions the defense would want to ask involving issues of standards and lack of reliability and validity.

So, in essence, I'm denying your motion.... I am allowing you to question the witness regarding this issue during the trial.

At trial, Kathy Williams, a criminal records analyst with the Louisiana State Police Bureau of Criminal Identification and Information, underwent a voir dire examination for her expertise in fingerprint analysis. She testified that she analyzed fingerprints and had been with the State Police for fifteen years. Her office used eight "points of identification" to determine if fingerprints match. As a supervisor, she had not analyzed as much as she used to, but the entirety of her work for fifteen years involved comparing fingerprints or supervising others comparing fingerprints. She further testified that she had been qualified as an expert about fifteen times, she had never failed to qualify as an expert, and the last time she had testified as an expert was the previous month. Following cross-examination on the voir dire, defense counsel objected to Williams being qualified as an expert based on her lack of formal education and on the minimal time she devoted to fingerprint analysis. The trial court overruled the objection and found Williams qualified to present expert testimony.

Williams then testified on direct examination that the fingerprints she had taken from the defendant that day matched the fingerprints on the defendant's bill of information charging him with aggravated flight from an officer. In confirming the match, she counted ten points of identification. On cross-examination, using the **Daubert** factors as a guide, defense counsel elicited from Williams that there were no uniform standards in fingerprint analysis, that she did not know if there was a known error rate in fingerprint analysis, that she did not know whether the technique she used had been accepted by the scientific community as valid, and that she did not know if the technique she used had been subjected to peer review. At the conclusion of Williams's testimony, defense counsel reurged his motion for a **Daubert** hearing. Defense counsel argued that he questioned Williams about the five factors in **Daubert**, and she had not been able to give any information regarding the factors.

In again denying defense counsel's motion for a **Daubert** hearing, the trial court stated:

> Often times the court is called upon to decide the **Daubert** issue. The federal bench book discusses **Daubert's** trilogy occasions [sic] and a footnote in that bench book that's a reference to an expert who is qualified as a wine sampler.
>
> There is no standard per se that a wine sampler uses other than his nasal and palet [sic] to assess quality wine. However, her testimony is utilized to price and to sample and determine a[n] expertise of wine.
>
> **Daubert** allows such expertise even though it seemingly doesn't have all of the factors which it prescribes. **Daubert** trilogy of cases suggests that in certain areas of subject matters, that those standards if rigidly applied, would never qualify anyone as an expert. . . .
>
> The objection is asserted. I have weighed it. All things considered, I maintain the original disposition. I overrule the objection.

We find no reason to disturb the trial court's ruling. There has been no showing there was a need for a **Daubert** hearing regarding Williams's expert testimony on fingerprint identification and comparison. Courts have long accepted expert testimony in the field of fingerprint analysis without a **Daubert** hearing. As discussed in **United States v. John**, 597 F.3d 263 (5th Cir. 2010), the Fifth Circuit found the district court did not err in dispensing with a **Daubert** hearing regarding fingerprint analysis:

> [W]e agree with a number of our sister circuits that have expressly held that in the context of fingerprint evidence, a **Daubert** hearing is not always required. As the Seventh Circuit has noted: "Those [courts] discussing the issue have not excluded fingerprint evidence; instead, they have declined to conduct a pretrial **Daubert** hearing on the admissibility of fingerprint evidence or have issued brief opinions asserting that the reliability of fingerprint comparison cannot be questioned."
>
> ..."Fingerprint identification has been admissible as reliable evidence in criminal trials in this country since at least 1911." In terms of specific **Daubert** factors, the reliability of the technique has been tested in the adversarial system for over a century and has been routinely subject to peer review. Moreover, as a number of courts have noted, the error rate is low.

John, 597 F.3d at 274-275 (footnotes omitted).

The **Daubert** Court, itself, noted that well-established propositions are less likely to be challenged than those that are novel, and theories that are so firmly established as to have attained the status of scientific law, properly are subject to judicial notice. **Daubert**, 509 U.S. at 592 n.11, 113 S.Ct. at 2796 n.11. While the principles underlying fingerprint identification have not attained the status of scientific law, they nonetheless bear the imprimatur of a strong general acceptance, not only in the expert community,

but in the courts as well. **United States v. Crisp**, 324 F.3d 261, 268 (4th Cir. 2003), cert. denied, 540 U.S. 888, 124 S.Ct. 220, 157 L.Ed. 2d 159 (2003). In **United States v. Mitchell**, 365 F.3d 215, 246 (3d Cir. 2004), cert. denied, 543 U.S. 974, 125 S.Ct. 446, 160 L.Ed.2d 348 (2004), the Third Circuit found that a district court would not abuse its discretion in dispensing with a **Daubert** hearing altogether if no novel challenge was raised to the admissibility of latent fingerprint identification evidence. The court in **Crisp** noted that under **Daubert**, a trial judge need not expend scarce judicial resources reexamining a familiar form of expertise every time opinion evidence is offered. **Crisp**, 324 F.3d at 268. See **United States v. Sherwood**, 98 F.3d 402, 408 (9th Cir. 1996). See also **United States v. Cooper**, 91 F.Supp.2d 79, 82 (D.C. 2000) ("Although the Court must ensure that expert testimony is reliable and admissible, there is nothing in **Kumho Tire** or **Daubert** that requires the Court to conduct a pre-trial evidentiary hearing if the expert testimony is based on well-established principles.")

In **Kumho Tire**, the court opined:

> The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable. . . . That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.

Kumho Tire, 526 U.S. at 152, 119 S.Ct. at 1176. Given the firmly established reliability of fingerprint evidence, defense counsel's full right to cross-examine the expert witness, and the expert witness's comparison of the defendant's fingerprints, not with latent prints, but with known fingerprints, the trial court did not err in denying the motion for a **Daubert** hearing. Wholly unnecessary, a **Daubert** hearing under these circumstances would have served only to squander judicial resources and cause needless delay. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that the evidence was insufficient to support the guilty verdict. Specifically, the defendant contends that only one unreliable witness, Joyce Mullins, testified the defendant was in possession of a firearm.

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 also 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, 1308-1309 (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 fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, pp. 4-5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

The defendant asserts that when Chrisentry was shot, the only witness to testify the defendant had a firearm in his possession was Mullins, who was a convicted felon. Defense witnesses Nelson and Hubbard testified that Mullins was intoxicated from alcohol and marijuana. Also Nelson testified that he did not see the defendant in possession of a firearm that night. Due to the conflicting testimony, the defendant maintains, the evidence was insufficient to support the conviction.

The testimony at trial established that Chrisentry was shot in the abdomen. The .380 casing found on the ground near the shooting was consistent with the .380 handgun found in Hubbard's apartment. According to Deputy Stewart, the gun was found with eight live rounds in it. The numbers and letters on the .380 live rounds and the manufacturer of the live rounds matched those of the .380 bullet casing found by Deputy

Stewart at the scene. When Deputy Stewart asked the defendant about the location of the gun he used in the shooting, the defendant told him the gun was in Hubbard's apartment in her room with his clothes. Deputy Stewart found the gun precisely in the location described by the defendant. Mullins testified that after the defendant and Chrisentry exchanged words, the defendant retrieved a gun from under his shirt and shot Chrisentry. Mullins testified she had no doubt the defendant had a gun. Chrisentry testified that he and the defendant were wrestling in a playful way. The horseplay then got out of control, and the defendant repeatedly bumped into Chrisentry. When Chrisentry pushed the defendant off of him, the defendant pulled a gun and fired two times, hitting Chrisentry once in the stomach.

Hubbard testified that when Mullins arrived at the party, she had been drinking and smoking "blunts" (marijuana). According to Hubbard, Mullins knew that Hubbard did not like marijuana around her, so Mullins walked away toward a neighbor's residence. Hubbard testified that she did not see the shooting because she was upstairs in her apartment using the bathroom. Hubbard further testified that when she had come back outside after the shooting, Mullins was standing about one hundred feet away from where the shooting occurred. Also, it was dark and the parking lot had poor lighting.

Nelson testified that when Chrisentry and Mullins came to the party, they were drunk. Nelson did not witness the shooting because he had left to get beer. He stated he did not see the defendant in possession of a gun that night.

The trial court heard all of the testimony and viewed all of the evidence presented to it at trial and, notwithstanding any alleged inconsistencies, the trial court found the defendant guilty. It is clear in its finding of guilt that the trial court discounted the testimony of Nelson and Hubbard, who suggested either that the defendant did not possess a gun or that Mullins was too far away to witness the shooting. The trial court clearly found the testimony of Chrisentry, Mullins, and Deputy Stewart credible and reliable enough to establish the defendant's guilt.

Where 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. Accordingly, our role is not to assess credibility or reweigh evidence. In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. **State v. Thomas**, 2005-2210, pp. 7-8 (La. App. 1 Cir. 6/9/06), 938 So.2d 168, 174, writ denied, 2006-2403 (La. 4/27/07), 955 So.2d 683.

An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. **Thomas**, 2005-2210 at 8, 938 So.2d at 175. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Ducksworth**, 496 So.2d 624, 634 (La. App. 1 Cir. 1986). The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **Thomas**, 2005-2210 at 8, 938 So.2d at 175. See **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1 Cir. 1985).

After a thorough review of the record, we find that the evidence supports the trial court's finding of guilt. 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 in possession of a firearm. This assignment of error is without merit.

SENTENCING ERROR

Under La. Code Crim. 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. See **State v. Price**, 2005-2514, p. 18 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277. After a careful review of the record, we have found a sentencing error.

For his possession of a firearm by a convicted felon conviction, the defendant was sentenced to ten years at hard labor without the benefit of probation, parole, or suspension of sentence. 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 the benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars. La. R.S. 14:95.1(B). The trial court failed to impose the mandatory fine.[2] Accordingly, the defendant's sentence, which did not include the mandatory fine, is illegally lenient. However, since the sentence is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See **Price**, 2005-2514 at 21-22, 952 So.2d at 124-25.

CONVICTION AND SENTENCE AFFIRMED.

[2] The minutes also reflect that no fine was imposed.