NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1394

STATE OF LOUISIANA

VERSUS

JANICE SINGLETON

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 10-08-0354, Section VII
Honorable A. J. Kling, Jr., Judge Ad Hoc Presiding

Hillar C. Moore, III
District Attorney
Jaclyn C. Chapman
Assistant District Attorney
Baton Rouge, LA

Attorneys for
State of Louisiana

Prentice L. White
Louisiana Appellate Project
Baton Rouge, LA

Attorney for
Defendant-Appellant
Janice Singleton

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered March 25, 2011

PARRO, J.

The defendant, Janice Singleton, was charged by bill of information with attempted first degree murder, a violation of LSA-R.S. 14:27 and 14:30.[1] She pled not guilty and waived her right to a jury trial. Following a bench trial, the trial court adjudged the defendant guilty as charged. The trial court sentenced the defendant to twenty years of imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

For about nine months, Alexander Gaines dated Shelvia Singleton, the younger sister of the defendant. Shelvia broke up with Alexander because he was having relationships with other people. On October 3, 2008, Alexander's girlfriend drove his car to pick up her children from school. As she went down 28th Street in Baton Rouge after picking up the children, someone threw a brick at the car. Alexander's girlfriend told him about the incident and identified Shelvia as the person who threw the brick. The defendant was also outside with Shelvia when the brick was thrown. In retaliation, Alexander drove to Shelvia's mother's house where he saw Shelvia and the defendant. Alexander threw a brick through the window of Shelvia's mother's truck.

Alexander drove back to his house on Colorado Street in Baton Rouge. About an hour or two later, between 5:00 p.m. and 5:30 p.m., a blue Honda with lightly tinted windows approached Alexander's house. Alexander, his son, and his son's girlfriend were outside. When the Honda stopped, Alexander looked at the car and saw the defendant standing outside of the passenger door pointing a gun at him. As Alexander turned to run, he heard gunshots. He was not shot, and he was not armed.

At trial, Alexander testified there were four people in the Honda, but he recognized only two of them, the defendant and Shelvia. Tiffany Johnson testified at

[1] The defendant was also charged with illegal use of weapons or dangerous instrumentalities, a violation of LSA-R.S. 14:94. The state subsequently dismissed that charge.

trial that she lived across the street from Alexander. While watching television, Tiffany saw the Honda drive by slowly. She then heard several gunshots. She ran outside because her children were outside. When she looked at the Honda, she saw the defendant standing by the passenger side of the car shooting at Alexander with a black handgun. Tiffany had seen the defendant one time before, but did not know her name. Tiffany also recognized Shelvia in the back of the car, whom she knew, but not well.

Sergeant Tim Browning, with the Baton Rouge Police Department, was near Colorado Street when he heard the gunshots. He testified at trial that he heard "a bunch" of shots. When he got to Colorado Street, he saw numerous shell casings in the street. The Honda was gone, and Alexander had returned. Alexander gave Sergeant Browning a description of the car and of Shelvia and the defendant. Police officers found the Honda shortly thereafter. A total of thirteen 9mm shell casings were found in front of Alexander's house. There were also several bullet holes on and near Alexander's property.

Shelvia, the sole witness for the defense, testified at trial that she did not throw a brick at the defendant's car. She stated she was with her sister, the defendant, all day on the day of the shooting. She testified that they did not go on Colorado Street that day, she saw no one shoot a gun, and that, at the time of the shooting, she and the defendant had walked to the store to get cigarettes.

ASSIGNMENT OF ERROR NO. 1

In her first assignment of error, the defendant argues that the evidence was insufficient to support the conviction. Specifically, the defendant contends that her identity as the shooter was not established at trial by the state.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; LSA-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 LSA-C.Cr.P. art. 821(B); **State v. Ordodi**, 06-0207 (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, LSA-R.S. 15:438 provides that, in order to convict, the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 01-2585 (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 fact finder who weighs the respective credibilities 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.

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of one of a list of enumerated felonies, including assault by drive-by shooting. See LSA-R.S. 14:30(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. LSA-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 (La. 1975); see also **State v. Fauchetta**,

98-1303 (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. LSA-R.S. 14:10(1). Such a 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 the 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). Deliberately pointing and firing a deadly weapon at close range indicates specific intent to kill. See **State v. Robinson**, 02-1869 (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 contends that Alexander was mistaken in his identification of her as the person who stepped out from the blue Honda with a gun, since no gun was found in her possession and there was no physical evidence connecting her to the shooting. Further, according to the defendant, it would have been highly unlikely Alexander could have seen the shooter since it was at night and Alexander was running away trying to avoid being shot. The defendant also suggests that since Shelvia, her sister, threw the brick at the defendant's car and had the relationship with Alexander, it was Shelvia who should have been considered by the police as the shooter. The defendant contends that Tiffany's eyewitness testimony was not credible because, after hearing gunshots, she ran outside to see if her children were safe. Tiffany identified the defendant as the shooter even though the shooter's back was facing Tiffany. According to the defendant, "it seemed totally unreasonable that [Tiffany], who was pregnant at the time of the shooting, could give such an accurate description of what she heard and saw while at the same time searching for her children and trying to keep them safe."

Alexander testified at trial that, while he saw the defendant outside of the car

with a gun in her hand, he did not actually see the defendant shoot at him. He had turned to run away before he heard the gunshots. However, Alexander also testified that about three seconds after seeing the defendant point a gun at him, he heard the first gunshot.[2] Alexander further testified that he saw no one else point a gun at him, he saw no one else get out of the car, and he saw no one roll down a car window and point a gun at him. Given Alexander's testimony, coupled with Tiffany's testimony identifying the defendant as the shooter, a fact finder could have reasonably concluded that the defendant tried to shoot Alexander. While the shooter's back was facing Tiffany as the shooter fired at Alexander, as noted by the defendant, Tiffany testified that she saw the defendant's face when the defendant turned and got back into the car. Also, in separate six-person photographic lineups, Tiffany identified the defendant as the shooter and Shelvia as Alexander's ex-girlfriend who was also in the car at the time of the shooting.

Thus, the issue in this case regarding the identification of the defendant as the shooter was one of credibility. The trial court heard all of the testimony and viewed all of the evidence presented to it at trial and, notwithstanding any alleged inconsistencies, it found the defendant guilty. It is clear from the finding of guilt, therefore, that the trial court concluded that the testimony of Alexander and Tiffany was more credible than the testimony of Shelvia. In finding the defendant guilty, the trial court clearly rejected the defense's theory of misidentification. 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 fact finder's determination of guilt. **State v. Taylor**, 97-2261 (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

[2] The shooting did not occur at night, but rather between 5:00 p.m. and 5:30 p.m.

cases. See **State v. Mitchell**, 99-3342 (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 trial court's finding of guilt. We are convinced that viewing the evidence in the light most favorable to the state, a 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 the perpetrator and was guilty of attempted first degree murder. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In her second assignment of error, the defendant argues that the trial court abused its discretion in denying the defendant's motion to withdraw her waiver of trial by jury. Specifically, the defendant contends that she was entitled to a jury trial, after waiving her right to a jury trial, because the state amended the bill of information and rearraigned her.

We note initially that in her brief, the defendant suggests that the amendment to the bill of information precipitated her request to withdraw her waiver of jury trial. However, the defendant requested to withdraw her waiver of jury trial prior to being rearraigned, evidencing that the request was not made as a result of the amendment. Further, despite the defendant's contention in her brief that the state amended the bill of information by adding the name of another victim, the state actually deleted the name of a victim.[3]

More than three months prior to trial, the defendant validly waived her right to jury trial. On August 27, 2009, the day of trial, defense counsel moved for a continuance because discovery had not been satisfied, namely, defense counsel did not

[3] The state also dismissed count two in the bill of information.

have the names of the witnesses the state intended to call. The prosecutor responded that, while the state was not obligated to provide a witness list, the state had filed a witness list that had been in the court record "the entire time." The trial court denied the continuance and informed counsel that trial on the matter would be later that day. At that point, defense counsel moved to waive the bench trial for the defendant and asked for a jury trial. The prosecutor objected to the motion on grounds of undue delay and inconvenience:

> We set it on this docket on May 18th of '09. He didn't advise me that he wanted a continuance before today. He didn't contact me in any way to let me know that there was a problem with today. And I have one, two, three, four, five, six, seven, eight, nine witnesses that were inconvenienced and brought down to this courtroom.

The trial court denied the motion to withdraw the waiver of a jury trial. The prosecutor then amended the bill of information, and the defendant was rearraigned. Defense counsel filed a motion for a stay pending an application for supervisory writs with this court. This court denied the motion for a stay order on the showing made. **State v. Singleton**, 09-1591 (La. App. 1st Cir. 8/27/09) (unpublished).

Louisiana Code of Criminal Procedure article 780(C) provides:

> The defendant may withdraw a waiver of trial by jury unless the court finds that withdrawal of the waiver would result in interference with the administration of justice, unnecessary delay, unnecessary inconvenience to witnesses, or prejudice to the state.

Where the request to withdraw the waiver of a jury trial is made sufficiently in advance of trial so as not to interfere with the orderly administration of the business of the court or so as not to result in unnecessary delay or inconvenience to witnesses or to the prejudice of the other party to the action, the court should exercise its discretion to allow the moving party the jury trial he seeks. **State v. Catanese**, 385 So.2d 235, 237 (La. 1980); **State v. Winn**, 39,104 (La. App. 2nd Cir. 12/15/04), 890 So.2d 697, 700-01, writ denied, 05-0401 (La. 5/13/05), 902 So.2d 1018. It is within the sound discretion of the trial court to determine if the withdrawal will interfere with the administration of justice, cause unnecessary delay, inconvenience the witnesses, or prejudice the state. **State v. Canova**, 541 So.2d 273, 276 (La. App. 4th Cir. 1989).

In this case, despite having had over three months to withdraw her waiver of a jury trial, the defendant sought such withdrawal on the day of trial. When defense counsel was denied a continuance based on a discovery issue that had little or no merit, defense counsel then moved for a jury trial, a seemingly dilatory tactic by defense counsel. To have allowed the withdrawal of her waiver at that point would have unnecessarily delayed the trial and inconvenienced the witnesses. Under these circumstances, the trial court did not abuse its discretion. See **Canova**, 541 So.2d at 276.

In her brief, the defendant also suggests that the trial court should have allowed her to withdraw her waiver of jury trial because the state amended the bill of information and the defendant was rearraigned. As noted, the defendant's request to withdraw her waiver occurred prior to the bill of information being amended or any discussion of amending it. As such, the request to withdraw her waiver was in no way predicated on the bill of information being amended and the defendant being rearraigned.

Moreover, we find that the defendant's prior waiver of her right to a jury trial remained valid even after the bill of information was amended. The only information changed in the bill was the deletion of one of the victims in the first count and the dismissal of the second count. All of the other information remained the same. Thus, the amendment did not change the nature of the charge against the defendant, and it did not prejudice her in any manner. In fact, the changes to the bill of information inured to the benefit of the defendant. See **State v. Farley**, 26,377 (La. App. 2nd Cir. 9/21/94), 643 So.2d 300, 303.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.