NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 0949

STATE OF LOUISIANA

VERSUS

JERROD ORLANDO LEWIS

Judgment Rendered: November 2, 2007

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Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne, Louisiana
Case No. 443,953

The Honorable George J. Larke, Judge Presiding

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BEFORE: GAIDRY, MCDONALD, AND MCCLENDON, JJ.

GAIDRY, J.

The defendant, Jerrod Orlando Lewis, was charged by bill of information with attempted second degree murder (count 1), a violation of La. R.S. 14:27 and 14:30.1, and armed robbery (count 2), a violation of La. R.S. 14:64. The defendant pled not guilty to the charges. Following a jury trial, the defendant was found guilty as charged on both counts. The defendant filed a motion for post-verdict judgment of acquittal, which was denied. The defendant was sentenced to forty (40) years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for the attempted second degree murder conviction (count 1), and to sixty-five (65) years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for the armed robbery conviction (count 2). The sentences were ordered to run concurrently. The defendant now appeals, designating two assignments of error. We affirm the convictions and sentences.

FACTS

On the night of July 31, 2004, George Calloway and his girlfriend, Kelly Jones, went to B.J.'s Lounge, a nightclub in Houma. They left the club and returned to Jones's mother's house on Hobson Street in Houma. At about 4:00 a.m. on August 1, 2004, Jones walked Calloway to his car, which was parked on the street in front of Jones's mother's house.

While they were standing by Calloway's car talking, a black car with two black males inside pulled up behind Calloway's car. Both males exited the car. The passenger approached Calloway and asked for directions to the nearest gas station. As Jones began to respond, the passenger pulled out a handgun, pointed it at Calloway, and told him several times to give him his jewelry and wallet. Calloway removed a chain and at least one ring and threw them on the ground toward the gunman's feet. The gunman shot Calloway in the stomach, took the

chain and a ring, returned to his car, and left. Calloway went to Terrebonne General Medical Center, where he underwent emergency surgery. Calloway survived his injuries, which consisted of an entry wound to his stomach and an exit wound to his back.

Upon questioning by police officers, both Calloway and Jones described the gunman as about 5'10" tall, 150 pounds, medium skin color, and having dreadlocks. Jones also said the gunman was about twenty years old. About a week later, Detective Cory Johnson with the Houma Police Department went to Calloway's house and showed him a six-person photographic lineup, which included the defendant. Calloway could not identify the person who shot him. Jones was shown the same photographic lineup at her mother's house and she identified the defendant as the shooter.

Calloway and Jones testified at trial. Calloway testified that the defendant looked very familiar to him and that he appeared to be the individual who shot him. However, Calloway was not one hundred percent sure that the defendant was the shooter. Jones positively identified the defendant in court as the shooter and testified that she was one hundred percent sure of that. She further testified that a chain and one ring were taken. Jones stated that she was standing by Calloway when the defendant approached, she kept her eyes on the defendant after he pulled a gun, she did not wear glasses, and there was sufficient light to see the defendant because there were two streetlights by her mother's house, and the porch light on her mother's house was on.

The defendant, who was twenty-three years old at the time of trial, testified that in 2004, he sometimes wore dreadlocks. The defendant stated that on the day of the shooting, he was not in Houma, but in New Orleans, and that he was sick with the flu. He further stated that he had only been to Houma two times, in September 2003 and June 2004, to see his friend's grandmother. When the

defendant was arrested in Lafayette for the present crimes, he stated that he lied about his identity because he was on parole for a simple burglary conviction in 2001, and he did not have permission to leave New Orleans. The defendant testified that he had never held a gun, he had never seen Calloway or Jones before, and that he knew nothing about the robbery or the shooting.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the evidence was insufficient to support the convictions. Specifically, the defendant contends that the State failed to prove his identity as the perpetrator of the shooting and the armed robbery. The defendant does not contest the fact that Calloway was shot during the armed robbery, nor does he contest the proof of any elements of the offenses. The only issue herein is the identity of the defendant as the perpetrator.

A conviction based on insufficient evidence cannot stand because 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. 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 v. Virginia* 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. 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 factfinder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. *State v. Hughes*, 2005-0992, pp. 5-6 (La. 11/29/06), 943 So.2d 1047, 1051.

Detective Johnson testified at trial that several days following the shooting, Jones identified the defendant in a photographic lineup. Jones testified at trial that when Detective Johnson showed her the photographic lineup, he told her that the perpetrator might not be in the lineup. When she viewed the lineup, Jones identified the defendant as the shooter. Jones also identified the defendant in court as the perpetrator.

The defendant claims that Jones was impeached during her testimony and that she may have been drinking prior to the incident. According to the defendant, Jones was impeached because she testified that Calloway could not have had more than five drinks. Later in her testimony, however, Jones testified that Calloway could have had more than five drinks. Jones explained that Calloway had arrived at the club about thirty minutes before her. Thus, when defense counsel asked her the number of drinks Calloway may have consumed, Jones explained that she understood the question to mean the number of drinks Calloway had when they were together. In other words, it was possible that Calloway may have had one or more drinks before Jones got to the club, but when Jones was with Calloway, she saw him drink three or four drinks. Jones also testified that she did not drink alcohol that night she was with Calloway at the club. Instead she drank a Coke. Calloway testified that Jones was drinking, but he did not know what she was drinking or how many drinks she had. When Jones was asked on cross-examination to explain the discrepancy, she responded that she did not think Calloway knew whether or not she had anything to drink.

We do not find irrational the jury's credibility calls and evidence-weighing in regard to Jones's testimony. The trier of fact makes credibility determinations, and may, within the bounds of rationality, accept or reject the testimony of any witness. Despite the defendant's assertion of alleged discrepancies with the type and number of drinks consumed by Jones or Calloway, Jones's testimony was not clearly unworthy of belief. See *State v. Bright*, 98-0398, pp. 23-24 (La. 4/11/00), 776 So.2d 1134, 1148.

It is clear from the unanimous finding of guilt that the jury concluded that the out-of-court and in-court identifications by Jones of the defendant as the perpetrator were credible and reliable enough to establish the defendant's guilt. The guilty verdicts reflect that the jury rejected the defendant's own testimony wherein he denied any involvement in the shooting of Calloway or in the armed robbery. 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.

After a thorough review of the record, we find that the evidence negates any reasonable probability of misidentification and supports the jury's verdicts. 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 attempted second degree murder and armed robbery.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in denying his challenge for cause of prospective juror Larry Naquin. Specifically, the defendant contends that Mr. Naquin could not be fair and impartial because his wife's niece was shot by a law enforcement officer about ten years ago.

Defense counsel tried to have Mr. Naquin removed for cause, but the trial court denied the challenge because it found that none of the grounds for challenge for cause under La. Code Crim. P. art. 797 applied, the offense occurred ten years ago to his wife's niece, and that he was "rehabilitated enough." The defendant objected to the trial court's ruling. Mr. Naquin was peremptorily struck and, therefore, never served on the jury.

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination and to the exercise of peremptory challenges. La. Const. art. I, § 17(A). The purpose of voir dire examination is to determine prospective jurors' qualifications by testing their competency and impartiality and discovering bases for the intelligent exercise of cause and peremptory challenges. *State v. Burton*, 464 So.2d 421, 425 (La. App. 1st Cir.), writ denied, 468 So.2d 570 (La. 1985). A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to law may be reasonably implied. A trial court is accorded great discretion in determining whether to seat or reject a juror for cause, and such rulings will not be disturbed unless a review of the voir dire as a whole indicates an abuse of that discretion. *State v. Martin*, 558 So.2d 654, 658 (La. App. 1st Cir.), writ denied, 564 So.2d 318 (La. 1990).

A defendant must object at the time of the ruling on the refusal to sustain a

challenge for cause of a prospective juror. La. Code Crim. P. art. 800(A). Prejudice is presumed when a challenge for cause is erroneously denied by a trial court and the defendant has exhausted his peremptory challenges. To prove there has been reversible error warranting reversal of the conviction, defendant need only show (1) the erroneous denial of a challenge for cause; and (2) the use of all his peremptory challenges. *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So.2d 1278, 1280-1281. It is undisputed that defense counsel exhausted all of his peremptory challenges before the selection of the twelfth juror. Therefore, we need only determine the issue of whether the trial judge erred in denying the defendant's challenge for cause regarding prospective juror Mr. Naquin.

Louisiana Code of Criminal Procedure article 797, states in pertinent part:

> The state or the defendant may challenge a juror for cause on the ground that:
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> * * * * *
>
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;
>
> (3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict;
>
> (4) The juror will not accept the law as given to him by the court[.]

During voir dire, the trial court asked the jurors if a close friend or relative had been the victim of a crime. Mr. Naquin stated that his wife's niece had been shot by a deputy about ten years ago. The following colloquy between the trial court and Mr. Naquin then took place:

> The Court: Would that in any way affect your ability to sit here and be fair and impartial? Would you hold that against either law enforcement or anything?
>
> Mr. Naquin: No, I don't hold it against the law enforcement, but I do have a little grudge.

The Court: And that's against who?

Mr. Naquin: I guess it would be against Thibodaux.

The Court: Oh, you mean the Sheriff's Office --

Mr. Naquin: Right.

The Court: -- or the Thibodaux Police Department.

Mr. Naquin: Right.

The Court: Okay. Can you put that aside and give both sides, the prosecution and the defense, a fair and impartial trial?

Mr. Naquin: I'll give it a shot. I'll be honest with you. I still have a little grudge.

The Court: Okay. There will be nobody from the Thibodaux Police Department testifying in this case. It has nothing to do with this. . . . You think you could be fair and impartial?

Mr. Naquin: I can try.

The Court: Okay. . . . Would you hold it against the State if --

Mr. Naquin: No, I wouldn't hold it again -- I wouldn't hold it against the State.

* * * * *

The Court: Can you do that? Can you sit here and listen to -- and you determine the credibility, and then you'll hear the facts, and then I'm going to give the law, and you apply the facts to the law.

Mr. Naquin: Yeah, I could do that.

Later during voir dire, the prosecutor asked Mr. Naquin, "Can I get your commitment that you'll listen to this evidence and make a determination as to this evidence?" Mr. Naquin responded, "Like I said earlier, I'll try." When it was defense counsel's turn to question the prospective jurors, defense counsel asked Mr. Naquin if this type of trial would be too close to home for him, to which Mr. Naquin responded in the affirmative. The following colloquy then took place:

Mr. Doyle [defense counsel]: To sit through and go through this kind of stuff?

Mr. Naquin: Uh-huh (indicating yes).

> Mr. Doyle: It just brings back very sad -- and you feel that you would be too emotionally involved to come out with what you feel is a just decision. Is that right?
>
> Mr. Naquin: (nodding affirmatively).

When the prosecutor and defense counsel were through with their questioning, the trial court, after addressing the jurors in general, addressed Mr. Naquin in particular:

> The Court: Okay. And, again, this is -- that crime has nothing do [sic] with the crime that's being -- can you put that aside and sit and be fair and impartial?
>
> Mr. Naquin: Like I said earlier, I can try.

The defendant contends that when the trial court addressed Mr. Naquin for the final time, Mr. Naquin did not indicate that he could be fair and impartial, but simply indicated that he could try. The defendant further argues that when Mr. Naquin was questioned by defense counsel, he did not respond verbally because he was too emotional to articulate an answer. According to the defendant, Mr. Naquin's statements as a whole indicate he was unable to be impartial because of his relationship to a murder victim.

A prospective juror's seemingly prejudicial response is not grounds for an automatic challenge for cause, and a trial judge's refusal to excuse him on the grounds of impartiality is not an abuse of discretion, if after further questioning the potential juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence. See *State v. Lee*, 559 So.2d 1310, 1318 (La. 1990), cert. denied, 499 U.S. 954, 111 S.Ct. 1431, 113 L.Ed.2d 482 (1991). See also *State v. Kang*, 2002-2812, pp. 8-9 (La. 10/21/03), 859 So.2d 649, 655; *State v. Copeland*, 530 So.2d 526, 534 (La. 1988), cert. denied, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989).

The line-drawing in many cases is difficult. Accordingly, the trial judge must determine the challenge on the basis of the entire voir dire, and on the judge's

personal observations of the potential jurors during the questioning. Moreover, the reviewing court should accord great deference to the trial judge's determination and should not attempt to reconstruct the voir dire by a microscopic dissection of the transcript in search of magic words or phrases that automatically signify the jurors' qualification or disqualification. See *State v. Miller*, 99-0192, p. 14 (La. 9/6/00), 776 So.2d 396, 405-406, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).

While Mr. Naquin at times used less than unequivocal responses like "I can try," we find the voir dire testimony overall established that he could have sat as an impartial juror. Despite his "little grudge" against the Thibodaux Police Department, we find nothing in Mr. Naquin's responses that suggested he would be unable to render an impartial verdict according to the law and the evidence. The trial court was in the best position to determine whether Mr. Naquin would discharge his duties as a juror in that regard. Upon reviewing the voir dire in its entirety, we cannot say that the trial court abused its discretion in denying defense counsel's challenge for cause.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.