NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1763

STATE OF LOUISIANA

VERSUS

JOSHUA DEON LACOX

Judgment Rendered: May 6, 2011

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 03-08-0539

Honorable Richard D. Anderson, Judge Presiding

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, Joshua Deon Lacox, was charged by grand jury indictment with second degree murder (count 1), a violation of LSA-R.S. 14:30.1, and attempted second degree murder (count 2), a violation LSA-R.S. 14:30.1 and 14:27. He pled not guilty and, following a jury trial, was found guilty as charged on both counts. The defendant filed a motion for postverdict judgment of acquittal, which was denied. For the second degree murder conviction (count 1), the trial court sentenced the defendant to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. For the attempted second degree murder conviction (count 2), the trial court sentenced the defendant to fifty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The sentences were ordered to run concurrently. The defendant now appeals, designating two assignments of error. We affirm the convictions and sentences.

FACTS

On January 19, 2008, Alexis Carroll, her fiancé Gregory Eames, Jr., and their three-year-old son picked up some food from McDonald's in Baton Rouge. Afterwards, Eames drove his family back to Richland Street to visit Carroll's mother and aunt who lived in an apartment complex. As they were eating their food in the car, a gunshot shattered the driver's side window. Eames was struck and slumped over. Carroll looked toward the driver's side and saw two men standing next to her car, one whom she could not indentify because he was wearing a ski mask, and the other whom she identified as the defendant, someone she knew. The defendant had a gun and wore a bandana that covered his mouth.

As Carroll screamed and grabbed her child, several more shots were fired at Eames. Carroll moved to the back seat and tried to cover her child. Someone then

opened the passenger back door. Carroll begged them not to hurt her child. She then heard one of the people say, "Just kill the H." Shots were fired at Carroll, and she was struck in the ankle. The perpetrators left, and Carroll's child was unharmed. Eames had been shot several times and died almost immediately from his wounds. Carroll was taken to the hospital, and while there, informed a police officer that the defendant was the shooter. Seven spent Winchester .45 auto cartridge cases were found at the scene of the shooting.

James Broome owned several apartment properties on Richland Street next to where the shooting occurred. On the morning when the shooting occurred, Broome was painting the interior of one of his apartments. When he exited the apartment to take a break, he observed a silver Honda erratically pull into his apartment parking lot, then quickly reverse and leave. Moments later, he saw two men walk across his property. One of the men pulled up his hood to cover his face. The other man, later identified by Broome as the defendant, did not have his face covered. Broome and the defendant looked at each other and exchanged greetings. Broome returned to his apartment. As Broome began to speak to a painter in the apartment, Broome heard a series of gunshots. Broome called 911. Later that day, Broome identified the defendant in a six-person photographic lineup as the person he saw shortly before the shooting. Broome testified at trial and made a positive in-court identification of the defendant. That same photographic lineup was shown a few days later to Carroll while she was in the hospital. Carroll identified the defendant as the shooter.

Three defense witnesses, namely the defendant's mother, Sylvia Lacox, Sylvia's friend, and Sylvia's "God-sister," all testified that the defendant was home during the time the shooting took place. 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 denying his motion to suppress James Broome's photographic lineup identification and in-court identification. Specifically, the defendant contends that the second photographic lineup shown to Broome was suggestive and led to a substantial likelihood of misidentification.[1]

The defendant filed a motion to suppress the photographic lineups used to identify him. Prior to trial, a hearing was held on the matter, and the trial court denied the motion to suppress.

The defendant argues in his brief that the second photographic lineup shown to Broome was suggestive and, further, that it led to a likelihood of "irreparable misidentification." In the first photographic lineup, Broome thought the person he saw was one of two people in the lineup, one of whom was the defendant. Broome asked to see another picture of the defendant with bushier hair. Broome was provided a second photographic lineup with a different picture of the defendant, but without a picture of the individual Broome was unsure about in the first photographic lineup. The defendant contends that since Broome requested another picture of the defendant, he would have known the second photographic lineup contained a picture of the defendant. The defendant asserts, "Such knowledge clearly led Broome's attention to be focused solely on the photo of the defendant." Further, according to the defendant, without a picture of the other individual from the first lineup whom Broome was unsure about, "Broome's attention would have been even more singularly focused on the defendant while viewing the second [lineup] because he [no] longer would have been deciding between the two individuals which led to his original uncertainty."

[1] In this assignment of error, the defendant does not present any argument regarding Broome's in-court identification of him.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 09-1589 (La. 12/1/09), 25 So.3d 746, 751.[2]

A defendant attempting to suppress an identification must prove *both* that the identification itself was suggestive and that there was a likelihood of misidentification as a result of the identification procedure. **State v. Prudholm**, 446 So.2d 729, 738 (La. 1984). See LSA-C.Cr. P. art. 703D.Single photograph identifications should be viewed in general with suspicion. **State v. Harper**, 93-2682 (La. 11/30/94), 646 So.2d 338, 341. An identification procedure is unduly suggestive if, during the procedure, a witness's attention is focused on the defendant. **State v. Hawkins**, 572 So.2d 108, 112 (La. App. 1st Cir. 1990). However, even should the identification be considered suggestive, this alone does not indicate a violation of the defendant's right to due process. It is the likelihood of misidentification which violates due process, not merely the suggestive identification procedure. See **State v. Jones**, 94-1098 (La. App. 1st Cir. 6/23/95), 658 So.2d 307, 311, writ denied, 95-2280 (La. 1/12/96), 666 So.2d 320.

The standard to be used for determining the admissibility of an in-court identification is whether, under the totality of the circumstances, the suggestive identification procedure led to a substantial likelihood of irreparable misidentification. With the deletion of the word "irreparable," the standard serves as well for admissibility of testimony concerning out-of-court identifications. **Neil**

[2] In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n. 2 (La. 1979).

v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401 (1972). See **Jones**, 658 So.2d at 311.

In **Manson v. Brathwaite**, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977), the U.S. Supreme Court concluded that "reliability is the linchpin in determining the admissibility of identification testimony ...." The **Manson** court adopted the **Neil v. Biggers** analysis and listed factors to be considered in determining whether a photographic identification was reliable: (1) the witness's opportunity to view the defendant at the time the crime was committed; (2) the degree of attention paid by the witness during the commission of the crime; (3) the accuracy of any prior description; (4) the level of the witness's certainty displayed at the time of identification; and (5) the length of time elapsed between the crime and the identification. These factors are to be weighed against the corrupting effect of the suggestive procedure and identification. **Jones**, 658 So.2d at 311. See **State v. Martin**, 595 So.2d 592, 595 (La. 1992).

Broome testified at the motion to suppress hearing and the trial that on the day of the shooting, he observed the defendant walking across his property about twenty feet away. It was close to noon on a clear day. Broome and the defendant looked at each other and exchanged greetings. Broome had eye contact with the defendant for about four or five seconds. Broome went back to his apartment and, about thirty seconds later, he heard gunshots. Shortly thereafter, Broome had his wife drive him to the police station near LSU. While Broome was waiting at the police station, Carroll gave a statement to a police officer at the hospital that the shooter was the defendant, whom Carroll had known for a few years. This information was conveyed to Detective Ross Williams, with the Baton Rouge Police Department. Detective Williams then had Broome transferred to the police station on Mayflower Street, where he showed Broome a photographic lineup based on Carroll's identification of the defendant.

In the first six-person photographic lineup, the defendant's picture was in the fourth position. At the motion to suppress hearing, Broome testified he felt "pretty sure" the defendant was the person he saw, but wanted to see another picture of the defendant with more hair. Broome also considered the picture of the person in the third position because his size was similar to the defendant's size. At trial, Broome explained that he wanted to see another picture of the defendant because, in the first photographic lineup, the defendant looked smaller with very narrow shoulders, and the person Broome had seen that day was bigger. Detective Williams prepared a second six-person photographic lineup with a different picture of the defendant, with a bit more hair, in the fifth position. The person in the third position in the first lineup was not included in the second lineup. In the second lineup, Broome almost instantly identified the defendant as the person he saw. Broome was never shown only a single picture of the defendant.

We do not find that the identification procedure employed was unduly suggestive. During the identification process, Broome was told not to pick anyone unless he was certain. In the first photographic lineup, the defendant appears smaller because he is set farther back than the other five suspects and most of his shoulders are cut from the framing. In the second photographic lineup, the defendant appears closer to the camera and more of his shoulders can be seen to indicate his actual size. All of the suspects in both lineups had the same general physical attributes as the defendant. While Broome asked to see only a different single picture of the defendant to confirm what he was nearly certain about, Detective Williams nevertheless provided Broome with another six-person lineup and, further, moved the position of the defendant's picture in the second lineup. The defendant complains that the person in the third position in the first lineup was not placed in the second lineup. However, Broome never requested to see that person again. Broome simply indicated that because of that person's relatively

large size, he wanted to see a picture of the defendant that revealed more of his actual size. We find nothing in the identification procedure that placed undue attention on the defendant.

Moreover, even if we were to find that the identification procedure was unduly suggestive, the defendant would be unable to prove a substantial likelihood of misidentification as a result of the procedure.

Regarding the opportunity to view the defendant, Broome's testimony established that he observed the defendant from about twenty feet away on a clear day near noon. He had eye-to-eye contact with the defendant for several seconds. Broome greeted the defendant and, in turn, the defendant greeted Broome. Broome's degree of attention was heightened because the defendant was walking across his property. Further, just prior to seeing the defendant on his property, Broome had observed a silver car erratically pull into his apartment parking lot, then quickly reverse and leave. Broome displayed a high degree of certainty when he identified the defendant in the second lineup. Broome made clear at both the motion to suppress hearing and the trial that he had picked out the defendant as the person he saw in the first lineup, but wanted to see another picture of the defendant to be "extra sure." When he was shown the second lineup, he identified the defendant within seconds. Finally, the length of time between the crime and Broome's identification of the defendant was minimal. Within a few hours on the same afternoon as the shooting, Broome positively identified the defendant as the person he saw moments before the shooting.

Based on the foregoing, we conclude there was no substantial risk of misidentification. Accordingly, the motion to suppress identification was properly denied.

Furthermore, even had the trial court improperly denied the motion to suppress, such a ruling would have been harmless error. See LSA-C.Cr. P. art. 921;

State v. Johnson, 94-1379 (La. 11/27/95), 664 So.2d 94. The erroneous introduction of an out-of-court identification is a trial error subject to harmless-error analysis. See **Arizona v. Fulminante**, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The pertinent inquiry to determine if a trial error is harmless is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

When a witness's in-court identification of a defendant emanates from independent recollection and is not the product of the tainted lineup, the in-court identification is not excluded. See **State v. Dixon**, 457 So.2d 854, 858-59 (La. App. 1st Cir.), writ denied, 462 So.2d 191 (1984). Broome's testimony established that his in-court identification of the defendant was based on independent recollection. At the motion to suppress hearing on cross-examination, Broome was asked if he could identify the person he saw that day if he saw him again. The following exchange then occurred:

A. Well, certainly.
Q. Do you see him in the courtroom anywhere?
A. Yeah. He's right there.
Q. And you're sure about that?
A. Positive.
Q. Let me ask you, what is the distinguishing features [sic] on his face that makes you know it's him?
A. He had a broad nose. I remembered that. And that was why with one of the other pictures I said, well, maybe that's him. But, like I said, you know, I spoke to the guy. I remember him.

At trial, Broome testified as follows on direct examination:

Q. Mr. Broome, let me ask you this. You have identified the defendant in court today and indicated you had previously identified him in court.
A. Uh-huh.
Q. Are you identifying him in court because he is the person you identified in these lineups?
A. No. It's because we spoke.
Q. Okay. So --
A. I'm sorry.

Q. So take these lineups away.
A. Yes.
Q. Do you have independent recollection today that this is the individual?
A. That's him.

It is clear, thus, that the out-of-court identification, had it been unreliable, did not taint Broome's in-court identification. Moreover, Carroll, who was one of the victims of the shooting and who personally knew the defendant, identified the defendant at trial as the shooter. Thus, even had the trial court erred in denying the motion to suppress the out-of-court identification, the guilty verdict actually rendered in this trial would have surely been unattributable to the error.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the evidence was insufficient to support the convictions. Specifically, the defendant contends that his 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; 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 LSA-C.Cr. P. art. 821B; **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 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; **State v. Davis**, 01-3033 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163-64.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. See LSA-R.S. 14:30.1A(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. 14:27A.

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 that 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 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 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 Carroll's identification of him was "based on very shaky grounds." Carroll did not see the defendant's whole face, but saw only his nose and eyes. Further, while Carroll provided direct evidence of the defendant's identity, Broome provided only circumstantial evidence in that he saw the defendant's face for three or four seconds in the area prior to the shooting.

Carroll testified at trial that she had known the defendant for a few years. She had talked to him before and seen him around the neighborhood. When Eames was shot, Carroll looked through the shattered car window and saw the defendant with a gun. The defendant had on a hood and a bandana over his mouth but below the nose. When asked on direct examination how she knew it was the defendant, Carroll testified, "Because I talked to him on several occasions and been around him enough to know him and I looked him directly in his eyes. It was the first thing I remember seeing when the glass shattered." Later on direct examination, Carroll was asked, "Can you sit here today under oath and say that Joshua Lacox is the man on the driver's side of the car?" Carroll responded, "Yes, ma'am." When asked on cross-examination to describe the people on the driver's side of her car, Carroll responded, "One I know for sure was Joshua because I looked in his eyes."

Carroll also picked the defendant out of a six-person photographic lineup. On her photographic lineup statement, it asked how the person she picked was known to her. Carroll wrote "the neighborhood."

Broome, who also viewed a six-person photographic lineup, identified the defendant within seconds as the person he saw walking past him. Although Broome did not witness the shooting, he testified that the shooting occurred about thirty seconds after seeing the defendant. He also testified that it appeared the defendant arrived in the area in a silver Accord or Civic. Carroll testified at trial that following the shooting, she got out of her car and saw the defendant and his accomplice walk off. She saw them get into a silver vehicle she believed was a Honda.

Testimony at the trial established that the shooting occurred around 11:45 a.m. on January 19, 2008. The defendant's mother, Sylvia Lacox, testified at trial that the defendant and her other son lived with her on North 23rd Street in Baton Rouge. When she left her house on that day (January 19) at 11:45 a.m., the defendant was still at home in bed. Catherine Ross, Sylvia's friend, testified at trial that she was with Sylvia when Sylvia left the house at 11:45 a.m., and that the defendant was home. Cynthia Searcy, Sylvia's "God-sister," testified at trial that she went by Sylvia's house that same day about 11:55 a.m. to drop off some money, and the defendant answered the door and let her in.

The jury heard all of the testimony and viewed all of the evidence presented 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 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 cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. 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. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

It is clear from the findings of guilt that the jury concluded the testimony of Carroll and Broome was more credible than the testimony of Sylvia Lacox, Ross, and Searcy. In finding the defendant guilty, the jury clearly rejected the defense's theory of misidentification. See **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). 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 (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).

After a thorough review of the record, we find that the evidence negates any reasonable probability of misidentification and supports the jury's unanimous 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 the second degree murder of Gregory Eames, Jr., and the attempted second degree murder of Alexis Carroll. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.