NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1380

STATE OF LOUISIANA

VERSUS

KENNETH DEMARIO MCCLAIN

Judgment Rendered: MAR 25 2011

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF WASHINGTON
STATE OF LOUISIANA
DOCKET NUMBER 07-CR3-97401, DIVISION "A"

THE HONORABLE RAYMOND S. CHILDRESS, JUDGE

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

PME McClendon, J. concurs and assigns reasons.

MCDONALD, J.

The defendant, Kenneth Demario McClain, was charged by bill of information with attempted first degree murder, a violation of La. R.S. 14:30 and 14:27 (count 1), and possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1 (count 2). The defendant pled not guilty and, following a jury trial, was found guilty as charged on both counts. The defendant filed a motion for post-verdict judgment of acquittal, which was denied. For the attempted first degree murder conviction (count 1), the defendant was sentenced to forty years at hard labor without benefit of probation, parole, or suspension of sentence. For the possession of a firearm by a convicted felon conviction (count 2), the defendant was sentenced to twelve and one-half years at hard labor without benefit of probation, parole, or suspension of sentence. The sentences were ordered to run consecutively. The State filed a habitual offender bill of information. A hearing was held on the matter, and the defendant was adjudicated a second-felony habitual offender. The forty-year sentence on count 1 was vacated, and the trial court resentenced the defendant to sixty years at hard labor. The sixty-year sentence was ordered to run concurrently with the count 2 sentence. The defendant now appeals, designating three assignments of error. We affirm the convictions, habitual offender adjudication, and sentences.

FACTS

Near midnight on September 17, 2007, Corporal Clay Arceneaux, with the Franklinton Police Department, was patrolling in a marked police unit on Alford Street in Franklinton, Washington Parish. Corporal Arceneaux saw an unknown person, later identified as the defendant, standing on the corner of 15th Avenue and Alford Street. The defendant, who was wearing a white muscle T-shirt and dark shorts, was talking on a cell phone as Corporal Arceneaux approached him. When Corporal Arceneaux came within about a one-half block of the defendant, the

defendant took off running. Corporal Arceneaux radioed that he was in pursuit of a black male.

Sergeant Ellis Norsworthy, with the Franklinton Police Department, was on Main Street in his patrol car when he received the call from Corporal Arceneaux. When Sergeant Norsworthy approached near 15th Avenue and Dobson Street, he saw Corporal Arceneaux in pursuit on foot on Dobson Street. Sergeant Craig James, with the Franklinton Police Department, also responded to Corporal Arceneaux's call. Sergeant James was on duty and in uniform at the police station. Sergeant James, along with Officer David Pettit, a volunteer reserve officer with the Franklinton Police Department, drove his unit to 16th Avenue. At 16th Avenue and Alford Street, Sergeant James exited his unit and searched for the suspect on foot. Moments later, while walking on Alford Street, Sergeant James spotted the defendant walking. As Sergeant James approached the defendant, the defendant saw him and ran. Sergeant James was not aware that he was chasing the defendant, whom he knew. Sergeant James identified himself as the police and ordered the defendant to stop, to no avail. A foot pursuit ensued. Sergeant Norsworthy saw Sergeant James chasing the defendant. He exited his vehicle to join the foot pursuit, but lost sight of Sergeant James and the defendant as they ran behind a residence.

Lieutenant Justin Brown, with the Franklinton Police Department, remained at the police station when Corporal Arceneaux's call came in. When Sergeant James radioed the police station about the foot pursuit, Lieutenant Brown left to assist in the pursuit. As Sergeant James continued to chase the defendant, they ran past 16th Avenue and onto Alford Street. The defendant stopped in the front yard of his aunt's house on Alford Street. Sergeant James testified at trial that he approached the defendant and told him to get on the ground. The defendant turned sideways, or "bladed his body" toward Sergeant James in a defensive posture.

Sergeant James could not see the defendant's hands. At this point as the defendant turned his face to Sergeant James, Sergeant James recognized that the person he was pursuing was the defendant. The defendant's shoulders moved in an upward direction, but the defendant did not get on the ground. Sergeant James removed his pepper spray and, as he sprayed the defendant, the defendant produced a gun and shot Sergeant James. Sergeant James fell to the ground and, while unable to move, heard three or more gunshots back to back. Sergeant James never pulled his gun. The defendant ran from the scene.

Corporal Arceneaux testified at trial that when he was on foot looking for the defendant, there were no other people on the street. Corporal Arceneaux was on Dobson Street when he heard the first gunshot. After a brief pause, he heard four more gunshots. He went back to his unit and drove toward the scene of gunfire. Sergeant Norsworthy testified at trial that as he headed on foot in the direction he saw Sergeant James running, he heard Sergeant James holler "stop." As Sergeant Norsworthy approached the rear of the residence of which Sergeant James and the defendant were standing in front, Sergeant Norsworthy heard a gunshot. He drew his weapon and, just as he began to move toward the front of the house, he heard four or five more gunshots in quick succession. Lieutenant Brown testified at trial that when he was walking toward his police unit to assist in the pursuit, he heard a gunshot. After a brief pause, he heard four more gunshots.

As Sergeant James lay on the ground from a bullet wound to his trapezius area, several officers, including Corporal Arceneaux and Lieutenant Brown, arrived to assist Sergeant James. Sergeant James told Corporal Arceneaux that "Pickle" shot him. Lieutenant Brown asked who "Pickle" was, and Sergeant James told him it was Kenneth McClain. Detective Richard Newman, with the Franklinton Police Department, went to the hospital to see Sergeant James. Sergeant James told Detective Newman that the defendant shot him and that he

went by the nickname of "Pickle." The defendant testified at trial that his nickname was "Pickle." Sergeant James testified at trial that there was no question in his mind that the defendant shot him.

Shortly after Sergeant James was shot, the defendant called 911 and turned himself in. The defendant was taken to the Franklinton Police Department, where he gave a recorded statement to Lieutenant Brown and Detective Newman. In his statement, the defendant admitted that he had a gun, which he thought was a Hi-Point .40. The defendant told the officers that when Sergeant James sprayed him with the mace, he put his hands over his eyes, and the gun, which the defendant was holding, went off. However, he did not mean for Sergeant James to get shot. After the first shot, the defendant heard two more shots and then ran. No gun was found in connection with the shooting of Sergeant James.

The defendant testified at trial that he did not shoot Sergeant James. He testified that he lied in his statement to Lieutenant Brown and Detective Newman because Lieutenant Brown had beat him up before the interview and told him what he needed to say in his statement. The defendant testified that he did run from Sergeant James and Sergeant James did chase him. According to the defendant, the reason he ran from Sergeant James was that he "was messing with his girlfriend." The defendant testified that in the past, Sergeant James had been pulling him over and harassing him. When Sergeant James caught up to him and maced him, they "tussled." While they were fighting, the defendant heard shots ring out. Sergeant James fell on top of the defendant. The defendant pushed Sergeant James off of him and ran. The defendant testified that Sergeant James mistook the defendant's cell phone for a gun.

Larry Cotton, the only defense witness, was serving a sentence at the time he testified for possession with intent to distribute cocaine and illegal possession of a firearm. He testified that on the night of the shooting, he was outside on Dobson

Street where he lived. He heard four or five gunshots about a block away. Cotton saw people running. He also saw the defendant running on Alford Street, being chased by police officers in a patrol car. An officer exited the passenger side of the unit and chased the defendant on foot. Cotton followed them until he saw the officer and the defendant stop in the yard on Alford Street. The officer and the defendant began to "tussle." During the scuffle, some unknown person with a gun came from behind a shed (or from inside the shed) out of the dark, approached the defendant and Sergeant James and fired two shots. Cotton then went back to his house. Cotton testified that he did not see the defendant with a gun.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in denying the motion to suppress the confession. Specifically, the defendant contends that his confession was coerced because he was repeatedly beaten by Lieutenant Brown and told what he needed to say in his statement. Out of fear of being beaten again, the defendant was forced to say in his statement that he shot Sergeant James.

Before a confession can be introduced into evidence, it must be affirmatively shown that it was free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises. La. R.S. 15:451. It must also be established that an accused who makes a confession during custodial interrogation was first advised of his **Miranda** rights. **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Since the general admissibility of a confession is a question for the trial court, its conclusions on the credibility and weight of the testimony are accorded great weight and will not be overturned unless they are not supported by the evidence. **State v. Patterson**, 572 So.2d 1144, 1150 (La. App. 1st Cir. 1990), writ denied, 577 So.2d 11 (La. 1991). However, a trial court's legal findings are subject to a *de novo* standard of review.

See **State v. Hunt**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751. The trial court must consider the totality of the circumstances in determining whether or not a confession is admissible. **State v. Hernandez**, 432 So.2d 350, 352 (La. App. 1st Cir. 1983). Testimony of the interviewing police officer alone may be sufficient to prove a defendant's statements were freely and voluntarily given. **State v. Mackens**, 35,350 (La. App. 2d Cir. 12/28/01), 803 So.2d 454, 463, writ denied, 2002-0413 (La. 1/24/03), 836 So.2d 37.

Although the burden of proof is generally on the defendant to prove the grounds recited in a motion to suppress evidence, such is not the case with the motion to suppress a confession. In the latter situation, the burden of proof is with the State to prove the confession's admissibility. La. C.Cr.P. art. 703(D). The State must prove beyond a reasonable doubt that the confession was made freely and voluntarily. **State v. Seward**, 509 So.2d 413, 417 (La. 1987). See **State v. Smith**, 409 So.2d 271, 272 (La. 1982). 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).

At the hearing on the motion to suppress the confession, the defendant testified that Lieutenant Brown took him from his holding cell at the Franklinton Police Department and took him to a small room that was not the interrogation room. In this room, which had no cameras, Lieutenant Brown hit and beat the defendant while he was handcuffed. Lieutenant Brown repeatedly hit the defendant, and told him what to say and how to say it. At trial, the defendant testified essentially the same. He added that Lieutenant Brown beat him with his fist on the right side of his face, and then gave the defendant an ice pack for his face, which reduced the swelling. The defendant also testified at trial that

Lieutenant Brown told him to say that the shooting was an accident. He further stated that he now wears an eye patch over his right eye because of the incident.

Lieutenant Brown testified at the motion to suppress hearing that at no time while the defendant was at the Franklinton Police Department did he threaten or abuse the defendant. He stated he never hit the defendant, he did not give the defendant an ice pack for his eye, and he did not tell the defendant to say that the shooting was an accident. Lieutenant Brown further testified that no one in his presence threatened, abused, or promised anything to the defendant, or induced the defendant to make a statement. When the defendant was taken to the interrogation room with Lieutenant Brown and Detective Newman, Lieutenant Brown **Mirandized** the defendant. The defendant indicated he understood his rights and, further, signed a waiver of rights form. The form listed the defendant's rights, then asked "Do you understand your rights" and "Are you willing to answer questions at this time?" The defendant placed an "x" in both of the "Yes" boxes and initialed his responses. The final question on the form to which the defendant responded in the negative and initialed was, "Have any threats or promises been made to you or has any pressure of any kind been used to get you to answer questions or to give up your rights?" The defendant, Lieutenant Brown, and Detective Newman all signed the rights form. Prior to questioning the defendant, Lieutenant Brown asked the defendant if he was willing to talk to them. The defendant responded, "Yes, sir." Lieutenant Brown then asked the defendant if he had made any promises or threats to him, or had pressure of any kind been used against him. The defendant responded, "No, sir."

Lieutenant Brown reiterated at trial that no one mistreated, abused, or threatened the defendant in his presence. At both the motion to suppress hearing and the trial, Lieutenant Brown indicated that he had taken photographs of the defendant about eight hours after the defendant's interview with Lieutenant Brown

and Detective Newman. According to Lieutenant Brown, the photographs were taken after the defendant and the other police officers had returned from looking for the gun used in the shooting, and just prior to the defendant being sent to another jail.

Seven photographs taken by Lieutenant Brown and introduced into evidence at the motion to suppress hearing and trial were close-ups of the defendant's face. In four of the poses, the defendant is facing the camera, and in the other three the defendant is turned to his right so that the viewer is looking directly at the left side of his face. Detective Newman was asked at the motion to suppress hearing to view the photographs of the defendant. Detective Newman testified he did not see any swelling on the defendant's face. He also testified he did not witness any first aid being given to the defendant's right eye. He further indicated that during his (and Lieutenant Brown's) interview of the defendant, he did not notice any bruising, redness, or cuts on the defendant that would indicate he had been beaten. Our review of the photographs indicate no bruising, swelling, or any other type of marking indicative of the defendant being struck around the right eye or the right side of the face. The photographs of the left side of the defendant's face are of no evidentiary value since the defendant claimed he was struck only on the right side of his face.

At the motion to suppress hearing, the defendant testified that while in St. Tammany Parish Jail, he requested to see a doctor about his eye. The paperwork, which included the request form from jail and treatment by Dr. Donald Bergsma, an ophthalmologist, was submitted into evidence. The request form from jail for an eye appointment indicates the patient reported head trauma from an alleged beating in October 2007. In the summary of his findings, Dr. Bergsma indicated his initial visit with the defendant was November 30, 2007. Dr. Bergsma's office did not see the defendant again until September 30, 2008. Dr. Bergsma noted in

his summary that the defendant's chief complaint was that his right eye was blurry. After diagnostic eye dilation drops were administered by an ophthalmic technician, the patient refused further examination and left without being seen by an ophthalmologist. In his comment, Dr. Bergsma noted, "We did not record recommending a patch for light sensitivity, although we would not dissuade it if the patient found comfort."

The defendant was interviewed and allegedly beaten by Lieutenant Brown on September 18, 2007. The request form from jail for a doctor, however, indicated the defendant was beaten in October 2007. When the defendant was asked about this discrepancy at the motion to suppress hearing, the defendant offered that the paperwork was incorrect. The defendant also stated at trial that he was moved to the St. Tammany Parish Jail on October 9, 2007. He told the medical staff at the St. Tammany Parish Jail that the incident relating to his eye happened in September in Washington Parish, but the staff got it wrong and put "October 9th because they had records that I was at the jail. . . . probably thought that I was in their jail." The defendant further indicated that he had a simple battery charge for fighting while in jail in St. Tammany Parish.

When the defendant was interviewed by Lieutenant Brown and Detective Newman, he initially denied any involvement in the shooting. The defendant told the officers that he never had a gun that night and that someone who looked like him shot Sergeant James. Later during the interview, the defendant changed his story and admitted that he had a gun and that he shot Sergeant James. At trial, the defendant testified he changed his story about being the one who shot Sergeant James because Lieutenant Brown had given him "the eye" or "the look," which suggested that if the defendant did not tell Lieutenant Brown what he wanted to hear, Lieutenant Brown would beat the defendant again. The defendant further testified that the only reason he said that his gun was a Hi-Point .40 was that

Lieutenant Brown had written "Hi-Point .40" on a piece of paper and showed it to the defendant during the interview.

Detective Newman testified at trial that during the interview, he did not see Lieutenant Brown write down anything on a piece of paper and show it to the defendant. He further testified he did not see Lieutenant Brown make any sort of facial gestures at the defendant during the interview. Our review of the videotape of the interview revealed that Detective Newman did most of the questioning. While the defendant answered Detective Newman's questions, the defendant made very little to no eye contact with Lieutenant Brown. It was during a conversation between the defendant and Detective Newman when the defendant decided to tell the truth. Rather than eye contact by Lieutenant Brown, and its attendant fear, causing the defendant to admit he shot Sergeant James, our appreciation of the cause of the defendant's admission was Detective Newman's informing the defendant that scientific evidence put him at the scene of the shooting. Detective Newman informed the defendant that certain tests and swabs taken of him while he was in the holding cell revealed that he had pepper spray on his face and in his hair. When Detective Newman then told the defendant that he needed to be honest with them, the defendant, without a glance toward Lieutenant Brown, said he was just going to tell the truth because he had three kids and he wanted to be there for them.

The record before us clearly establishes that the defendant's confession was free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises, and that the defendant was advised of his **Miranda** rights prior to making a confession while in police custody. The defendant's claims of being beaten or abused by Lieutenant Brown are wholly unsupported by the testimonial and documentary evidence. The defendant's explanations of how, why, and when the alleged abuse occurred were rife with

inconsistencies. In particular, we note the following inconsistency based on the defendant's own conflicting assertions. The defendant maintained throughout the motion to suppress hearing and the trial that Lieutenant Brown beat him before he was questioned in the interrogation room by Lieutenant Brown and Detective Newman. The defendant insisted that Lieutenant Brown repeatedly struck him and told him what to say during the interview and how to say it. The defendant was to say the shooting was an accident. According to the defendant, Lieutenant Brown also told him that before they went into the interrogation room, he (Brown) was going to write down on a piece of paper the type of gun that was used to shoot Sergeant James. The defendant did not want to say these things, but he had to because he was afraid of Lieutenant Brown and did not want to get beat again. However, when the defendant went into the interrogation, waived his rights and volunteered to talk, for the first twenty-eight minutes of a forty-one minute interview, the defendant denied having a gun, denied being maced, denied having any involvement in the shooting, and suggested that Danny, a.k.a. "Murderblades," from New Orleans probably shot Sergeant James and the defendant was wrongly accused because he looked like Danny.

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 allowing other crimes evidence at trial. Specifically, the defendant contends that the probative value of evidence of another shooting two days before the instant shooting where no one was arrested was outweighed by its prejudicial effect.

Prior to trial, the State filed a notice of intent to use evidence of other crimes pursuant to La. C.E. art. 404. Particularly, the State sought to introduce at trial evidence of gunshots fired on September 15, 2007, two days before the shooting in the instant crime. The defendant was a suspect in the September 15 shooting, but

no arrests were made. Four shell casings were found around where the September 15 shooting took place. Those four shell casings matched the shell casings found at the scene of the instant crime.

In ruling at a hearing that the other crimes evidence was admissible, the trial court stated in pertinent part:

> I have taken the time to, more thoroughly, read through the statements given by the defendant.
>
> And on at least two occasions, he makes reference to having been accused of a shooting and claiming that somebody else was the person who was apparently doing some shooting the day or two before the incident, which we're here concerning today.
>
> In trying to balance this whole situation regarding whether or not to allow any testimony concerning these events on September the 15th of '07, trying to determine whether or not the probative value of any testimony that might be given relative to that outweighs the prejudicial value that might be given to that testimony.
>
> I would say that, given the fact that the defendant has made reference to it on at least two occasions and I think later on towards the end, he further makes reference to it about having to get a gun because somebody was out to get him a couple of days before, I think it's relevant.
>
> It's relevant as to the entirety as to why the Jury can make their own determination as to how much weight they would want to give this.

Louisiana Code of Evidence article 404(B)(1) provides:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. In order to avoid the unfair inference that a defendant committed a particular crime simply because he is a person of criminal character, other crimes evidence is inadmissible unless it has an independent relevancy

besides simply showing a criminal disposition. **State v. Lockett**, 99-0917 (La. App. 1st Cir. 2/18/00), 754 So.2d 1128, 1130, writ denied, 2000-1261 (La. 3/9/01), 786 So.2d 115.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. La. C.E. art. 401. All relevant evidence is admissible except as otherwise provided by positive law. Evidence which is not relevant is not admissible. La. C.E. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or waste of time. La. C.E. art. 403.

The defendant contends that there was no independent relevance for the introduction into evidence of the shooting on September 15. According to the defendant, no one was arrested for the shooting, the two shootings were dissimilar, and the probative value of admitting evidence of another shooting was greatly outweighed by the prejudice it created because the State was trying to connect an unrelated shooting to him. We do not agree.

The defendant's theory of the case was that he was not the person who shot Sergeant James. Accordingly, the defendant has made his identity an issue in this case. The defendant further claims in his sufficiency of evidence argument (third assignment of error) that since he was not the shooter, he could not have been in possession of a firearm. The September 15 shooting itself, although the defendant was a suspect, arguably may not have connected the defendant to the instant shooting. However, the four shell casings found at that scene were a match to the shell casings found at the instant shooting. As such, in light of the defendant's defenses of not possessing a firearm and misidentification, evidence of the four

shell casings was relevant to show identity and the opportunity to be in possession of a firearm.

The trial court's ruling on the admissibility of other crimes evidence will not be overturned absent an abuse of discretion. See **State v. Galliano**, 2002-2849 (La. 1/10/03), 839 So.2d 932, 934 (per curiam). We find no abuse of discretion in the trial court's ruling. The evidence of the four shell casings found at the scene of the September 15 shooting had independent relevance to the issues of identity and opportunity, and any prejudicial effect was outweighed by the probative value of such evidence. See **State v. Scales**, 93-2003 (La. 5/22/95), 655 So.2d 1326, 1330-31, cert. denied, 516 U.S. 1050, 116 S.Ct. 716, 133 L.Ed.2d 670 (1996).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues that the evidence was insufficient to support the guilty verdicts. Specifically, the defendant contends that he is not guilty of attempted first degree murder because the State did not prove beyond a reasonable doubt that he was the person who shot Sergeant James. The defendant further contends that, since he was not the shooter and the weapon was never recovered, the State also failed to prove that he was guilty of possession of a firearm by a convicted felon.

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 proof beyond a reasonable doubt of each of 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. C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207 (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, 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 (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 (La. 11/29/06), 943 So.2d 1047, 1051.

The defendant asserts in his brief that the weapon was never found and that he was not the shooter. Gunshot residue was not found on his hands. According to the defendant, when he was sprayed with pepper spray, he heard gunshots, and then Sergeant James fell on top of him. The defendant could not see from being sprayed with pepper spray. As such, the defendant maintains, it would have been almost impossible for him to shoot Sergeant James after being sprayed due to the Glock .40 handgun having a three-part safety system as described by Lieutenant Brown. Furthermore, defense witness, Larry Cotton, stated he witnessed another individual shoot Sergeant James.

The testimony at trial established that the defendant was standing on the street close to midnight wearing a white muscle T-shirt and dark shorts. As Corporal Arceneaux approached the defendant, the defendant ran. Corporal Arceneaux radioed that he was in pursuit of a suspect with a description of what he was wearing and that the suspect was running in the area of 15th Avenue and

Alford Street. Sergeant James, who was on duty and in uniform, heard the call over the radio while at the police station. Sergeant James, along with Officer Pettit, drove his unit to 16th Avenue. At 16th Avenue and Alford Street, Sergeant James exited his unit and searched for the suspect on foot. Moments later while on Alford Street, Sergeant James spotted the described suspect in a white T-shirt and dark shorts. As Sergeant James approached the defendant, the defendant saw him and ran. Sergeant James identified himself as the police and ordered the defendant to stop, to no avail. A foot pursuit ensued. They ran past 16th Avenue and onto Alford Street, where the defendant slowed down in the front yard of a house. Sergeant James approached and told the defendant to get on the ground. The defendant turned sideways, or "bladed his body" toward Sergeant James in a defensive posture. Sergeant James could not see the defendant's hands. At this point as the defendant turned his face to Sergeant James, Sergeant James recognized that the person he was pursuing was the defendant. The defendant's shoulders moved in an upward direction, but the defendant did not get on the ground. Sergeant James removed his pepper spray and, as he sprayed the defendant, the defendant produced a gun and shot Sergeant James. Sergeant James fell to the ground and, while unable to move, heard four more gunshots. The defendant ran from the scene.

As Sergeant James lay on the ground, several officers, including Corporal Arceneaux and Lieutenant Brown, arrived to assist Sergeant James before an ambulance arrived. As Corporal Arceneaux grabbed Sergeant James's hand, Sergeant James told him that "Pickle" shot him. Lieutenant Brown asked who "Pickle" was, and Sergeant James said "Kenneth McClain." Detective Newman went to the hospital to see Sergeant James. Sergeant James told Detective Newman that the defendant shot him and that he went by the nickname of "Pickle."

The defendant testified at trial that his nickname was "Pickle." Sergeant James testified at trial that there was no question in his mind that the defendant shot him.

No gun was found in connection with the shooting of Sergeant James. However, during his interview with Lieutenant Brown and Detective Newman, the defendant stated that he thought the gun he used was a Hi-Point .40. While the gun used was determined by Lieutenant Brown to be a .40 caliber Glock pistol based on the shell casings found at the scene, those casings were for a .40 caliber semi-automatic handgun. Both a Hi-Point .40 and a Glock .40 are .40 caliber semi-automatic handguns. The bullet removed from Sergeant James's body was a .40 caliber copper-jacketed lead bullet.

The white muscle T-shirt the defendant was wearing was found near the scene. Elaina Foster, an expert in forensic science, testified at trial that she found particles unique to gunshot residue on the defendant's T-shirt. Foster explained that when a gun is discharged, particles will form that have at least one of three elements - lead, barium, or antimony. When all three elements fuse together into a single particle, that particle is classified as unique gunshot residue. If an item tested was "consistent" with gunshot residue, that would indicate that two of the three elements were present. The test for gunshot residue on the defendant's hands was inconclusive. Foster testified that gunshot residue on an item of clothing indicates the person wearing the clothing could have discharged the firearm, he could have been in close proximity to someone else who discharged a firearm, or the clothing came into contact with something that had gunshot residue on it. Foster also tested a swab taken from above the defendant's left ear for pepper spray. Foster testified that she indentified on the swab capsaicin, which is found in pepper spray.

Lieutenant Brown explained at trial that Sergeant James sprayed the defendant with pepper spray, or oleoresin capsicum, which has an implanted dye

within in. That florescent dye, which glows in the dark, will reveal itself under an alternative light source, such as a black light. When the defendant was in the holding cell shortly after being arrested, Lieutenant Brown and Detective Newman went to see the defendant. The light in the cell was turned off and Lieutenant Brown held a black light near the defendant's face. Lieutenant Brown observed the oleoresin capsicum dye on the defendant's face and took swabs of the dye. Sergeant Detective Randall Penton, with the Franklinton Police Department, testified at trial that he also saw the florescent dye on the defendant.

In his statement to Lieutenant Brown and Detective Newman, the defendant admitted that he had a gun, which he thought was a Hi-Point .40. The defendant told the officers that when Sergeant James sprayed him with the mace, he put his hands over his eyes, and the gun, which the defendant was holding, went off. However, he did not mean for Sergeant James to get shot. After the first shot, the defendant heard two more shots and then ran.

The defendant testified at trial that he ran from Sergeant James, Sergeant James chased and caught up to him, and maced him. They then "tussled." While they were fighting, the defendant heard shots ring out. Sergeant James fell on top of the defendant. The defendant pushed Sergeant James off of him and ran. The defendant testified that he did not shoot Sergeant James, and that Sergeant James mistook the defendant's cell phone for a gun. Larry Cotton, the only defense witness, testified that he witnessed the defendant struggling with Sergeant James. According to Cotton, some unknown person with a gun came from behind a shed out of the dark, approached the defendant and Sergeant James and fired two shots. Cotton then went back to his house.

The issue in this case regarding the identification of the defendant as the shooter was one of credibility. The jury 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 of attempted first degree murder of a police officer (as well as the second count). 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 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. The appellate courts 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 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).

It is clear from the finding of guilt that the jury concluded the testimony of several of the State's witnesses, including Sergeant James, Lieutenant Brown, Detective Newman, and Elaina Foster, was more credible than the testimony of the defendant or Cotton. 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**, 2003-1980 (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). In finding the defendant guilty, the jury clearly rejected the defendant's theory of misidentification. See **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655

So.2d 448, 453. We note, as well, that after shooting Sergeant James, the defendant fled from the scene. Flight following an offense reasonably raises the inference of a "guilty mind." **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984).

After a thorough review of the record, we find that the evidence clearly negates any reasonable probability of misidentification and 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, in shooting Sergeant James, was guilty of attempted first degree murder. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

The defendant's conviction for attempted first degree murder necessarily established that he possessed a firearm. David Boe, a probation officer for the State of Louisiana, testified at trial that he was the defendant's probation officer for a possession of cocaine conviction. The defendant pled guilty to the charge in January 2007. Accordingly, we find that the evidence also supports the jury's finding of guilt for the charge of possession of a firearm by a convicted felon.

This assignment of error is without merit.

SENTENCING ERROR

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

For his possession of a firearm by a convicted felon conviction, the defendant was sentenced to twelve and one-half years at hard labor without 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 benefits and be fined not less than one thousand dollars nor more than five thousand dollars. La. R.S. 14:95.1(B) (prior to its amendment by 2010 La. Acts No. 815, § 1). The trial court failed to impose the mandatory fine.[1] 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**, 952 So.2d at 124-25.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.

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

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1380

STATE OF LOUISIANA

VERSUS

KENNETH DEMARIO MCCLAIN

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McCLENDON, J., concurs and assigns reasons.

While I am concerned about the failure of the trial court to impose the legislatively mandated fine, given the state's failure to object and in the interest of judicial economy, I concur with the majority opinion.