NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1849

STATE OF LOUISIANA

VERSUS

PERRY CORNER

Judgment Rendered: May 3, 2012.

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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. 04-08-0414

The Honorable Richard D. Anderson, Judge Presiding

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Hillar C. Moore, III Tracey Barbera Dale R. Lee Baton Rouge, La.	Attorneys for Plaintiff/Appellee, State of Louisiana
Perry Corner Angola, La.	Defendant/Appellant, In Proper Person
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* * * *

BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

CARTER, C.J.

The defendant, Perry Corner, was charged by grand jury indictment with second degree murder, a violation of Louisiana Revised Statutes section 14:30.1. He pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed a motion for post-verdict judgment of acquittal, which was denied. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating two counseled assignments of error and one *pro se* assignment of error.[1] We affirm the conviction and sentence.

FACTS

On March 16, 2008, shortly after midnight, Barry Heard was standing outside near the corner of South 15th Street and Julia Street in Baton Rouge when someone shot him twice. Most of the people who were hanging around at or near the scene ran when they heard the gunshots. Freddie Wilson remained at the scene and called 911. Heard died a short time later. One of the bullets had entered his back and lacerated his right lung.

Initially the police did not have a lead on the identity of the shooter. A couple of days later, Randy Citizen went to the police and informed them he had witnessed the shooting. Citizen testified at the trial of the matter. He stated that he lived on South 12th Street and that he knew Heard and his family. On the night of March 16, Citizen left his house and was walking to South 15th Street to see a friend. As Citizen approached the corner of South

[1] A second *pro se* assignment of error merely supplemented the argument for two counseled assignments of error.

15th Street and Julia Street, he saw Heard getting off of his bicycle. Citizen continued to walk to his friend's house when he heard three gunshots. Citizen turned and saw Heard lying on the ground and the defendant, with a gun in his hand, standing over Heard. Citizen heard the defendant tell Heard, "Look at you. Your body full of holes. Behind a 9th Ward chain." Citizen then ran.

Citizen did not know the defendant. At the police station, Citizen identified the defendant in a photograph shown to him. Through their investigation, the police learned that the defendant was a possible witness to the shooting. Thus, when they showed Citizen the picture of the defendant, they were only expecting him to identify the defendant as someone who was or was not at the scene. However, Citizen jumped up and immediately identified the defendant as the shooter. Citizen was then shown a six-person photographic lineup where he again identified the defendant as the person who shot Heard. Citizen also identified the defendant in court.

Wilson, who had called 911, was interviewed by the police and identified the defendant as the shooter in a photographic lineup. At trial, however, Wilson testified that he did not see who shot Heard and that he did not think the defendant was the person who shot Heard. Wilson had several prior convictions, including armed robbery, burglary, and theft.

The defendant did not testify at trial.

Counseled Assignments of Error Numbers 1 and 2

In these related assignments of error, the defendant argues, respectively, the evidence was insufficient to support the conviction, and the

trial court erred in denying the post-verdict judgment of acquittal. 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, § 1; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* La. Code Crim. Proc. Ann. art. 821(B); *State v. Ordodi*, 06-0207 (La. 11/29/06), 946 So.2d 654, 660. 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. *See State v. Patorno*, 01-2585 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144. When analyzing circumstantial evidence, Louisiana Revised Statutes section 15:438 provides that in order to convict, the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. *Patorno*, 822 So.2d at 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. *See State v. Hughes*, 05-0992 (La. 11/29/06), 943 So.2d 1047, 1051. Positive identification by only one witness is sufficient to support a conviction. *Hughes*, 943 So.2d at 1051. It is the factfinder who

weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. *Id.*

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. La. Rev. Stat. Ann. § 14:30.1A(1). 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. La. Rev. Stat. Ann. § 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 (2004).

The defendant contends the State's evidence was insufficient to establish his identity as the shooter. Citizen spoke to the police on two occasions. The first time, Citizen told the police that he did not see the shooter's face; the second time, Citizen told the police that he did see the shooter's face. Thus, according to the defendant, Citizen's testimony alone did not establish he shot Heard. The defendant also points out that, while Wilson identified the defendant as the shooter when he was talking to the

police, Wilson testified in court that he did not believe that the defendant was the shooter.

Testimony and physical evidence introduced at the trial established that Heard was shot twice in his back shortly after midnight while standing in or near the street. While one of the bullet wounds was superficial, the other wound resulted in a lacerated lung, and Heard died from a bleeding lung. Citizen testified at trial that he told the police he did not see the shooter's face because he did not want to get involved. In fact, Citizen had been brought from jail to testify in the instant matter because he had been jailed for initially refusing to testify. He had no convictions. Citizen explained at trial that, while he was not worried about who might come after him, he was worried about the safety of his family, particularly his two daughters. Citizen knew Heard and Heard's mother well. He testified that when he told Heard's mother that he saw the face of the shooter, she cried and asked Citizen to help her by telling the police what he saw. Thus, as described by Citizen, it was at the behest of a very upset mother over the death of her son that Citizen came forward to identify the defendant as the person who shot his friend.

According to Citizen, he did not witness the actual shooting, but the time between when he heard the gunshots and turned to see the defendant standing over Heard's body was about two or three seconds. Citizen stated that he made eye contact with the defendant and that the defendant had a "big gun" in his hand. Citizen did not see anyone else at the scene with a gun. When asked which hand the gun was in, Citizen stated, "I want to say

it's the left hand. That's what I really truly want to say." Pieces of two spent bullets and three cartridge cases found at the scene were examined by firearms expert Charles Watson, Jr. Watson testified at trial that a piece of one of the bullets was consistent with a .45 bullet. He also stated the three semi-automatic cartridge cases were fired in the same gun. Detective Brett Magee, with the Baton Rouge Police Department, testified at trial that he was present when the defendant signed the advice of rights form and that he wrote with his left hand.

Citizen identified the defendant as the shooter in the photograph shown to him by the police. They asked if he was sure, and he told them he was positive. Citizen then identified the defendant in a photographic lineup. He also positively identified the defendant in court.

Wilson also looked at a six-person photographic lineup and identified the defendant as the shooter. He circled the defendant's picture in the lineup and initialed it. The accompanying photographic lineup statement form asked how the person who Wilson picked in the lineup was known to him. Wilson wrote, "[H]e did shoot Barry[.]"

At trial, Wilson testified that he did not see who shot Heard. Similar to Citizen's situation, it appeared Wilson changed his story for fear of reprisal. When asked on direct examination if the defendant killed Heard, Wilson stated, "I don't think so. I really, I really didn't think so." The following colloquy between the prosecutor and Wilson then took place:

> Q. What are you afraid of? Talk to me, Mr. Wilson. What are you afraid of?
> A. Losing my life.
> Q. What about your family, are you worried about them?

A. Yeah.
Q. In fact, you told the police officers that day that you were worried about your people?
A. Uh-huh.
Q. And you told them that you weren't afraid. You were more afraid for your family?
A. Yes, ma'am.

Later, on redirect examination, Wilson was asked why he circled the defendant's picture in the photographic lineup. He stated, "I was intoxicated when I circled it." The videotaped police interview of Wilson was admitted into evidence and played for the jury. This court has reviewed the videotaped interview of Wilson. We observed nothing in Wilson's manner, behavior, speech, or movements that would suggest intoxication. On the contrary, Wilson appeared quite lucid and clear-headed. He voiced the same concerns in the interview that he did at trial. He was worried about the safety of his family. When he was shown the photographic lineup, he positively, but reluctantly, identified the defendant as the shooter.

When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. *See State v. Moten*, 510 So. 2d 55, 61 (La. App. 1st Cir.), *writ denied*, 514 So. 2d 126 (La. 1987). The jury's verdict reflected the reasonable conclusion that, based on the physical evidence and the eyewitness testimony of Citizen and/or Wilson, the defendant shot and killed Heard. In finding the defendant guilty, the jury clearly rejected the defense's theory of misidentification. *See Moten*, 510

So. 2d at 61; *State v. Andrews*, 94-0842 (La. App. 1 Cir. 5/5/95), 655 So. 2d 448, 453.

The jury heard the testimony and viewed the evidence presented at trial and found the defendant guilty as charged. The defendant did not testify and presented no rebuttal testimony. Whether the jury believed some or all of the testimony of Citizen and Wilson, or whether it believed some or all of what each witness told the police (or some combination thereof) cannot be ascertained from the verdict. Regardless, 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 (2005). Moreover, the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. *State v. Taylor*, 97-2261 (La. App. 1 Cir. 9/25/98), 721 So. 2d 929, 932. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. *Taylor*, 721 So. 2d at 932. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. *Id.* 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 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 jury's unanimous 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 the hypothesis of innocence suggested by the defense at trial, that the defendant was guilty of the second degree murder of Barry Heard. *See State v. Calloway*, 07-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam). Accordingly, the trial court did not err in denying the post-verdict judgment of acquittal.

These assignments of error are without merit.

Pro Se Assignment of Error

In his *pro se* assignment of error, the defendant argues the trial court erred in denying defense counsel's motion to prohibit Dr. Edgar Cooper from testifying about the results of Heard's autopsy report. Specifically, the defendant asserts that since Dr. Cooper did not perform Heard's autopsy, his Sixth Amendment right to confrontation was violated because he was not able to confront the doctor who performed the autopsy on Heard.

Dr. Cooper, pathologist and East Baton Rouge Parish Coroner, testified at trial that he had reviewed Heard's autopsy protocol. Dr. Gilbert Corrigan had performed the autopsy on Heard, but Dr. Cooper explained that Dr. Corrigan was retired and lived in St. Louis. The defendant argues that he had the "absolute right" to confront Dr. Corrigan, the author of the protocol, pursuant to *Davis v. Washington*, 547 U.S. 813 (2006) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527 (2009). According to the

defendant, Dr. Corrigan's testimony was crucial because the doctor stated in his protocol that Heard "was out on the street when a car drove by and shots from the car [sic] which penetrated his trunk and right lung and killed him by exsanguination." This statement is consistent with Dr. Cooper's testimony that a "second gunshot wound entered his back at the level of the fifth thoracic vertebra just to the left of the midline and it passed upwards exiting from the chest at the fifth intercostal space, which is the space between the fifth and sixth rib." The defendant asserts this shows Heard was shot by someone sitting below him, which contradicts the testimony of Citizen, who stated that he only saw the defendant standing over Heard after hearing the gunshots.

The seminal case in this area is *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Supreme Court held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54. While the Court did not fully define the scope of testimonial statements, it held that certain statements "by their nature [are] not testimonial," such as business records. *Crawford*, 541 U.S. at 56. In *Melendez-Diaz*, in discussing *Crawford's* application to "certificates of analysis" showing the results of the forensic analysis performed on seized substances, the Court held the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. *Melendez-Diaz*, 557 U.S. at __, 129 S.Ct. at 2531-32. Absent a showing that the analysts

were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be confronted with the analysts at trial. *Melendez-Diaz*, 557 U.S. at __, 129 S.Ct. at 2532.

The various courts are split on whether an autopsy report is testimonial under *Melendez-Diaz*. *See Wood v. State*, 299 S.W. 3d 200, 208-10 (Tex. App. 2009) (finding the autopsy report was a testimonial statement); *State v. Locklear*, 681 S.E. 2d 293, 304-05 (N.C. 2009), *clarification denied*, 684 S.E. 2d 439 (N.C. 2009) (evidence introduced of forensic analyses performed by a forensic dentist and forensic pathologist who did not testify violated defendant's constitutional right to confront the witnesses against him). In *Davis v. Washington*, 547 U.S. at 822, the Court, in discussing the parameters of *Crawford*, held that statements are testimonial when the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Thus, see *United States v. Feliz*, 467 F.3d 227, 236-38 (2d Cir. 2006), *cert. denied sub nom.*, *Erbo v. United States*, 549 U.S. 1238 (2007), where the Second Circuit, in finding that autopsy reports were not testimonial within the meaning of *Crawford*, noted that thousands of routine autopsies were conducted every year without regard to the likelihood of their use at trial. *See also People v. Hall*, 84 A.D. 3d 79, 81-82 (N.Y.A.D. 1 2011) (noting that *Melendez–Diaz* did not explicitly hold that autopsy reports are testimonial).

At any rate, we need not determine the legal issue of whether Dr. Cooper's testimony explaining the autopsy report violated the defendant's Sixth Amendment rights because even assuming, without deciding, there

was error, we conclude any error in admitting the evidence was harmless beyond a reasonable doubt. Mistaken application of the rule of *Crawford* is subject to harmless error analysis. *State v. Buckenberger*, 07-1422 (La. App. 1 Cir. 2/8/08), 984 So. 2d 751, 759, *writ denied*, 08-0877 (La. 11/21/08), 996 So. 2d 1104.

Dr. Cooper's conclusion that Heard died of a gunshot wound did not prejudice the defendant because it was supported by independent evidence. Both Wilson and Citizen testified they heard gunshots and saw Heard lying on the ground. Wilson identified the defendant as the shooter, and Citizen identified the defendant as the person with a gun standing over Heard moments after hearing the gunshots. Wilson testified that he stayed with Heard as he was lying on the ground. Wilson asked Heard where he was shot. Heard raised up his shirt and showed Wilson the bullet wound, which prompted Wilson to call 911. Further, Detective Magee attended the autopsy and saw the gunshot wounds on Heard's body. Autopsy photos were submitted into evidence; one photo in particular showed the bullet holes in Heard's back.

The defendant asserts that the upward angle the bullet traveled through Heard's body, as discussed in the autopsy protocol, indicates the shooter was "sitting below" Heard when he fired the shots. But this is mere speculation by the defendant. More importantly, however, the autopsy protocol was not submitted into evidence. Defense counsel had ample opportunity to, and, in fact, did cross-examine Dr. Cooper at trial. Defense counsel was afforded the opportunity to elicit from Dr. Cooper any

information he thought might help his case, including a discussion about the angles the bullets traveled through Heard's body or the possibility of shots being fired from a car. Defense counsel, however, did not raise these issues during his cross-examination of Dr. Cooper.

There was sufficient evidence in the form of eyewitness testimony and forensic evidence, and the record leaves no doubt that the defendant shot and killed Heard. No harm was suffered by the defendant as a result of defense counsel's inability to cross-examine Dr. Corrigan. Accordingly, we conclude that the admission of Dr. Cooper's testimony, if error, was harmless error beyond a reasonable doubt. *See* La. Code Crim. P. art. 921.

The *pro se* assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the conviction and sentence of defendant, Perry Corner, for second degree murder are affirmed.

CONVICTION AND SENTENCE AFFIRMED.