

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0981

STATE OF LOUISIANA

VERSUS

ROBERT E. KING, III



**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 464,560, Division "C"
Honorable Richard A. Swartz, Jr., Judge Presiding**

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Robert E. King, III**

**Robert E. King, III
Covington, LA**

**Defendant-Appellant
In Proper Person**

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered December 22, 2010

Hughes, J., concurs.

PARRO, J.

The defendant, Robert E. King, III, was charged by bill of information with aggravated assault with a firearm, a violation of LSA-R.S. 14:37.4.¹ The defendant pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed motions for new trial and post-verdict judgment of acquittal, which were denied. The state filed a multiple offender bill of information. At the habitual offender hearing, the defendant was adjudicated a second-felony habitual offender and sentenced to eight years of imprisonment at hard labor, without benefit of probation or suspension of sentence. The defendant now appeals, designating one assignment of error. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On the afternoon of January 3, 2009, fourteen-year-old A.W. was riding in the passenger seat of his mother's Monte Carlo, which was being driven by his brother on Lincoln Avenue in Slidell. A.W. testified at trial that when they stopped at a stop sign, A.W. heard gunshots. A.W. looked to his left and saw the defendant, who was across the street on the sidewalk under a tree, fire several shots at him and his brother with a handgun. One of the bullets struck the car. A.W. and his brother ducked, and his brother sped off.

Later that same day, Officer Christopher Culotta, with the Slidell Police Department, removed a bullet from the driver's-side door of the Monte Carlo. No physical evidence was found at the scene of the shooting.

Two days later, A.W. looked at a photographic lineup and identified the defendant as the shooter. A.W. also gave a written statement, which set forth that at about 2:00 p.m., he was riding with his brother when he saw a "guy with dre[a]ds" and gold in his mouth pull up his shirt, pull out a gun, and fire at them. A.W. did not identify the defendant by name in his statement. A.W. testified at trial that he knew the defendant's name from "just hearing about him on the streets."

¹ Initially, the defendant was also charged with one count of possession of a firearm by a convicted felon, a violation of LSA-R.S. 14:95.1, and another count of aggravated assault with a firearm, a violation of LSA-R.S. 14:37.4. At the trial of the matter, the state elected to proceed only on the count tried.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the evidence was insufficient to support the conviction. Specifically, the defendant contends that the state failed to prove his identity as the shooter.²

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved 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 LSA-C.Cr.P. art. 821(B); **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that, in order to convict, the fact finder must be satisfied that 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 an appellate court will generally not second-guess those determinations. **State v. Hughes**, 05-0992 (La. 11/29/06), 943 So.2d 1047, 1051.

Louisiana Revised Statute 14:37.4 provides, in pertinent part:

- A. Aggravated assault with a firearm is an assault committed by the discharge of a firearm.
- B. For the purposes of this Section, "firearm" is defined as an instrument used in the propulsion of shot, shell, or bullets by the action of gunpowder exploded within it.

² The defendant does not dispute that a shooting occurred.

An assault is defined as an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery. LSA-R.S. 14:36.

A.W. made an in-court positive identification of the defendant as the person who shot at him and his brother from across the street and struck his mother's Monte Carlo with one of the bullets. A.W. testified that his brother was driving. As they stopped at a stop sign, A.W. saw, on his left, the defendant lift up his shirt, pull out a gun, and begin shooting at them. A.W. testified that the defendant had a black handgun, that he heard the gunshots, and that he saw fire come out of the gun as it was being shot. Shortly after the shooting, a bullet was removed from the driver's-side door of the Monte Carlo by Officer Culotta. The location of the bullet in the driver's-side door was consistent with the defendant's location when A.W. saw him shooting.

A.W. also identified the defendant in a six-person photographic lineup two days after the shooting. When asked at trial if A.W. showed any hesitancy in picking out the defendant, Detective John Cole with the Slidell Police Department testified that A.W. did not. When A.W. was asked on direct examination if there was any doubt in his mind that the defendant was the person who shot at him, A.W. replied, "No."

A.W. testified at trial that the defendant had dreadlocks when he shot at him, but at trial the defendant had gotten his hair cut because he did not have dreadlocks. The defendant's theory of misidentification, thus, was that the state had no evidence he ever had dreadlocks. The defendant's assertion is erroneous. A.W. testified the defendant had dreadlocks, and this testimony was corroborated by Detective Cole's testimony and the six-person photographic lineup introduced into evidence, which clearly shows the defendant with dreadlocks. Detective Cole verified that the person A.W. picked in the photo lineup - the "[n]umber two" photo - was Robert King, the defendant.

The defendant suggests, however, that the person identified as the defendant in the photo lineup is not him (the defendant). In his booking photo, the defendant does not have dreadlocks, but very short hair. The defendant asserts in his brief that the man in the photo lineup identified as the defendant has a facial structure entirely different from his facial structure as shown in his booking photo when he was arrested.

Initially we note that the shooting occurred on January 3, 2009, and the booking date when the photo of the defendant was taken was March 31, 2009. As such, almost three months elapsed from the time the defendant had dreadlocks to the time he did not. Detective Cole testified that, after the defendant had been identified as the shooter, but prior to his being apprehended, he (Cole) believed that word went out that the police were looking for someone with dreadlocks. Detective Cole had also known people to change their appearance after the police started looking for them. Thus, a rational juror could have reasonably concluded the defendant had cut his hair between the time of the shooting and the time of his arrest.

Moreover, despite the defendant's assertion about entirely different facial structures, a comparison of the lineup photo with the booking photo apparently reveals that both pictures are of the defendant. Aside from the longer hair in the lineup photo, the features and poses are virtually identical. However, our assessment of the similarity between the photos notwithstanding, it was the jury that heard all of the testimony and viewed all of the evidence presented to it at trial and, after considering any alleged inconsistencies, found the defendant guilty. 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).

It is clear from the finding of guilt that the jury concluded that the testimony of A.W. and Detective Cole was credible and reliable and was sufficient to establish the defendant's guilt. 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, it is clear the jury rejected the defense's theory of misidentification. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given

evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (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 verdict. We are convinced that viewing the evidence in the light most favorable to the state, a rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of aggravated assault with a firearm. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). The assignment of error is without merit.

**CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE
AFFIRMED.**