NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 1433

STATE OF LOUISIANA

VERSUS

TAURIUS MARQUIES HOLMES

Judgment Rendered: March 23, 2007

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of Washington, Louisiana
Trial Court Number 05-CR3-92375

Honorable Raymond S. Childress, Judge

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

The defendant, Taurius Marquies Holmes, was charged by bill of information with two counts of attempted first degree murder (counts I and II), violations of La. R.S. 14:27 and La. R.S. 14:30, and one count of distribution of marijuana (count III), a violation of La. R.S. 40:966(A)(1).[1] He pled not guilty on all counts. Following a jury trial, he was found guilty as charged on counts I and II, and not guilty on count III. He moved for a new trial and for a post-verdict judgment of acquittal, but the motions were denied. Thereafter, the State filed a habitual offender bill of information against the defendant, alleging, in regard to count I, he was a second felony habitual offender. The defendant was sentenced to twenty-five years without benefit of parole, probation, or suspension of sentence on each count, to run concurrently with each other.[2] He moved for reconsideration of sentence, but the motion was denied. Following a habitual offender hearing, in regard to count I, he was adjudged a second felony habitual offender, the previous sentence on count I was vacated, and he was sentenced on count I to forty years at hard labor without benefit of parole, probation, or suspension of sentence. He moved for reconsideration of sentence, but the motion was denied. He now appeals, designating one assignment of error. On count I, we affirm the conviction, habitual offender adjudication, and sentence. On count II, we affirm the conviction, amend the sentence, and affirm the sentence as amended.

In this appeal, the defendant raises one assignment of error: that the evidence was insufficient to support the convictions.

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[1] Justin Randy Keys was also charged by the same bill of information with the same crimes. The State, however, elected to sever the prosecution of Keys from that of the defendant.

[2] The minutes of the initial sentencing indicates the defendant was sentenced to twenty-five years at hard labor on each count. The transcript of initial sentencing, however, indicates the defendant was sentenced to twenty-five years on each count. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

FACTS

On February 18, 2005, the victims, Probation and Parole Officers Shannon Stewart and Michael Breland, were in the Bogalusa area to conduct a supervised visit with the defendant. The officers were in uniform and had their weapons and badges displayed. On the way to the defendant's house, Officer Breland recognized the defendant driving a car. As the defendant drove passed them, the officers noticed a passenger in the vehicle, and they observed the defendant's vehicle pull up next to another vehicle and converse with its driver. The officers drove around the block and returned to the area where they had seen the defendant. The defendant's vehicle and the other vehicle had left that location, but were side-by-side at a nearby intersection. The driver of the other vehicle was standing at the passenger window of the defendant's vehicle. Officer Breland exited his vehicle, identified himself, and stated he needed to speak with the defendant. The defendant fled in his vehicle. The driver of the other vehicle ran back to his vehicle and also fled.

Officers Stewart and Breland called for back up and began chasing the defendant. Eventually, the defendant drove across an old culvert, "appeared to spin out" in front of a house, and brought his vehicle to a complete stop in the front yard. Officer Breland thought the defendant was going to surrender. The officers parked their vehicle between a curve in the road and the culvert, exited the vehicle, and walked on the street in front of the yard to see if the defendant was surrendering. The officers had their service weapons out and ordered the defendant and his passenger to step out of the car and show their hands.

Officer Stewart indicated the defendant's vehicle sat motionless for a second, and then the tires on the car started spinning and the car moved directly toward Officer Breland and himself. Officer Stewart ordered the defendant to stop and began firing as the defendant drove across a small ditch directly at Officer Stewart. Officer Stewart was unaware of any braking of the vehicle by the defendant or of any

decrease in the vehicle's speed, and indicated the vehicle was not veering away from him. Officer Stewart dove out of the path of the vehicle and avoided being struck by the vehicle by only a few inches. The incident occurred during the day, in good weather, and without anything obstructing the defendant's view of Officer Stewart.

Officer Breland also indicated the defendant's vehicle traveled directly toward him. Officer Breland heard the vehicle's engine revving and its tires spinning. He did not hear the motor idle down, did not see the vehicle's wheels stop spinning, and the defendant did not swerve the vehicle away from Officer Breland. Officer Breland also indicated that the defendant did not have to drive directly forward at him in order to leave the yard and could have left the yard in three other directions. Officer Breland ordered the defendant to stop, and as he moved out of the way, Officer Breland fired his weapon six times. Officer Breland stated that he either dove or fell from the oncoming path of the vehicle, which passed within a foot of him, just before the vehicle sped away from the scene.

Officer Stewart later captured the defendant in a wooded area after he abandoned his vehicle and fled on foot.

Bogalusa Police Department Officer Paris Smith subsequently advised the defendant of his **Miranda**[3] rights and the defendant indicated he was "[s]erving a lick" when Officer Breland "came up on him." Officer Smith explained "serving a lick" was a street term for selling drugs. He also indicated the defendant later specified Officer Breland had disturbed him while the defendant was selling marijuana.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, the defendant argues the evidence did not exclude the reasonable hypothesis of innocence that he was merely trying to escape, rather than trying to run over the probation officers.

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[3] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The standard of review for 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 conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. **State v. Wright**, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 2000-0895 (La. 11/17/00), 773 So.2d 732.

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 98-0601 at p. 3, 730 So.2d at 487.

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm upon a peace officer engaged in the performance of his lawful duties. La. R.S. 14:30(A)(2). However, a specific intent to kill is an essential element of the crime of attempted murder. **State v. Butler**, 322 So.2d 189, 192 (La. 1975). For purposes of La. R.S. 14:30(A)(2), "peace officer" includes any parole or probation officer. La. R.S. 14:30(B)(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. La. R.S. 14:27(A).

Specific criminal 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. R.S. 14:10(1). Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. **State v. Buchanon**, 95-0625, p. 4 (La. App. 1st Cir. 5/10/96), 673 So.2d 663, 665, writ denied, 96-1411 (La. 12/6/96), 684 So.2d 923.

In **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, the Louisiana Supreme Court set forth the following precepts for appellate review of circumstantial evidence in connection with review of the sufficiency of the evidence:

> On appeal, the reviewing court "does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events." Rather, the court must evaluate the evidence in a light most favorable to the state and determine whether the possible alternative hypothesis is sufficiently **reasonable** that a rational juror could not have found proof of guilt beyond a reasonable doubt.
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> The jury is the ultimate factfinder of "whether a defendant proved his condition and whether the state negated that defense." The reviewing court "must not impinge on the jury's factfinding prerogative in a criminal case except to the extent necessary to guarantee constitutional due process."

Mitchell, 99-3342 at p. 7, 772 So.2d at 83. (Citations omitted).

Further, the **Mitchell** Court cautioned:

> "The actual trier of fact's *rational* credibility calls, evidence weighing, and inference drawing are preserved ... by the admonition that the sufficiency inquiry does not require a court to ask itself

> whether it believes that the evidence at trial established guilt beyond a reasonable doubt." The reviewing court is not called upon to determine whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Rather, the court must assure that the jurors did not speculate where the evidence is such that reasonable jurors must have a reasonable doubt. The reviewing court cannot substitute its idea of what the verdict should be for that of the jury. Finally, the "appellate court is constitutionally precluded from acting as a 'thirteenth juror' in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact."

Mitchell, 99-3342 at p. 8, 772 So.2d at 83. (Citations omitted).

After a thorough review of the record, we are convinced the evidence presented in this case, viewed in the light most favorable to the State, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of attempted first degree murder and the defendant's identity as the perpetrator of that offense against Officers Stewart and Breland. The verdict rendered against the defendant indicates the jury accepted the testimony of the State's witnesses. That testimony established that the defendant ignored police commands to stop and drove his vehicle at a high rate of speed, through gunfire, directly at Officers Stewart and Breland. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-0385, p. 9 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332, p. 32 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464.

Moreover, the jury rejected the defense theory that the defendant was not trying to run over the probation officers when he drove into them, but was merely trying to escape. When a case involves circumstantial evidence and the jury 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). No such hypothesis exists in the instant case.

This assignment of error is without merit.

REVIEW FOR ERROR

On count II, the defendant was sentenced to twenty-five years without benefit of parole, probation, or suspension of sentence.[4] In reviewing the record for error pursuant to La. C.Cr.P. art. 920(2), we have discovered that on count II, the trial court failed to impose the sentence at hard labor. See La. R.S. 14:27(D)(1)(a) and La. R.S. 14:30(C).

Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the proceedings without inspection of the evidence, La. C.Cr.P. art. 920(2) authorizes consideration of such an error on appeal. Further, La. C.Cr.P. art. 882(A) authorizes correction by the appellate court. We conclude that correction of this illegal sentence does not involve the exercise of sentencing discretion; and therefore, we see no reason why this court should not amend the sentence. Accordingly, since a sentence at hard labor was the only sentence, which could have been imposed for the conviction on count II, we hereby amend the sentence to provide that it be served at hard labor. See **State v. Bonin**, 2006-0974 (La. App. 1st Cir. 12/28/06), (unpublished opinion).

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE ON COUNT I AFFIRMED; CONVICTION ON COUNT II, AFFIRMED, SENTENCE ON COUNT II AMENDED, AND SENTENCE AS AMENDED ON COUNT II AFFIRMED.

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4 See footnote 2, supra.