NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 0262

STATE OF LOUISIANA

VERSUS

ANTOINE DEMOND SMITH

DATE OF JUDGMENT: SEP 1 4 2009

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 08-06-0653, SECTION 8, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILSON FIELDS, JUDGE

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

KUHN, J.

The defendant, Antoine Demond Smith, was charged by amended bill of information with one count of attempted second degree murder of Charles Tureaud (count I), a violation of La. R.S. 14:27 and 14:30.1, and one count of aggravated battery of Byron Dawson (count II), a violation of La. R.S. 14:34. He pled not guilty on both counts. Following a jury trial, he was found guilty as charged on count I, and, on count II, he was found guilty of the responsive offense of simple battery, a violation of La. R.S. 14:35. On count I, he was sentenced to twenty-five years at hard labor. On count II, he was sentenced to six months in the parish prison.[1] He moved for reconsideration of the sentence imposed on count I, but the motion was denied. He now appeals, designating the following assignments of error:

> 1) the trial court committed manifest error by accepting the jury's guilty verdict because a) the record failed to establish any physical evidence connecting the defendant to these crimes, and b) there is a strong probability that the State's other three eyewitnesses yielded to one eyewitness's testimony simply because that eyewitness had known the defendant longer than any of them and strongly believed that the defendant was the person who had shot at their car; and
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> 2) The twenty-five year sentence is excessive in light of the fact that the defendant was a youthful offender who did not have any physical evidence linking him to these crimes.

For the following reasons, we affirm the convictions and sentences on counts I and II.

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[1] The trial court ordered the sentences to be served concurrently.

FACTS

On May 27, 2006, Valmie Brown, Jr., his brother, Thomas Brown, his cousins, John Coates and Byron "Bill" Dawson, and his friend, Charles Tureaud, went to The Renaissance Center (Renaissance) on Plank Road. Tureaud was from the Glen Oaks area of Baton Rouge, while the other men were from the Banks area of Baton Rouge. Valmie saw the defendant at Renaissance, and the men greeted each other. The defendant was also from "Banks" and had known Valmie since they were children. Additionally, Thomas also had a friendly conversation with the defendant at Renaissance, and Coates saw defendant as he was leaving the club.

When Renaissance closed at approximately 1:30 a.m., the Brown brothers, Coates, Dawson, and Tureaud all left in Valmie's vehicle. Thereafter, while stuck in traffic, they happened to be next to a parked vehicle, belonging to the defendant's father, which the defendant had used to travel to Renaissance. According to Valmie's testimony, as the defendant approached the parked vehicle, he saw Tureaud, and referencing Tureaud, the defendant told Valmie to "let [Tureaud] out." Valmie refused, and the defendant stated, "[M]an let him out." Valmie again refused.

The defendant and some other men entered the defendant's father's car and then followed Valmie's vehicle onto the interstate; the defendant was a passenger in the vehicle. According to Valmie, during the ensuing high-speed chase, the defendant rolled down a rear-window of his father's car and began shooting at Valmie's vehicle. In response, Valmie used his vehicle to strike the defendant's father's vehicle in which the defendant was riding, but then Valmie lost control of

his own vehicle. Valmie's vehicle crashed at the Evangeline exit of Interstate 110, and the Brown brothers, Coates, Dawson, and Tureaud fled and called the police.

Valmie's vehicle had bullet holes in it. Three of the passengers were injured, and there was blood inside of the vehicle. Thomas dislocated his toe when he was thrown from the car; Dawson was shot behind his kneecap; and Tureaud was shot in the leg and the buttocks.

Valmie, Thomas, and Tureaud knew of the defendant prior to the shooting incident.[2] While the vehicles were travelling down the interstate, Tureaud, Coates, and the Brown brothers saw defendant roll down his window, lean out of the window with a gun, and shoot in the direction of Valmie's vehicle. Those four men positively identified the defendant in court as the shooter. Although Coates initially told police that the gunman's name was "Tommy," he later explained that he had misheard his friends identify the gunman's name as "Demond." Additionally, three days after the shooting, Coates had selected the defendant's photograph as that of the gunman. Dawson was the only passenger in Valmie's vehicle that was unable to identify the gunman because he had ducked during the gunfire.

The defendant's father's vehicle was recovered on Interstate 110, approximately 100 yards south of the Evangeline exit. A semiautomatic pistol and shell casings were lying on the interstate approximately two or three car lengths from the vehicle. Forensic analysis indicated that the gun had been used to fire a bullet later recovered from Tureaud's leg. The defendant fled from the police

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[2] Thomas testified that the defendant and Tureaud had "had some altercations in the past." Thomas indicated that Tureaud was from Glen Oaks, the defendant was from Banks, and there was "a little beef against the hoods."

when they attempted to arrest him in connection with the offense, but he was ultimately apprehended.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, the defendant argues that Valmie and Thomas identified him as the gunman only because of their familiarity with him, and the other witnesses identified him only because they acquiesced in Valmie's identification. He further argues that even if he was in the suspect vehicle, there was no evidence, other than Valmie's testimony, to suggest that he was the gunman.

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. **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, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

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.

All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals. La. R.S. 14:24. However, a defendant's mere presence at the scene is not enough to "concern" him in the crime. Only those persons who knowingly participate in the planning or execution of a crime may be said to be "concerned" in its commission, thus making them responsible as principals. A principal may be connected only to those crimes for which he has the requisite mental state. **State v. Neal**, 2000-0674, pp. 12-13 (La. 6/29/01), 796 So.2d 649, 659, cert. denied, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002).

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. R.S. 14:30.1(A)(1). 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).

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. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. Henderson**, 99-1945, p. 3 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

Battery is the intentional use of force or violence upon the person of another. La. R.S. 14:33. Simple battery is a battery committed without the consent of the victim. La. R.S. 14:35.

After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of attempted second degree murder and simple battery and the defendant's identity as the perpetrator of those offenses. The verdict rendered against the defendant indicates the jury accepted the testimony offered against the defendant, including the multiple identifications of him as the gunman, while rejecting the defendant's attempts to discredit those witnesses. This court cannot assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt.

The testimony of the victim alone is sufficient to prove the elements of the offense. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. **State v. Lofton**, 96-1429, p. 5 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Further, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 2006-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In assignment of error number 2, the defendant argues that the trial court erred in imposing a twenty-five year sentence against a youthful offender who had no history of committing similar offenses. He does not challenge the sentence imposed on count II.

The Louisiana Code of Criminal Procedure sets forth items which must be considered by the trial court before imposing sentence. La. Code Crim. P. art. 894.1. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Hurst**, 99-2868, p. 10 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is

subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **Hurst**, 99-2868 at pp. 10-11, 797 So.2d at 83.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. La. R.S. 14:30.1(B). Whoever attempts to commit a crime punishable by death or life imprisonment shall be imprisoned at hard labor for not less than ten nor more than fifty years without benefit of parole, probation, or suspension of sentence. La. R.S. 14:27(D)(1)(a). On count I, the defendant was sentenced to twenty-five years at hard labor.

In sentencing the defendant, the trial court indicated it had ordered and reviewed a pre-sentence investigation report (PSI) concerning the defendant. The court indicated that it would sentence the defendant to a lesser sentence than that recommended in the PSI.

In the PSI, Thomas Brown indicated that the injury to his toe ended his high school football career, as well as what he believed would be a promising college football career. The probation and parole officer preparing the PSI noted that although the defendant was only eighteen years old when he committed the instant

offenses, he already had an "extensive juvenile record with a full complement of crimes against the person." The officer noted that the defendant had multiple arrests as a juvenile for crimes involving the possession of weapons, as well as an adult arrest for armed robbery. The officer also noted that in connection with the instant offenses, the defendant shot two separate victims, one of them twice. The officer found the defendant to be "a clear threat to the public safety" and recommended that, on count I, he be sentenced to forty years at hard labor without benefit of probation, parole, or suspension of sentence.

A thorough review of the record reveals the trial court adequately considered the criteria of Article 894.1 and did not manifestly abuse its discretion in imposing the sentence on count I. See La. Code Crim. P. art. 894.1(A)(1), (A)(2), (A)(3), (B)(1), (B)(5), (B)(6), (B)(9), (B)(10), (B)(12), & (B)(18). Further, the sentence imposed on count I was not grossly disproportionate to the severity of the offense and thus, was not unconstitutionally excessive.

This assignment of error is without merit.

For these reasons, we affirm the defendant's convictions and sentences on both counts.

CONVICTIONS AND SENTENCES AFFIRMED.