

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1685

STATE OF LOUISIANA

VERSUS

DELMAR COX

Judgment rendered: March 28, 2007

**On Appeal from the 21st Judicial District Court
Parish of Tangipahoa, State of Louisiana
Suit Number 111667; Division B
The Honorable Bruce C. Bennett, Judge Presiding**

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State of Louisiana**

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**Counsel for Appellant
Delmar Cox**

BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

Hughes, J. concurs with reasons.

DOWNING, J.

The defendant, Delmar Cox, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. He pled not guilty. Following a jury trial, Cox was found guilty as charged. The defendant filed motions for new trial, post-verdict judgment of acquittal, and in arrest of judgment, all of which were denied. Cox waived any sentencing delay and was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. Cox now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

Cox, his long-time girlfriend, Tiffanie Booty, and their three children lived in a trailer in Kentwood, Tangipahoa Parish, near the house of Wallace Ballard. At one time, Booty and Booty's mother had lived with Ballard. On August 10, 2004, Cox went to Ballard's house and shot and killed Ballard with a twelve-gauge shotgun. He took Ballard's wallet.

Cox, Booty, and their children left in Ballard's car and drove to the Magnolia Inn Hotel in Hammond. They rented a room with money from Ballard's wallet. Shortly thereafter, Cox contacted his brother, who picked up him and his family at the hotel and brought them to Cox's pickup truck near Cox' house.¹

Cox and his family then drove to Rainey's Auto Sales in Kentwood where and Booty bought a used Dodge Caravan.² Cox removed from his truck the shotgun he used to kill Ballard and asked Rainey to hold it for him.³ Rainey agreed and put the shotgun in a closet in his office. The

¹ The defendant's truck had run out of gas. The defendant's brother brought the defendant to get gas for his truck. Ballard's car was found at O'Reilly's Auto Parts in Hammond.

² Booty used her identification card for the sale, and she signed the bill of sale and the motor vehicle registration. The defendant gave Sam Rainey a down payment of \$600.00 in cash.

³ According to the defendant, the defendant's nephew owned the shotgun.

defendant left his truck at Rainey's, and he and his family headed to Mississippi in the Dodge Caravan.

Following a brief stay in Mississippi, they went to Texas. Pursuant to a traffic stop in Laporte, Texas, Cox was arrested based on an arrest warrant for first-degree murder in Louisiana. Following questioning in Texas by two detectives from the Tangipahoa Parish Sheriff's Office, he was extradited to Louisiana.

Detective Randy Henigan, who was with the Tangipahoa Parish Sheriff's Office when Ballard was killed, testified at trial that he investigated the crime scene. Detective Henigan determined that a shotgun was fired from an open bathroom window in front of Ballard's house. The bathroom door opened up to Ballard's bedroom. It appeared that Ballard, who died on his bed, was either standing or sitting up on his bed when he was shot. The distance from the bathroom window to the foot of Ballard's bed was about twelve feet. Ballard's metal walker, which was near his bed, appeared to have been hit by the shotgun blast. Detective Henigan testified that when he shook the walker, he could hear some of the BBs inside of it. The front screened door and the window in the front door of the house were broken. The two phone lines had been unplugged from the phone junction box on the outside of the house. There was no weapon found in Ballard's house. On cross-examination, Detective Henigan testified that he was not a ballistics expert and that, while he could not state it as a fact, the evidence showed that the shots fired that killed Ballard came from outside the bathroom window.

The bathroom doorframe had a bullet hole. A slug was cut out of Ballard's bedroom wall. It appeared that a slug fired from the shotgun went through the bathroom doorframe and lodged into the north wall of Ballard's bedroom. The shotgun used to kill Ballard, later retrieved from Rainey's

Auto Sales, was a New England Firearms single shot twelve gauge. This type of shotgun requires the barrel to be “cracked” open to load and unload each shot.

Patrick Lane, a firearms identification expert with the Louisiana State Police Crime Lab, testified at trial that the crime scene evidence indicated that two shots were fired, the slug and a No. 6 lead shot shell, which was the source of the pellets found at the scene and in Ballard’s body. Lane could not determine if the slug found at the crime scene came from the shotgun that killed Ballard. Lane testified that while the slug was consistent with a twelve-gauge shotgun, “it is very, very rare to identify a slug back to a particular firearm.”

Dr. Michael Defatta, the Chief Deputy Coroner and forensic pathologist for the St. Tammany Parish Coroner’s Office, testified at trial that he autopsied Ballard, who was sixty-eight years old. Ballard sustained shotgun pellet patterns on his chest, arms, and face. There were also larger defects in the skin, which were consistent with some type of intermediate target in the pathway between Ballard and the shotgun. Regarding these defects in the skin, Dr. Defatta stated, “It was brought to my attention at the autopsy that there was a metal walker in the vicinity or next to Mr. Ballard in some way, shape or form. And certainly it was damaged. That would have explained a lot of the large defects on the body that I found.”

A shotgun pellet, which perforated the heart, was found within the heart cavity. Multiple pellets were removed from the lungs and the entire chest cavity. The pellets entered on the front part of the heart. Ballard had a blood-alcohol content level of .016. The manner of death was determined to be homicide, and the cause of death was a shotgun wound to the chest.

Detective Jerry McDowell, who was with the Tangipahoa Parish Sheriff's Office when Ballard was killed, testified at trial that about eleven days after the killing, he and Detective Robert Bell interviewed the defendant while he was in custody at the Laporte, Texas Police Department. The defendant's interview was videotaped, and the videotape and transcript of the defendant's statement were submitted into evidence. The videotape was played for the jury.

The transcript of the defendant's statement indicates that, after being **Mirandized**, Cox, although initially denying shooting Ballard, confessed to shooting him. The defendant stated that when he went to Ballard's house, Ballard and Booty were arguing. Ballard had a pistol, and he told Cox to leave or he would shoot him. Cox left, retrieved his nephew's shotgun from his truck and went back to the house. Ballard fired a shot at the defendant. The shot went through the glass window of the house. Cox fired one shot at Ballard. At this point of the interview, Cox stated he was standing in Ballard's bedroom door when he shot Ballard.

Later in the interview, Cox stated that he shot a warning shot at Ballard through his bathroom window. Ballard shot back, and Cox fired another shot at Ballard and killed him. Cox then took Ballard's wallet, which contained about \$1,200.00 or \$1,300.00. Still later in the interview, Cox stated that he shot Ballard because he was threatening his family. When asked if Booty saw what happened, Cox stated that Booty came to the house after she heard the first shot fired. When asked how they got inside, he stated that he broke the window out.

Cox testified at trial. He stated that his statement given to Detectives McDowell and Bell was not true because he was scared. He also stated that statements he had given to doctors regarding the incident were not true. He

explained that he lied because he was trying to save Booty. He testified that he did not shoot Ballard. When asked on direct examination about what happened on the day Ballard was killed, Cox offered the following explanation. Booty got \$70 in cash from Ballard to buy groceries for Ballard. Instead, Booty and the defendant used the money to buy dope. They smoked dope all day and got high. Their children were with them. Fearing that Ballard would be angry for not buying his groceries, they did not immediately go back to their trailer house, which was only about sixty yards away from Ballard's house. They hung out at the river and built a fire.

When it got dark, the mosquitoes got so bad that they decided to go home. Cox's truck was out of gas, so they had to walk home, which was about a quarter of a mile away. When they got to their trailer, they began arguing because Booty wanted more dope. Cox did not want to argue and went to bed. Cox heard Booty leave the trailer, and about an hour later he heard Booty screaming for him to help her. Cox grabbed his nephew's shotgun and some shells from the trailer, loaded the shotgun, and ran to Ballard's house. When he arrived, he saw Booty in the "bedroom" window trying to raise the window up. The window was raised slightly. Booty told Cox that Ballard was trying to kill her. Booty was in the bathroom and the bathroom door was closed. Unable to raise the window, Cox shoved the shotgun and the shells through the small opening made by the partially raised window. Booty took the shotgun and fired a shot. The shot made a hole in the doorframe, and the bathroom door came open. Ballard was standing in the bathroom doorway. Booty unloaded the shotgun, reloaded it, and shot Ballard. He then went to the front door and tried to enter, but the door was locked. Booty came to the front door with the shotgun in one hand and a wallet and some shells in the other hand. Booty could not open the

door, so she broke the glass windowpane in the door with the shotgun. Cox then reached through the window and unlocked the door. Booty gave Cox the shotgun and the shell casings and told him that he was just as much a part of this as she was. They went to their trailer and picked up their children. They went back to the river where the defendant's truck was. Cox put the shotgun in his truck. From there, they went to the Magnolia Inn Hotel in Hammond.

On cross-examination of the defendant, the following colloquy took place regarding whether there was a gun in Ballard's house:

Q.: There wasn't no gun in the house that night from Wallace Ballard?

A.: No, sir.

Q.: So when those police came back there the next day and said, "We didn't see no gun," they were right. They (sic) were none to be recovered?

A.: That's right.

ASSIGNMENT OF ERROR

In this assignment of error, Cox argues the evidence was insufficient to support the conviction of second-degree murder. He contends specifically, that the State failed to prove that it was he, instead of someone else, who shot and killed Ballard.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this Court must consider "whether, after 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, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

See also La. Code Crim. P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-1309 (La. 1988). The **Jackson v. Virginia** 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. **State v. Patorno**, 01-2585, p. 5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

La. R.S. 14:30.1 provides, in pertinent part:

A. Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm[.]

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. R.S. 14:10(1). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503, p. 13 (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 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, pp. 5-6 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932.

When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984). In the instant matter, the defendant's hypothesis of innocence was based on the theory that Booty shot Ballard. In finding the defendant guilty of second-degree murder, it is clear the jury resolved against the defendant the conflicts between the defendant's trial testimony and his taped statement, as well as the conflicts within the taped statement, itself.⁴ See **Captville**, 448 So.2d at 679.

Following the shooting of Ballard in Louisiana, Cox fled, in a newly bought vehicle, to Mississippi and then to Texas. During the early stages of the defendant's questioning by Detectives McDowell and Bell, Cox denied that he shot Ballard. He stated, "Now, who done killed the man. I don't really know. I really don't know who killed the man. I don't own a gun. My nephew had a shotgun. It was at the river with me." Later, the defendant stated, "I didn't killed (sic) this man." As the interrogation progressed, Cox admitted that he shot and killed Ballard.

A finding of purposeful misrepresentation reasonably raises the inference of a "guilty mind," as in the case of flight following an offense or the case of material misrepresentation of facts following an offense. Lying has been recognized as indicative of an awareness of wrongdoing.

⁴ For example, during his taped interview, Cox stated that Ballard had a gun, yet, at trial, he testified that there was no gun in Ballard's house. Also, at one point during his taped interview, he stated that Booty was at Ballard's house arguing with him before he went over there with the shotgun. Later during the interview, Cox stated that Booty went to Ballard's house *after* she heard the first gunshot.

Captville, 448 at 680 n.4. The facts in the instant matter established acts of both flight and material misrepresentation by the defendant.

In finding Cox guilty, it is clear the jury rejected some or all of his trial testimony, as well as some of his taped statement, and concluded that his version of the events preceding and following the fatal shot was a fabrication designed to deflect blame from him. 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, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence that 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. 1 Cir. 1985). The conclusion by the jurors that the defendant did not testify truthfully could reasonably support an inference that the “truth” - if told by him as the only witness to the killing who testified at trial - would have been unfavorable to his claim that it was Booty, and not he, who shot Ballard. See Captville, 448 So.2d at 680. Further, the testimony elicited at trial established that Ballard died as a result of a shotgun wound to the chest from about twelve feet away. The fact that Cox shot Ballard in the chest with a shotgun at a fairly close range indicates a specific intent to kill or inflict great bodily harm. See State v. Wallace, 612 So.2d 183, 190 (La. App. 1 Cir. 1992). As such, the hypothesis of innocence presented by the defendant falls.

After a thorough review of the record, we conclude that the evidence supports the jury’s verdict. 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 was guilty of second-degree murder.

The assignment of error is without merit.

DECREE

Accordingly, we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED

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HUGHES, J. concurs.

While defendant's story at trial is plausible and matches the physical evidence, unfortunately it was not his first story.