NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 2323

STATE OF LOUISIANA

VERSUS

LARRY D. HUNLEY

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 03-07-0076, Section 1
Honorable Anthony J. Marabella, Jr., Judge Presiding

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Judgment rendered May 7, 2010

PARRO, J.

The defendant, Larry D. Hunley, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1 (Count 1), and attempted second degree murder, a violation of LSA-R.S. 14:27 and 14:30.1 (Count 2). He pled not guilty and, following a jury trial, the defendant was found guilty of the responsive offenses of manslaughter, a violation of LSA-R.S. 14:31 (Count 1), and aggravated battery, a violation of LSA-R.S. 14:34 (Count 2). The defendant was sentenced to twenty years of imprisonment at hard labor for the manslaughter conviction (Count 1), and ten years of imprisonment at hard labor for the aggravated battery conviction (Count 2). The ten-year sentence was ordered to run concurrently with the twenty-year sentence. The defendant now appeals, designating one assignment of error. We affirm the convictions and sentences.

FACTS

On the evening of December 27, 2006, Ladorthy Demanuel was driving an R.T.A. bus en route from New Orleans to a stop across the street from the Baton Rouge Greyhound bus station and the CATS terminal on Florida Boulevard. During the bus ride, the defendant, a passenger, became upset about the windows being fogged up and the bus ventilation system not working properly. The defendant asked Ladorthy to adjust the air conditioning. As the windows remained fogged up, the defendant became more agitated. He moved up in the bus toward Ladorthy and sat behind her. He continually remarked aloud, to no one in particular, about tuberculosis and how he did not want to catch a disease. As the defendant became increasingly belligerent and hostile, passengers Andrew McDonald, Christopher Barton, and Christopher's cousin, Alan Davis, exchanged words with the defendant. When the bus arrived at the stop across the street from the Greyhound bus station, the defendant exited the bus, and moments later, Andrew, Christopher, and Alan exited the bus. Based on the testimony of several witnesses at trial, there are conflicting accounts of what transpired immediately following the departure of the four men from the bus. What is undisputed, however, is that the defendant armed himself with a knife, slashed Andrew across the face, and stabbed Alan in the chest, killing him.

Andrew testified at trial that the defendant became irate about the ventilation system on the bus. Unprovoked, the defendant began cursing. According to Andrew, the defendant said at one point, "I'll kill the m----- f-----." The bus had women and children on it, but the defendant was not directing his profanities to any one person in particular. After repeated threats by the defendant, Andrew told the defendant he was getting on his nerves because he was not respecting anyone on the bus. When the defendant moved to the front of the bus toward the bus driver, Andrew moved up with the defendant. Because of the defendant's erratic behavior, Andrew was concerned about the safety of the bus driver and the other passengers. When the defendant exited the bus, Andrew remained on the bus. However, the defendant then turned around and walked back toward the bus with his hand in his backpack. Andrew stepped off the bus and struck the defendant. The two men fell to the ground and began fighting. Andrew was on top of the defendant and struck him several times. While he was striking the defendant, Andrew thought that someone might have kicked the defendant. Then someone standing next to Andrew told him that he better get off of the defendant because the defendant had a knife. As Andrew began to stand up, the defendant sliced Andrew across the face with a knife.[1] Andrew backed up and fell. The defendant approached Andrew and told him that he ought to kill him but he would not. Alan was standing on a grassy sloped incline next to a sign. The defendant, who was still on the sidewalk, proceeded up the grassy slope toward Alan. Alan threw his hands up, and the defendant stabbed Alan in the chest. The defendant then ran away. The defendant was apprehended by the police two days later. Andrew stated at trial that he did not know Alan. He further stated that Alan was not involved in the fight with the defendant and had nothing to do with the fight. According to Andrew, he was the only person who fought with the defendant.

Christopher testified at trial that the defendant became belligerent about the foggy windows and began arguing with Andrew. At one point during his raving, the defendant said, "A n----- ain't going to f--- with me on this bus. A n----- f--- with me

[1] When Andrew got home, he realized he had also been stabbed twice in the back.

I'm going to kill them." Christopher and Alan told the defendant to shut up. The defendant continued to blurt out threats. When the defendant exited the bus, Andrew moved to the door of the bus. The defendant turned back toward the bus, Andrew exited the bus, and they began fighting. When Christopher and Alan exited the bus, Andrew and the defendant were on the ground. Christopher and Alan remained several feet away from the fight. Christopher heard someone yell that the defendant had a knife. Christopher tried to get the knife, but the defendant swung the knife at Christopher's hand, which quelled his effort to assist. Andrew and the defendant then stood up. Christopher noticed that Andrew had been cut on his face. The defendant then charged toward Alan. Alan told Christopher to get the defendant. Christopher ran toward the defendant, but was unable to reach him before the defendant stabbed Alan. The defendant then ran.

Charles Seal, a bus passenger, testified at trial for the defense. According to Charles, he observed the fighting outside the bus through a window from inside the bus. Charles did not know any of the men involved in the altercations on the bus. At the stop, Andrew, the defendant, Christopher, Alan, and a woman exited the bus.[2] According to Charles, the defendant exited the bus first. It is not clear from Charles's testimony who exited the bus behind the defendant, but Charles stated that Alan started the fight by striking the defendant. Alan and the defendant began fighting, and then the defendant stabbed Alan in the chest. Following this, "everybody started fighting." He did not see anyone else get stabbed or see Andrew get his face slashed. According to Charles, Andrew and Christopher ran down the defendant and beat him up. Another man, who Charles identified as Andrew's brother, got off the bus about one-half block away and ran toward the fight. Charles testified that he had been convicted for attempted possession of MDMA and for attempted criminal entry into an inhabited dwelling. When Charles was asked on cross-examination "who set this whole thing in motion," Charles replied it was the defendant.

[2] Alan's fiancée was with him on the bus, so the woman to whom Charles referred was likely her.

The defendant testified at trial that when he exited the bus, three people exited behind him. Andrew charged the defendant. The defendant backed up until they overpowered him. The defendant did not remember stabbing Alan or cutting Andrew. After he was attacked, the defendant walked off. The defendant did not think he did anything to provoke the attack. On cross-examination, the defendant stated that he was not angry on the bus. He asked the bus driver to turn on the ventilation. He did not threaten anyone or curse. When people commented about his wanting the ventilation on, he told them to "mind your business." The defendant testified that the knife used to kill Alan was not his. Rather, while the defendant was getting struck in the head, someone dropped the knife, and the defendant picked it up. The defendant further testified that Andrew was the first person on top of him and who overpowered him. However, Andrew made "contact" with the defendant, but did not punch him. The defendant stated he had convictions for the following crimes: aggravated rape (three convictions), second degree burglary (two convictions), robbery with a deadly weapon, and first degree robbery.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the evidence was insufficient to support the conviction for manslaughter. Specifically, the defendant contends the state failed to prove that he did not kill Alan in self-defense. The defendant does not address the aggravated battery conviction in the argument portion of the assignment of error. The defendant, for the first time, in the conclusion of his brief mentions the aggravated battery conviction when he states, "The evidence is insufficient to support the convictions of manslaughter and aggravated battery." The defendant does not address the sufficiency of the aggravated battery conviction in his argument and, as such, the issue is considered abandoned. See Uniform Rules - Courts of Appeal, Rule 2-12.4.

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

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 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 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.

While the defendant was charged with the second degree murder of Alan Davis, he was found guilty of manslaughter. Guilty of manslaughter is a proper responsive verdict for a charge of second degree murder. LSA-C.Cr.P. art. 814(A)(3). Louisiana Revised Statute 14:31(A)(1) defines manslaughter as a homicide which would be either first degree murder or second degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the fact finder finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed. LSA-R.S. 14:31(A)(1). The existence of "sudden passion" and "heat of blood" are not elements of the offense but, rather, are factors in the nature of mitigating circumstances that may reduce the grade of homicide. **State v. Maddox**, 522 So.2d 579, 582 (La. App. 1st Cir. 1988). Manslaughter requires the presence of specific intent to kill or inflict great bodily harm. See **State v. Hilburn**, 512 So.2d 497, 504 (La. App. 1st Cir.), writ denied, 515 So.2d 444 (La. 1987).

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. LSA-R.S. 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. The existence of

specific intent is an ultimate legal conclusion to be resolved by the trier of fact. **State v. Landry**, 08-1553 (La. App. 1st Cir. 5/8/09), 15 So.3d 138, 149.

Louisiana Revised Statute 14:20(A) provides, in pertinent part:

> A homicide is justifiable:
>
> (1) When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.

LSA-R.S. 14:21 provides:

> A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.

The defendant contends that the trial testimony of Charles, which suggested that Alan started the fight, is consistent with the statement Charles gave to the police. On the other hand, according to the defendant, parts of the trial testimony of Andrew and Christopher were not consistent with their taped statements they gave to the police.

Specific intent need not be proven as a fact but may be inferred from the circumstances of the transaction and the actions of the defendant. In the instant matter, the victim's death was proved. The fact that the defendant inflicted a stab wound to Alan's chest indicates the defendant clearly had the specific intent to kill or to inflict great bodily harm upon the victim. Therefore, the only remaining issue in a review of the sufficiency of the evidence is whether or not the defendant acted in self-defense. See **State v. Spears**, 504 So.2d 974, 977-78 (La. App. 1st Cir.), writ denied, 507 So.2d 225 (La. 1987).

When self-defense is raised as an issue by the defendant, the state has the burden of proving, beyond a reasonable doubt, that the homicide was not perpetrated in self-defense. Thus, the issue in this case is whether a rational fact finder, viewing the evidence in the light most favorable to the prosecution, could have found beyond a reasonable doubt that the defendant did not kill the victim in self-defense. The guilty verdict of manslaughter indicates that the jury accepted the testimony of the prosecution witnesses insofar as such testimony established that the defendant did not kill Alan in self-defense. See **Spears**, 504 So.2d at 977-78.

Andrew and Christopher both testified that Alan was not involved in the fight the defendant was engaged in outside of the bus. According to their testimony, the only physical contact was between the defendant and Andrew, who admitted at trial that he started the fight with the defendant by throwing the first punch. Their testimony suggested that Alan was observing the fight as a passive onlooker when he was stabbed by the defendant. Charles's testimony, on the other hand, suggested that Alan started the fight by throwing the first punch. The defendant's testimony suggested that "they" overpowered him, although Andrew was the first person on top of him. The defendant offered no explanation of how he came to stab Alan because the defendant claimed he did not remember stabbing anyone. The jurors could have concluded that the version of the events as told by Andrew and Christopher was more believable than the version of events as told by Charles and the defendant. Given the conflicting testimony adduced at trial, it would seem that all of the witnesses could not have been completely truthful or were mistaken about what actually occurred. The decision of the jury obviously came down to the issue of credibility. Thus, any alleged inconsistencies between the trial testimony of Andrew and Christopher and the trial testimony of Charles and the defendant were considered by the jury in its determination of who was more credible.

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. 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).

In finding the defendant guilty of manslaughter, it is clear the jury rejected the claim of self-defense and found the defendant's killing of Alan neither reasonable nor necessary. Given the testimony of Andrew and Christopher, a rational trier of fact could have reasonably concluded that the killing of Alan was not necessary to save the defendant from the danger envisioned by LSA-R.S. 14:20(A)(1) and/or that the defendant had abandoned the role of defender and taken on the role of an aggressor and, as such, was not entitled to claim self-defense. See LSA-R.S. 14:21; **State v. Bates**, 95-1513 (La. App. 1st Cir. 11/8/96), 683 So.2d 1370, 1377. Further, it would seem that even accepting as true the testimony of Charles, a rational trier of fact could have reasonably concluded that the defendant's stabbing of Alan to death after only being punched was not necessary to save the defendant from the danger envisioned by LSA-R.S. 14:20(A)(1).

Moreover, the defendant's actions of running away from the scene after stabbing Alan and failing to report the stabbing are inconsistent with a theory of self-defense. See **State v. Emanuel-Dunn**, 03-0550 (La. App. 1st Cir. 11/7/03), 868 So.2d 75, 80, writ denied, 04-0339 (La. 6/25/04), 876 So.2d 829; **State v. Wallace**, 612 So.2d 183, 191 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1253 (La. 1993). Flight following an offense reasonably raises the inference of a "guilty mind." **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984). Accordingly, the jury's rejection of the defense of justifiable homicide is supported by these circumstances.

After a thorough review of the record, we find that the evidence supports the jury's unanimous verdict of manslaughter. 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 every reasonable hypothesis of innocence, that the defendant did not kill his victim in self-defense and, as such, was guilty of manslaughter.

The assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.