NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 1306

STATE OF LOUISIANA

VERSUS

ZACHARY PUSCH

Judgment Rendered: APR 01 2013

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On Appeal from the
23rd Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Trial Court No. 28,483

The Honorable Ralph Tureau, Judge Presiding

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BEFORE: PARRO, WELCH, AND KLINE[1], JJ.

[1] Judge William F. Kline, Jr., retired, serving Pro Tempore by special appointment of the Louisiana Supreme Court.

KLINE, J.

The defendant, Zachary Pusch, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. He pled not guilty and, following a jury trial, was found guilty as charged. He filed a *pro se* motion for new trial, which was denied. He was then sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, challenging the sufficiency of the evidence in support of his conviction and the district court's denial of his motion for new trial. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

On May 3, 2011, the defendant and victim were patrons at the Suthern Kumfort lounge in Ascension Parish. The defendant was escorted out of the lounge after engaging in an argument with his ex-girlfriend who was employed there. After being escorted out, the defendant re-entered the building. Upon exiting the building for the second time, the defendant bumped into many of the lounge patrons, including the victim.[2] The victim followed the defendant out of the lounge and asked, "Why did you push me, ['N' word]?" Then the defendant and victim swung at each other. The victim missed the defendant, but the defendant hit the victim in his nose, and he fell to the ground, face down. A bystander pulled the victim to the side while the defendant began pacing around the parking lot area of the lounge. The victim was lying face down and was unconscious when the defendant ran toward him and jumped on him. The defendant stomped once on the back of the victim's neck and twice on the back of his skull. The lounge's bouncer, who was attending to the victim, told the defendant that he had probably just killed the victim. The defendant responded, "Good, I hope [he] dies." The defendant attempted to come toward the victim a

[2] Although the defendant's brief states that the victim was a bouncer at the lounge, the record does not support that assertion.

third time before the police arrived on the scene, but was stopped by another lounge patron.

The defendant was taken into custody, and he gave a taped statement. He stated that he had been doing work on the computers and camera systems at the lounge for the owner earlier that day and was being paid with alcohol. He and his ex-girlfriend began arguing, and the lounge owner told him that he needed to leave. He exited with the lounge owner who was going to drive him home, but he got into an argument with the owner, so the owner went back into the lounge. According to the defendant, the victim charged out of the lounge and accused the defendant of pushing the victim's "homeboy," a bouncer at the lounge. The victim was charging him, so he punched the victim in his face. The victim landed on the ground, on his stomach, and the defendant fell on top of him and punched him two more times in the back of his head. Although the victim was still lying on his stomach at this point, the defendant stated that it appeared he was about to get back up, so the defendant ran and jumped on the victim. He stated that he attempted to land on the victim's back, but landed on his head. The defendant stated that he had many alcoholic drinks that day.[3] The officer taping the defendant's statement testified that at the time of his statement, a slight odor of alcohol emanated from the defendant, but his speech was not sluggish, and he did not stutter or stagger.

The sequence of events leading to the victim's death was not recorded on the lounge's video recording system. According to the detective, who was called to recover surveillance video from that night, the lounge's computer system was stopped by the defendant a little after noon that day, and no events after that time were recorded.

Dr. Bruce Wainer, the Chief Forensic Pathologist and Deputy Coroner for East Baton Rouge Parish, testified that the cause of the victim's death was blunt-

[3] Reports indicated that the defendant's blood-alcohol content was 0.04 percent.

force trauma to the head. The victim had multiple abrasions on the surface of his face, multiple fractures of facial bones, and fractures at the base of his skull. The victim also suffered from hemorrhages inside of the skull and multiple contusions of the brain.

DISCUSSION

In combined assignments of error, the defendant argues that the district court erred in denying his motion for new trial because the evidence was insufficient to support his second degree murder conviction. The defendant does not contest killing the victim, but argues that he should only have been convicted of manslaughter. According to the defendant, he had just gotten into an argument with his ex-girlfriend and his emotions were heightened. The defendant also contends that he was deprived of his self-control and cool reflection and was provoked by the victim.

Sufficiency of the Evidence

As indicated, the defendant confessed that he killed the victim. The remaining issue is whether the jury should have convicted him of manslaughter as opposed to second degree murder. The constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. See La. Code Crim. P. art. 821. 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," every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. **State v. Wright**, 98-0601 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs

denied, 99-0802 (La. 10/29/99), 748 So. 2d 1157, 00-0895 (La. 11/17/00), 773 So. 2d 732.

The crime of second degree murder, in pertinent part, "is the killing of a human being: [w]hen the offender has a specific intent to kill or to inflict great bodily harm[.]" La. R.S. 14:30.1(A)(1). 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 (La. App. 1 Cir. 5/10/96), 673 So. 2d 663, 665, writ denied, 96-1411 (La. 12/6/96), 684 So. 2d 923.

Manslaughter is a homicide, which would be a first 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 jury 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[.]" La. R.S. 14:31(A)(1). "Sudden passion" and "heat of blood" are not elements of the offense of manslaughter; rather, they are mitigatory factors in the nature of a defense which exhibit a degree of culpability less than that present when the homicide is committed without them. Because they are mitigatory factors, a defendant who establishes by a preponderance of the evidence that he acted in "sudden passion" or "heat of blood" is entitled to a verdict of

manslaughter. **State v. Rodriguez**, 01-2182 (La. App. 1 Cir. 6/21/02), 822 So. 2d 121, 134, writ denied, 02-2049 (La. 2/14/03), 836 So. 2d 131.

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. Thus, an appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1 Cir. 9/25/98), 721 So. 2d 929, 932.

Viewing the evidence in the light most favorable to the prosecution, we find that it supports the jury's verdict. The guilty verdict indicates that the jury concluded this was a case of second degree murder and rejected the possibility of a manslaughter verdict. The helpless victim was lying face down on the ground, apparently unconscious. The fight was clearly over when the defendant, who was pacing back and forth in the parking lot, suddenly ran toward the victim and jumped on his neck and head several times. The jury obviously concluded that the circumstances surrounding the altercation did not equate to sufficient provocation to deprive an average person of self-control and cool reflection; thus, mitigating factors, which would reduce the degree of homicide from murder to manslaughter, were not established by a preponderance of the evidence in this case. We find no error in this conclusion. Furthermore, an appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the trier of fact. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

Motion for New Trial

The defendant also contends that the district court erred in denying his motion for new trial, which was based upon La. Code Crim. P. art. 851(1).[4] La. Code Crim. P. art. 851(1) provides that the court, on motion of the defendant, shall grant a new trial whenever "[t]he verdict is contrary to the law and the evidence[.]" Under Article 851(1), the district court, in ruling on a motion for new trial, can only consider the weight of the evidence, not its sufficiency, and must conduct a factual review of the evidence as a thirteenth juror. See **State v. Steward**, 95-1693 (La. App. 1 Cir. 9/27/96), 681 So. 2d 1007, 1014; see also **State v. Morris**, 96-1008 (La. App. 1 Cir. 3/27/97), 691 So. 2d 792, 799, writ denied, 97-1077 (La. 10/13/97), 703 So. 2d 609. An appellate court, on the other hand, is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely with the trier of fact. **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So. 2d 78, 83. Appellate courts may review the grant or denial of a motion for new trial only for errors of law. See La. Code Crim. P. art. 858.

The defendant has made no showing that an error of law was committed in this case. Accordingly, the denial of the defendant's motion for new trial based upon La. Code Crim. P. art. 851(1) is not subject to review on appeal. See **State v. Guillory**, 10-1231 (La. 10/8/10), 45 So. 3d 612, 614-15 (per curiam). Moreover, the constitutional issue of sufficiency of the evidence in this case was discussed in the previous assignment of error and found to be without merit. This assignment of error also lacks merit.

CONVICTION AND SENTENCE AFFIRMED.

[4] In his *pro se* motion for new trial, the defendant also cited Article 851(4). However, on appeal, he only challenges the district court's ruling as it relates to Article 851(1).