NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1566

STATE OF LOUISIANA

VERSUS

EARNEST GERALD BERAUD

DATE OF JUDGMENT: APR 26 2013

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 26629, DIV. G., PARISH OF LIVINGSTON
STATE OF LOUISIANA

HONORABLE ERNEST G. DRAKE, JR., JUDGE

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Disposition: CONVICTION AND SENTENCED AFFIRMED.

KUHN, J.

Defendant, Earnest Gerald Beraud, was charged by grand jury indictment with manslaughter, a violation of La. R.S. 14:31. He pled not guilty and, following a jury trial, was found guilty of the responsive offense of negligent homicide, a violation of La. R.S. 14:32. He was sentenced to five years at hard labor. Defendant now appeals, urging that the evidence was insufficient to support his conviction. We affirm defendant's conviction and sentence.

FACTS

On March 23, 2011, around 11:30 p.m., Detective Robert Audoin with the Livingston Parish Sheriff's Office responded to an investigation involving a shooting on Ernest Stilley Road in Livingston Parish. Upon arrival, the detective saw a man lying in a pool of blood beside a Ford Explorer parked in front of defendant's home. The detective spoke with defendant inside of his home. Defendant stated that he was in bed when he heard a horn honking around 11:00 p.m. Defendant, who is confined to a wheelchair, got out of his bed and into his wheelchair and went out onto his front porch. He saw the victim, went down the ramp that extended from his front porch, and told him to leave. He then went back up the ramp to get his shotgun and returned to his front porch with the gun. The victim got back in his vehicle and proceeded to back the vehicle up. Defendant hollered at the victim to stay out of his garden, but defendant backed into it. Defendant then fired a shot that hit the front of the victim's vehicle. The victim got out of his vehicle and stated, "I'm going to get your [expletive] a**." Defendant saw something shiny in the victim's hand that he thought was a gun, so

he shot at the victim who fell down and did not move.[1] Defendant called his cousin who lived next door and then called 911. Defendant was then transferred to the detectives' office where he gave a taped statement and was subsequently placed under arrest.

An autopsy report indicated that the cause of the victim's death was multiple perforating internal injuries secondary to a shotgun wound.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, defendant contends that there was insufficient evidence to support the negligent homicide conviction. Defendant does not contest having killed the victim, but asserts that his actions were justified because he acted in self-defense. According to defendant, he believed that the shiny object in the victim's hand was a gun and, because he was confined to a wheelchair and unable to run away or engage the victim physically, he took the only course of action he saw available to avoid being attacked.

The constitutional standard for testing the sufficiency of the evidence, as enunciated in ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 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. La. C.Cr.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, in order to convict," every reasonable hypothesis of innocence is excluded. La. R.S. 15:438; ***State v. Wright***, 98-0601

[1] The victim was wearing a silver watch and a black cell phone was found near his body.

(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.

Defendant was found guilty of negligent homicide, which is defined as "[t]he killing of a human being by criminal negligence." La. R.S. 14:32A(1). Criminal negligence exists when, although neither specific nor criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances. La. R.S. 14:12.

When the defendant in a homicide prosecution claims self-defense, the State must prove beyond a reasonable doubt that the homicide was not committed in self-defense. ***State v. Williams***, 2001-0944 (La. App. 1st Cir. 12/28/01), 804 So.2d 932, 939, writ denied, 2002-0399 (La. 2/14/03), 836 So.2d 135. According to La. R.S. 14:20A(1), a homicide is justifiable "[w]hen 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." However, "[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." La. R.S. 14:21. On appeal, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that the defendant did not act in self-defense. ***State v. Williams***, 804 So.2d at 939.

A recording of defendant's statement taken at the detectives' office was played during trial. Defendant told the detectives that were interviewing him that

he had known the victim his whole life and had been telling him for months not to come to his residence. But defendant also stated that he and the victim had not been having problems and had no history of fighting. Defendant did not know why the victim came to his residence on the night of the shooting, and the last time the victim had been at his house was approximately one year prior. He stated that when he went down his wheelchair ramp and told the victim to leave, the victim said, "No, I want your a**. I'm going to kill you." He said that he could tell the victim was "messed up," so he went back into his house to get his shotgun before returning to his front porch.[2] The victim then got back in his vehicle and proceeded to leave, but backed into the defendant's garden, which was at the foot of the wheelchair ramp. The defendant shot the front of the victim's vehicle, and the victim got out of the vehicle with something shiny in his hand, moved toward the victim, and said, "I want your [expletive] a**. I'm going to kill you." The victim made about two steps toward defendant. While he was right outside of the vehicle, defendant shot him. According to defendant, both shots were fired from the porch, and defendant and victim were the only two present at the time of the shooting.

Detective Ben Ballard with the Livingston Parish Sheriff's Department testified at trial. He identified a photograph that he took of a cellular phone at the scene of the shooting. According to Detective Ballard, the phone, which was

[2] Testimony presented at trial established that the victim was positive for cannabinoids and had a blood-alcohol content of .291 grams percent.

found near the body of the victim, had "9-1-1" displayed on the screen. He testified that no deputies or detectives typed "9-1-1" into the phone after recovering it from the scene. The detective stated that whoever touched the phone last dialed "9-1-1," but did not hit "send."

Detective Ballard also testified that two spent shotgun shells were recovered from the scene. One was found inside defendant's residence and the other was found off the side of the wheelchair ramp. According to the detective, the location of the shells indicated that, contrary to defendant's statement that both shots were fired from his porch, one shot was fired while he was on the ramp. The victim's body was approximately sixty-one and one-half feet from the location on the ramp where that shot was fired. The distance from the doorway of defendant's residence to the center of the victim's body was seventy-one and one-half feet.

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. 1st Cir. 9/25/98), 721 So.2d 929, 932. 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 jury. ***State v. Calloway***, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

The jury obviously rejected defendant's theory that he acted in self-defense in shooting the victim. 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 (La. 11/29/06), 946 So.2d 654, 662. The victim was in his vehicle leaving defendant's house when defendant retrieved his gun. The victim only stopped and got out of his vehicle after defendant shot at it. It is uncontested that the victim was not physically attacking defendant before he fired his weapon and was approximately sixty to seventy feet away from defendant. Also, there was no evidence that the victim was actually armed during the verbal altercation. Considering the evidence presented in the light most favorable to the prosecution, we conclude that a rational juror could have found that the State established beyond a reasonable doubt that defendant did not act in self-defense. The sole assignment of error lacks merit.

DECREE

For these reasons, we affirm the conviction and sentence of defendant-appellant, Earnest Gerald Beraud.

CONVICTION AND SENTENCE AFFIRMED.