NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 0452

STATE OF LOUISIANA

VERSUS

DISHAY DEMONE ELZEY

Judgment Rendered: SEP 19 2014

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
No. 506841

Honorable Richard A. Swartz, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

McCLENDON, J.

Defendant, Dishay Demone Elzey, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. He pled not guilty. Following a jury trial, defendant was found guilty of the responsive offense of manslaughter, a violation of LSA-R.S. 14:31. The trial court denied defendant's motions for new trial and post-verdict judgment of acquittal and sentenced him to thirty years at hard labor. The trial court also denied defendant's motion to reconsider sentence. Defendant now appeals, alleging one assignment of error related to the sufficiency of the evidence presented at his trial. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

Late in the evening on December 31, 2010, St. Tammany Parish Sheriff's Office (STPSO) Deputy Shane Bennett was dispatched to Chahta Trailer Park in Mandeville. Julie Martin, a resident of the trailer park, had initially called 911 to report a fight between her live-in boyfriend, Kevin "Pee Wee" Robertson (the victim), and her former boyfriend, defendant. As he was en route to Martin's residence, Deputy Bennett received information that the incident had escalated from a fight to a stabbing.

Upon arriving at the scene, Deputy Bennett observed defendant in the doorway of Martin's trailer. He was holding a knife in one of his hands. Deputy Bennett announced his presence and ordered defendant to drop the knife. Defendant complied, dropping the knife on Martin's back porch, and Deputy Bennett subsequently secured him in handcuffs.

As Deputy Bennett secured defendant, STPSO Deputies Matthew Bauer and Brandon Brenner arrived at the scene. Deputy Bauer remained with defendant and secured the porch area while Deputies Bennett and Brenner entered the residence and attempted to render aid to Robertson, who was bleeding profusely. Robertson later died at the hospital. An autopsy revealed that Robertson had suffered four stab wounds, two of which were potentially

lethal – one that pierced one of his coronary arteries and his left ventricle and another that punctured the top portion of his left lung.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant argues that the evidence presented at his trial was insufficient to support his conviction of manslaughter. Specifically, defendant alleges that the state failed to prove beyond a reasonable doubt that he did not act in self-defense when he stabbed the victim.

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. 821B; **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 821B, 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 the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 01-2585 (La.App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

While defendant was charged with second degree murder, he was found guilty of manslaughter, which is a proper responsive verdict for a charge of second degree murder. LSA-C.Cr.P. art. 814A(3). Louisiana Revised Statutes 14:31A(1) defines manslaughter, in pertinent part, as follows:

> A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (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[.]

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. 1 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. 1 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. La. 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. 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. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982). Specific intent to kill can be implied by the use of a deadly weapon such as a knife or a gun. **State v. Maten**, 04-1718 (La.App. 1 Cir. 3/24/05), 899 So.2d 711, 716, writ denied, 05-1570 (La. 1/27/06), 922 So.2d 544.

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. **State v. Ducre**, 596 So.2d 1372, 1382 (La.App. 1 Cir.), writ denied, 600 So.2d 637 (La. 1992). 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 defendant did not kill the victim in self-defense. **Ducre**, 596 So.2d at 1382-83.

Louisiana Revised Statutes 14:20 provides, in pertinent part:

> A. 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.

Louisiana Revised Statutes 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.

Defendant argues in his brief that he stabbed Robertson in self-defense. Specifically, he maintains that he inflicted the stab wounds only after Robertson approached him as he sat in Martin's kitchen and began to punch and choke him.

At trial, the jury heard two explanations for how defendant came to stab Robertson on the night of the incident. Julie Martin testified on behalf of the State. According to Martin's testimony, defendant called her sometime during the day on December 31, 2010, to ask if he could come by her home to wash his clothes and bathe. Martin testified that she and defendant had been romantically involved in 2007 and 2008, but that from 2009 onward, she lived and was involved romantically with Robertson.

Martin, defendant, and several of Martin's family members congregated at Martin's home while defendant's clothes were being washed. Martin testified that defendant drank several beers throughout this time. Around 7:15 p.m., Robertson arrived home from his job at a nearby hospital. Robertson went to bathe, and then he joined the others in Martin's kitchen, where defendant gave him a beer.

According to Martin, after they conversed civilly for awhile, Robertson and defendant began to argue about who loved and cared for Martin the most. The argument apparently became heated, and everyone left Martin's home except for Martin and defendant. Martin stated that she took defendant to her living room couch, where she told him to sleep off his intoxication before he left. Martin said that sometime later, Robertson returned home and began to have a conversation with her while defendant was still on the couch. According to Martin, defendant rose from the couch, yelling at Robertson and threatening him. Defendant then threw a punch at Robertson, and the men began to fight. During the fight, Martin called 911 and attempted to step between the men. Martin testified that Robertson attempted to retreat from the altercation by removing himself to the bedroom. On the way to the bedroom, however, Robertson realized that he had

been stabbed, and he fell to the ground. Martin maintained that defendant was the aggressor throughout the incident.

Defendant testified on his own behalf at trial. In contrast to Martin's description of their relationship as being totally in the past, defendant testified that he and Martin habitually saw each other on the weekend. He stated that it was actually Martin who invited him to come to her home, and that he did not ask to stop by to wash his clothes and bathe. In describing the incident, defendant stated that Robertson simply walked up to him and started punching him in the face as he sat at Martin's kitchen table. Defendant alleged that, from there, Robertson grabbed him by the neck and began to choke him. Defendant testified that, in an attempt to save his life, he began to grab at whatever he could find on Martin's table. When he found something, he began to hit Robertson with it. Defendant said he saw Robertson fall to the ground, and he ran outside in an attempt to get away. At that point, he heard Deputy Bennett tell him to drop the knife, and it was only at that point he realized he had grabbed a knife during the struggle. Defendant stated that all of the injuries he suffered – black eyes, a busted lip, and three missing teeth – were all the result of Robertson's aggression.

The guilty verdict of manslaughter indicates that the jury accepted the testimony of Martin to the extent that such testimony established that defendant did not kill Robertson in self-defense. See **State v. Spears**, 504 So.2d 974, 977-78 (La.App. 1 Cir.), writ denied, 507 So.2d 225 (La. 1987). 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. 1 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. 1 Cir. 1985).

The jury may have determined the aggressor doctrine applied, since one version of the events indicates that defendant escalated the conflict by striking Robertson first and by arming himself with a knife. See **State v. Loston**, 03-0977 (La.App. 1 Cir. 2/23/04), 874 So.2d 197, 205, writ denied, 04-0792 (La. 9/24/04), 882 So.2d 1167. 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 which raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984). The jurors clearly did not believe defendant's hypothesis of innocence that he acted purely in self-defense.

In finding the defendant guilty of manslaughter, it is clear the jury did not believe the defendant's testimony regarding self-defense, but found the mitigating circumstances of sudden passion and/or heat of blood. See **Maddox**, 522 So.2d at 582. The possibility of a compromise verdict notwithstanding, the guilty verdict of manslaughter suggests the jury concluded either that the confrontation was sufficient provocation to deprive an average person of his self-control and cool reflection, or that an average person's blood would not have cooled before defendant stabbed Robertson.

After a thorough review of the record, we find that the evidence supports the jury's verdict. We are convinced that viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that defendant did not kill Robertson in self-defense and, as such, was guilty of manslaughter. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 422 (per curiam).

This assignment of error is without merit.

DECREE

For the foregoing reasons, we affirm defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.