NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0418

STATE OF LOUISIANA

VERSUS

ROBERT PETERSON

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 06-01-0405, Section VII
Honorable Todd W. Hernandez, Judge Presiding

Doug Moreau
District Attorney
Jeanne Rougeau
Assistant District Attorney
Baton Rouge, LA

Attorneys for
State of Louisiana

Kevin P. Monahan
Baton Rouge, LA

Attorney for
Defendant-Appellant
Robert Peterson

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered December 28, 2006

PARRO, J.

The defendant, Robert Peterson, was charged by bill of indictment with second degree murder, a violation of LSA-R.S. 14:30.1. He pled not guilty. Following a jury trial, the defendant was found guilty of the responsive offense of manslaughter, a violation of LSA-R.S. 14:31. He was sentenced to thirty years of imprisonment at hard labor. The defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

The testimony of several witnesses at trial established the following facts. During the early morning of February 17, 2001, Brandon Cheney, his friend, Marc Williams, and Marc's cousin, Fatima Celestine,[1] found Gary Butler dead in his (Butler's) apartment from multiple stab wounds. Brandon, Butler's son, called the police.

Bloody fingerprints and bloody palm prints were found throughout Butler's apartment, including on a table top, the bathroom door frame, the bedroom door, and the kitchen floor. Several prints were lifted and submitted to the State Police Crime Lab for analysis.

Through his investigation as lead investigator of the case, Detective Lonnie Lockett of the Baton Rouge Police Department developed the defendant as a suspect in the murder of Butler. Subsequently, the police went to the defendant's house and asked him to come to the police station. The defendant complied, and at the police station he was fingerprinted and palm printed. After he was printed, he was advised of his **Miranda** rights. At no time was the defendant placed under arrest. When the defendant was asked by the police about his contact with Butler, the defendant informed them that he did not know Butler. When the police informed the defendant

[1] In another part of the record, she is referred to as "Fatema Selestine."

that they had knowledge that he was seen with Butler,[2] the defendant altered his story. According to the testimony of Detective Lockett, the defendant told him that he drove Butler to Butler's mother's house to get her television. Upon returning to Butler's apartment, the defendant remained in his vehicle while Butler went into his apartment. The defendant did not go into the apartment with Butler because it was too late and he had to go home. The defendant told the police that he had never been inside of Butler's apartment. The police asked the defendant if he would take a voice stress analysis test. The defendant declined, and the police brought him back home.

Shannon McDaniel testified at trial that she knew the defendant and that she had met Butler once. According to her testimony, on February 14, 2001, she saw Butler and the defendant walking out of a Winn Dixie grocery store together. Two days later on February 16, at about 10:30 p.m., Butler came to her apartment to briefly speak with Justin, her roommate. On February 19, a few days after Butler was killed, the defendant came to McDaniel's apartment. The defendant told McDaniel that Butler was a crack head and that she should not have answered her door and talked to him. The defendant then told her that Butler would never be bothering her again. He told her that he and Butler had gotten into an argument and that Butler pulled a knife on him and stabbed the defendant in the leg. Butler then took the defendant's money and left in the defendant's car.[3] The defendant did not tell McDaniel that Butler was dead.

Janice Reeves, a latent fingerprint analyst with the State Police Crime Lab, testified at trial. She was accepted as an expert in fingerprint and palm print analysis. She stated that bloody palm prints found on a table and the refrigerator in Butler's apartment were a match for the defendant.

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[2] During the investigation, Williams told the police that he had seen Butler getting into the defendant's car. Gerald Lane testified at trial that on February 17, 2001, at about 12:30 a.m., after talking to Butler, whom he knew, he saw Butler get into the defendant's car, a green Mitsubishi Diamante. Lane testified that Butler was alone, and that he entered on the driver's side of the defendant's car and drove off.

[3] At trial, the parties stipulated that the defendant was treated at the Earl K. Long Hospital emergency room in March 2001 for injuries consistent with a knife wound to the right leg.

Alejandro Vara, a forensic DNA analyst with the State Police Crime Lab, testified at trial. He was accepted as an expert in the lifting and collecting of fingerprint and palm print evidence, as well as serology. DNA taken from bloodstains found on the door frames, table top, and other areas of Butler's apartment, as well as the floorboard of the defendant's car, was a match for Butler.

Dr. Alfredo Suarez, a pathologist, performed the autopsy on Butler.[4] Dr. Suarez stated that Butler received a total of thirty knife wounds and that he may have lived for ten to fifteen minutes before he bled to death. Dr. Suarez felt that the stab wound that was the direct cause of death was the deep wound to Butler's left axilla, or armpit. At trial, the parties stipulated that a urine specimen taken from Butler contained cocaine and marijuana.

Detective Lockett testified that he did not find any physical evidence that would support or corroborate the position that the defendant killed Butler in self-defense. He stated there was no doubt that there was a struggle and that the evidence supported that Butler was the one inside the tub. When asked if he found any physical evidence that would corroborate an attack by Butler upon the defendant, Detective Lockett responded, "No, sir."

The defendant did not testify.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the evidence was insufficient to support a conviction. Specifically, the defendant contends that the state did not prove beyond a reasonable doubt that he did not kill Butler in self-defense.

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[4] The autopsy report, which was admitted into evidence, stated that the cause of death was exsanguination due to multiple cuts and stab wounds to the body, and the manner of death was homicide. The list of injuries under "Final Diagnosis" was as follows:

1. Multiple stab wounds, slashes and cuts to the head, neck, thorax, upper extremities and left lumbar fossa with/including:
   a. Severed left axillary blood vessels, and left internal jugular vein.
   b. Lacerated skeletal muscle of the left arm, axilla, right neck and occiput.
   c. Fractured left 4th and 5th ribs.
   d. Left sided hemothorax.
   e. Multiple defense wounds to the upper extremities.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; LSA-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 LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (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, 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. **State v. Patorno**, 01-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

While the defendant was charged with second degree murder, 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. 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.

Louisiana Revised Statute 14:20[5] 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.

Louisiana Revised Statute 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 testimony of Dr. Suarez and Mr. Vara established a reasonable theory of self-defense. The defendant posits that Butler had the knife and was trying to rob the defendant for drug money. Following a struggle, the defendant got the knife away from Butler. The defendant then ran to the bathroom, got cornered in the bathtub, and was forced to stab Butler, who kept coming toward the defendant.[6]

On cross-examination, the following exchange between defense counsel and Dr. Suarez took place regarding photographs, introduced into evidence, of a defense wound on Butler's hand, as characterized by Dr. Suarez

> Q. In terms of first of all, the defense wounds, you characterized them as defense wounds because they're on the hands and the lower part of the arms, correct?
>
> A. Yes.
>
> Q. If Mr. Butler began with the knife and Mr. Peterson had to take it

[5] Louisiana Revised Statute 14:20 was amended by 2006 La. Acts, No. 141, § 1; however, that amendment is not applicable in this case.

[6] The defendant's theory of self-defense is described in detail in defense counsel's opening statement.

from him, couldn't he have cut his hands in the fold as they were struggling over that knife?

A. It's possible.

Q. Okay. Well, you say possible.

A. Well, it's not the likely scenario. In this case, the several other defense wounds, not that --

Q. I'm going to get -- I'm going to get to those. But what I'm going to start with is --

* * * * *

Q. And there was a struggle going on in this apartment, correct?

A. Yes.

Q. Okay. And you don't know if the struggle is Mr. Peterson attacking Gary Butler or Mr. Peterson is taking the knife from Mr. Butler, and is defending himself because Mr. Butler is coming at him? You don't know that, do you?

A. I don't know. I just -- I just bring the evidence to you that I found.

Q And going back to defensive wounds, just because you characterize them as defensive doesn't mean that somebody's acting defensive. It could be the situation as going for the knife as we characterized, correct?

A. That particular one that you mention, the one between the thumb and the index, could be in your scenario that could be possible. Now their (sic) other ones though.

Q. I understand.

On redirect examination, the following exchange between the prosecutor and Dr. Suarez took place:

Q. Dr. Suarez, Mr. Monahan talked about the smears in the tub. I'm showing you S-7. And he hypothesized that that could have been Robert Peterson putting the smears on the tub. Is it possible that Gary Butler was in the tub bleeding, and he was bleeding and fending off Robert Peterson and fell down and slipped with his elbow against the wall and his hip against the wall. Because the skid marks must be created by somebody whose (sic) bleeding.

* * * * *

A. I believe that the person who was bleeding the most was the one who caused these smears in there.

Later in the trial, on cross-examination, the following exchange between defense counsel and Mr. Vara took place regarding photographs, introduced into evidence, of

blood smears found in the bathroom at the crime scene:

Q. Right. And now the two pieces that I've just showed you, meaning D-2, which would be the both (sic) horizontal smear and the vertical smears, if I hypothesized to you that that was Mr. Peterson with one leg in the tub, with his hip up against, and a knife in his hand, trying to defend himself from somebody coming in at him with their hand right here holding (sic) themself, that evidence right there could not dispute that hypothesis, could it? Those two photographs. I'll go through it again.

A. One more time, please. It's a big, long question.

Q. I know. I recognize. D-2, you've already agreed with me that it is consistent with somebody who would have blood on their hip, and would be smearing it against that wall, correct?

A. Yes. There is that smear pattern.

Q. And then the vertical smears, you said that those are consistent with what could be an elbow; correct?

A. Correct.

Q. Okay. And I'm hypothesizing to you now just on D-2. If that is Mr. Peterson with one foot in the tub, defending himself with his hip up against the wall, struggling with Mr. Butler in the tub, that picture would not dispute that hypothesis that I'm putting to you of Mr. Peterson's back against the wall with his hip causing the horizontal rub and the (sic) his elbow causing the vertical rubs, correct?

A. Correct. That wouldn't dispute the hypothesis.

Q. Okay. If I add one more hypothesis that if it's Mr. Butler whose coming into the tub after him, and has his hand on the corner right here, stabilizing himself as he's trying to get the knife from Mr. Peterson, you couldn't tell me that that photograph right there disputes that hypothesis, could you?

A. No, I couldn't.

Q. Thank you.

On redirect examination, the following exchange between the prosecutor and Mr. Vara took place:

Q. What hypothesis could you not dispute that I missed?

A. I couldn't dispute if -- if it's just strictly going to be the left hand or the right hand. I couldn't tell you which one it is given the picture.

Q. Would you if (sic) dispute the fact that if Gary Butler was in the tub and he was fighting for his life and he slipped when someone came at him with the knife that those exact same markings could be made?

A. No, I couldn't dispute that.

Q. I'm going to show you what's been previously marked as S-8 and S-9, pictures of the blood in the tub. Would you agree that it would be reasonable to believe that the person leaving those bloodstains in that tub is bleeding profusely?

A. Yes.

Q. And the person in that tub, given the facts of this case, do you know of any person other than Gary Butler that could have been?

A. No.

* * * * *

Q. Mr. Vara, you understand that you're qualified as an expert here, and therefore, we get to provide scenarios to you. And you get to talk about that?

A. Yes.

Q. Now using this as our handy dandy tub here, if -- if Gary Butler is in the tub, and he is bleeding with the wounds in this case, could he have left those marks in that tub?

A. Yes, he could of.

Q. And he is weak and then slips and falls. Could he have left the smudge marks with his elbow or grasp trying to keep himself up with his fingertips?

A. Yes, he could of.

Q. And you can't say whether this is Gary Butler fighting for his life trying to stand up or whether this is Robert Peterson in there, can you?

A. That's correct.

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. Thus, it is necessary that a determination be made as to whether the circumstances presented support the jury's finding that the defendant had the specific intent to kill or to inflict great bodily harm. **State v. Spears**, 504 So.2d 974, 977 (La. App. 1st Cir.), writ denied, 507 So.2d 225 (La. 1987).

In the instant matter, the victim's death was proved. The fact that the defendant inflicted a total of thirty stabbings, slashes, and cuts indicates that the defendant clearly

had the specific intent to kill or to inflict great bodily harm upon the victim.[7] Therefore, the only remaining issue in a review of the sufficiency of the evidence is whether or not the defendant acted in self-defense.

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 Butler in self-defense. No defense witnesses testified at trial. See **Spears**, 504 So.2d at 977-78.

In finding the defendant guilty of manslaughter, it is clear the jury rejected the claim of self-defense, and concluded that the scenarios of self-defense, as suggested by the defendant on the cross-examinations of Dr. Suarez and Mr. Vara, while possible, were not reasonable. Given the number of cut, slash, and stab wounds suffered by Butler, it is clear the jury concluded that the force used by the defendant against Butler was unreasonable and unjustifiable. Based on the defendant's own account of the incident reflecting that he stabbed Butler after disarming him, a rational trier of fact could have reasonably concluded that the killing was not necessary to save the defendant from the danger envisioned by LSA-R.S. 14:20(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; see also **State v. Bates**, 95-1513 (La. App. 1st Cir. 11/8/96), 683 So.2d 1370, 1377.

Moreover, at no time during the police investigation of the matter did the defendant suggest that he killed Butler in self-defense. Instead, after killing Butler the

[7] Dr. Suarez testified that one of the stab wounds penetrated Butler five inches and that it took a lot of force to cause a wound that deep.

defendant left the scene and did not contact the police. Further, when the police first began questioning him about what happened, the defendant denied ever knowing Butler; then, after admitting he knew Butler, the defendant insisted he had never been inside Butler's apartment.

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 by the defendant following an offense. Lying has been recognized as indicative of an awareness of wrongdoing. **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984). The facts in the instant matter established acts of both flight and material misrepresentation by the defendant.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **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).

An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **Taylor**, 721 So.2d at 932. A determination of the weight of the evidence is a question of fact. This court has no appellate jurisdiction to review questions of fact in criminal cases. LSA-Const. art. V, § 10(B). See **Spears**, 504 So.2d at 978.

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 state, a 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.[8]

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that his sentence was excessive.

A thorough review of the record indicates that defense counsel did not make a written or oral motion to reconsider sentence. Under LSA-C.Cr.P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. The defendant, therefore, is procedurally barred from having this assignment of error reviewed. **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam). See also **State v. Felder**, 00-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 01-3027 (La. 10/25/02), 827 So.2d 1173.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.

[8] Moreover, a rational trier of fact, viewing all of the evidence as favorable to the prosecution as any rational fact finder can, could have concluded that the state proved beyond a reasonable doubt that the charged offense of second degree murder was proved and that the defendant did not kill the victim in self-defense. Therefore, the responsive verdict of manslaughter was proper. See **State v. Jones**, 598 So.2d 511 (La. App. 1st Cir. 1992). See also **State ex rel. Elaire v. Blackburn**, 424 So.2d 246 (La. 1982), cert. denied, 461 U.S. 959, 103 S.Ct. 2432, 77 L.Ed.2d 1318 (1983).