

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0013

STATE OF LOUISIANA

VERSUS

MARCUS EVANS

Judgment Rendered: MAY - 7 2010

APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 07-07-0393, SECTION "7"

THE HONORABLE DONALD R. JOHNSON, JUDGE
AND THE HONORABLE BOB HESTER, JUDGE, AD HOC¹

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

¹ Judge Johnson presided over the trial and Judge Hester presided over the sentencing.

McDONALD, J.

The defendant, Marcus Evans, was charged by East Baton Rouge Parish grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. He pled not guilty. Following a trial by jury, the defendant was convicted as charged. The defendant subsequently was sentenced to life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. The defendant now appeals, challenging the sufficiency of the State's evidence in support of his conviction. Finding no merit in the assigned error, we affirm the defendant's conviction and sentence.

FACTS

On July 4, 2007, Rose Christopher was leaving her North Baton Rouge home when she observed a body lying in a grassy field near the corner of Weller Avenue and Powhatan Street. The Baton Rouge City Police were called to the area to investigate. The body, found face down in the field, was later determined to be that of Delvin Johnson. A wrecked 1992 Toyota Camry was observed in a parking lot adjacent to the field. The vehicle was registered to Shameka Davis ("Ms. Davis").² A homicide investigation was launched. The investigation revealed that the defendant was responsible for shooting Johnson. The defendant was arrested at his place of employment the following day. In a recorded statement to the police, the defendant admitted that he shot Johnson, but claimed he did so in defense of Ms. Davis, the defendant's cousin. The defendant claimed Johnson and Ms. Davis were involved in a relationship and Johnson was physically abusive toward Ms. Davis. On the night of the shooting, the defendant claimed Johnson, who had borrowed and wrecked Ms. Davis's Camry, became irate and belligerent towards Ms. Davis and was preparing to attack her when he shot him.

² We observe that, in the defendant's brief, the witness's first name is spelled "Shaneka." However, throughout the record, the witness's name is spelled "Shameka." In this opinion, for consistency, we refer to the witness as "Ms. Davis."

SUFFICIENCY OF THE EVIDENCE

In a single assignment of error, the defendant argues that the evidence presented at his trial was insufficient to support the second degree murder conviction, because the State failed to negate his theory that the victim was shot in defense of Ms. Davis. Alternatively, the defendant argues that the evidence supports a conviction of manslaughter.³ He claims the evidence presented at trial established that he lost his self-control in an effort to protect his family. Thus, he asserts, the mitigating factors that reduce murder to manslaughter were present.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved 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 La. C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

When analyzing circumstantial evidence, La. R.S. 15:438 provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the **Jackson** constitutional sufficiency standard. Ultimately, all evidence, both direct and circumstantial, must be sufficient under **Jackson** to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Shanks**, 97-1885, pp. 3-4 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 159.

³ Although defendant's assignment of error includes a reference challenging the negligent homicide conviction, because he failed to present any discussion on this issue, it is abandoned and we do not consider it. See Louisiana Uniform Rules-Courts of Appeal, Rule 2-12.4.

To support a conviction for second degree murder, the State is required to show: 1) the killing of a human being; and 2) that defendant had the specific intent to kill or inflict great bodily harm. La. R.S. 14:30.1(A)(1); **State v. Morris**, 99-3075, p. 13 (La. App. 1st Cir. 11/3/00), 770 So.2d 908, 918, writ denied, 2000-3293 (La. 10/12/01), 799 So.2d 496, cert. denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002). 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). Specific intent may be proved by direct evidence, such as statements by defendant, or by inference from circumstantial evidence, such as defendant's actions or facts depicting the circumstances. **State v. Cummings**, 99-3000, p. 3 (La. App. 1st Cir. 11/3/00), 771 So.2d 874, 876.

When a defendant claims self-defense in a homicide case, the State has the burden of establishing beyond a reasonable doubt that he did not act in self-defense. **State v. Fisher**, 95-0430, p. 3 (La. App. 1st Cir. 5/10/96), 673 So.2d 721, 723, writ denied, 96-1412 (La. 11/1/96), 681 So.2d 1259. A homicide is justifiable 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. La. R.S. 14:20(A)(1); **State v. Lilly**, 552 So.2d 1036, 1039 (La. App. 1st Cir. 1989). It is justifiable to use force or violence or to kill in the defense of another person when it is reasonably apparent that the person attacked could have justifiably used such means himself, and when it is reasonably believed that such intervention is necessary to protect the other person. La. R.S. 14:22. 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. For appellate purposes, the standard of review of a claim of self-defense is whether or not a rational trier of fact, after viewing the evidence in the light most favorable to the prosecution, could find beyond a reasonable doubt that the homicide was not committed in self-defense. **State v. Lilly**, 552 So.2d at 1039.

In this case, the defendant does not deny that he shot the victim. He insists, however, that the homicide was justifiable because he acted in defense of Ms. Davis. The defendant asserts his actions were in response to Johnson's violent aggression towards Ms. Davis on the night of the shooting, coupled with his personal knowledge of Johnson's past physical abuse of Ms. Davis. The defendant claims he believed that Johnson was preparing to strike Ms. Davis and that his use of force against Johnson was necessary to save Ms. Davis from that danger. The defendant further argues that the trial testimony provided by Naketa Batiste, naming the defendant as the aggressor, should not be found credible.

At the trial of this matter, Ms. Davis testified that she and Johnson were involved in a romantic relationship. She further testified that, on July 3, 2007, she was at home visiting with her neighbor, Ms. Batiste, and her cousin, the defendant, when Johnson arrived and asked if he could use her vehicle. Ms. Davis owned a 1992 Toyota Camry. Knowing that she did not have any insurance on the vehicle, Ms. Davis reluctantly allowed Johnson to use the vehicle. Later that evening, Johnson contacted Ms. Davis and advised that he had wrecked her vehicle. According to Ms. Davis, Johnson disclosed his location and she, Ms. Batiste, and the defendant went there. The defendant drove, Ms. Davis rode in the front passenger seat, and Ms. Batiste and her small children rode in the rear of the defendant's Monte Carlo.⁴

⁴ There is conflicting information in the record regarding the number of children accompanying Ms. Batiste on the night in question. Ms. Batiste testified that she had three children with her on the night of the shooting. However, Ms. Davis's testimony indicates there were two children in the vehicle.

When Ms. Davis arrived in the area, she observed Johnson and her vehicle. Ms. Davis became very upset at the sight of her vehicle. The front end of the vehicle was severely damaged. According to Ms. Davis, when Johnson approached and attempted to explain what happened to the vehicle, she refused to listen and told him to "get out of [her] face." Because she was unsure what Johnson had hit with the vehicle (there were no other vehicles in the area), Ms. Davis decided that she would attempt to escape any liability by reporting the vehicle stolen. She used the defendant's cellular phone to contact the police.

Meanwhile, the defendant and Johnson started arguing. On the taped recording of the 911 call, two males can be heard arguing in the background. Ms. Davis claimed she was still on the call, with her back turned to the defendant and Johnson, when she heard shots fired. Ms. Davis testified that the defendant was armed with a handgun and Johnson was not. She further testified that Ms. Batiste remained inside the vehicle.

Ms. Davis testified that Johnson had been violent towards her in the past and the defendant was aware of the violence. Johnson's violence caused her to seek police assistance on several occasions. Ms. Davis explained, on cross-examination, that Johnson once hit her in the head eight times and threatened to kill her and her children. Ms. Davis denied that Johnson was violent towards her on the night of the shooting.

After the shots were fired, the defendant and Ms. Davis returned to the vehicle and left the area. Ms. Davis claimed she did not realize that Johnson had been hit. She observed him run away toward the nearby field, but was unsure whether he was injured.

Ms. Batiste testified at the trial. She testified that she and her children rode to the Weller Avenue location with Ms. Davis and the defendant. They remained inside the vehicle when the defendant and Ms. Davis exited to speak with Johnson.

From the back seat of the defendant's vehicle, Ms. Batiste observed the entire incident. According to Ms. Batiste, Ms. Davis became very upset when she witnessed the condition of her vehicle. In response, Johnson became very apologetic. He apologized to Ms. Davis for damaging her vehicle and assured her that he would have it fixed. Ms. Davis did not wish to converse with Johnson. She used the defendant's phone to contact the police and report her vehicle stolen.

According to Ms. Batiste, as Ms. Davis spoke with the police, the defendant and Johnson were "having words." The defendant was very upset and confrontational with Johnson. He repeatedly explained that the vehicle was Ms. Davis's only transportation and demanded an explanation from Johnson regarding the damages. Ms. Batiste claimed Johnson was in no way aggressive toward the defendant and did nothing to provoke the shooting. In fact, Ms. Batiste claimed he insisted, "I don't want to fight with you" and "[i]t don't have to be all this." The defendant continued to argue with Johnson and later returned to the vehicle and armed himself with a handgun. Ms. Batiste denied ever observing Johnson behaving aggressively or violently towards Ms. Davis. Johnson was not preparing to strike Ms. Davis when he was shot. According to Ms. Batiste, the defendant continued to shoot at Johnson as he ran away. Johnson ran into the nearby field and collapsed. The defendant and Ms. Davis returned to the vehicle. The defendant returned the gun to the glove box and said "I f _ _ _ ed up. I f _ _ _ ed up." Then they drove away. He dropped Ms. Davis and Ms. Batiste off at Ms. Davis's residence and left.

Ms. Batiste further testified that in October 2007, when she was questioned by the police regarding what she observed, she provided the same information. On cross-examination, when the defense questioned Ms. Batiste regarding the delay in her reporting, she explained that she initially stayed out of it, but once the police approached to question her, she told what she knew. Ms. Batiste insisted that the

defendant developed a "temper" with Johnson during the confrontation. Johnson did nothing to provoke the defendant and even attempted to defuse the situation. She testified that the defendant had no reason to shoot Johnson.

Officer Chris Fisher, with the Baton Rouge City Police, testified that he responded to the Weller Avenue location on the night in question in response to a complaint of a stolen vehicle. On the scene, he observed a heavily damaged 1992 Toyota Camry. On the ground near the vehicle, Officer Fisher noted the existence of several spent shell casings. The casings were in very close proximity to each other, which suggested that they had been fired in rapid succession. There were no persons in the area when Officer Fisher arrived.

Dr. Gilbert Corrigan was accepted as an expert in forensic pathology. Dr. Corrigan performed the autopsy on Johnson. Dr. Corrigan testified Johnson sustained a single gunshot wound to the right side of his back. He died as a result of exsanguination due to the gunshot wound. Dr. Corrigan explained that the wound was inflicted from a distance of approximately four to five feet away.

Although the defendant did not testify at the trial, his version of the events was presented through a taped statement he gave to the investigating officers upon his arrest. In his taped statement, the defendant stated he was at Ms. Davis's home with her and Ms. Batiste on the night in question when Johnson called and advised that he had wrecked Ms. Davis's vehicle. He claimed he and Ms. Davis went to the scene to check on Johnson and Ms. Davis's vehicle. Once they arrived, Ms. Davis questioned Johnson about what happened to her vehicle and Johnson became belligerent. He was yelling and screaming at Ms. Davis. Because Johnson was the one who damaged Ms. Davis's property, the defendant claimed he did not understand Johnson's behavior. The defendant explained that he was also really bothered by Johnson's behavior, because he was aware that Johnson had a history of physically abusing Ms. Davis. The defendant claimed he only fired the weapon

after Johnson started moving towards Ms. Davis with his "fist" balled up. He claimed he believed Johnson was preparing to attack Ms. Davis and he fired the weapon to distract him. The defendant claimed he raised the weapon and Johnson stated, "Whoa" and took off running. The defendant admitted that he shot more than once. He claimed he believed that Johnson was hit in the leg. After Johnson collapsed in the field, the defendant walked over to his body to check on him. He stated he then became "real scared." He claimed he told Ms. Davis to call 911, but the cellular phone would not work. He and Ms. Davis got back into the vehicle and left the area. The defendant claimed he placed the gun on the trunk of the vehicle after firing it, and he forgot it was there when he drove away.

It is evident that the jury was presented with conflicting evidence regarding the events that transpired when the defendant and Ms. Davis encountered Johnson after he wrecked Ms. Davis's vehicle. Specifically, there were conflicting accounts of whether the victim was aggressive towards Ms. Davis and/or the defendant.⁵ The guilty verdict in this case shows that the jury rejected the defendant's claim of justification based on the defense of another. Considering Ms. Batiste's testimony and the physical evidence, the jury could have reasonably determined that the defendant did not believe that Ms. Davis was in imminent danger of losing her life or receiving great bodily harm at the time he shot the victim, and thus, the defendant's actions were not reasonable under the circumstances. Ms. Batiste's testimony was also consistent with Ms. Davis's testimony in that she said Johnson and the defendant were arguing or "having words" immediately before the shooting. Contrary to the defendant's claims, both women also testified that Johnson was not aggressive towards Ms. Davis.

⁵ With respect to the defendant, we find that, based on our review of the entire record, a rational trier of fact, after viewing the evidence in the light most favorable to the prosecution, could find, beyond a reasonable doubt, that the homicide was not committed in self-defense.

Moreover, the defendant's failure to report the shooting to the police after he left the area is also inconsistent with a theory of justifiable defense of another.

However, even if the jury believed the defendant's account of the events, they could have reasonably found that the fatal force utilized by the defendant was not reasonable under the circumstances. By the defendant's own account of the incident, reflecting that Johnson raised his fist and attempted to become aggressive toward Ms. Davis, any rational trier of fact could have reasonably concluded that the killing was not necessary to save Ms. Davis from the unarmed victim.

On the issue of credibility, the defendant was afforded ample opportunity to cross-examine Ms. Batiste on the issues affecting her credibility. Thus, the jurors were well aware of all of the circumstances that the defendant claims negatively affected Ms. Batiste's credibility, and they still chose to accept her testimony. Ms. Batiste admitted that she did not report the matter to the police immediately after it occurred. She acknowledged that her first statement to the police was not made until approximately three months after the shooting. However, Ms. Batiste explained that once the police approached her with questions, she advised them of what she had observed on the night in question.

Considering the foregoing, we find that the record, when viewing the evidence in the light most favorable to the prosecution, reasonably supports the jury's verdict, which clearly required credibility determinations. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Glynn**, 94-0332, p. 32 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Smith**, 600 So.2d 1319, 1324 (La. 1992). The credibility of a witness is a matter of the weight of the evidence, not sufficiency. See State v. Johnson, 446

So.2d 1371, 1375 (La. App. 1st Cir.), writ denied, 449 So.2d 1347 (La. 1984). 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. Azema**, 633 So.2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460.

Having found the elements of second degree murder, the jury was then required to determine whether the circumstances indicated that the crime was actually manslaughter. La. R.S. 14:31 defines manslaughter, in pertinent part, as:

A. (1) 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" under La. R.S. 14:31(A)(1) are not elements of the offense but, rather, are factors in the nature of mitigating circumstances to be proven by the defendant, which may reduce the grade of homicide. See State v. Crochet, 96-1666, pp. 9-10 (La. App. 1st Cir. 5/9/97), 693 So.2d 1300, 1307, writ denied, 97-1547 (La. 11/21/97), 703 So.2d 1305. Provocation is a question of fact to be determined by the trier of fact. Thus, the issue remaining is whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found that the mitigating factors were not established by a preponderance of the evidence. **State v. Harris**, 97-0537, p. 11 (La. App. 1st Cir. 2/20/98), 708 So.2d 1169, 1176, writ denied, 98-0758 (La. 9/4/98), 723 So.2d 434. The defendant has the burden of proving these mitigating factors by a preponderance of the evidence. **State v. Riley**, 91-2132, p. 11 (La. App. 1st Cir. 5/20/94), 637 So.2d 758, 763.

In his brief, the defendant argues that he shot Johnson only after he lost self-control because Johnson was behaving so violently towards Ms. Davis. He claims he acted out of fear that Ms. Davis was about to suffer violence at the hands of Johnson again. As previously stated, in order to reduce second degree murder to manslaughter, the defendant is required to prove, by a preponderance of the evidence, "sudden passion" or "heat of blood" immediately caused by provocation sufficient to deprive an average person of self-control and cool reflection. The guilty verdict in this case indicates that the jury, who was aware of the defendant's version of the events, concluded this was a case of second degree murder and rejected the possibility of a manslaughter verdict. The jury obviously concluded that any argument between Johnson and Ms. Davis and/or the defendant and Johnson did not equate to provocation sufficient to deprive an average person of self-control and cool reflection. We find that, under the facts and circumstances of this case, any rational trier of fact could have concluded that the mitigating factors, which reduce the degree of homicide from murder to manslaughter, were not present herein.

Based upon the aforementioned evidence, we find that the record in this case clearly demonstrates that the State carried its burden of proving beyond a reasonable doubt that the defendant was guilty of the offense of second degree murder and that the homicide was not committed in defense of Ms. Davis. Further, 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, p. 14 (La. 11/29/06), 946 So.2d 654, 662. This assignment of error is without merit.

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

CONVICTION AND SENTENCE AFFIRMED.