NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0984

STATE OF LOUISIANA

VERSUS

ANTHONY MANZELLA

Judgment Rendered: December 21, 2011

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On Appeal from the
20th Judicial District Court
In and for the Parish of East Feliciana
State of Louisiana
Trial Court No. 10-CR-660

Honorable George H. Ware, Jr., Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, Anthony Manzella, was charged by grand jury indictment with one count of first degree murder, a violation of La. R.S. 14:30. The defendant pled not guilty, and following a jury trial, he was found guilty of the lesser offense of negligent homicide, a violation of La. R.S. 14:32. The defendant moved for a post-verdict judgment of acquittal, but the motion was denied. He was sentenced to five years at hard labor, with all but four years of the sentence suspended, and five years active supervised probation, subject to general and special terms and conditions, including payment of $5,572 in restitution and payment of a $2,500 fine, plus costs of court. The defendant now appeals, contending: (1) the evidence presented by the State did not prove him guilty beyond a reasonable doubt; (2) the trial court erred in denying the motion for a post-verdict judgment of acquittal; and (3) the trial court erred in exposing him to a term of imprisonment in excess of the maximum five years at sentencing. For the following reasons, we affirm the conviction and sentence.

FACTS

Officer Kenya Huggins was an employee of the Clinton Police Department on July 24, 2009, when he conducted a murder investigation concerning the victim, Jeral Matthews.[1] On the night of July 24, 2009, Officer Huggins was patrolling the Rileyville area in East Feliciana Parish when Johnny "Jay" Barnes flagged him down and ran to his marked police vehicle. When Officer Higgins exited his vehicle, he saw two other men running, including a man who was later identified as the defendant and who was armed with a Glock handgun. Officer Huggins ordered the two men to get down on the ground, where he handcuffed them together and disarmed the defendant. Barnes stated, "someone was trying to kill him or someone had been shot," so Officer Huggins and Barnes ran to the house where the victim was

[1] At the time of trial, Huggins was no longer a police officer, but was employed as a special education teacher.

located.

A Dodge Charger automobile, later identified as the defendant's vehicle, was parked outside the front of the very small "shotgun" type house that was leased to Barnes. Officer Huggins saw denominations of money stacked neatly on top of the television in the first room, which appeared to be a living room. There was also a marijuana cigarette in that room. The next room was a bedroom. The victim was lying on the floor between the bedroom and the "rear of the room," with an AK-47 assault rifle by his head. He had been shot and was dead. Officer Huggins asked Barnes what had happened, and Barnes indicated that the other two men had either robbed him or tried to rob him. There was a misfired .40 caliber cartridge along with numerous pill bottles, including one containing ten oxycodone pills, lying near the bed. When Officer Huggins went back into the living room, there was no longer any money on top of the television. Subsequently, $625 was recovered from Barnes at the police department. Also, 0.82 grams of marijuana was recovered from the house. Examination of the AK-47 recovered at the scene indicated it had several rounds in the magazine, but none in the chamber. The State and the defense stipulated that the victim had died as a result of a gunshot wound and that his blood-alcohol level at the time of the autopsy was .18.

The defendant's July 25, 2009 audio-taped statement was played at trial. In the recorded statement, the defendant detailed the events of the night. He claimed that "Jay" (Barnes) called him and his girlfriend, Lauren Wongchoy, and offered to sell some marijuana for a cheap price. The defendant called Barnes back and arranged to meet him on Wilson Street in Clinton to buy a pound of marijuana for $650. The defendant drove to Wilson Street with his friend, Andrew Robertson, and then called Barnes. Barnes walked to the defendant's car, got inside, and directed them to a house. Barnes walked into the house, followed by Robertson and the defendant. Barnes closed the door and asked if the defendant had the money. The

defendant then counted out the money, which was placed on the TV. Next, Barnes opened the curtain dividing the first two rooms in the house and went into the back.

According to the defendant, he heard a noise in the back of the house and he heard Barnes say, "hold up." It is at that point that the defendant claimed the victim appeared and pointed an AK-47 at Barnes. The victim stated he had been watching Barnes and asked him, "where was the money." The defendant claimed he "went to grab the door," but the victim locked the door and then walked the defendant to the room on the other side of the curtain and sat on the edge of a bed. The defendant stated that he hid his gun on the side of his leg. The victim then walked Robertson and Barnes to the back area, and Robertson pleaded for the victim not to shoot. The victim pointed his gun at Robertson and the defendant. The defendant kept telling the victim he did not have any money, because all of his money was in the front of the house. The defendant claimed that he pleaded with the victim to take his keys and his car, and he tried to hand the victim his keys. But according to the defendant, the victim hit him with the gun and pointed it at Robertson.[2] Then the defendant tried to fire his weapon "to defend ourselves," but the gun did not fire. He stated he "cocked" the gun again and then fired the weapon. The defendant claimed that he, Barnes, and Robertson all ran out of the house and surrendered to a police officer who happened to be patrolling in the area.

Lauren Wongchoy also testified at trial. She was living with the defendant on July 24, 2009. On that date, Barnes called her, and she called him back. She stated that Barnes had marijuana, and she made arrangements for the defendant to meet him at 11:00 a.m. Wongchoy also texted Barnes, asking if he could get "Oxy." According to Wongchoy, she was scheduled to work that morning, so she asked Robertson to go with the defendant to Clinton to buy the drugs. She indicated that after the incident, she had a voice mail message on her phone, in which the defendant

[2] The defendant had a small cut on his head.

begged for his life. Wongchoy did not recognize the voice of the person stating "Hold up, hold up, hold up" at the end of the recorded voice mail message.

The voice mail was played at trial. The message included multiple voices, but there was one prominent louder voice and also a fainter voice. The fainter voice is mostly inaudible, but does repeatedly state, "Right now." The louder voice states, "You found the money man. It's up front man. It's up front man. I ain't worried about it. Here man, look. Take my keys. Take my keys man. I ain't got nothing in my ... pockets. Take my phone then man." The recording ends with a voice stating, "Hold on, hold on, hold on, hold on," followed by a loud noise and a cry of pain.

SUFFICIENCY OF THE EVIDENCE

In the defendant's first assignment of error, he argues that the verdict was unsupported by the evidence, because the evidence revealed his actions were justified, not negligent. In his second assignment of error, the defendant argues the trial court erred in denying the motion for a post-verdict judgment of acquittal, because the State's case-in-chief did not support a finding of negligent homicide or exclude self-defense and every other reasonable hypothesis of innocence.

The standard of review for 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 the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. 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. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the

reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 730 So.2d at 487.

The State argued to the jury that the defendant was guilty of first degree murder, because he had killed a human being with the specific intent to kill or cause great bodily harm, while purchasing or attempting to purchase controlled dangerous substances. See La. R.S. 14:30(A)(6). The defense argued the defendant was not guilty, because he acted in self-defense and in defense of another. See La. R.S. 14:20(A)(1) & (2); La. R.S. 14:22. Additionally, pursuant to the defense's request for a special jury instruction, the jury was instructed on negligent homicide. After retiring to deliberate, the jury asked the court for a written description of the definitions of first degree murder, second degree murder, manslaughter, and negligent homicide. The court read the definitions of the offenses, along with the applicable penalty provisions.

In **State ex rel. Elaire v. Blackburn**, 424 So.2d 246, 251 (La. 1982), cert. denied, 461 U.S. 959, 103 S.Ct. 2432, 77 L.Ed.2d 1318 (1983), the Louisiana Supreme Court recognized the legitimacy of a "compromise verdict," i.e., a legislatively approved responsive verdict which does not fit the evidence, but which (for whatever reason) the jurors deem to be fair, as long as the evidence is sufficient to sustain a conviction for the charged offense. If the defendant timely objects to an instruction on a responsive verdict on the basis that the evidence does not support that responsive verdict, the court overrules the objection, and the jury returns a verdict of guilty of the responsive offense, the reviewing court must examine the record to determine if the responsive verdict is supported by the

evidence and may reverse the conviction if the evidence does not support the verdict. However, if the defendant does not enter an objection (at a time when the trial judge can correct the error), then the reviewing court may affirm the conviction if the evidence would have supported a conviction of the greater offense, whether or not the evidence supports the conviction of the legislatively responsive offense[3] returned by the jury. See **State ex rel. Elaire**, 424 So.2d at 251.

In the instant case, rather than being given over defense objection, the instruction on negligent homicide was given on the specific request of the defense. Accordingly, we will review the sufficiency of the evidence to support first degree murder in light of the defendant's claim of justification.

First Degree Murder

As applicable here, first degree murder is the killing of a human being "[w]hen the offender has the specific intent to kill or to inflict great bodily harm while engaged in the ... purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedules I, II, ... of the Uniform Controlled Dangerous Substances Law." La. R.S. 14:30(A)(6). Marijuana is a controlled dangerous substance listed in Schedule I of the Uniform Controlled Dangerous Substances Law. See La. R.S. 40:964, Sched. I, (C)(19). Oxycodone is a controlled dangerous substance listed in Schedule II of the Uniform Controlled Dangerous Substances Law. See La. R.S. 40:964, Sched. II, (A)(1)(p).

Specific criminal intent is that "state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal

[3] Negligent homicide is not listed under La. Code Crim. P. art. 814 as a responsive verdict for first degree murder. The trial court was, however, obligated by the jurisprudence to give the requested special jury charge in this case. In **State v. Marse**, 365 So.2d 1319, 1322-23 (La. 1978), the Louisiana Supreme Court, in a first degree murder case, found the trial court failed to comply with its duty under La. Code Crim. P. art. 807 to give a requested charge of negligent homicide which "does not require qualification, limitation, or explanation" and "is not included in the general charge" or another special charge, if it is wholly correct and pertinent to the case.

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. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. Henderson**, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

In **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83, the Louisiana Supreme Court set forth the following precepts for appellate review of circumstantial evidence in connection with review of the sufficiency of the evidence:

> On appeal, the reviewing court "does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events." Rather, the court must evaluate the evidence in a light most favorable to the state and determine whether the possible alternative hypothesis is sufficiently **reasonable** that a rational juror could not have found proof of guilt beyond a reasonable doubt.
>
> The jury is the ultimate factfinder of "whether a defendant proved his condition and whether the state negated that defense." The reviewing court "must not impinge on the jury's factfinding prerogative in a criminal case except to the extent necessary to guarantee constitutional due process."
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> * * *
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> "The actual trier of fact's *rational* credibility calls, evidence weighing, and inference drawing are preserved ... by the admonition that the sufficiency inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." The reviewing court is not called upon to determine whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Rather, the court must assure that the jurors did not speculate where the evidence is such that reasonable jurors must have a reasonable doubt. The reviewing court cannot substitute its idea of what the verdict should be for that of the jury. Finally, the "appellate court is constitutionally precluded from acting as a 'thirteenth juror' in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound

discretion of the trier of fact." (Citations omitted).

Self-Defense and the Aggressor Doctrine

When a defendant charged with a homicide claims self-defense, the State has the burden of establishing beyond a reasonable doubt that he did not act in self-defense. **State v. Rosiere**, 488 So.2d 965, 968 (La. 1986). The elements of self-defense are set forth in La. R.S. 14:20, which 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.
>
> (2) When committed for the purpose of preventing a violent or forcible felony involving danger to life or of great bodily harm by one who reasonably believes that such an offense is about to be committed and that such action is necessary for its prevention. The circumstances must be sufficient to excite the fear of a reasonable person that there would be serious danger to his own life or person if he attempted to prevent the felony without the killing.

Additionally, La. R.S. 14:22 provides:

> 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.

However, La. R.S. 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.

Thus, the relevant inquiry on appeal is whether or not, after viewing the evidence in the light most favorable to the prosecution, a rational fact finder could have found beyond a reasonable doubt that the defendant had specific intent and did not act in self-defense. **Rosiere**, 488 So.2d at 968-69; see also **State v. Wilson**, 613 So.2d 234, 238 (La. App. 1st Cir. 1992), writ denied, 93-0533 (La. 3/25/94), 635 So.2d 238.

After a thorough review of the record, we are convinced that any rational

trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of first degree murder and the defendant's identity as the perpetrator of that offense against the victim. The verdict returned in this case indicates the jury rejected the defendant's claims of self-defense and defense of another. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). No such hypothesis exists in the instant case.

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 (La. 11/29/06), 946 So.2d 654, 662. 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).

Moreover, any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could find that the evidence presented by the State established that the defendant was the aggressor in the conflict and, thus, was not entitled to claim self-defense. Further, even if it could be found that the defendant was not the aggressor, any rational trier of fact could find, beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant did not act in self-defense. The State argued that the voice on Wongchoy's cell phone stating, "Hold on, hold on, hold on, hold on," was the victim, and Wongchoy could not identify the voice because she did not know him. The State

pointed out the victim was not shot in the front of his body, but rather the side, which was consistent with him turning to get away at the time of the shooting. The State also pointed out, that after the defendant's weapon initially misfired, he "racked another one in and he shot again and at that time it went off." Additionally, evidence at trial indicated the AK-47 assault rifle allegedly in the possession of the victim at the time of the incident did not have a cartridge in its chamber.

These assignments of error are without merit.

EXCESSIVE SENTENCE

In his third assignment of error, the defendant argues the trial court imposed an unconstitutionally excessive sentence, because the defendant could potentially be exposed to a term of imprisonment in excess of the maximum five years. However, our review of the record indicates the defendant failed to make or file a motion to reconsider sentence in this matter. Accordingly, further review of this assignment of error is procedurally barred. See La. C.Cr.P. art. 881.1(E) and La. C.Cr.P. art. 881.2(A)(1); **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam).

But even if we were to consider the defendant's claim, we would find it baseless. Whoever commits the crime of negligent homicide shall be imprisoned with or without hard labor for not more than five years, fined not more than five thousand dollars, or both. La. R.S. 14:32(C)(1). The defendant was sentenced to the statutory maximum five years at hard labor, with all of the sentence except four years suspended, and five years of active supervised probation, subject to general and special terms and conditions, including payment of $5,572 in restitution and payment of a fine in the amount of $2,500 plus costs of court. Thus, the defendant will serve four years at hard labor, and one year of the five-year sentence will be suspended. The defendant will also serve five years of active supervised probation. Should he ever be found guilty of violating his probation and his

probation revoked, the defendant would be required to serve up to one year of the suspended maximum sentence. See La. C.Cr.P. art. 900(A)(5). Moreover, the cases cited by the defendant[4] are distinguishable, because in those cases, unlike in the instant case, the defendants had potential sentencing exposure of more than the maximum sentence for the offense.

CONVICTION AND SENTENCE AFFIRMED.

[4] **State v. Brown**, 93-2305 (La. App. 4th Cir. 11/17/94), 645 So.2d 1282; **State v. Jenkins**, 527 So.2d 356 (La. App. 5th Cir. 1988); **State v. Martin**, 525 So.2d 535 (La. App. 5th Cir.), writ granted, 532 So.2d 163 (La. 1988), affirmed, 539 So.2d 1235 (La. 1989).