NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1995

STATE OF LOUISIANA

VERSUS

ERVIN J. ALLEN, SR.

* * * * * * *

Judgment Rendered: June 8, 2012

* * * * * * *

APPEALED FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF IBERVILLE
STATE OF LOUISIANA
DOCKET NUMBER 1083-07

THE HONORABLE ALVIN BATISTE, JUDGE

* * * * * * *

Richard Ward
District Attorney
and
Tony Clayton
Dana Larpenteur
Elizabeth Engolio
Assistant District Attorneys
Plaquemine, Louisiana

Attorneys for Appellee
State of Louisiana

Margaret Sollars
Thibodeaux, Louisiana

Attorney for Defendant/Appellant
Ervin J. Allen, Sr.

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

McDONALD, J.

The defendant, Ervin J. Allen, Sr., was charged by grand jury indictment with two counts of first degree murder, in violation of La. R.S. 14:30. The defendant originally pled not guilty but subsequently changed his plea to not guilty by reason of insanity, and the trial court granted the defendant's application for appointment of a sanity commission to determine his mental capacity at the time of the offenses and to proceed to trial. The State amended the charges to two counts of second degree murder, violations of La. R.S. 14:30.1. The defendant was found competent to stand trial and following a trial by jury, was unanimously found guilty as charged on both counts. The defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence on both counts, to be served concurrently. The defendant now appeals, challenging the trial court's admission of other crimes evidence and the sufficiency of the evidence to support the convictions. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

On June 12, 2007, officers of the White Castle Police Department were dispatched to the scene of a shooting. When Chief Mario Brown arrived at the scene, the defendant's residence, the defendant was outside. Chief Brown was familiar with the defendant and his family. The defendant walked toward one of the police units that responded to the scene with his hands out and asked Chief Brown, whom he referred to on a first name basis, if he was there to arrest him, further stating that he just killed his wife, Lorna Allen, and his twenty-seven-year-old stepdaughter, Herkeisha Young. Chief Brown observed blood on the defendant's attire. As he

handcuffed and escorted him to a police vehicle and began reading him his

Miranda[1] warnings, the defendant informed the officer of the location of the gun and knife he used in committing the instant offenses. After securing the defendant, the officer entered the home. Mrs. Allen's mother, Earline Jackson, was present at the scene and was looking for Young, and Chief Brown instructed her to exit the home. Chief Brown observed Mrs. Allen on the floor in a pool of blood, motionless, with a telephone in her left hand and a gunshot wound to the head. Chief Brown saw a case that contained two BB guns and CO-2 cartridges on a chair in the room that adjoined the garage and located another gun and a hunting knife in the back of the house, hidden under cinder blocks as the defendant had indicated.

Chief Brown located Young's body in one of the bedrooms on the second floor of the home. There were bullet casings leading to the room where Young was located and there were bullet holes in the door of the room. As Chief Brown entered the room, he could hear Young making sounds that he described as "gargling or regurgitating" or a "gasp for air." There was blood all over the room and it was in disarray. Chief Brown used his radio to announce that one of the victims was still alive, stepped out when EMS arrived, and turned the investigation over to the Iberville Parish Sheriff's Office.

Mrs. Allen suffered lacerations, nonfatal gunshot wounds to the neck and shoulder, and a fatal gunshot wound to the skull. Young suffered many nonfatal stab wounds and superficial cuts, a deep stab wound in the left thorax, gunshot wounds in her left hand and right breast, and a fatal gunshot wound in her neck that lacerated her left jugular vein and caused profuse bleeding.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends that the trial court erred in allowing the State to introduce a tape recording of his divorce proceeding

[1] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

in Plaquemine that included evidence of alleged acts of sexual misconduct by the defendant. The defendant argues that the admission of the other crimes evidence prevented the jury from properly considering the evidence of the offenses charged. The defendant contends the jury was provided a sordid story about his lustful nature founded on hearsay that did not meet the admission standard of clear and convincing evidence. The defendant notes that he was not represented by counsel when he was accused, by the victims, during the hearing in the divorce proceeding, of sexual misconduct and that his stepdaughter was not cross-examined during the divorce hearing. The defendant also notes that during the trial, the prosecutor asserted that the unproven allegations were truthful and implied that he deserved to be convicted because of the unsubstantiated evidence. The defendant argues that the tape recording was introduced to portray him as a person of criminal character, not insane, who was responsible for the victims' deaths. The defendant further argues that the prosecution deliberately introduced the evidence for its prejudicial effect and reminded the jury of the sordid details throughout the trial. The defendant contends that the evidence was not relevant to any genuinely contested issue, that the probative value of the evidence was outweighed by its prejudicial impact, and that there was no independent basis for the admission of the evidence. The defendant concludes that the admission of the other crimes evidence denied him a fair trial and made the outcome of the trial questionable.

Relevant evidence is any evidence tending to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. La. C.E. art. 401. Generally, all relevant evidence is admissible. La. C.E. art. 402. It may be excluded, however, if its probative value is substantially outweighed by the danger of unfair prejudice. La. C.E. art. 403. Further, a trial judge's determination regarding the relevancy and admissibility of evidence will not be overturned on appeal absent a clear abuse of

discretion. **State v. Freeman**, 2007-0470 (La. App. 1st Cir. 9/14/07), 970 So.2d 621, 625, writ denied, 2007-2129 (La. 3/14/08), 977 So.2d 930. Generally, evidence of other crimes, wrongs, or acts committed by the defendant is inadmissible due to the substantial risk of grave prejudice to the defendant. **State v. Williams**, 96-1023 (La. 1/21/98), 708 So.2d 703, 725, cert. denied, 525 U.S. 838, 119 S.Ct. 99, 142 L.Ed.2d 79 (1998). However, such evidence may be admitted for the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. La. C.E. art. 404(B)(1) Evidence of other bad acts is not admissible simply to prove the bad character of the accused. Furthermore, the other crimes evidence must tend to prove a material fact genuinely at issue, and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. **State v. Williams**, 96-1023, 708 So.2d at 725 (citing La. C.E art. 404 (B)(1)).

Under Louisiana Code of Evidence Article 404(B)(1), other crimes evidence is also admissible "when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding." For other crimes evidence to be admissible under this exception, the evidence must bear such a close relationship with the charged crime that the indictment or information as to the charged crime can fairly be said to have given notice of the other crime evidence as well. **State v. Odenbaugh**, 2010-0268 (La. 12/6/11), 82 So.3d 215, 251(citing **State v. Schwartz**, 354 So.2d 1332, 1334 (La. 1978)). Thus, other crimes evidence forms part of the *res gestae* when the evidence is related and intertwined with the charged offense to such an extent that the State could not have accurately presented its case without reference to it. In such cases, the purpose served by admission of other crimes evidence is not to depict the defendant as a bad man, but rather to complete the story of the crime on trial by proving its

immediate context of happenings near in time and place. **State v. Brewington**, 601 So.2d 656, 657 (La. 1992) (per curiam).

The *res gestae* doctrine in Louisiana is broad and includes not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed before, during, or after the commission of the crime, if a continuous chain of events is evident under the circumstances. **State v. Kimble**, 407 So.2d 693, 698 (La. 1981). Integral act evidence in Louisiana incorporates a rule of narrative completeness without which the State's case would lose its "narrative momentum and cohesiveness, 'with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.'" **State v. Colomb**, 98-2813 (La. 10/1/99), 747 So.2d 1074, 1076 (per curiam) (quoting **Old Chief v. United States**, 519 U.S. 172, 187, 117 S.Ct. 644, 653, 136 L.Ed.2d 574 (1997)).

During the pretrial hearing regarding the admission of the audio recording of the divorce proceeding in question, the State noted that the defendant committed the instant offenses within two hours of the divorce proceeding. The State further noted that during the divorce proceeding the defendant was accused, by the victims, of sexual misconduct involving Young and the defendant's other stepdaughter. The State argued that the accusations that took place during the divorce proceeding made the evidence independently relevant and factually peculiar to the victims and the instant crime and the plea of insanity. The State further argued that it should be allowed to present the moral force of its case including the defendant's motive for the instant offenses. The State further noted that the evidence was not being introduced for the truth of the matter asserted and that the evidence was an exception to the hearsay rule under La. C.E. art. 804(B)(1) as it consists of a prior proceeding wherein the subjects were under oath

and subject to cross-examination and the declarants (the victims) are unavailable because they were killed by the defendant. The State further indicated that the evidence is part of the *res gestae* of the offenses. The defendant noted that he was not represented by counsel at the proceeding and did not cross-examine Young. The defendant further argued that the evidence clearly contained hearsay, that the allegations contained therein were not proven by clear and convincing evidence, and that there was no similarity between the instant offenses and the allegations raised during the divorce proceeding. Finally the defendant argued that the evidence is not relevant since he confessed to the instant offenses.

The trial court noted that the evidence was connected to motive and ruled that the evidence was admissible as *res gestae* of the offenses and constituted an exception to the hearsay rule under La C.E. art. 804(B)(1). Considering the defendant's confession to the police, the trial court further found that the evidence would not be highly prejudicial. Before admitting the evidence in question, the trial court instructed the jury regarding the nature of the evidence, specifically informing them that it consisted of an audio recording of a family court proceeding. The trial court added that the evidence was not being offered to prove the allegations mentioned therein, but for the sole purpose of providing a complete picture of what transpired on the date in question, noting that the instant offenses took place shortly after the hearing. During the divorce proceeding, Mrs. Allen stated that she wished to end her marriage to the defendant and she and Young made allegations pertaining to the defendant's alleged misconduct and sexual abuse of his stepdaughters. The defendant also testified during the proceeding and denied the allegations. After contemplating living arrangements for the children of the marriage, the hearing officer took the matter under advisement.

After the divorce proceeding, the victims went home. The defendant arrived home shortly before Mrs. Allen and the children arrived. Mrs. Allen called her

sister, Emma Jean Rozier, and told her that she had just gotten home after the hearing. Mrs. Allen was upset regarding the pending custody determination for the children of the marriage and stated that she could not continue to live with a man who molested her children. The defendant gave his biological children of the marriage, Erin and Ervin Allen, Jr., money and instructed them to go to a nearby snowball stand. As Mrs. Allen and Rozier were talking, Rozier heard a gunshot and began calling out to her sister but did not hear a response. Rozier disconnected the call with her sister and called her mother, Earline Jackson, and told her to call the police. Young called 911 while being attacked by the defendant. Jackson, who resided about a mile away from the Allen residence, also called for emergency assistance and went to the residence.

During the jury charge, the trial court instructed the jury that evidence that the defendant was involved in the commission of offenses other than the offenses for which he was being tried is to be considered on a limited basis. The trial court reiterated that the audio recording of the divorce proceeding was admitted for the purpose of showing motive and the events that led up to the instant offenses. The trial court further instructed the jury that it may not find the defendant guilty of the instant offenses merely because he may have committed another offense.

We note that during his audio recorded interview with the police after his arrest, the defendant talked about the divorce proceeding, including the fact that he had been accused of child molestation. Thus, the challenged evidence was cumulative of additional evidence admitted during the trial that is not being contested on appeal. At any rate, the evidence at issue was necessary to give the jury a complete picture of the events that gave rise to the instant offenses. The evidence forms an inseparable link in the continuous chain of events leading to the murders in this case. It was used merely to complete the story of the crimes on

trial and allow the State to accurately present its case.[2] The evidence at issue clearly constitutes an integral part of the transaction and was therefore properly admitted. La. C.E. art. 404(B)(1); see also **State v. Sigur**, 578 So.2d 143, 146 (La. App. 1st Cir. 1990), writ denied, 582 So.2d 1303 (La. 1991). Assignment of error number one lacks merit.

ASSIGNMENTS OF ERROR NUMBERS TWO AND THREE

In the second assignment of error, the defendant argues that no rational trier of fact could have found that the defense failed to carry its burden of proving by a preponderance of the evidence that he was delusional and insane at the time he committed the instant offenses. The defendant contends that within a reasonable medical certainty, he was insane at the time of the killings. The defendant contends that the overwhelming nature of the expert testimony fully supported by the lay testimony of his brother renders the jury's verdicts unsupportable by the record.

In the final assignment of error, the defendant contends that should the first two assignments of error be found meritless, the convictions should be reduced to manslaughter. The defendant notes that while he does not contest killing the victims, the offenses were committed under enormous provocation and rage. The defendant contends that the State offered no evidence to rebut his evidence that his wife threatened to kill him. The defendant claims that he believed his wife would

[2] Previous jurisprudence held that when evidence of other bad acts is admissible as res gestae, the probative value of the evidence need not be balanced against its prejudicial effect. **State v. Brown**, 428 So.2d 438, 442 (La. 1983) (overruled by **State v. Johnson**, 94-1379 (La. 11/27/95), 664 So.2d 94, on unrelated grounds). However, current cases question whether the integral-act evidence under La. C.E. art. 404(B) remains subject to the balancing test of La. C.E. art. 403. See **Colomb**, 747 So.2d at 1076. In this case, the prejudicial effect of the evidence admitted does not substantially outweigh its probative value. Thus, we need not decide here whether integral-act evidence presented under the authority of La. C.E. art. 404(B) must invariably pass the balancing test of La. C.E. art. 403.

kill him, based on her threat to do so, rather than allow him to have his children, especially considering his war experiences and mental illness and his wife's history. According to the defendant, after being threatened by his wife, he was not thinking rationally and was deprived of any self-control and the offenses were committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of cool reflection. The defendant contends his loss of self-control and state of rage is consistent with the injuries he inflicted upon the victims. The defendant argues that the homicides were not calculated and that the mitigating factors negated any claim for the specific intent element necessary for second degree murder convictions. The defendant concludes that he established by a preponderance of the evidence that he was insane at the time of the offenses.

As indicated, the defendant confessed and is not disputing the fact that he killed the two victims. The remaining evidentiary issues are whether the defendant proved by a preponderance of the evidence that he was insane at the time of the offenses and whether the jury should have convicted him of manslaughter as opposed to second degree murder. 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," every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. **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, 2000-0895 (La. 11/17/00), 773 So.2d 732.

In Louisiana a defendant is presumed sane at the time of the offense; the State is not required to prove sanity. La. R.S. 15:432; **State v. Weber**, 364 So.2d 952, 956 (La. 1978); **State v. Thames**, 95-2105 (La. App. 1st Cir. 9/27/96), 681 So.2d 480, 486, writ denied, 96-2563 (La. 3/21/97), 691 So.2d 80. A defendant who wishes to negate the presumption must put forth an affirmative defense of insanity and prove his insanity by a preponderance of the evidence. To be exempt from criminal responsibility on the ground of insanity, a defendant must persuade the jury that he had a mental disease or defect which rendered him incapable of distinguishing right from wrong with reference to the conduct which forms the basis for the criminal charge against him. **State v. Roy**, 395 So.2d 664, 665-66 (La. 1981) (citing La. C.Cr.P. art. 652 and La. R.S. 14:14). The determination of sanity is a factual matter reserved to the jury or other fact finder. **State v. Claibon**, 395 So.2d 770, 772 (La. 1981). The standard of review when a defendant pleads the affirmative defense of insanity and claims the record does not support a finding of guilty beyond a reasonable doubt is whether under the facts and circumstances of the case, any rational fact finder, viewing the evidence in a light most favorable to the prosecution, could conclude the defendant did not prove by a preponderance of the evidence that he was insane at the time of the offense. La. R.S. 14:14, 15:432; La. C.Cr.P. art. 652; **Roy**, 395 So.2d at 667-68 (extending the standard of review set forth in **Jackson v. Virginia** to cases in which the defendant claims insanity).

The crime of second degree murder, in pertinent part, "is the killing of a human being: (1)[w]hen the offender has a specific intent to kill or to inflict great bodily harm[.]" La. R.S. 14:30.1(A)(1). 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). 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. **State v. Buchanon**, 95-0625 (La. App. 1st Cir. 5/10/96), 673 So.2d 663, 665, writ denied, 96-1411 (La. 12/6/96), 684 So.2d 923. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. Delco**, 2006-0504 (La. App. 1st Cir. 9/15/06), 943 So.2d 1143, 1146, writ denied, 2006-2636 (La. 8/15/07), 961 So.2d 1160.

Manslaughter is a homicide which would be a first 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 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... ." La. R.S. 14:31(A)(1). "Sudden passion" or "heat of blood" are not elements of the offense of manslaughter; rather they are mitigatory factors in the nature of a defense which exhibit a degree of culpability less than present when the homicide is committed without them. **State v. Rodriguez**, 2001-2182 (La. App. 1st Cir. 6/21/02), 822 So.2d 121, 134, writ denied, 2002-2049 (La. 2/14/03), 836 So.2d 131. Because they are mitigatory factors, a defendant who establishes by a preponderance of the evidence that he acted in "sudden passion" or "heat of blood" is entitled to a verdict of manslaughter. **Rodriguez**, 822 So.2d at 134.

The defendant's biological children, Erin Allen and Ervin Allen, Jr., testified during the trial. According to the children, their father was a normal person and

did not complain of effects or dreams from his service in Vietnam. The children stated that after they arrived home from the divorce proceeding on the day in question, the defendant gave them money and instructed them to go to the snowball stand. While they were at the snowball stand but before they could get their snowballs, the shootings occurred and they were taken to the police station.

Deputy Sheriff Christopher Couty of the Iberville Parish Sheriff's Office was dispatched to the scene to transport the defendant to the Sheriff's Office Criminal Investigation Department (CID). Chief Brown transferred the defendant to Deputy Couty's custody and as Deputy Couty was performing a pat-down search, the defendant stated that he did not have any weapons on him but informed him of the locations of the murder weapons, as he had also informed Chief Brown. The defendant appeared to be agitated but responded appropriately to directions and instructions and was very cooperative. While being transported, the defendant frustratingly stated, "She just wouldn't quit. I couldn't take it anymore." The defendant and Deputy Couty arrived at the CID and met with Detective Eric Ponson. When the defendant removed a peppermint from his pocket, Deputy Couty realized that he had not cleared the defendant's pockets during the pat-down search. As Deputy Couty conducted a more thorough search of the defendant's person, a round of handgun ammunition fell from his pocket to the floor. Without prompting, the defendant stated that it was a .32 caliber and attempted to retrieve it from the floor, but Deputy Couty prevented him from doing so.

Detectives Blair Favaron and Ponson interviewed the defendant after advising him of his **Miranda** rights. According to Detective Favaron, the defendant appeared to understand his rights and indicated that he wished to give a voluntary statement. During his audio recorded statement, the defendant indicated he completed high school and that he had been married to Mrs. Allen for nineteen years. He indicated that he had just left the courthouse after a divorce proceeding

wherein his wife indicated that she wanted the children, the home, and "everything," and the defendant told her that he could not afford it because of a previous bankruptcy. The defendant also stated that his wife indicated that she did not want him to have contact with the children and accused him of child molestation, which he classified as a fabrication to persuade the hearing officer. The defendant and Mrs. Allen were still living together at the time along with the two children of the marriage. The defendant stated that the children told the hearing officer that they wanted to live with him. The defendant indicated that he arrived home first after the proceeding and Mrs. Allen arrived shortly thereafter and started "talking trash" and was angry because he did not agree to her request for alimony, the home, a restraining order, and no visitation rights. The defendant told his wife to shut up and she did not comply. Mrs. Allen called her sister and started relaying her side of the story and in doing so called the defendant a pervert, stated that he was no good, and that she would have him put in jail. The defendant stated that he told his biological children to go to the nearby snowball stand and they left. According to the defendant, his wife continued to make offensive statements, including a statement that she would kill the defendant before allowing her children to stay with him. The defendant snapped and retrieved his pistol and knife. He repeatedly instructed his wife to shut up, she ignored his commands, and the defendant started shooting her.

Young heard the gunshots and came to the stairway. The defendant attempted to shoot her while she was at the stairway but the gun misfired. Young began hollering and ran to her brother's bedroom and locked the door. The defendant did not have any more bullets, but he retrieved more, reloaded the gun, placed some of the bullets in his pocket and went upstairs. The defendant told Young that it was too late for her to holler as she and her mom did not comply with his previous commands to leave him alone and thought he was afraid of them. The

defendant shot through the bedroom door and busted through the door and began shooting Young. He removed his new knife from its packaging and began stabbing Young. The defendant stated he wanted to kill them because they were setting him up and deliberately schemed and misled the hearing officer at the divorce proceeding.

The defendant further complained that the victims would talk about him "like trash" over the years and eat all of his food, noting that he worked every day of his life and he just could not take anymore. The defendant also stated that his wife was at the brink of a nervous breakdown at the time and would constantly "nag" him. The defendant indicated that he had taken a rifle to his brother's home about three weeks before the incident because his wife often "talked too much trash" and he did not want to hurt anyone. However, the defendant still had possession of his loaded .32 caliber pistol and a knife that he stored in the shed located past the garage. The defendant initially indicated that he had handled or retrieved the gun and knife just before the confrontation with his wife occurred. The defendant stated that he had recently purchased the knife for emergencies. The defendant confirmed that he used the knife to stab his stepdaughter but did not stab his wife.

After committing the offenses, the defendant took the gun and knife to his backyard and placed them under a stack of bricks, adding that at that moment he was expecting his biological children to return from the snowball stand. The defendant tried to call 911 to report the incident but did not get an answer so he called his twin brother and told him about the shootings. The 911 operator called the defendant back and he reported the incident. By that time the police were already arriving and the defendant met them in front of his home. The defendant gave the police his brother's telephone number. The defendant's demeanor was normal during the interview.

Dr. Ron Taravella, a psychiatrist and member of the Sanity Commission appointed to examine the defendant before the trial regarding his competency to stand trial, and subsequently examined him regarding his sanity at the time of the offenses, was initially called as a State witness. Dr. Taravella testified that his evaluations were based on information provided by the patient and noted that he diagnosed the defendant with Post-Traumatic Stress Disorder (PTSD) on May 1, 2011, after visiting the defendant twice while he was incarcerated after the instant offenses. Dr. Taravella noted that the defendant served in the Vietnam War and received shrapnel wounds and a Purple Heart award and concluded that the defendant's combat in the war left him with a severe case of PTSD. After his first meeting with the defendant in 2008, Dr. Taravella did not diagnose the defendant with PTSD but entertained it as a "possibility" and determined that the defendant was competent to stand trial. However, Dr. Taravella testified that in his opinion, the defendant was in a dissociated state at the time of the commission of the murders and not in touch with reality. The doctor specified that he believed the defendant entered the disassociated state after his wife stated that she would kill him before she would allow him to have custody of their children. The second interview lasted for approximately forty-five minutes. Dr. Taravella believed that the difficulties in the marriage led to stress but not to the murders.

Dr. Taravella further added that the defendant's wife was provoking him to hit her, and his training taught him that there was a critical three to five-minute period to break an ambush or be killed. Dr. Taravella admitted that malingering was a possibility in every case. Dr. Taravella further admitted that notwithstanding his determination, there were some indications in this case that the defendant was thinking logically during the offenses. Dr. Taravella provided consistent testimony when called as a defense witness. Dr. Taravella added that he had experience treating veterans at the outpatient clinic and inpatient alcoholism unit. The

defendant informed the doctor of his alcohol abuse and suicidal actions after his service in the war. The defendant indicated that he did not like to talk about the war experience and would avoid loud noises or anything that would remind him of bombs. Dr. Taravella noted that the fact that the defendant was able to relay the incident to the police in detail did not impact his determination, further noting that amnesia can be impermanent.

Dr. Donald Hoppe, a clinical psychologist and expert in that field, also evaluated the defendant to determine whether he was sane or not at the time of the offenses. Dr. Hoppe interviewed the defendant during a two-hour period on June 15, 2010, about a year before the trial, and reviewed the records that Dr. Taravella also reviewed. He concluded that the interview and records did not provide a sufficient basis for him to make a PTSD diagnosis. Dr. Hoppe took the defendant at his word that he had been exposed to life-threatening situations while in the war but was unable to establish that he met the other criteria for such a diagnosis. Specifically, he could not determine that the defendant experienced recurrent or intrusive distressing recollections of a traumatic event, recurrent dreams of the event, acting or feeling as if the event was recurring, intense psychological distress at exposure to internal or external cues that represent an aspect of the event, and psychological reactivity on exposure to cues that symbolize or resemble an aspect of the traumatic event. Dr. Hoppe testified that such a diagnosis cannot be based on one incident and that the symptoms should be present for at least one month, which was clearly not demonstrated in this case. Dr. Hoppe was unaware of the allegations of sexual misconduct at the time of his evaluation and was not informed of such by the defendant.

Dr. Hoppe further indicated Dr. Taravella's diagnosis was inconsistent with Dr. Hoppe's evaluation of the defendant. Dr. Hoppe stated that the fact that the defendant hid the weapons after the offenses and other facts regarding the offenses

increase the doubt that he was insane at the time of the offenses, but were not conclusive. The doctor further noted indicators that the offenses were planned, including the fact that the defendant sent away his biological children before killing the victims. Dr. Hoppe further testified that the defendant's description of his state of mind at the time of the offenses, that he "went blank," was not consistent with the evidence and his statement to the police, and added that during his interview of the defendant, he considered the possibility that the defendant had been coached or instructed but did not have the opportunity to further explore that possibility.

Dr. Lynn Simon, a psychiatrist and expert in that field, examined the defendant on June 15, 2007, three days after the offenses, to determine his capacity to stand trial. At that time, the defendant appeared to have an atypical psychotic disorder but no evidence of frank psychosis, phobias, obsessions, or out-and-out psychotic thinking. His reality testing was intact. Dr. Simon further ruled out a major depressive disorder and determined that the defendant was competent to stand trial, noting that he had no difficulty in assisting, could understand normal conversation, convey and receive information adequately, and had no memory gaps. The defendant was alert and aware and there were several indications that he was able to distinguish right from wrong. There were no glaring symptoms of or apparent disturbances referable to PTSD.

The defendant's twin brother, Mervin Allen, testified as a defense witness. Mr. Allen was also a war veteran and stated that after he and the defendant got out of the war, the defendant had problems adjusting and started drinking alcohol and was suicidal. According to Mr. Allen, the defendant sought assistance from the Veteran's Administration but did not receive any. He further testified that the defendant was afraid of noises like fireworks because it sounded like the bombs that went off while they were in the military.

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. Lay testimony concerning defendant's actions, both before and after the crime, may provide the jury with a rational basis for rejecting even unanimous medical opinion that a defendant was legally insane at the time of the offense. **Thames**, 681 So.2d at 486.

Considering the totality of the evidence herein in a light most favorable to the prosecution, we find that a rational trier of fact could have found that the defendant did not prove his insanity by a preponderance of the evidence. In this case, the jury properly made its own credibility determinations and accorded the weight it deemed appropriate to each witness's testimony. The expert testimony presented by the State was fully sufficient to support the jury's unanimous guilty verdicts. Before the shootings, the defendant had the sagacity to send his biological children to the snowball stand so they would not be in harm's way. The defendant also removed the more dangerous gun from the case, the .32 caliber, as opposed to one of the BB guns, further evidencing clarity and his intent to kill the victims. In order to reload his pistol, the defendant had to remove the cylinder from the frame and carefully insert the cartridge. After the killings, the defendant hid the gun and knife because he expected his biological children would soon return home. During his interview following the offenses, the defendant stated why he killed the victims, spoke clearly, recalled all of the events of the incident with great detail, and did not mention that he had any mental or emotional

condition. We conclude the jury did not err in rejecting the defendant's insanity defense.

In returning two guilty verdicts, the jury obviously found insufficient evidence of provocation such that a reasonable person would have used deadly force. Before the defendant retrieved his weapons, he could have left the home as he indicated he had done in the past during arguments. It was clear that the defendant was the aggressor and initiated the violence. A rational trier of fact could have concluded the defendant failed to establish by a preponderance of the evidence that he acted in "sudden passion" or "heat of blood." See **State v. Maddox**, 522 So.2d 579, 582 (La. App. 1st Cir. 1988).

Viewing the evidence in the light most favorable to the prosecution, we find that it supports the jury's unanimous verdicts. Furthermore, 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 trier of fact. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Based on the foregoing conclusions, assignments of error numbers two and three lack merit.

CONVICTIONS AND SENTENCES AFFIRMED.