NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 KA 0957

STATE OF LOUISIANA

VERSUS

FELIPE GARCIA FUENTES

Judgment Rendered: FEB 18 2014

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 519497

Honorable Reginald T. Badeaux, III, Judge

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WELCH, J.

The defendant, Felipe Garcia Fuentes, was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1, and pled not guilty. Following a jury trial, he was found guilty as charged. He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. He now appeals, filing a pro se brief and a counseled brief. In his pro se brief, he challenges the sufficiency of the evidence. In his counseled brief, he contends the trial court erred in refusing to give a special jury instruction requested by the defense. For the following reasons, we affirm the conviction and sentence.

FACTS

On November 11, 2011, the defendant, the victim, Geraldo Jimenez Garcia, a/k/a Miguel, a/k/a Chiquito (meaning small), and Pedro Hernandez shared an apartment in building 2003 in Slidell. Bruno Martinez, Hector Poralis, Juan Martinez, and Santiago Francisco shared an apartment in building 2001. All of the men worked together.

Hernandez testified that on November 11, 2011, the victim played a joke on the defendant. The victim pushed the door closed for approximately five minutes while the defendant was trying to exit the bathroom. After the defendant got out of the bathroom, he tried to put the victim in the bathroom and the men had a verbal argument and a physical fight, with the defendant throwing the first punch. During the fight, the defendant told the victim to leave or he would kill him. Hernandez, Bruno Martinez, and Poralis broke up the fight, and the victim went to the apartment in building 2001 with Bruno Martinez and Poralis. The defendant went "upstairs." Hernandez testified he saw the defendant and the victim drink one beer each before he left to wash clothes, and he returned approximately one-half hour later.

Subsequently, the defendant approached Hernandez and asked him to drive

him away, claiming he had hit the victim with a bottle. Hernandez refused and went to see the victim.

Juan Martinez testified that, after work on the day of the incident, he was invited to the apartment in building 2003 for drinks. Six men in the apartment shared a twelve-pack of Corona. Thereafter, Juan Martinez returned to his own apartment to give family members a code for money he had sent them. He left to buy a six-pack of beer. When he returned to the victim's apartment, Bruno Martinez and Poralis were leaving because "the young [men] got in a fight." Juan Martinez talked to the defendant and the victim for approximately ten or twelve minutes, asking them why they were fighting and telling them they had to get along. Juan Martinez then accompanied the victim back to the apartment in building 2001, telling him, "Let everything cool down and, you know, tomorrow y'all talk and discuss everything[.]" Juan Martinez, Bruno Martinez, and the victim then sat on the couch, watched TV, and drank beer.

Approximately ten minutes later, the defendant entered the apartment in building 2001 and, while the victim was sitting on the couch, stabbed him in the chest, stating, "I told you I was going to kill you." Bruno Martinez disarmed the defendant, and the defendant ran from the apartment. Subsequently, a police dog tracked and located the defendant in a wooded area a few blocks from the apartment complex. The defendant was taken to the hospital for treatment for a minor dog bite and a laceration to his head.

The stab wound penetrated the victim's chest four and one-quarter inches, entered his heart, and caused his death. The length of the blade used by the defendant was between two and one-half inches and three inches. Dr. Michael Difatta, forensic pathologist and St. Tammany Parish Chief Deputy Coroner, testified that given the depth of the wound and the length of the blade, the victim's chest was compressed more than one to two inches when he was stabbed.

SUFFICIENCY OF THE EVIDENCE

In pro se assignment of error number 1, the defendant argues the evidence was insufficient to support the verdict because the jury failed to weigh the fact that he "was under the influence of alcohol and was not acting as any reasonable person would have at the time of the offense[.]" He argues this case "mirrored" **State v. Lombard**, 486 So.2d 106 (La. 1986).

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 & 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.

SECOND DEGREE MURDER

Second degree murder is the killing of a human being when 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. 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.

Voluntary intoxication is a defense to a prosecution for a crime only when the condition precludes the presence of a specific criminal intent or a special knowledge required in that particular crime. La. R.S. 14:15(2). When defenses which actually defeat an essential element of an offense, such as intoxication, are raised by the evidence, the State must overcome the defense by evidence which proves beyond a reasonable doubt that the mental element was present despite the alleged intoxication. **State v. Harris**, 527 So.2d 1140, 1143 (La. App. 1st Cir. 1988).

In **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 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."

Mitchell, 772 So.2d at 83 (citations omitted).

Further, the **Mitchell** Court cautioned:

> "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."

Mitchell, 772 So.2d at 83 (citations omitted).

MANSLAUGHTER

Manslaughter is a homicide which would be either 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. La. R.S. 14:31(A)(1). "Sudden passion" and "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 that present when the homicide is committed without them. The State does not bear the burden of proving the absence of these mitigatory factors. A defendant who establishes by a preponderance of the evidence that he acted in a "sudden passion" or "heat of blood" is entitled to a manslaughter verdict. In reviewing the claim, this court must determine if a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the mitigatory factors were not established by a preponderance of the evidence. **State**

v. Huls, 95-0541 (La. App. 1st Cir. 5/29/96), 676 So.2d 160, 177, writ denied, 96-1734 (La. 1/6/97), 685 So.2d 126.

STATE v. LOMBARD

Lombard, 486 So.2d at 107, involved an appeal from a conviction for the second degree murder of the victim, John St. Pierre. The defendant, the victim, and the victim's girlfriend were spectators at a football game. The defendant harassed the girlfriend as she walked past him on her way to and from the bathroom. The girlfriend disclosed the harassment to the victim, and the victim threatened to kill the defendant if he said anything else to her. The defendant immediately retorted that he would say something to the girlfriend. The victim warned the defendant that if anything remained to be settled, he would be back later. The defendant told a few bystanders that if the victim returned, there would not be much of a fight because the defendant had a knife, which he would use. The victim and his girlfriend passed the defendant without incident as they left the game, but following an argument, the victim challenged the defendant to fight him in the parking lot. The defendant refused the invitation, making an obscene gesture. The victim responded with the statement "[T]hat's your ass," handed his glasses to his girlfriend, and moved toward the defendant. The victim threw the first blow, grabbed the defendant and hurled him against a railing, and wrapped his right arm around the defendant's neck in a stranglehold while twisting the defendant's left arm behind his back. The defendant used his right hand to remove his knife from his pocket, flick off the sheath, and stab the victim twice. **Lombard**, 486 So.2d at 107–08.

The court in **Lombard** found that the jury erred in finding the defendant guilty of second degree murder, rather than manslaughter, because a preponderance of the evidence clearly showed that the defendant committed the offense in a sudden passion or heat of blood caused by a provocation which would

have deprived an average person of his self-control and cool reflection, and no rational trier of fact could have concluded otherwise. **Lombard**, 486 So.2d at 111.

This court and other courts have limited **Lombard** to its facts, and we find the case factually distinguishable. See **State v. Morris**, 2009-0422 (La. App. 1st Cir. 9/11/09), 22 So.3d 1002, 1010; **State v. Clark**, 93–2090 (La. App. 4th Cir. 5/17/94), 637 So.2d 1140, 1142–43 (declining to reverse based on **Lombard** where no evidence was presented that the victim was carrying a gun or was actively threatening the defendant when the fatal shot was fired). In this case, the defendant, rather than the victim, made the threat to kill prior to the offense. Further, this case did not involve the victim challenging the defendant to a fight. Additionally, the instant victim did not throw the first blow in the encounter leading to his death, but rather, was sitting on the couch when the defendant stabbed him.

Any rational trier of fact, viewing the evidence presented 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 second degree murder, and the defendant's identity as the perpetrator of that offense against the victim. Further, the verdict rendered indicates the jury accepted the testimony offered against the defendant and rejected his attempts to discredit that testimony. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-0385 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. Additionally, 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*). Any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could also have found that the mitigatory factors required to support manslaughter were not established by a preponderance of the evidence. Additionally, any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could also have found that the evidence proved beyond a reasonable doubt that the defendant had the specific intent to kill or to inflict great bodily harm despite his alleged intoxication. The defendant did not act as a mindless drunk. Rather, he acted with deliberation, indicating a clear mind. He threatened to kill the victim prior to the offense. The defendant then retrieved a knife and followed the victim into another apartment, where he stabbed the defenseless victim in the heart with great force, while stating he told the victim he would kill him. Thereafter, the defendant fled from the scene and hid himself in a nearby wooded area until he was apprehended by a police dog. Flight and attempt to avoid apprehension indicate a guilty mind. See **Harris**, 527 So.2d at 1144.

This assignment of error is without merit.

SPECIAL JURY INSTRUCTION

In counseled assignment of error number 1, the defendant argues the trial court erred in refusing to give a jury instruction based on **Lombard,** 486 So.2d at 106, as requested by the defense.

Louisiana Code Criminal Procedure article 807 provides:

> The state and the defendant shall have the right before argument

> to submit to the court special written charges for the jury. Such charges may be received by the court in its discretion after argument has begun. The party submitting the charges shall furnish a copy of the charges to the other party when the charges are submitted to the court.
>
> A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given.

Prior to closing argument, the State requested that the jury be charged on the full definition of manslaughter as set forth in La. R.S. 14:31. The defense stated it had no objection to the proposed jury charge. Citing **Lombard**, the defense requested the jury be charged, "a defendant who establishes by a preponderance of the evidence that he acted in a sudden passion or heat of blood is entitled to a manslaughter verdict." The State objected, arguing the proposed jury instruction was a decision made on a case, and the instruction on manslaughter from the criminal code was sufficient.

The trial court denied the defense request for the special jury charge, holding the basic charge or definition of manslaughter from the criminal code was sufficient, and the court believed the proposed defense jury instruction improperly instructed the jury to return a manslaughter verdict. The defense objected to the ruling.

In regard to manslaughter, the trial court charged the jury:

> Manslaughter is the killing of a human being when the defendant has a specific intent to kill or inflict great bodily harm, but the killing 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 a 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.
>
> Alternatively, [m]anslaughter is the killing of a human being when the defendant is engaged in the commission or attempted commission of [a]ggravated [b]attery, [s]econd [d]egree [b]attery, or

[s]imple [b]attery even though there is no intent to kill.

. . .

Thus, in order to convict the defendant of manslaughter, you must find:

(1) That the defendant killed [the victim]; and

(2) That the defendant had a specific intent to kill or inflict great bodily harm;

but

(3) That the killing was committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his [s]elf-control and cool reflection.

OR

(1) That the defendant killed [the victim] whether or not he had an intent to kill; and

(2) That the killing took place while the defendant was engaged in the commission or attempted commission of [a]ggravated [b]attery, [s]econd [d]egree [b]attery, or [s]imple [b]attery.

Thus, if you are convinced beyond a reasonable doubt that the defendant is guilty of [s]econd [d]egree [m]urder, the form of your verdict should read: "Guilty of Second Degree Murder."

If you are not convinced beyond a reasonable doubt that the defendant is guilty of [s]econd [d]egree [m]urder, but you are convinced beyond a reasonable dout [sic] that the defendant is guilty of [m]anslaughter, the form of your verdict should be "Guilty of Manslaughter."

If the State failed to prove beyond a reasonable doubt that the defendant is guilty of the offense charged, or of the responsive lesser offense, the form of your verdict should be: "Not Guilty."

The trial court correctly concluded the proposed defense special jury charge was included in the general charge on manslaughter. The general charge on manslaughter was the legal definition of manslaughter provided by La. R.S. 14:31. However, the court incorrectly stated the jury had to be convinced "beyond a reasonable doubt," rather than "by a preponderance," to return a verdict of

manslaughter. Even an erroneous jury instruction which includes intent to inflict great bodily harm as an element of attempted second degree murder is a trial error subject to harmless-error analysis. See **State v. Hongo**, 96-2060 (La. 12/2/97), 706 So.2d 419, 420-22. Given the evidence at trial of the minimal provocation in this case, of the defendant's threat to kill the victim, of the defendant's retrieving his knife, of the defendant's following the victim into another apartment, of the defendant's stabbing the defenseless victim in the heart, while stating he told the victim he would kill him, and of the defendant fleeing and hiding himself after the offense, the error in the jury instruction was harmless beyond a reasonable doubt. See La. C.Cr.P. art. 921. The guilty verdict rendered in this case was surely unattributable to the erroneous portion of the jury charge. See **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

This assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.