NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 2013 KA 1530

STATE OF LOUISIANA

VERSUS

ROY HOLMES

RHP by

Judgment Rendered: MAY 22 2014

On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
No. 04-12-0618, Sec. 6

The Honorable Richard "Chip" Moore, III, Judge Presiding

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Hillar C. Moore, III
District Attorney
Baton Rouge, Louisiana
and
Dale R. Lee
Assistant District Attorney
Baton Rouge, Louisiana

Attorneys for Appellee,
State of Louisiana

Bertha M. Hillman
Louisiana Appellate Project
Thibodaux, Louisiana

Attorney for Appellant,
Roy Holmes

* * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.

The defendant, Roy Holmes, was charged by bill of information with attempted second degree murder, in violation of La. R.S. 14:30.1 and La. R.S. 14:27. The defendant pled not guilty and was found guilty as charged after a trial by jury. The defendant was sentenced to ten years imprisonment at hard labor.[1] The defendant now appeals, assigning error to the sufficiency of the evidence in support of the conviction. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On February 13, 2012, sometime after 10:00 p.m., officers of the Baton Rouge City Police Department (BRPD) were dispatched to the Belle of Baton Rouge Casino VIP Lounge regarding a stabbing that took place by the bar. Officer Luke Cowart of the BRPD was one of the first responders on the scene. The paramedics had not yet arrived, and the victim, John Rester Givens, was in the breezeway area outside of the casino losing a great deal of blood. After the paramedics arrived and transported the victim to Baton Rouge General Medical Center, the officers obtained a description of the suspect from witnesses and apprehended the defendant. Following a search of the defendant, the police recovered a pocketknife with blood on the blade from his pocket, later identified as the one used in the stabbing. The defendant did not have any bruises or other visible injuries, with the exception of cuts and blood on his hands and fingers. The police transported the defendant to Earl K. Long Medical Center for medical attention. According to witnesses who testified at the trial, the defendant and the victim had a verbal altercation that escalated to a physical tussle just before the defendant stabbed the victim multiple times.

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[1] Under the self-activating provisions of La. R.S. 15:301.1(A), La. R.S. 14:30.1(B), and La. R.S. 14:27(D)(1)(a), the sentence will automatically be served without the benefit of parole, and there is no need to remand the matter for resentencing. *State v. Williams*, 2000-1725 (La. 11/28/01), 800 So. 2d 790, 799.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant contends that he stabbed the victim in self-defense. The defendant notes that the victim was taller and weighed over one hundred pounds more than the defendant. The defendant claims that he pulled out his knife after being physically attacked and further threatened with additional bodily harm by the victim. In this regard, the defendant contends that the victim had already violently thrown him to the floor and was approaching aggressively after threatening to beat the defendant. According to the defendant, the victim made a move toward the defendant, and he took out his pocketknife because he was afraid that the victim was going to hurt him again. In the alternative, the defendant argues that the evidence was only sufficient to establish aggravated battery because he did not have the specific intent to kill the victim. Finally, as another alternative, the defendant argues that the evidence showed that there was provocation and heat of passion sufficient for attempted manslaughter. In this regard, the defendant contends that he had been provoked by the victim's threatening remarks and physical aggression, and that he stabbed the victim in the heat of an argument while they were tussling.

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 have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); *State v. Ordodi*, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 660. The *Jackson* standard of review, incorporated in Article 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing

circumstantial evidence, La. R.S. 15:438 provides that the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. See *State v. Patorno*, 2001-2585 (La. App. 1 Cir. 6/21/02), 822 So. 2d 141, 144. When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. *State v. Captville*, 448 So. 2d 676, 680 (La. 1984); *State v. Taylor*, 97-2261 (La. App. 1 Cir. 9/25/98), 721 So. 2d 929, 932.

La. R.S. 14:27(A) provides that, to attempt a crime, an accused must do an act tending directly toward the accomplishing of his object, having a specific intent to commit the crime. Second degree murder is, in pertinent part, defined as the killing of a human being "[w]hen the offender has a specific intent to kill or to inflict great bodily harm." La. R.S. 14:30.1(A)(1). While murder requires the specific intent to kill or to inflict great bodily harm, attempted murder requires the specific intent to kill. Thus, the elements of attempted second degree murder are the specific intent to kill a human being and an overt act in furtherance of the object. *State v. Butler*, 322 So. 2d 189, 192 (La. 1975). Specific intent may be inferred from a defendant's actions and the circumstances. *State v. Templet*, 2005-2623 (La. App. 1 Cir. 8/16/06), 943 So. 2d 412, 421-22, *writ denied*, 2006-2203 (La. 4/20/07), 954 So. 2d 158. Moreover, specific intent to kill can be inferred from the intentional use of a deadly weapon, such as a knife or a gun. *Butler*, 322 So. 2d at 194; *Templet*, 943 So. 2d at 421.

In a nonhomicide situation, a claim of self-defense requires a dual inquiry: first, an objective inquiry into whether the force used was reasonable under the circumstances, and, second, a subjective inquiry into whether the force used was apparently necessary. See La. R.S. 14:19(A); *Taylor*, 721 So. 2d at 931. In a homicide case, the State must prove, beyond a reasonable doubt, that the homicide

was not perpetrated in self-defense. Louisiana law is unclear as to who has the burden of proving self-defense in a nonhomicide case. In previous cases dealing with this issue, this court has analyzed the evidence under both standards of review, that is, whether the defendant proved self-defense by a preponderance of the evidence or whether the State proved beyond a reasonable doubt that the defendant did not act in self-defense. Similarly, we need not decide in this case who has the burden of proving (or disproving) self-defense, because under either standard, the evidence in this case sufficiently established that the defendant did not act in self-defense. *Taylor*, 721 So. 2d at 931. Self-defense is not available to "[a] person who is the aggressor or who brings on a difficulty ... 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.

Under La. R.S. 14:31(A)(1), manslaughter is a first or second degree murder that 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" and "heat of blood" are not elements of the offense of manslaughter; rather, they are mitigatory factors in the nature of a defense that tend to lessen the culpability. *State v. Rodriguez*, 2001-2182 (La. App. 1 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. Although specific intent to kill is not necessary for a conviction of manslaughter, a specific

intent to kill is required for a conviction of attempted manslaughter. *State v. Brunet*, 95-0340 (La. App. 1 Cir. 4/30/96), 674 So. 2d 344, 347, *writ denied*, 96-1406 (La. 11/1/96), 681 So. 2d 1258. To support a conviction for attempted manslaughter, the State must prove that the defendant specifically intended to kill the victim and committed an overt act in furtherance of that goal. See La. R.S. 14:31(A)(1) and 14:27(A).

The offense of aggravated battery "consists of the intentional use of force or violence, with a dangerous weapon, upon the person of another." See La. R.S. 14:34(A) and 14:33. The crime requires neither the infliction of serious bodily harm nor the intent to inflict serious injury. The offense does require physical contact, whether injurious or merely offensive. It also requires proof only of general intent, or a showing that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. La. R.S. 14:10(2); *State v. Howard*, 94-0023 (La. 6/3/94), 638 So. 2d 216, 217 (per curiam). In general intent crimes, the criminal intent necessary to sustain a conviction is shown by the very doing of the acts which have been declared criminal. *State v. Meads*, 98-1388 (La. App. 1 Cir. 4/1/99), 734 So. 2d 792, 798, *writ denied*, 99-1328 (La. 10/15/99), 748 So. 2d 465.

The victim testified that he frequented the lounge after work hours and was there with a friend, Troy Jackson, on the night in question. The victim and Jackson arrived at the lounge at approximately 9:00 p.m., sat at the bar, and began ordering drinks and watching a basketball game. The defendant arrived about thirty minutes later. Jackson was sitting just to the left of the victim and another patron, Brian Turner, was sitting just to the right of the victim. As they sat there watching the game, according to the victim, the defendant told Turner, "Don't be like that pussy on the side of you." The victim ignored the defendant and the defendant repeated

the statement, adding, "You hear me." At that point, the victim responded by stating, "No, like your maw and paw." As they exchanged verbal insults, the defendant approached and leaned on the victim as he was seated on a barstool. The victim slid his stool back and told the defendant, "Man, get off me." The defendant grabbed the victim, and the victim shoved him away to the floor. The victim walked back to his stool, sat down, and grabbed his beer to continue drinking. As soon as he picked up the beer, the victim heard someone say "Roy, what you doing?"[2] At that point, the defendant came behind him with the knife and stabbed him in the back. As the victim stood up, he tussled with the defendant and attempted to take the knife. The defendant had stabbed the victim in the back, chest, and stomach before he was able to push the defendant away to the floor. Other patrons held the defendant back, and as the victim headed for the exit he heard the defendant state, "Yeah, I was trying to kill your big ass." The victim told the defendant to "finish the job," but proceeded to the front entry to try to report the stabbing as he bled profusely. The victim was not armed with any weapon that night.

During the trial, the victim narrated video footage that depicts an individual identified as the defendant (wearing dark clothing) approaching and leaning over the victim (wearing lighter clothing) as he sat at the bar.[3] The victim can be observed standing up and pushing the defendant away from his barstool, and sitting back down. The defendant got up and reapproached the victim at his barstool, and it appears as though the stabbing and tussle took place at that point. The defendant and the victim had been in the lounge together on several occasions before the

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[2] Later in his testimony, the victim recalled this statement as, "Mr. Holmes, what are you doing with the knife."

[3] The video footage has no audio, is of poor quality, and appeared to have a timer that often skipped every other second. While the patrons' faces cannot be discerned, the defendant does not contest the identifications noted above.

night in question, but never had any problems or confrontations.[4] The victim is about six feet, three inches tall and weighed about two hundred eighty pounds at the time of the trial, though he testified that he was "a little smaller" at the time of the offense.

During cross-examination, the victim was asked to describe the initial physical confrontation. The victim specifically testified, "When he came behind me ... he lean up against me. I push my hand up against the bar stool and I push my bar stool away to get him off of me ... I got tired of trying to tussle with him and I just threw him." After the victim sat back on his barstool, the stabbing took place. During redirect examination, the victim reiterated that the defendant grabbed him first, before he stood up to remove the defendant. The victim further reiterated that he was seated again when the defendant stabbed him in the back.

Jackson testified that as he was sitting at the bar watching the game and drinking a beer, the defendant and the victim started "talking smack" back and forth. He read the defendant's lips as he cursed the victim, calling him a "dirty mother fu____." When the victim responded by saying "your momma," the defendant came from the end of the bar, approached the victim from the back and pushed the victim, and the victim pushed him back with his stool. Jackson confirmed that the defendant initiated the physical contact when he pushed the victim. The victim stood up, they tussled, and the victim "pushed him [the defendant] off." Jackson further testified that he did not see the victim with a weapon at the time. After the victim sat back down, the defendant came back and the stabbing took place. Jackson further confirmed that the defendant could have exited the lounge after the initial confrontation without passing the part of the bar where the victim was seated. Jackson confirmed that he and others broke up the

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[4] On cross-examination, the victim confirmed that while the defendant had never threatened him before the night in question, the defendant had previously cursed at him.

altercation and the victim headed for the exit. Jackson did not hear the defendant state that he was going to kill the victim. On redirect examination, he confirmed that there was a little commotion at the time, though not many people were in the lounge.

Chole Jones, a casino employee who was working in guest services at the time of the incident, also testified at the trial. Jones knew the defendant, the victim, and Jackson as regular patrons before the incident. Jackson and the victim were sitting at the bar when Jones left to take a break, and when she returned, the defendant had arrived and was standing at the end of the bar. Jones observed the defendant and the victim tussling before the victim pushed the defendant down, next to the food warmers near Jones. Jones testified that after the victim pushed the defendant, the victim went and sat back down. She added, the defendant got up and went towards the victim and, "it happened fast." Jones specified, "[t]hey started to fight, like, started to, I guess, stab him." She further testified, "Mr. Holmes was walking towards him. Mr. John was about to sit down but he stood back up and that's when it happened." Jones confirmed that after the defendant was initially pushed down to the floor, there was nothing to prevent him from walking out of the bar without passing the victim. On cross-examination, Jones confirmed that the victim stood up when the defendant reapproached him after the initial tussle. Jones did not see anything in the defendant's hand until after the first hit. On redirect examination, the State asked, "After you saw Mr. Holmes hit the ground and Mr. Givens sit back down, did you observe any reason for Mr. Holmes to walk back over there and pull that knife out?" Jones responded, "I guess, aside from getting pushed, no."

State witness Eric Batts was also in the lounge at the time of the incident. Before the night in question, Batts knew the defendant, the victim, and Jackson from seeing them in the lounge. Batts was sitting at the other end of the bar when

he saw the defendant approach the victim. Televisions were on at the time, so Batts could not hear what was being said, but he observed as the defendant and the victim had a tussle, and as the victim tossed the defendant to the floor. He specifically further stated, "John comes back, sits down, you know, in the seat, and Roy comes back around. I don't see a knife. I just see them start to tussle again." After other individuals broke up the altercation, Batts saw the victim standing with a trail of blood on the side of him. Batts clarified that the victim was sitting at the bar when the defendant walked from the end of the bar to initiate the first encounter that led to a tussle. Batts also confirmed that there were two exits and that the defendant could have exited the lounge after that tussle without passing the victim.

Brian Turner testified as a defense witness. Turner frequented the lounge and described the defendant as a family friend whom he had known his whole life. Turner had also known the victim for about five to seven years as a frequent patron of the lounge. Turner testified that before the stabbing, the victim was seated in the middle of the bar, and Turner was seated next to the victim. Turner did not see the initial contact but he saw the defendant out of the corner of his eye as he was hitting the floor. He specified that he saw the defendant's body "go by" as he had been "pushed, shoved, however[sic]." After the defendant ended up on the floor, the victim came back to his seat. As he was coming back, the defendant got up, approached the victim and asked, "What the hell you pushed me down for -- throw me down for[?]" Turner confirmed that the defendant did not use the word "hurt" in reference to being pushed down. Turner did not hear the victim's response, but noted that the victim laughed. According to Turner, at that point, the defendant pulled out his knife and stabbed the victim. Turner confirmed that the victim actually sat back down on the stool, that the defendant approached him again, and that the victim stood up at that point. Turner noted that the video footage appeared

distorted as it skipped seconds during the recording in a "choppy" manner. Turner stated that he was certain that the victim stood up to face the defendant as he reapproached him from behind. Turner testified that he thought the victim and the defendant were just joking during the verbal exchange that took place before the initial physical confrontation.

During cross-examination, Turner admitted that he did not want to see the defendant go to jail for the offense and reiterated that he saw about "eighty percent" of the altercation and did not see the initial physical contact. Turner also confirmed that the defendant got back up very quickly after the initial push by the victim. The victim did not initiate the confrontation or have a weapon, to Turner's knowledge. On redirect examination, Turner confirmed that he would not lie on the defendant's behalf, that he wanted the truth to be known, and that he considered both the defendant and the victim friends.

Defense witness Donald Quiett arrived at the lounge with the defendant on the night in question. Quiett was standing at the other end of the bar talking to Batts when the defendant stopped to talk to a female friend. Quiett saw the defendant when he walked to the victim's stool but could not hear what was being said. He responded positively when asked if he saw the victim grab the defendant and throw him. He specifically added, "Well, after he threw him on the floor, he got back up and came back down there. John went back and sat back in his seat after that happened, back by that tv. Roy got up off the floor and came back over there." At that point, Quiett heard the defendant say something to the effect of, "you can't handle me." They tussled again, and Jackson and others tried to stop them.

The defendant testified as the final witness. The defendant indicated that the verbal exchange began as the female (the defendant's friend's wife) with whom he had just conversed was exiting the lounge. Turner stated, "You better watch

yourself." The defendant responded, "No, I'm nothing like the one in the middle." At that point the victim stated, "Your maw and your paw." The defendant stated that he did not take the exchange seriously and thought they were joking. The defendant walked around and asked the victim what he said, the victim repeated the statement about the defendant's parents and the defendant replied, "Your maw and your paw." According to the defendant, at that point, the victim grabbed and bear hugged him, started shaking him, and slung him "like you do with a rag doll." The defendant testified that he is five feet eleven inches tall and weighs between one hundred sixty-seven and one hundred seventy-four pounds. When asked if the victim was the same size at the time of the trial as the time of the offense, the defendant stated that the victim "could have been bigger then" or about the same size. The defendant indicated that one of his shoes flew off when the victim slung him, and stated that he got up and went back to the victim and asked, "why you want to hurt me?" According to the defendant, the victim replied, "I don't like your old ass." When asked if that was the victim's complete statement, the defendant added, "he said, I ain't never liked your old ass and I'm gonna beat you down." The defendant further testified that the victim "made a move" and he decided not to allow the victim to hurt him again. The defendant stated that when he reapproached the victim he did not have the intention to cut him, and that he only wanted to tell the victim that he had hurt the defendant. The defendant stated the victim was not seated when he stabbed him and that the victim had "made his move," and stated that he would beat the defendant just before the defendant threw his arm up and said, "no, not this time." The defendant further stated that he felt the need to use the knife because the victim is such a big man, was going to hurt him, and had already slung him all over the place. When asked to explain how the victim got stabbed in his back, the defendant stated, "I don't know because when he came to me we were facing each other." The defendant could not recall whether

he stabbed the victim more than once and stated that he was trying to protect himself. The defendant was unsure about how he got the lacerations on his fingers.

The guilty verdict in this case indicates the jury rejected the defendant's claim that he stabbed the victim in self-defense or that his actions constituted only attempted manslaughter or aggravated battery. 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. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. *Taylor*, 721 So. 2d at 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. 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. In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. Further, the testimony of the victim alone is sufficient to prove the elements of the offense. *State v. Clouatre*, 2012-0407 (La. App. 1 Cir. 11/14/12), 110 So. 3d 1094, 1100.

The testimony indicated that the defendant was the initial aggressor. Further, the testimony, including the defendant's own testimony, indicated that the defendant approached the victim at the point of both physical interactions. The defendant quickly got back up after being pushed away by the victim. The defendant had the opportunity to exit the lounge before he re-approached the victim. It was unreasonable for the defendant to respond with deadly force. It is particularly pertinent in this regard that the victim was unarmed and was stabbed in

the back after he sat back down. Accordingly, the jury could have reasonably concluded that the victim did not pose an imminent threat to the defendant before the stabbing. Thus, we find no error in the jury's rejection of the defendant's claim of self-defense.

Further, a rational juror could have found insufficient evidence of provocation, such that a reasonable person would not have used deadly force. 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. 1 Cir. 1988). Additionally, specific intent to kill can be inferred based on the defendant's use of a knife to repeatedly stab the victim. Accordingly, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See *Ordodi*, 946 So. 2d at 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). After careful review, we are convinced that any rational trier of fact, viewing the evidence presented at trial in the light most favorable to the State, could have found the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of attempted second degree murder. The assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.