NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 2010

STATE OF LOUISIANA

VERSUS

JOSHUA DAVID ROBERSON

Judgment Rendered: MAY 02 2014

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 512753

Honorable Richard A. Swartz, Judge Presiding

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

WHIPPLE, C.J.

The defendant, Joshua David Roberson, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. He pled not guilty and, following a jury trial, was found guilty as charged. He filed a motion for postverdict judgment of acquittal, which was denied. He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating two assignments of error. We affirm the defendant's conviction and sentence.

FACTS

After 10:00 p.m. on Saturday, August 13, 2011, Usheeka Quinn and her friend, Tabitha Ross, the victim herein, drove to a daiquiri shop in Mandeville. The victim went inside the daiquiri shop, while Usheeka stayed in the vehicle. A short time later, Usheeka went to pick up a friend, Shemeta Marshall, whom she brought to the daiquiri shop. Usheeka stayed in the car. About an hour later, Usheeka saw the victim, the defendant (the victim's former fiancé) and Shemeta leave the shop. The victim, who had been dating the defendant on and off for several years, became upset about the defendant talking to Shemeta. Shemeta then went back into the daiquiri shop, and the defendant walked to his car.

The victim got in Usheeka's car and told her to drive over by the defendant's car. When they approached, the victim asked the defendant if he was okay, and the defendant replied, "Bitch, call Peggy." The defendant then drove away. The victim wanted to follow the defendant to his house, but Usheeka did not want to drive. Thus, after switching places in the car, the victim drove to the defendant's house on Adair Street in Mandeville. She met the defendant in his yard, and they walked inside the defendant's house, while Usheeka waited in the car. About

fifteen minutes later, the defendant approached Usheeka and told her that the victim was "good" and that Usheeka could leave. Usheeka then drove back to the daiquiri shop, where she met up with Shemeta. While at the daiquiri shop, Usheeka called and texted the victim, but received no response. Usheeka and Shemeta drove to the defendant's house, but his car was gone; thus, they again drove back to the daiquiri shop.

That night, Usheeka and her sister, Erica, slept at Shemeta's house. The next morning, Sunday, Usheeka continued to text the victim without reply. At about 7:30 a.m., the defendant stopped by Shemeta's house to see Shemeta's brother, Demond. The defendant and Demond had plans to go to a barbeque that day. When Shemeta asked the defendant about the victim, the defendant told her that he had not seen the victim and did not know her whereabouts. By Sunday afternoon, no one had heard from the victim. Marci Ross, the victim's sister, went to the defendant's house and knocked on the front door, but no one answered. Marci then called the police.

Sergeant Paul Bourque, with the city of Mandeville Police Department, arrived at the defendant's house, checked the front door and found it locked. After knocking open the door with his shoulder, he found the victim dead on the floor with a single gunshot wound to the head and her body partially covered with a blue tarp. Dr. Michael Defatta, a pathologist who performed the autopsy, testified that, given the multiple skull fractures and the through-and-through wound to her head, the victim was shot by a powerful handgun or rifle, and that a .22 caliber weapon could not have done that kind of extensive damage.

Sergeant Vincent Liberto, with the Mandeville Police Department, was the lead detective on the case. He testified that about forty people were interviewed,

and the only suspect developed was the defendant. The defendant was brought to the police station for questioning. Sergeant Liberto testified that after speaking to the defendant, he learned the location of the murder weapon. The defendant was brought to Sunset Point, where he pointed out where he had thrown the gun. About an hour and fifteen minutes later, a dive team found a .357 magnum handgun in the middle of a lagoon. The chambers were empty. The dive team could not find the cartridges or bullets. The gun was test-fired and was in working condition.

Joseph Crowe, III, who was in jail on pending charges of convicted felon in possession of a firearm, theft, and bank fraud, testified that a few days before the victim was shot, he gave a .357 magnum Smith & Wesson handgun to the defendant in Mandeville in exchange for cocaine. The gun belonged to Crowe's father. On a second occasion, Crowe gave the defendant his father's .22 caliber handgun in exchange for drugs. (According to Crowe, although the defendant got the .22, he never got the drugs).

Peggy Magee testified that in August of 2011, she worked for a bail bonding company and had an outstanding bond for the defendant, for which the victim was a signed surety. The State's theory of the case was that the defendant killed the victim to prevent her from removing herself as a surety for the bond, the removal of which would have resulted in the defendant going back to jail.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court abused its discretion in allowing into evidence at trial other crimes of the defendant. Specifically, the defendant contends that the testimony of Joseph Crowe, III about trading the guns for drugs had no probative value, but served only to inform the

jury that the defendant was involved with drugs and criminal activity.

Prior to Crowe taking the stand, one of the defense attorneys reurged her objection to the State's LSA-C.E. art. 404(B) notice of intent to introduce other crimes evidence. Defense counsel argued that because the guns were offered to the defendant, rather than sought out by him, the exchange for drugs did not show preparation, intent, motive, or any other permissible purpose; thus, if there was any probative value to the evidence, it would be grossly outweighed by any prejudicial effects. The prosecutor responded that he believed the evidence did show plan, preparation, and intent and, further, that the defendant's acquiring the guns was part of the *res gestae*. The trial court agreed that it was res gestae and overruled the art. 404(B) objection.

Louisiana Code of Evidence article 404(B)(1) provides:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. In order to avoid the unfair inference that a defendant committed a particular crime simply because he is a person of criminal character, other crimes evidence is inadmissible unless it has an independent relevancy besides simply showing a criminal disposition. State v. Lockett, 99-0917 (La. App. 1st Cir. 2/18/00), 754 So. 2d 1128, 1130, writ denied, 2000-1261 (La. 3/9/01), 786

So. 2d 115. The trial court's ruling on the admissibility of other crimes evidence will not be overturned absent an abuse of discretion. See State v. Galliano, 2002-2849 (La. 1/10/03), 839 So. 2d 932, 934 (per curiam).

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. LSA-C.E. art. 401. All relevant evidence is admissible except as otherwise provided by positive law. Evidence which is not relevant is not admissible. LSA-C.E. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or waste of time. LSA-C.E. art. 403.

The sale of the guns to the defendant, particularly the .357 magnum, had independent relevance and was admissible under LSA-C.E. art. 404(B)(1) to identify the defendant as the assailant. In his opening statement, defense counsel raised the issue of the identity of the shooter by stating that someone who had a "bone to pick" with the defendant was in the house and shot the victim. Counsel further stated that the recovered guns were "not linked to" the defendant, and, instead, were "linked to Joseph Crowe." Thus, the defense's hypothesis of innocence was that someone else shot the victim. Proof of the defendant's acquisition of the .357 magnum, which the defendant threw in the lagoon after the crime, was relevant to show that he owned a large caliber handgun that could have caused the victim's wound. Crowe's testimony contradicted the defense's hypothesis of innocence by directly linking the defendant to the recovered .357 magnum.

Moreover, the evidence at issue constituted "*res gestae*" or integral act

evidence. Under LSA-C.E. art. 404(B)(1), evidence of other crimes, wrongs or acts may be introduced when it relates to conduct, formerly referred to as *res gestae*, that "constitutes an integral part of the act or transaction that is the subject of the present proceeding." *Res gestae* events constituting other crimes are deemed admissible because they are so nearly connected to the charged offense that the state could not accurately present its case without reference to them. A close proximity in time and location is required between the charged offense and the other crimes evidence to ensure that the purpose served by admission of other crimes evidence is not to depict defendant as a bad person, 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. Colomb, 98-2813 (La. 10/1/99), 747 So. 2d 1074, 1076 (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 during or after the commission of the crime if a continuous chain of events is evident under the circumstances. State v. Taylor, 2001-1638 (La. 1/14/03), 838 So. 2d 729, 741, cert. denied, 540 U.S. 1103, 124 S. Ct. 1036, 157 L. Ed. 2d 886 (2004).

The evidence established that just days before the killing, the defendant obtained two guns in exchange for drugs. Crowe testified that he gave the defendant his father's .357 magnum handgun in exchange for cocaine. Shortly thereafter, Crowe gave the defendant his father's .22 caliber handgun for more drugs. Sergeant Liberto testified that after speaking to the defendant, he learned that the defendant had thrown the murder weapon into a lagoon at Sunset Point. The defendant was taken to the lagoon, where he pointed out the spot where he

threw the gun. Within about an hour and fifteen minutes, a dive team retrieved a .357 magnum handgun from the water. Crowe was shown this handgun at trial, and testified that that gun was the one he had sold to the defendant.

Dr. Defatta testified at trial that the through-and-through wound to the victim's head was so complete and extensive that a smaller caliber handgun, such as a .22, could not have caused that wound; rather, the wound was caused by a high-caliber weapon, such as a .357 magnum, or a 9mm or .38 caliber weapons with Plus-P rounds, which are very powerful rounds.

The prosecutor was entitled to present a case with narrative momentum and cohesiveness. See Colomb, 747 So. 2d at 1076. Accordingly, the gun sales to the defendant, particularly the .357 magnum, constituted "integral part of the act" evidence, which was highly relevant in establishing how the defendant came into possession of the gun he used to kill the victim and then threw it into the lagoon.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the evidence was insufficient to support the conviction for second degree murder. Specifically, the defendant contends the State did not prove he had the specific intent to kill the victim; in the alternative, if specific intent was proven, the defendant contends he is guilty of manslaughter because of the presence of the mitigating factors of sudden passion or heat of blood at the time of the killing.

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 or not, 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 LSA-C.Cr.P. art. 821(B); State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 660; State v. Mussall, 523 So. 2d 1305, 1308-09 (La. 1988). The Jackson standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. Pursuant to LSA-R.S. 15:438, when analyzing circumstantial evidence, the factfinder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144.

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. LSA-R.S. 14:30.1(A)(1). "Guilty of manslaughter" is a proper responsive verdict for a charge of second degree murder. LSA-C.Cr.P. art. 814(A)(3). Louisiana Revised Statute 14:31(A)(1) defines manslaughter as a homicide which would be either first degree murder 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 factfinder finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed. The existence of "sudden passion" and "heat of blood" are not elements of the offense, but, rather, are factors in the nature of mitigating circumstances that may reduce the grade of homicide. State v. Maddox, 522 So. 2d 579, 582 (La. App. 1st Cir. 1988). Manslaughter requires the presence of specific intent to kill or inflict great bodily harm. See State v. Hilburn, 512 So. 2d 497, 504

(La. App. 1st Cir.), writ denied, 515 So. 2d 444 (La. 1987).

Specific 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. LSA-R.S. 14:10(1). Such state of mind can be formed in an instant. State v. Cousan, 94-2503 (La. 11/25/96), 684 So. 2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. State v. Graham, 420 So. 2d 1126, 1127 (La. 1982). Deliberately pointing and firing a deadly weapon at close range are circumstances that support a finding of specific intent to kill. State v. Broaden, 99-2124 (La. 2/21/01), 780 So. 2d 349, 362, cert. denied, 534 U.S. 884, 122 S. Ct. 192, 151 L. Ed. 2d 135 (2001). The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. State v. McCue, 484 So. 2d 889, 892 (La. App. 1st Cir. 1986).

Negligent homicide is the killing of a human being by criminal negligence. LSA-R.S. 14:32(A)(1). Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances. LSA-R.S. 14:12.

In his brief, the defendant does not deny shooting the victim. Instead, he argues that he did not have the specific intent to kill her. Specifically, he asserts that a reasonable hypothesis of innocence is that he accidentally shot the victim because he had been drinking heavily. The defendant argues in the alternative that if he did have specific intent, the evidence was sufficient to support a conviction only for manslaughter. Specifically, the defendant asserts the second degree

murder was based on insufficient evidence "because he established provocation and heat of passion sufficient for manslaughter."

The jury could have reasonably concluded the defendant did not kill the victim accidentally, but had the specific intent to kill her. According to Dr. Defatta, the defendant fired his gun at the victim's head from a range no closer than thirty-six to forty-three inches away. The bullet traveled completely through her head, defining a path that was virtually parallel to the ground. This trajectory suggested that the victim was standing when she was shot and that the defendant was holding the gun straight, or parallel to the ground, as he fired at her head. Moreover, the defendant's actions following the shooting were consistent with a finding of specific intent to kill, as he rendered no aid and fled from the scene. See State v. Lutcher, 96-2378 (La. App. 1st Cir. 9/19/97), 700 So. 2d 961, 973, writ denied, 97-2537 (La. 2/6/98), 709 So. 2d 731. After the defendant shot the victim, he did not call the police or seek help. Instead he covered the victim's body with a tarp and left her body in his house, where he locked the front door. He then threw the .357 magnum that he used to kill her into a lagoon and later lied to the victim's sister about not having seen her. See 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. Accordingly, the defendant's specific intent to kill could have been inferred from his actions.

The remaining issue, thus, is whether the victim's killing constituted manslaughter instead of second degree murder. It is the defendant's burden to establish by a preponderance of the evidence the mitigating factors of sudden passion or heat of blood to reduce a homicide to manslaughter. See State ex rel. Lawrence v. Smith, 571 So. 2d 133, 136 (La. 1990); State v. LeBoeuf, 2006-0153

(La. App. 1st Cir. 9/15/06), 943 So. 2d 1134, 1138, writ denied, 2006-2621 (La. 8/15/07), 961 So. 2d 1158. See also Patterson v. New York, 432 U.S. 197, 208-211, 97 S. Ct. 2319, 2326-2327, 53 L. Ed. 2d 281 (1977). Further, the killing committed in sudden passion or heat of blood must be immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Thus, the evidence at trial had to establish that the provocation was such that it would have deprived an average person of his self-control and cool reflection.

There was no testimony or physical evidence that the victim physically provoked the defendant in any way. The defendant did not testify at trial, and there were no witnesses for the defense. Thus, the defense did not establish the mitigating factors of sudden passion or heat of blood during the night of the shooting. In his brief, the defendant suggests that he and the victim had recently broken off their engagement and that they had an argument in the daiquiri shop parking lot. At that time, the defendant "was very angry and upset when he left to go home." A reasonable hypothesis of innocence, according to the defendant, is that he became even angrier when the victim followed him home and that she may have threatened at that point to remove her name as surety, which sufficiently provoked the defendant and deprived him of his self-control and cool reflection. We reject these assertions as meritless.

The evidence established that in the parking lot, the defendant and the victim very briefly exchanged words. According to Usheeka, she drove by the defendant in the parking lot so that the victim, who was a passenger in Usheeka's car, could see how the defendant was doing. When the victim asked the defendant if he was "okay," the defendant replied, "Bitch, call Peggy," and drove away. Shortly

thereafter, the victim drove Usheeka's car to the defendant's house. Usheeka was the front-seat passenger. The defendant was walking from his aunt's house (next door to his house) across his front yard to his house. The victim met the defendant in the yard, and they walked together inside the defendant's house. Usheeka waited in her car. About fifteen minutes later, the defendant approached Usheeka and told her that the victim was "good," and that she could "roll out." According to Usheeka, when the defendant told her that she could leave, the defendant did not seem angry or upset.

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 which raises a reasonable doubt. See State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126 (La. 1987). It is clear from the guilty verdict that the jury rejected the theory that the defendant was so angry when he shot the victim that he was deprived of his self-control and cool reflection. Moreover, even if the victim did threaten to remove her name as surety, which caused the defendant to become so angry that he killed her, he would still be guilty of second degree murder. Questions of provocation and time for cooling are for the jury to determine under the standard of the average or ordinary person with ordinary self-control. If a man unreasonably permits his impulse and passion to obscure his judgment, he will be fully responsible for the consequences of his act. State v. Leger, 2005-0011 (La. 7/10/06), 936 So. 2d 108, 171, cert. denied, 549 U.S. 1221, 127 S. Ct. 1279, 167 L. Ed. 2d 100 (2007). Mere words or gestures, no matter how insulting, will not reduce a homicide from murder to manslaughter. State v. Mitchell, 39,202 (La. App. 2nd Cir. 12/15/04), 889 So. 2d 1257, 1263, writ denied, 2005-0132 (La.

4/29/05), 901 So. 2d 1063. See State v. Charles, 2000-1611 (La. App. 3rd Cir. 5/9/01), 787 So. 2d 516, 519, writ denied, 2001-1554 (La. 4/19/02), 813 So. 2d 420 (an argument alone will not be sufficient provocation to reduce a murder charge to manslaughter). See also State v. Tran, 98-2812 (La. App. 1st Cir. 11/5/99), 743 So. 2d 1275, 1292, writ denied, 99-3380 (La. 5/26/00), 762 So. 2d 1101.

The jury heard the testimony and viewed the evidence presented to it at trial and found the defendant guilty as charged. The defendant did not testify. See Moten, 510 So. 2d at 61-62. 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. State v. Higgins, 2003-1980 (La. 4/1/05), 898 So. 2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S. Ct. 182, 163 L. Ed. 2d 187 (2005). Moreover, the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. 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 factfinder's determination of guilt. State v. Taylor, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See State v. Mitchell, 99-3342 (La. 10/17/00), 772 So. 2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. State v. Quinn, 479 So. 2d 592, 596 (La. App. 1st Cir. 1985). The guilty verdict indicates the reasonable determination by the jury that, for whatever reason the defendant had, he shot the victim in the head with the specific intent to kill her and in the absence of the mitigating factors of manslaughter. See State v. Delco, 2006-0504

(La. App. 1st Cir. 9/15/06), 943 So. 2d 1143, 1149-51, writ denied, 2006-2636 (La. 8/15/07), 961 So. 2d 1160.

After a thorough review of the record, we find that the evidence supports the jury's guilty verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the second degree murder of Tabitha Ross. See State v. Calloway, 2007-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

This assignment of error is without merit

CONVICTION AND SENTENCE AFFIRMED.