NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 2209

STATE OF LOUISIANA

VERSUS

AKEEM GAILES

Judgment Rendered: JUN 0 6 2014

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APPEALED FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF IBERVILLE
STATE OF LOUISIANA
DOCKET NUMBER 231-12
DIVISION "D"

HONORABLE WILLIAM C. DUPONT, JUDGE

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McClendon, J. concurs and assigns reasons.

McDONALD, J.

Defendant, Akeem Gailes, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1 (count one); possession of a firearm or carrying a concealed weapon by a convicted felon, a violation of La. R.S. 14:95.1 (count two); and illegal carrying of a firearm at a parade with any firearm used in the commission of a crime of violence, a violation of La. R.S. 14:95.2.1 (count three). He pled not guilty.

Prior to trial, the state nolle-prossed the charge on count three. Following a jury trial, defendant was found guilty on count one of the responsive charge of manslaughter, a violation of La. R.S. 14:31, and guilty as charged on count two. The trial court denied defendant's motion for new trial and sentenced defendant to forty years at hard labor on count one, and to twenty years at hard labor, without benefit of parole, probation, or suspension of sentence on count two. The trial court ordered these sentences to run concurrently. Defendant filed a pro se motion to reconsider sentence, but the trial court denied that motion. Defendant now appeals, alleging three assignments of error. For the following reasons, we affirm defendant's convictions and sentences.

FACTS

On February 19, 2012, Dorothy Smith hosted a gathering at her home on W.W. Harleaux Street in Plaquemine. She and her guests attended a parade that passed on the opposite side of her divided street. Dorothy's guests included Alvin Smith (her brother), Brittanie Percell (a friend), and Dewayne Smith (her cousin and the victim).

Shortly after the parade had passed her home, Dorothy, Alvin, and Brittanie were taking pictures in or around the roadway. Defendant and several other men pulled up near Dorothy's home in a white Chevy Malibu. Defendant exited the vehicle and began a verbal altercation with Dorothy and her guests about their

alleged obstruction of the roadway. The verbal altercation quickly escalated to a physical altercation. During that time, Dewayne rushed over into the fracas. The witnesses reported hearing a gunshot shortly thereafter, and Dewayne began to run back in the direction of Dorothy's house where he eventually collapsed on the sidewalk and died as a result of a single gunshot wound that pierced his heart. Dorothy identified defendant as the shooter. Alvin and Brittanie identified defendant as possessing a black handgun when he exited his vehicle.

ASSIGNMENT OF ERROR #1

In his first assignment of error, defendant contends that the evidence presented at trial was insufficient to support his conviction for manslaughter. He appears to argue both that the state failed to prove that he shot the victim and also that, if he did shoot the victim, the state failed to prove that this action was not taken in self-defense.

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 conclude that the state proved 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. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). When circumstantial evidence is used to prove the commission of an offense, La. R.S. 15:438 requires that assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. See **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. This is not a separate test to be applied when circumstantial evidence forms the basis of a conviction; all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant

is guilty beyond a reasonable doubt. **State v. Ortiz**, 96-1609 (La. 10/21/97), 701 So.2d 922, 930, cert. denied, 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998).

In the instant case, defendant was charged with second degree murder. In pertinent part, second degree murder is the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm. See La. R.S. 14:30.1(A)(1). 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. La. R.S. 14:10(1). Since specific intent is a state of mind, it need not be proved as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982).

Defendant was convicted of the responsive offense of manslaughter. Manslaughter is defined, in pertinent part, as follows:

> A. Manslaughter is:
>
> (1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (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; or
>
> (2) A homicide committed, without any intent to cause death or great bodily harm.
>
> (a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Article 30 or 30.1, or of any intentional misdemeanor directly affecting the person[.]

See La. R.S. 14:31.

The fact that an offender's conduct is justifiable, although otherwise criminal, constitutes a defense to prosecution for any crime based on that conduct.

See La. R.S. 14:18. Regarding a justifiable homicide, La. R.S. 14:20(A) provides, in pertinent part:

> A homicide is justifiable:
>
> (1) When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.
>
> (2) When committed for the purpose of preventing a violent or forcible felony involving danger to life or of great bodily harm by one who reasonably believes that such an offense is about to be committed and that such action is necessary for its prevention. The circumstances must be sufficient to excite the fear of a reasonable person that there would be serious danger to his own life or person if he attempted to prevent the felony without the killing.

When the defendant in a homicide prosecution claims self-defense, the state must prove beyond a reasonable doubt that the homicide was not committed in self-defense. **State v. Williams**, 2001-0944 (La. App. 1st Cir. 12/28/01), 804 So.2d 932, 939, writ denied, 2002-0399 (La. 2/14/03), 836 So.2d 135. For the defendant's actions to be justified, the force used must be reasonable under the circumstances and apparently necessary to prevent an imminent assault. **State v. Nelson**, 34,077 (La. App. 2d Cir. 12/6/00), 775 So.2d 579, 584. On appeal, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, a rational fact finder could have found beyond a reasonable doubt that the defendant did not act in self-defense. **State v. Fisher**, 95-0430 (La. App. 1st Cir. 5/10/96), 673 So.2d 721, 723, writ denied, 96-1412 (La. 11/1/96), 681 So.2d 1259.

On appeal, defendant appears to argue both that the state failed to prove beyond a reasonable doubt that he killed Dewayne Smith and that, in the alternative, the state failed to prove beyond a reasonable doubt that he did not act in self-defense. Viewing the record in the light most favorable to the state, we find

that the state did in fact meet its burden of proof with respect to both of these issues.

In the instant case, Dorothy Smith, Alvin Smith, and Brittanie Percell all testified that defendant exited his vehicle with a black handgun in his right hand. They stated that he yelled at them to get out of the road and that he began to approach Alvin in an aggressive manner. Dorothy and Brittanie (who also happens to be defendant's cousin) attempted to calm defendant down as he approached them. As Dorothy attempted to calm him, defendant punched her in her face with his left hand. Apparently provoked by that behavior, the victim ran toward defendant and began to scuffle with him. Shortly thereafter, the witnesses heard a gunshot and observed the victim run away from the fight before he collapsed to the ground. Dorothy specifically testified that she witnessed defendant shoot the victim.

Defendant did not testify at trial, but he called two witnesses to testify on his behalf. Both men, David Hightower and Dallas Williamson, were riding with defendant in the white Chevy Malibu when the incident occurred. Hightower and Williamson stated that the incident began when defendant asked the people in the roadway to move so that his car could pass and one of the men began to curse at defendant. They stated that all of the occupants of the vehicle – themselves, defendant, and a fourth male – exited the vehicle at the same time. Both witnesses testified that a woman started the altercation by running up to defendant and hitting him. From there, they stated that the altercation grew until several people were hitting defendant. At some point, they each heard a gunshot and witnessed everyone begin to scatter. Both men testified that they had not seen defendant in possession of a gun. However, Hightower stated that he had seen a large, unidentified black male with a handgun, but he did not see this individual during the fight.

Viewed in the light most favorable to the state, the evidence presented at trial was sufficient to establish that defendant initiated the altercation by stepping out of his vehicle with a handgun, and he then escalated that situation by striking Dorothy Smith in the face. The state also elicited testimony sufficient to support a finding that defendant shot the victim during the ensuing scuffle. A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict. La. R.S. 14:21. Defendant did not withdraw from the altercation that he created. Therefore, by presenting sufficient evidence to prove that defendant was the aggressor, the state successfully carried its burden of proving that defendant did not act in self-defense. Accordingly, we also find that the evidence sufficiently supported defendant's conviction of manslaughter. We cannot say that the jury's determination of guilt 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.

We note the fact that there was conflicting testimony at trial by witnesses for the state and defense. This court can not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Moreover, where there is conflicting testimony about factual matters, the matter is one of the weight of the evidence, not its sufficiency. See **State v. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Further, 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).

This assignment of error is without merit.

ASSIGNMENT OF ERROR #2

In his second assignment of error, defendant argues that La. R.S. 14:95.1 is unconstitutional in light of the strict scrutiny mandated by the amended version of La. Const. art. I, § 11, warranting reversal of his conviction on count two. Defendant specifically contends that La. R.S. 14:95.1 cannot pass strict scrutiny review because it is not narrowly tailored to achieve a compelling governmental interest. He further argues that this offense is so "closely tied" to the entire incident for which he was convicted that his manslaughter conviction should be reversed as well.

The Second Amendment to the United States Constitution and Article I, Section 11 of the Louisiana Constitution prohibit the infringement of the right to keep and bear arms. The Louisiana Legislature enacted 2012 La. Acts, No. 874, § 1 to amend Article I, Section 11, which, as a result, specifically states that the right of each citizen to keep and bear arms is "fundamental and shall not be infringed."[1] The amended version of Section 11 further states that "[a]ny restriction on this right shall be subject to strict scrutiny."[2] In **District of Columbia v. Heller**, 554 U.S. 570, 635, 128 S.Ct. 2783, 2821-22, 171 L.Ed.2d 637 (2008), the U.S. Supreme Court held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense and struck down a District of Columbia law that banned the possession of handguns in the home. As noted by the U.S. Supreme Court in **McDonald v. City of Chicago, Ill.**, ____ U.S. ____, 130 S.Ct. 3020, 3042, 177 L.Ed.2d 894 (2010), a clear majority of the states in 1868 recognized the right to keep and bear arms as being among the foundational rights

[1] While the amended version of Article I, Section 11 was not in effect at the time of the defendant's offense herein, the amendment has prospective effect from its effective date of December 10, 2012, and has retroactive effect to this case and all cases pending on direct review or not yet final.

[2] Prior to the 2012 amendment, Article I, Section 11 stated: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person."

necessary to our system of government, and the framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty. Accordingly, the right to bear arms was always fundamental. See also **State v. Draughter**, 2013-0914 (La. 12/10/13), 130 So.3d 855, 861.

Both this court and the Louisiana Supreme Court have held that, when applied to a convicted felon still under state supervision, La. R.S. 14:95.1 does not unconstitutionally infringe upon the right to bear arms secured by the amended Article I, Section 11 of the Louisiana Constitution. See **Draughter**, 130 So.3d at 868; **State v. Wiggins**, 2013-0649 (La. App. 1st Cir. 1/31/14), ____ So.3d____, ____. At the time of the incident, defendant was on supervised parole for his previous convictions of possession of cocaine and third-offense possession of marijuana. Both of these offenses are felonies which preclude the subsequent possession of a firearm or carrying of a concealed weapon. See La. R.S. 14:95.1(A); La. R.S. 40:966(E)(3) & 40:967(C)(2). Because, at the time of the incident, defendant was a convicted felon who was still under the state's supervision (though no longer in its physical custody), La. R.S. 14:95.1 is not unconstitutional as it applies to him.[3]

This assignment of error is without merit.

ASSIGNMENT OF ERROR #3

In his final assignment of error, defendant argues that the trial court erred in denying his motion to reconsider his sentences. He contends that his maximum sentences for each offense are unconstitutionally excessive.

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[3] As in **Draughter**, the defendant herein does not have standing to raise the larger question of whether the state may dispossess certain convicted felons of their right to bear arms for a number of years, even after they have paid their debt to society and fully discharged their sentences. **Draughter**, 130 So.3d at 866; see also **State v. Sandifer**, 95-2226 (La. 9/5/96), 679 So.2d 1324, 1332 (a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court).

Prior to addressing defendant's assignment of error, we note an error with respect to defendant's sentence on count two. On this count, the trial court sentenced defendant to twenty years at hard labor, without benefit of parole, probation, or suspension of sentence. However, a conviction under La. R.S. 14.95.1 also requires a mandatory fine of not less than one thousand nor more than five thousand dollars. See La. R.S. 14:95.1(B). Because defendant's sentence on count two does not include this mandatory fine, it is illegally lenient. However, since this sentence is not inherently prejudicial to defendant, and because this sentencing issue has not been raised on appeal by either the state or defendant, we decline to correct this error. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

We turn now to consideration of defendant's third assignment of error. Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. See **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Hogan**, 480 So.2d 288, 291 (La. 1985). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. See La. Code Crim. P. art. 894.1. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982).

Whoever commits the crime of manslaughter shall be imprisoned at hard labor for not more than forty years. See La. R.S. 14:31(B). The trial court sentenced defendant to the maximum of forty years at hard labor for this conviction. Whoever commits the crime of possession of a firearm or carrying a concealed weapon by a convicted felon shall be imprisoned at hard labor for not less than ten nor more than twenty years without the benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars. See La. R.S. 14:95.1(B). The trial court sentenced defendant to the maximum term of twenty years at hard labor, without benefit of parole, probation, or suspension of sentence for this offense.

Maximum sentences are generally reserved for the most serious violations of the relevant statute and for the worst type of offenders. **State v. Mance**, 2000-1903 (La. App. 1st Cir. 5/11/01), 797 So.2d 718, 721. Defendant argues simply that there is not enough evidence in the record to support the trial court's imposition of the maximum sentences for each of his offenses.

At the sentencing hearing, the trial court heard an impact statement from the victim's mother. Subsequently, defendant made a brief statement in which he stated that he wished he could "take that whole day back." Prior to imposing defendant's sentences, the trial court noted that defendant had a prior criminal history and that his own choices led to the situation that caused the victim's death. Further, although not explicitly referred to at sentencing, the trial court was certainly aware of defendant's brief escape from custody during a recess in his trial. Considering the above, the trial court could have concluded that defendant was of the worst class of offenders. Accordingly, we find that the trial court did not abuse its discretion in sentencing defendant to the maximum terms of imprisonment for each of his convictions. We further note that the state could have billed defendant as an habitual offender, which would have exposed him to a much harsher sentence. See **Mance**, 797 So.2d at 722.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.

STATE OF LOUISIANA

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VERSUS

AKEEM GAILES

****

McCLENDON, J., concurring.

While I am concerned about the failure of the trial court to impose the legislatively mandated fine, given the State's failure to object and in the interest of judicial economy, I concur with the majority opinion.