NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 KA 1128

STATE OF LOUISIANA

VERSUS

JUSTIN DAVIS

Judgment Rendered: MAR 06 2015

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 10-11-0644

Honorable Richard Anderson, Judge

* * * * * * *

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

WELCH, J.

The defendant, Justin Davis, was charged by grand jury indictment with the second degree murder of Alton Fields, a violation of La. R.S. 14:30.1. At arraignment, the defendant pled not guilty, but following a jury trial, he was found guilty as charged. He was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. Motions for post-verdict judgment of acquittal and new trial were filed, but denied by the trial court.[1] The defendant now appeals with three counseled assignments of error. For the following reasons, we affirm the defendant's conviction and sentence.

STATEMENT OF FACTS

Roy Grimes, Jr. testified that on July 18, 2011, he was living at an apartment complex at 6820 Cezanne Avenue in Baton Rouge, Louisiana. After returning from work, Grimes drank a few beers and began playing video games, when he heard gunshots outside. He stepped outside, and "when [he] was looking out the balcony to see what happened, [he saw] a guy running past that way," and another individual "who was laying in the street." Grimes did not see the shooting occur, nor did he recognize either individual. He stated that the person running was "dressed in all black-type stuff." Grimes proceeded towards the person lying in the street, and called 911 along the way. He informed the dispatcher that there was an individual in the street, shot, breathing heavily, and that he was trying to say a name. "But by him trying to, you know, breathe and everything, he couldn't really get it out. He had got shot, you know, a lot of times." Grimes estimated the victim

[1] To the extent that the court minutes may be read to indicate that the State likewise filed the same motions, we note that the parties did not raise any contentions about them. Moreover, the record and the transcript are devoid of such motions having been filed on behalf of the State. Lastly, it is well settled that in the event of a discrepancy between the minutes and the transcript, the transcript prevails. See **State v, Lynch**, 441 So.2d 732, 734 (La. 1983).

had been shot seven or eight times based on the number of gunshots he heard.[2] Although Grimes noted the victim had difficulty breathing, he stated that "he just kept breathing and saying like - - like, he was making the juh sound, but he couldn't get it out because the way he was breathing. He trying to breathe but he trying to say a name at the same - - say something at the same time. And he was making the juh sound like juh, like that." He also noted that the victim kept saying "juh, Justin, Germany, something." Later, Grimes specifically testified that the victim was making a "J" sound, not a "D" sound. Grimes, along with others, gathered around the victim, while he attempted to assist him. However, once the police arrived, Grimes left the victim[3] and returned to his apartment. On cross-examination, and upon reviewing defense photographs, Grimes testified the victim's apartment complex was "right next to mine."

Terrius Brown testified that he was friends with the defendant and the victim, and on the night of the murder, was living on North Donmoor. Brown stated that he went to the apartment complex in question to visit his friend, "B-Eric." Brown testified that the victim came down from the balcony and he, the victim, and B-Eric conversed in the parking lot, when Brown walked off. Brown then heard gunshots and saw the victim running, with the shooter behind him. Brown ran behind a nearby wall, and observed B-Eric run upstairs. After the shooting stopped, Brown went into the street where the victim's body was lying.

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[2] Patrick Lane was qualified as an expert in the field of firearm identification at trial. After analyzing the seven recovered 9mm bullet casings, as well as the two 9mm live rounds, Lane testified they were all fired from the same firearm. Phillip Simmers, a DNA analyst with the Louisiana State Police Crime Lab, was qualified as an expert at trial. He analyzed one of the recovered bullet casings and one of the live rounds, but was unable to make a comparison to the known DNA profile of the defendant.

[3] Dr. Bruce Wainer, who, at the time of the murder, was employed by the East Baton Rouge Parish coroner's office, conducted the victim's autopsy. He testified that the victim was shot five times; once to the front chest, three times to the back and shoulder, and once to the left leg. Dr. Wainer noted that all the gunshots perforated the victim's body. The wound to the chest, and one of the wounds to the back resulted in the puncturing of both of the victim's lungs, both of which were lethal. Dr. Wainer testified the victim was shot at an indeterminate range of fire.

He testified that he was standing at the foot of the victim when the police officer asked the victim who shot him, but Brown did not hear the victim respond.

Brown testified the shooter was wearing black clothing, but Brown did not recognize him. Further, Brown noted the shooter was a "tall bright guy" who did not have dread locks. Brown further explained that Dustin, who is the brother of Charmaine Batiste (another witness at trial whose testimony is hereinafter discussed), is a "tall bright dude," and that one day, Dustin and the victim had an altercation in which Dustin pulled a gun and accused the victim of inappropriate conduct with his niece. According to Brown, Dustin told the victim he would kill him.

Angela Simon, a resident of Melrose Apartments located at 6776 Cezanne Avenue, indicated that the defendant, whom she identified in-court, had gained some weight and that he had "dreads" when she had seen him before. On the date of the shooting, Simon had returned from work, and was outside, sitting on her car talking to Terrius Brown and another individual known to her as "D". The victim was on the balcony and greeted Simon and Brown. Simon saw the defendant looking around the corner. She testified that Brown asked the victim to come down and talk, but before he did, she returned to her apartment. As she began to return outside, she heard the gunshots, then re-entered her apartment.

Rebecca D. Brown testified at trial that on the day of the murder, she was inside her apartment at 6820 Cezanne Avenue, when she heard between seven and ten gunshots. Ms. Brown indicated that once the shooting was over, she exited her apartment, and when she "initially opened the door, I saw a human running down the street. And then we walked farther up the balcony and we seen the crowd. And I walked downstairs and I saw - - I don't even know his name - - the guy on the ground that was shot." Ms. Brown did not recognize the person running, but

noted that he was wearing "dark clothes, like a sweat suit," that he "had a gun and he had dreads," and that he was running toward North Donmoor.

On July 18, 2011, Sharonda Scott was retrieving items from her van that was parked at the apartment complex in question, Melrose Apartments. Scott testified that "when we was pulling out of the parking lot...a guy hit the ground I didn't see nobody else, and I ran to him to see what was wrong with him and he was shot." Scott indicated the person who was shot was "Soul."[4] Scott stated that the victim was bleeding, and that he was "just saying he was shot." Scott was able to obtain a shirt and placed it on the victim's chest. She made an in-court identification of the defendant, but noted that in July 2011, he had his hair cut lower, like a "bush." Once the police arrived, Scott left and did not talk to any responding police officer. She did not see the defendant shoot the victim.

Charmaine Batiste testified at trial. On the night of the murder, Batiste lived at apartment C-118 at 6776 Cezanne Avenue, Melrose Apartments, with her sister and her sister's children. Batiste testified that she knew the defendant prior to the night in question, and noted that his hair was different then – "he don't have his dreads anymore, that is all." Batiste testified that on July 18, 2011, she was inside her apartment, when she heard two gunshots. She opened her door, and observed the victim lying in the road. Batiste specifically stated that "[a]fter the two gunshots what I saw was Justin running from there." Batiste did not see the victim move during the shooting, and specifically testified that, "[t]he only thing I seen [was that the victim] just dropped." Though she only heard two gunshots, once she went downstairs and reached the street, the other people gathered said "all together it was seven [gunshots]."

Three days after the shooting, Batiste provided a voluntary statement to

[4] "Soul" is later identified as the victim.

Detective Blake of the Baton Rouge Police Department. At that time, Batiste relayed to Detective Blake that nine gunshots were fired. She also indicated that the defendant "had dreads" and that he was dressed in all black with a bandana across his face. Batiste also testified that she recognized the defendant "because [of] his hair, and I know how he walk[s]." Batiste was shown a six-person photographic lineup, whereby she identified the defendant as the shooter. Specifically, she testified that "[i]f I wasn't sure I wouldn't have picked [him] out on the [lineup]." Batiste also testified that her brother, Dustin, never had any problems with the victim, never pulled a gun on him, and that the victim got along well with her children.

Patricia Greathouse, the victim's mother, testified at trial. At the time of the murder, she resided in the apartment complex in question with her son, the victim, who was also known as "Soul." Greathouse knew of the defendant prior to the murder, and testified that in July 2011, "[h]e had dreads in his hair." Greathouse testified that, on the night of the murder, between 7:30 and 8:00 p.m., after they finished eating, the victim stepped outside to smoke a cigarette, and she prepared to take a bath. However, she heard a gunshot, stepped outside, and heard the victim say, "Tricia, these dudes trying to kill me out here." Greathouse stated that she thought the shooter was wearing a red or blue shirt, but the red she saw could have been the red from the firearm (presumably muzzle flash). Greathouse testified she ran downstairs, and "could see the [gunshot]," and "the person that [was] shooting the gun, but I couldn't see that person because of the fire from the gun." Greathouse noted she heard six or seven gunshots. When she reached the victim, she indicated the victim was able to talk. Greathouse specifically testified that, "[the victim] did [make] the statement that Justin had shot him. He said, Tricia, Justin shot me." Greathouse later testified that "my last - - son's last words

said that Justin killed him." She stated that on the day of the murder, both before and after the victim was shot, she did not see the defendant at the apartment complex. Greathouse later met with Detective Blake of the Baton Rouge Police Department, who presented her with a six-person photographic lineup, whereby she identified the defendant as the shooter.

Detective John Dauthier with the Baton Rouge Police Department spoke with Greathouse at Baton Rouge General on the night of the murder. Detective Dauthier testified that Greathouse stated she heard gunshots, and the victim saying, "[t]hey're trying to kill me, 'K.'" Greathouse told Detective Dauthier that "[s]he saw that [the victim] had been struck and that he was laying in the roadway. She went to him and that he told her that Justin had shot him." Detective Dauthier did testify that Greathouse stated she was unsure who the victim was referring to when he said he was shot by "Justin."

At approximately 8:58 p.m., on July 18, 2011, Corporal Ronald Norman, Jr. of the Baton Rouge Police Department was dispatched to the scene after being advised that shots were fired in the Mall City area. Corporal Norman, being the first to arrive to the location, noted approximately fifty people "looking down at someone else laying on the ground." Corporal Norman cleared the scene of everyone except a woman who was leaning over the victim, trying to keep pressure on his wounds. Corporal Norman noted that the victim "was in a lot of pain," and he saw "a lot of blood and stuff on his body." Corporal Norman asked the victim who shot him, and "he looked up. He was looking at me. He said pretty much Jay - - Justin. He said, 'Justin shot me.'" Corporal Norman went on to state that he was "crystal clear [the victim] said Justin." Corporal Norman was later recalled, and testified that, "[w]hen I leaned over [the victim], I could see him say Justin. I asked the lady, 'What did he say,' and she repeated what he said." Further,

defense counsel asked, "[a]nd are you absolutely certain he couldn't have been saying Dustin?" Corporal Norman responded, "[w]hat I heard him say was Justin."

Another Baton Rouge Police Department officer, George Martrain, testified at trial and was dispatched to the scene. When he arrived on the scene, he was informed the suspect's name was Justin Davis. Officer Martrain maintained scene integrity and once the homicide detectives arrived, turned the crime scene over to them.

One of the responding detectives, Phillip Chapman, testified that upon his arrival at the crime scene, he proceeded to a specific apartment at 6776 Cezanne Avenue (Melrose Apartments) in an attempt to locate the defendant. The defendant was not present, but Detective Chapman spoke with Korsica Theriot, the mother of the defendant's child. Theriot signed a voluntary consent to search form allowing Detective Chapman to search her apartment. Detective Chapman was unable to locate any evidence inside the apartment, but he did inspect Theriot's cell phone. Of interest, he noted that around the time that the homicide occurred, "some" calls were made from Theriot's phone to Belinda Davis, the defendant's mother.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant contends that the evidence presented at trial was insufficient to support the jury's verdict. Specifically, he argues that "viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could not have found, beyond a reasonable doubt, that [the defendant] was the person or one of the persons seen running in this area with a gun after the shooting." Further, the defendant contends that another individual, Dustin, previously pulled a gun on the victim and threatened to kill him. As such,

the defendant avers that "[t]he State did not exclude the reasonable hypothesis that someone else at the scene was the shooter."

The standard of review for sufficiency of the evidence to support a conviction is whether viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime, and defendant's identity as the perpetrator of that crime, beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Patton**, 2010-1841 (La. App. 1st Cir. 6/10/11), 68 So.3d 1209, 1224. In conducting this review, we must also be expressly mindful of Louisiana's circumstantial evidence test, *i.e.*, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438; **State v. Millien**, 2002-1006 (La. App. 1st Cir. 2/14/03), 845 So.2d 506, 508-09.

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. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 487, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732.

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.

A thorough review of the record indicates that any rational trier of fact, viewing the evidence presented in this case 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 the offense against the victim. The verdict rendered in this case indicates the jury credited the testimony of the witnesses against the defendant and rejected his attempts to discredit those witnesses, particularly in light of the multiple witnesses who testified that the victim stated he was shot by the defendant, the matching physical description of the shooter with the defendant, Batiste's eyewitness identification of the defendant as the shooter, and the multiple witness testimony indicating that the victim was not making "D" sounds, or naming "Dustin," as the shooter.

This Court will 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. **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. However, 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 that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). 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. **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, 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*). Therefore, for the reasons set forth above, this assignment of error is without merit.

DYING DECLARATION

In his second assignment of error, the defendant claims the trial court erred by admitting hearsay evidence. Specifically, he contends that the victim's statement to Officer Norman regarding the identity of the shooter did not constitute a "dying declaration." The defendant avers that "[a]lthough the victim was shot and had lost some blood, there is no testimony in this record that the victim believed his death was imminent. In the absence of such evidence, the statement is not admissible as a dying declaration exception to the hearsay rule." As such, the defendant concludes that "[t]here is no doubt the jury credited this hearsay

evidence to the egregious detriment of [his] right to due process and a fair trial."

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." La. Code Evid. art. 801(C). Generally, hearsay is not admissible except as otherwise provided by law. La. Code Evid. art. 802. Louisiana Code of Evidence Article 804, in pertinent part, provides:

> **B. Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * *
>
> **(2) Statement under belief of impending death.** A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

A statement is admissible as a dying declaration if made when the declarant is conscious of his condition and aware of his approaching demise. However, the necessary state of mind may be inferred from the facts and circumstances surrounding the making of the declaration and the victim need not express this belief in direct terms. **State v. Penny**, 486 So.2d 879, 882 (La. App. 1st Cir.), writ denied, 489 So.2d 245 (La. 1986). A victim's statement may be admissible as a dying declaration even if the statement is elicited by questions. Moreover, while no absolute rule can be laid down by which to decide with certainty whether the declarant, at the time of making his statement, really expected to die, yet when the wound is from its nature mortal, and when, as a matter of fact, the deceased shortly after making his statement died, the courts have uniformly held that the declarant really believed that death was impending, and his statement has been admitted as a dying declaration. **State v. Verrett**, 419 So.2d 455, 456 (La. 1982).

As noted above, when Officer Norman arrived at the scene, he observed the

victim lying in the street, with a woman leaning over him, using "whatever she had in her hand" to keep pressure on the victim's wounds. Officer Norman specifically testified that the victim, although alert and talking, was "in a lot of pain." Further, Officer Norman noted "a lot of blood and stuff on [the victim's] body." When Officer Norman leaned over the victim's body, and asked who shot him, the victim replied, "Justin shot me." Additionally, as discussed, the victim was shot five times, once to his chest, three to his back, and once to his left leg. The first two gunshot wounds were lethal, perforating his body, puncturing both lungs, and causing extensive blood loss.

Therefore, because of the magnitude of the victim's injuries, the circumstances surrounding the declaration, and the victim's subsequent death, we find an inferential basis for finding that the victim was in fact, and believed himself to be, near death and, therefore, his statement to Officer Norman was a dying declaration. See **State v. Lucas**, 99-1524 (La. App. 1st Cir. 5/12/00), 762 So.2d 717, 724. Accordingly, this assignment of error is without merit.

INTRODUCTION OF POLICE DASHCAM VIDEOTAPE

In his third assignment of error, the defendant contends that the trial court erred by admitting the videotape from Officer Norman's police car dash-camera. Specifically, he argues that the introduction of the video offered little probative value because "the victim [could] not be heard on this video and it merely depicted Officer Norman next to the victim." Further, he avers that the video was "highly prejudicial to [the defendant] because it gave Officer Norman a chance to clarify his prior testimony in which he testified that he *heard* the victim state Justin was the shooter by allowing Officer Norman to testify that he *saw* the victim identify Justin as the shooter." Ultimately, the defendant claims that the "videotape should not have been admitted into evidence because its minimal probative value was

outweighed by its substantial prejudicial effect on [the defendant]."

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. La. Code Evid. art. 401. All relevant evidence is admissible, except as otherwise provided by positive law. Evidence which is not relevant is not admissible. La. Code Evid. 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. La. Code Evid. art. 403.

The issue of admissibility of a videotape is similar to the issue of the admissibility of photographs; a videotape, like a photograph, may be admissible to corroborate other testimony in a case, such as location of the body; manner of death; specific intent to kill; number, location, and severity of wounds; and cause of death. Photographs that illustrate any fact, shed light upon any fact or issue in the case, or are relevant to describe the person, place, or thing depicted, are generally admissible, provided their probative value outweighs any prejudicial effect. Merely because the videotape may be "cumulative" evidence does not render the tape inadmissible. A trial court's ruling on the admissibility of such evidence will be disturbed only if the prejudicial effect of the evidence outweighs its probative value. **State v. Pooler**, 96-1794 (La. App. 1st Cir. 5/9/97), 696 So.2d 22, 50-51, writ denied, 97-1470 (La. 11/14/97), 703 So.2d 1288.

In this case, the videotape from Officer Norman's police car dash-camera depicted his arrival at the crime scene, the location of the victim and those standing around him, and Officer Norman's initial actions and conversation with the victim. Thus, the videotape corroborated Officer Norman's testimony and version of

events and was highly probative of whether the victim spoke to Officer Norman, particularly in light of Terrius Brown's testimony that the victim did not identify his assailant or respond to Officer Norman. When we balance the high probative value of the videotape with the prejudice, if any, arising from the jury simply viewing the videotape, we find its probative value outweighs any possible prejudicial effect. Therefore, we find no error in the district court allowing it to be admitted into evidence. Accordingly, this assignment of error lacks merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.