NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 KA 1322

STATE OF LOUISIANA

VERSUS

BENJAMIN MCKINNEY

Judgment Rendered: MAR 06 2015

* * * * *

On Appeal from the
17th Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Trial Court No. 512236

Honorable Ashly Bruce Simpson, Judge Presiding

* * * * *

Camille A. Morvant, II
District Attorney
Rene´ C. Gautreaux
Assistant District Attorney
Thibodaux, LA

Attorneys for Plaintiff-Appellee,
State of Louisiana

Mark D. Plaisance
Thibodaux, LA

Garyland Wallis
Gray, LA

Janice Montague Myles
Baton Rouge, LA

Attorneys for Defendant-Appellant,
Benjamin McKinney

* * * * *

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

Defendant, Benjamin McKinney, was charged by bill of information with domestic abuse battery by strangulation, a violation of La. R.S. 14:35.3(L) (count one), and with second degree battery, a violation of La. R.S. 14:34.1 (count two). He pled not guilty. The state nol-prossed count two and proceeded to trial on count one only. Following a jury trial, defendant was found guilty as charged. The trial court denied defendant's motions for new trial and postverdict judgment of acquittal, and sentenced him to two years at hard labor. The trial court suspended defendant's sentence and placed him on three years supervised probation. Defendant now appeals, alleging a single assignment of error alleging that the evidence presented at trial was insufficient to support his conviction. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

On the morning of July 5, 2012, defendant was scheduled to return his two children to his ex-girlfriend, Gina Naquin, at her home in Thibodaux. Defendant and Naquin had previously lived together from May 2007 until October 2010.

According to Naquin, defendant had agreed to bring the children home at 6:00 a.m., but he did not arrive until approximately 6:45 a.m. Upon defendant's arrival at Naquin's home, a physical altercation took place. According to Naquin, defendant began the altercation when he exited his vehicle, approached her, and demanded to talk about reconciling. Defendant later stated to the police that the incident occurred when Naquin became aggressive toward him for bringing the children home late. Following the altercation, Naquin ran to her neighbor's trailer and asked her to call the police. Defendant was subsequently arrested for his role in the incident.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, defendant argues that the evidence presented at trial was insufficient to support his conviction for domestic abuse battery by

strangulation. Specifically, he contends that the victim was the aggressor, and he took action against her only to defend himself.

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 also La. Code Crim. 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(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 factfinder must be satisfied 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.

Domestic abuse battery is the intentional use of force or violence committed by one household member upon the person of another household member. La. R.S. 14:35.3(A). A "household member" includes any person of the opposite sex who has lived in the same residence with the defendant as a spouse, whether married or not, within five years immediately prior to the occurrence of the domestic abuse battery. See La. R.S. 14:35.3(B)(2) (prior to amendment by 2013 La. Acts No. 289, §1). Domestic abuse battery involving strangulation occurs when the offender intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of the victim. See La. R.S. 14:35.3(B)(3) (prior to amendments by 2013 La. Acts No. 289, §1 and 2014 La. Acts. No. 194, §1).

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); see also **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 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. See **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.

At trial, the victim testified regarding the circumstances of the incident. According to Naquin, she was on her way out of her trailer as defendant pulled up in his vehicle with their children. Naquin stated that as she walked down her stairs, defendant stated that he needed to talk to her. She presumed it was about getting back together again. Naquin described that she opened up the front passenger's side door of her car to put her purse and her children's belongings inside; as she did so, defendant approached her more closely. According to Naquin, defendant said, "I'm not taking no for an answer. It's either going to be yes or I'm going to kill you. I'm going to jail today." Naquin testified that defendant then grabbed her by her throat

and shoved her into her vehicle via the open passenger's side door. The shove caused Naquin to fall into the vehicle and hit her head on the center console. Defendant got into the car with Naquin and began to choke her while also putting his other hand over her mouth and nose, causing her to briefly lose consciousness.

When Naquin regained consciousness, defendant was standing outside the vehicle, looking at her through the back window. When Naquin stood up, defendant asked where her keys and phone were, and he began to dig through her purse. After defendant took Naquin's keys, she began to beg him to give her the children and leave. According to Naquin, defendant refused because he was going to bring her inside the trailer to kill her. Naquin asked defendant to let her see the children and tell them goodbye, and he led her to his truck. Naquin opened one of the back doors of defendant's truck and began to unstrap her daughter from her car seat. Defendant saw what Naquin had done, and he pulled her by the arm and slammed his door closed. Naquin again begged defendant, this time to let her tell their son goodbye. When Naquin began to unstrap him from his car seat, defendant again pushed her out of the way. Naquin began to run away.

Naquin ran from the front of her trailer to its rear. As Naquin ran, she kicked off her flip flops because they had caused her to slip in the dew. By the time Naquin got a couple of trailers away from her own, defendant caught up to her and tackled her to the ground. He flipped her over and began to choke her again. On this occasion, Naquin did not lose consciousness. Defendant eventually let go, got up, and began to drag Naquin along the ground. He subsequently grabbed her by her right arm and then picked her up with at least one hand in the area of her neck, mouth, and nose. Defendant carried Naquin back in the direction of her front door. When they reached the front steps of Naquin's trailer, defendant retrieved Naquin's keys from his pocket. At that point, Naquin knocked the keys out of his hand. Defendant picked up Naquin and threw her against the side of her trailer, causing

her to fall onto the ground. When Naquin looked up, she saw that defendant was looking for her keys, and she again ran away along the back side of the neighboring trailers. Naquin eventually reached a neighbor's trailer, where she was able to call the police.

Deputy Lynette Grazer, of the Lafourche Parish Sheriff's Office, responded to the scene. Upon her arrival, she noted that the victim was visibly upset and that her dress was covered in mud and debris. She also noticed and photographed numerous red marks on Naquin's neck and face. Pictures of Naquin's physical injuries and of relevant portions of the scene were introduced at trial. At trial, Deputy Grazer testified on cross-examination that the visible marks from the victim's strangulation appeared to be inflicted using only one hand. However, she stated that this conclusion was simply an opinion.

Defendant did not testify at trial. On cross-examination of Deputy Grazer, defense counsel elicited testimony regarding the statement that defendant gave in response to the incident. According to Deputy Grazer, defendant stated that Naquin had been the aggressor, having hit him in the mouth and eye and having scratched the back of his neck because he was late bringing the children home. Defendant introduced pictures of his own injuries, which included marks above his eye and on his lip and a scratch behind his neck. Defendant also introduced the testimony of Cami Thibodaux, an expert in addiction and psychological counseling, who had previously (before the incident) held sessions with the victim. Thibodaux testified that during at least one of these sessions, Naquin admitted to having physically hit defendant in the past and that defendant never hit her.

On appeal, defendant contends that Naquin's testimony was not credible. As support for this argument, defendant cites Deputy Grazer's opinion (in contradiction to Naquin's testimony) that the victim was only strangled with one hand. He also points to Thibodaux's testimony regarding Naquin's alleged admission of prior

physical attacks against defendant, which contradicted her rebuttal testimony that she had never been physical with him.

Viewing the evidence in the light most favorable to the prosecution, we are convinced that the evidence presented at trial was sufficient to support defendant's conviction for domestic abuse battery by strangulation. 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 evidence to overturn a fact finder's determination of guilt. See **Taylor**, 721 So.2d at 932.

Naquin's testimony indicates that defendant attacked her and strangled her several times, seemingly without provocation. She also testified that she assumed defendant's injuries were the result of her trying to get away from his grasp. The testimony of the victim is sufficient to establish the elements of the offense. **State v. Polkey**, 529 So.2d 474, 476 (La. App. 1st Cir. 1988), writ denied, 536 So.2d 1233 (La. 1989). Naquin's testimony clearly contradicts the version of events given by defendant to Deputy Grazer in the aftermath of the incident. Nonetheless, the jury clearly believed the victim's account of the incident over that given by defendant. Similarly, Deputy Grazer was explicit that her hypothesis concerning the number of hands used during the victim's strangulation was simply an opinion. Finally, while Naquin's rebuttal testimony contradicted Thibodaux's testimony during defendant's case-in-chief, that issue is one of the victim's credibility, not sufficiency. 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. 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. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir), writ denied, 514 So.2d 126 (La. 1987). After a thorough review of the record, we cannot say that the jury's determination of defendant's guilt was irrational under the facts and circumstances presented to them. See **Ordodi**, 946 So.2d at 662.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.