

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2016 KA 0464

STATE OF LOUISIANA

VERSUS

SHAWN GILMORE

Judgment rendered OCT. 27, 2016

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On Appeal from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
No. 1100494 Div. "F"

The Honorable Elizabeth P. Wolfe, Judge Presiding

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* * * * *

BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

Crain J dissenting and assigns reasons

HOLDRIDGE, J.

The defendant, Shawn Gilmore, was charged by grand jury indictment with manslaughter, a violation of La. R.S. 14:31. The defendant pled not guilty and after a trial by jury was found guilty as charged. Subsequently, the trial court granted the defendant's motion for new trial. The State filed a supervisory writ seeking review of that ruling, and this Court denied the State's writ application. See State v. Gilmore, 2013-0575 (La. App. 1st Cir. 6/19/13) (unpublished). The Louisiana Supreme Court agreed with this Court's dissenting opinion and reversed the ruling of the trial court. See State v. Gilmore, 2013-1559 (La. 8/22/13), 127 So.3d 907. The trial court subsequently denied the defendant's motion for postverdict judgment of acquittal and sentenced the defendant to five years imprisonment at hard labor but suspended the sentence and placed the defendant on supervised probation for five years. The State filed an expedited writ application seeking review of the defendant's sentence. This Court granted the writ application, finding that the trial court imposed an illegally lenient sentence because La. Code Crim. P. art. 893(A) prohibits suspension of sentence and probation for crimes of violence such as manslaughter. This Court further remanded the case to the trial court for resentencing. **State v. Gilmore**, 2013-1758 (La. App. 1st Cir. 10/15/13) (unpublished).

On remand, the trial court resentenced the defendant to one day imprisonment at hard labor and denied the State's motion to reconsider sentence. The State filed a writ application to seek review of the denial of the motion to reconsider sentence. Noting that a sentence imposed within the statutory limits may be set aside if the trial court manifestly abuses its discretion in imposing that sentence, this Court granted the State's writ and remanded the case for resentencing before a judge other than the judge who imposed the sentence,

pursuant to La. Code Crim. P. art. 881.4(B). **State v. Gilmore**, 2014-0117 (La. App. 1st Cir. 4/21/14) (unpublished) (Higginbotham, J., dissenting), writ denied, 2014-0903 (La. 11/21/14), 160 So.3d 969. After this Court granted the State's writ and remanded the case for resentencing, the defendant filed an application for writs to the Louisiana Supreme Court. While the writ application was pending, the defendant filed her initial appeal of this case under 2014 KA 0031. On January 21, 2015, this Court dismissed the appeal after the Louisiana Supreme Court denied the defendant's writ application. **State v. Gilmore**, 2014-0031 (La. App. 1st Cir. 1/21/15), 160 So.3d 969 (unpublished).

On remand, the case was re-allotted, the trial court denied the defendant's supplemental motion for new trial, and the defendant was sentenced to six months imprisonment at hard labor. The defendant now appeals, challenging the sufficiency of the evidence in support of the conviction and the denial of her motion for postverdict judgment of acquittal. For the following reasons, we reverse the conviction and sentence, and order the defendant released on this offense.

STATEMENT OF FACTS

On November 26, 2010, pursuant to a series of 911 calls beginning at approximately 7:39 a.m. regarding a disturbance, officers of the Tangipahoa Parish Sheriff's Office (TPSO) were dispatched to a trailer park located at 13444 Old Baton Rouge Highway in Hammond. When the officers entered the residence, they observed blood on the floor and the walls, a male subject (who was identified as Alvin Collier, the deceased herein) lying face up on the floor in a puddle of blood, and a female subject (the defendant) kneeling beside Collier. A knife (specifically described as an eight and one-half inch steak knife including the

handle) was lying next to Collier and appeared to match the set of knives remaining in a wooden block in the kitchen.

The police immediately took the defendant outside of the residence and began securing the scene. Collier had no signs of life and was determined deceased at the scene and removed by the Tangipahoa Parish Coroner's Office. Along with a wallet, Mark Apperson, the coroner's office investigator, removed from Collier's left back pocket a black semi-automatic handgun with a round in the chamber and additional bullets in the magazine.

According to the autopsy performed that day by Dr. Fraser Mackenzie, Collier suffered an incised wound in the left neck. The straight-line (from left to right) stab wound severed a subclavian artery and pierced the aorta, thus exsanguination was the cause of death, and the manner of death was homicide. In addition to the fatal injury, Collier also had a small incised v-shaped wound on his left shoulder. The defendant was taken to North Oaks Medical Center where she received fourteen staples to mend a laceration on her inner left forearm that was described as approximately four inches long.

ASSIGNMENTS OF ERROR

In a combined argument addressing the assignments of error, the defendant argues that the State failed to prove beyond a reasonable doubt that she did not commit the homicide in self-defense. The defendant contends that her claim of self-defense was clearly asserted in her taped statement to the police wherein she relayed that Collier forced his way into her home and refused to leave. The defendant further asserts that the events began with Collier's jealousy, which lead to an argument that escalated to Collier becoming physical and hitting the defendant. The defendant further challenges the logic and legality of the State's closing argument, which claimed that the defendant was not entitled to pick up a

knife to ward off a physical beating. The defendant argues that the law does not require that one wait until one is being hit with a weapon to defend oneself. The defendant claims that in this case, Collier took control of the knife at some point and used it to cut her arm open such that she needed fourteen staples to close the wound. The defendant further contends that after she was seriously wounded by Collier, she called 911 and can be heard both begging and demanding that Collier leave her home as he refused and continued to pursue her. The defendant contends that the 911 call recording offered ample evidence that she was placed in reasonable apprehension of either great bodily harm or death. The defendant notes that Collier had a history of being physically and verbally abusive and had on previous occasions threatened her life with a gun, which was found by the police in his pocket on the morning of the altercation with a bullet in the chamber. The defendant claims that her testimony regarding Collier's abusive behavior and unwanted presence in her home was corroborated by the testimony of Dr. Angelloz, Jerome Fultz, Shakira Gilmore, and Ernest Bailey.

The defendant also argues that the evidence does not support the State's theory that she was the aggressor and cites La. R.S. 14:20 in noting that she could use lethal force and did not have the duty to retreat from Collier who forcibly entered her home. The defendant argues that the evidence proves that the offense was committed in self-defense, contending that Collier was likely stabbed when she tried to deflect his blows as he actively pursued her while she was retreating with the knife in her hand. The defendant further argues that her version of the events was corroborated by photographs of her stab wound, bruises on her neck, and a bloody wound on the right side of her head. The defendant contends that the State did not offer any evidence to show that the events transpired in an alternative manner. The defendant notes that Collier had already inflicted great bodily harm

upon her person in concluding that it was reasonable for her to believe that he might inflict more harm to her. Citing its argument in opposition to the defense motion for directed verdict, the defendant contends that the State erroneously believed that it had no burden of disproving self-defense and thus, presented no evidence in that regard.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV, § 1; La. Const. art. I, § 2. The constitutional standard for testing the sufficiency of the evidence, as adopted by the Legislature in enacting La. Code Crim. P. art. 821, requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find 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). The **Jackson** standard of review 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 trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420. 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. 1st Cir. 9/25/98), 721 So.2d 929, 932.

The defendant was convicted of manslaughter. Manslaughter consists, in pertinent part, of a homicide 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, requiring the presence of specific intent to kill or inflict great bodily harm. La. R.S. 14:31(A)(1); **State v. Hilburn**, 512 So.2d 497, 504 (La. App. 1st Cir.), writ denied, 515 So.2d 444 (La. 1987). "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 which tend to lessen the degree of culpability. **State v. Rodriguez**, 2001-2182 (La. App. 1st Cir. 6/21/02), 822 So.2d 121, 134, writ denied, 2002-2049 (La. 2/14/03), 836 So.2d 131.

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). Thus, 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. **State v. Buchanan**, 95-0625 (La. App. 1st Cir. 5/10/96), 673 So.2d 663, 665, writ denied, 96-1411 (La. 12/6/96), 684 So.2d 923. Specific intent to kill or inflict great bodily harm may be inferred from the intentional use of a deadly weapon such as a knife or a gun. **State v. Butler**, 322 So.2d 189, 194 (La. 1975); **State v. Templet**, 2005-2623 (La. App. 1st Cir. 8/16/06), 943 So.2d 412, 421, writ denied, 2006-2203 (La. 4/20/07), 954 So.2d 158.

Louisiana Revised Statute 14:20(A)(1) provides that a homicide is justifiable 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. When the defendant in a

homicide prosecution claims self-defense, the State has the entire and affirmative burden of proving beyond a reasonable doubt that a homicide was not perpetrated in self-defense. The defendant who raises the issue of self-defense does not assume any burden of proof whatsoever on that issue. **State v. Lynch**, 436 So.2d 567, 569 (La. 1983); **State v. Hart**, 457 So.2d 791, 791-92 (La. App. 1st Cir. 1984), writ denied, 462 So.2d 1262 (La. 1985). On appeal, the relevant inquiry is whether or not, 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. 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. 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. Not every act of a defendant will make him or her an aggressor. It is the character of the act coupled with the intent of the defendant that determines whether the defendant is the aggressor. **State v. Gondy**, 442 So.2d 703, 706 (La. App. 1st Cir. 1983).

911 Phone Calls:

The State played the 911 calls for the jury in this case. In the initial 911 call at 7:39 a.m., the defendant can be heard using expletives in demanding that Collier leave. The call was considered an “open line call” because the caller who was identified as the defendant, did not communicate with the operator after making the call. At that point, the defendant had already armed herself with the knife, and Collier was using expletives as he told the defendant not to touch him with the knife and that he loved her. The defendant stated that she did not love Collier, and then she accused Collier of lying and told him that he did not know the meaning of

love and that he would not have cheated on her if he did. Collier used further expletives regarding the knife and threatened the defendant in regards to her use or potential use of the knife.

At 7:41 a.m., the second 911 call took place. The defendant was still telling Collier to leave the residence. Based on the complaints by Collier that can be heard in this recording, Collier had been injured with the knife just prior to the second call and/or after the call was connected. Collier specifically stated that the defendant had cut him on his *arm*, adding, “you gonna pay for that shit ... I’m a hit you.” Collier complained that the defendant was pointing the knife at him, before indicating that she had stabbed him in the *chest*, specifically stating, “you cut my chest and got me bleeding like a bitch.” The defendant can be subsequently heard pleading, praying, and crying.¹

The third 911 call at 7:45 a.m. was made by the next door neighbor who provided the exact location and lot number of the defendant’s trailer and noted that she had come to his door pleading for someone to call 911. During the final 911 call at 7:48 a.m., the defendant was still crying and praying and was still non-responsive to the 911 dispatcher. The arrival of the police can be detected at the end of this call. The defendant told the police that she and Collier had gotten into a fight and that she stabbed Collier.

State Trial Witnesses:

TPSO Deputy Thomas Cokern, Sergeant Norman Carter, and Detective Mike Moore were among the first officers to respond to the scene followed by Mark Apperson of the Tangipahoa Parish Coroner’s Office. Sergeant Carter took photographs of the scene and Apperson took additional photographs and examined

¹ Considering the defendant’s and Collier’s commentary in the recording, it is difficult to confirm whether both Collier’s non-fatal and fatal stab wounds were inflicted just before Collier verbally threatened the defendant.

Collier. Collier's body was lying on the floor in or near the kitchen section of the open area. In addition to the pool of blood at the body and the blood on the door and walls, there was blood on the floor and countertop near the kitchen sink. Apparent smears of blood were located on the screen door and to the left of the front door on the vinyl, and there were bloody footprints in the home. Further, the neighbor's door also had blood on it. The steak knife was located next to Collier's body. A towel with a possible blood spot on it was located around Collier's left shoulder. Collier was face up before Apperson rolled him over to check for injuries. Apperson patted Collier's pockets and recovered his wallet and the firearm. Apperson collected the defendant's clothing at the hospital, and Collier's clothing at the autopsy. He further took photographs of the defendant at the hospital and noted that she did not have any visible injuries other than the stapled wound to her arm. Detective Dale Athmann of TPSO was dispatched at 8:26 a.m. and also responded to the hospital. Detective Athmann noted that the defendant's laceration was about four inches long. The defendant was sedated at the hospital, thus the police decided to wait to get a statement the following Monday, November 29.

Dr. Fraser Mackenzie, the forensic pathologist and expert witness in pathology who performed the autopsy on Collier that day, also testified at the trial. Dr. Mackenzie noted that the non-fatal wound on Collier's shoulder was in a 'v fashion' which indicated that Collier was moving or the knife or other sharp object was moving, otherwise the sharp object would have caused a straight line cut like the fatal wound to Collier's neck. The next day at the Sheriff's Office, additional photos were taken of the defendant to document bruises that she claimed to have and a knee injury.

Defendant's Recorded Interview:

The interview of the defendant took place at 11:25 a.m. on Monday, November 29, 2010. At the beginning of the interview, the defendant was informed of her rights and a waiver of rights form was also executed. The police did not detect any signs that the defendant was under the influence of any drugs at the time of the interview. During the interview, the defendant provided a detailed account of the nature of her relationship with Collier and the events leading up to the stabbing. She indicated that she and Collier had been living together at the residence and at the time of the offense, she was in the process of breaking up with Collier after catching him with another woman, Brenda Hawkins. According to the defendant, Collier had been having on and off relations with her and Hawkins for some time period but had given her the impression that he was no longer seeing Hawkins. The defendant had caught Collier with Hawkins the Monday before the stabbing took place, which was, to her knowledge, the first time he had been with Hawkins in several months.

The night before the stabbing (Thursday, Thanksgiving night), Collier initially came to the defendant's home around 8:30 p.m. and knocked on the bedroom window and front door. The defendant told Collier to leave and go home to Hawkins. Collier told the defendant that the trailer was also his home since they had moved there together. Collier ultimately left but he returned a short time later. When Collier returned, the defendant decided to call Hawkins and was able to persuade Collier to leave again. Collier returned for a third time around 10:00 p.m., and forced entry when the defendant opened the door to pass some of his belongings. Collier spent the night there despite the defendant's requests that he leave. The defendant indicated that she repeatedly told Collier to leave, but he told her that he was not going to leave and questioned her as to why she wanted to

break up with him. The defendant stated she decided not to call the police, noting that Collier had been drinking and that she did not want to get him into trouble with the police. Collier insisted on watching a movie and ultimately fell asleep. The stabbing took place the next morning when Collier again refused to leave the residence.

Before the stabbing, the defendant woke up around 6:15 a.m., when the telephone rang. She repeatedly told Collier to get up and leave and he still refused. As they argued back and forth, Collier pushed her and shoved her into the sink area. She continued to tell Collier to leave and when he strongly pressed his arm against her chest, she reached into the kitchen sink and grabbed the knife and again told Collier to leave. Collier told the defendant that he should hurt her and she knocked a cup of coffee out of his hand. Collier then became angry and called her stupid. The defendant indicated that Collier was not initially threatened by her possession of the knife and did not think she would actually use it. According to the defendant, they were “tussling” when Collier tried to take the knife. Collier said he would kill her and began pushing and shoving her to the foyer area and grabbing her clothes as she tried to push him away. Collier grabbed her wrist (of her right hand, the hand that was holding the knife) and kept trying to take the knife. She stated that the laceration on her arm took place when Collier pulled her arm down in an attempt to take the knife. As she tried to get away, Collier kept grabbing and verbally threatening the defendant. The defendant grabbed her cell phone that was on a table in the living room and called 911. At that point, the defendant was standing on the sofa above Collier as he stood on the floor. The defendant stabbed Collier when he “reached and grabbed” for the defendant (pulling her hair and her shirt).

When the defendant was specifically asked why she stabbed Collier, she stated that he had hit her prior to that by shoving her in the chest while she was standing on the sofa. She noted that Collier punched her with great force in the head after she stabbed him. She further noted that she must have scratched him in the nose area at some point because he had a small injury in that area. She noted that Collier was angry and in disbelief over the stabbing and that she observed a little blood on his arm or chest. When asked again what happened before the stabbing and what prompted it, the defendant noted that before she stood up on the sofa, she and Collier were fighting and Collier had pulled her hair. The defendant clarified that the cut on her arm occurred while they struggled as Collier was trying to take the knife. She stated that she did not initially realize that she had stabbed Collier and that it was a reaction to him grabbing her. The defendant armed herself with a knife during a previous altercation with Collier, but never tried to stab him, and never fought him back before this incident.

Defense Trial Witnesses:

Defense witness Dr. Christine Angelloz, a clinical psychologist, was accepted as an expert witness in domestic violence. Dr. Angelloz explained that domestic violence is multidimensional and includes physical, emotional, economic, social, and sexual abuse. She further explained that physical assault, which includes statements or actions indicating the intent to assault or a threat or attack with a weapon, must exist in order for the behavior to be considered battering. The individual must have experienced a life threatening situation and know that the abuser is capable of killing him or her such that the individual has been terrorized or humiliated into a submissive subservient posture. Dr. Angelloz conducted an over seven-hour interview of the defendant before the trial wherein she questioned her regarding the nature of her relationship with Collier. The defendant reported

incidents in which Collier had beaten her and an instance when he broke her nose. Dr. Angellos testified that Collier's responses were "consistent with the histories of women that are considered to be experiencing battered women syndrome, or, if not in fact, also post traumatic stress disorder." She noted that in cases of domestic violence, the severity of the behavior escalates over time. She further noted that it can be deduced that the defendant lived in constant fear of being killed by Collier. When asked if battered women ever leave the abusive relationship, she stated that under certain circumstances the battered person leaves but added, "[t]hese women truly love these men" and "over time they blame themselves." She noted that the women often tell the men to leave but then miss them and take them back.

Dr. Angellos noted that she did not have sufficient time in this case to conduct the kind of extended evaluation that she would typically conduct. She had not spoken to the family and friends of the defendant and victim, or reviewed documentation, or conducted her typical thirty or more hours of clinical interviews over a three-to-six month time period. Although she did not have time to speak to the defendant's children, she did have them write a statement regarding their observations of the relationship between the defendant and Collier. Dr. Angellos noted that men do sometimes get abused by women but that it happens less often because men are "built different than women and are physically stronger and more powerful" so such abuse would tend to be emotional or social abuse as opposed to physical.

The defendant also testified at the trial. She claimed that she had been deprived of sleep by the time the pretrial interview took place the morning of November 29, three days after the offense, and had taken some valium and Zoloft the night before and was still under the influence of the drugs. She stated that her condition affected her ability to understand her rights. The defendant testified that

she met the defendant right after Hurricane Katrina, and they ultimately started dating and began cohabiting in September or November of 2006, less than a year later. She noted that Collier was “wonderful” in the beginning and was nice and affectionate. According to the defendant, Collier became abusive within the first three months of their cohabitation. The defendant specifically noted an occasion when they argued (outside of Club Oasis) after Collier accused her of being disrespectful by allowing a male acquaintance to hug her in his presence. She further testified that there was another incident that escalated to physical abuse (the victim hit her in the chest and abdomen), and that she called the police on that occasion and Collier was arrested. According to the defendant, the police also called for an ambulance on that occasion and the defendant was given oxygen because she was short winded from several blows to her chest. Collier returned home a couple of days later after he got out of jail and promised he would not hit her again. The defendant recalled subsequent incidents of abuse including an incident when Collier hit her with his elbow several times across the nose and mouth, breaking her lip and causing her nose to bleed. She did not seek medical attention on that occasion. According to the defendant, Collier discouraged any friendships that she had and they argued over money and other items.

The defendant confirmed that she was truthful during her police pretrial interview. She stated that she did not intentionally leave out any details, but claimed that she was not descriptive enough when she indicated that Collier was pushing and shoving her just before she stabbed him. Consistent with her interview, she stated that Collier had hit her in the chest with his forearm before she grabbed the knife, though she did not initially use it. She further consistently relayed that she knocked a cup of coffee out of Collier’s hand, that they struggled as he pushed her into the foyer area, and that she received the injury to her arm and

called 911. She testified that she was afraid to put the phone to her ear at the time of the incident and that Collier was hitting and fighting with her at that time. She further testified that she was afraid that he would do more damage if she spoke to the operator. She also stated that when Collier pulled her pajama shirt she was jerked forward and he was continuously hitting her. She stated that her eyes were closed when she inflicted the fatal injury. She added, "All I remember is my arms going up and I was trying to block the licks."

The defendant also testified that Collier had put a gun to her head on a previous occasion, that he told her he would kill her, and that she would lose if she ever crossed him. She confirmed that Collier routinely carried a gun, that he had previously pointed the gun at her, and that he threatened to shoot her on other occasions. She gave additional details regarding the occasion Collier broke her nose.

The defendant confirmed that she never indicated to the police that she had problems understanding her rights. The defendant also confirmed that Collier had previously reported to the police that she assaulted him on occasion and his accusation resulted in her arrest but the charges were dropped when Collier did not show up for court. Collier had specifically informed the police that the defendant had attempted to run over him with a vehicle. She noted that she was the one who initially called the police on that occasion. The State also introduced a letter that the defendant confirmed she wrote wherein she apologized to Collier for past mistreatment and jealousy on her part.

Defense witness Jerome Fultz testified that he was a bar owner and that he recognized the defendant. He recalled seeing her with a male in November of 2010, whom he could not identify. He noted that the couple were having a good time initially and then they began arguing after he accused her of talking to

someone. Fultz observed the unknown male slap or punch the defendant. He offered to call the police, but the defendant declined. He noted that the defendant appeared to be afraid of the male.

The defendant's twenty-three-year-old daughter, Shakira, also testified as a defense witness. Shakira noted that she lived in the same house with her mother and Collier for a period of time and would often visit when she was not living with them. She described the relationship of the defendant and Collier as "rocky" and noted that they often broke up. She witnessed several verbal and physical disputes. When asked if Collier ever put his hands on her mother in front of her, she said it was "more like shoving" and grabbing the defendant's clothing on occasions. She confirmed that her mother fell down during one of the shoving incidents. She also confirmed that the defendant would not fight back, but would only throw her arms up to guard herself.

The defendant's eighteen-year-old son, Ernest Bailey, also testified and had similarly resided with the defendant and Collier on a "back and forth" basis, alternating between them and his grandmother. He testified that the defendant and Collier mostly argued on weekends whenever they went out. He witnessed pushing, shoving, and slapping between the two of them on one occasion. He noted that Collier elbowed and punched the defendant in the face and broke her nose (similar to the defendant's testimony about the same incident). Bailey broke up the altercation and Collier left when the defendant threatened to call the police.

State's Rebuttal Witness:

Consistent with the defendant's statements, the final witness, Brenda Hawkins, testified that Collier was her boyfriend during the same time period that he was in a relationship with the defendant. She indicated that she and the defendant had arguments over Collier in the past. She described her relationship

with Collier as “off and on,” but also noted that it was a “good” relationship. Hawkins further testified that Collier was a good man, was not argumentative, and further described him as, “a joking kind of person.” She stated that they did not have arguments or physical altercations. She also testified that she witnessed the defendant attempt to run over Collier in front of her house on one occasion.

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. Thus, an appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **Williams**, 804 So.2d at 939. 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).

In **Hart**, a game room operator (the defendant) shot a belligerent patron who along with two of his friends were menacingly advancing upon the operator and threatening him for asking them to stop abusing the machines. As he and his friends continued to drink beer throughout the evening, the patron became increasingly abusive of the electronic games and repeatedly spit tobacco juice on the floor despite the defendant's repeated warnings to discontinue such conduct. The patron also became verbally aggressive, threatening to “kick out Hart's brains.” The defendant therein testified that the patron and his two friends advanced toward him in a threatening and menacing manner before he pulled out

his gun, cocked it, and set it on the counter. As the patron continued to advance, the gun fired, striking the patron in the chest and killing him instantly. This court found the operator was not the aggressor and did nothing to provoke the patron into threatening him and advancing upon him. **Hart**, 457 So.2d at 793.

Similarly, in **Lynch**, a battered wife (the defendant) shot her husband who was threatening her and pursuing her as she ran out of their home. While the defendant therein was armed with a gun, the court noted that she was not familiar with guns, was trying to retreat, had asked her husband to leave her alone, and had been subject to past beatings. In concluding that the State failed to meet its burden of proof, the court further noted that the defendant's husband had a "dangerous character" and that the defendant's fear and apprehension were reasonable. **Lynch**, 436 So.2d at 569.

Herein, the defendant continued to ask Collier to leave as he aggressively pursued her, using physical force. The defendant was trying to get away from Collier as she grabbed the knife. Collier continued to physically assault the defendant as he tried to get control over the knife, causing the defendant's significant knife wound requiring fourteen staples. Based on the expert testimony of Dr. Mackenzie, the cut to Collier's shoulder was of a "v fashion," showing that he or the knife was moving, as opposed to a straight-line cut which would have otherwise indicated that Collier was standing still at the time it was inflicted. The defendant consistently stated that Collier was still grabbing and threatening her when the fatal wound was inflicted. It should be also noted that Collier had a loaded pistol in his pocket when the abuse of the defendant took place. Considering these facts, the history of abuse in the relationship and Collier's dangerous character, we find that the defendant's fear and apprehension was reasonable in this case. Under the burden of proof principles applicable to criminal

cases, the State has failed to exclude justification by self-defense. The defendant did not assume nor have any burden of proof. Thus, the burden of proof was entirely on the State. See **Lynch** 436 So.2d at 569; **Hart**, 457 So.2d at 791-92. No rational trier of fact could have found beyond a reasonable doubt that the State proved that the defendant did not act in self-defense. See **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662; **State v. Mussall**, 523 So.2d 1305, 1312 (La. 1988). For the foregoing reasons, the conviction and sentence are reversed and the defendant is ordered released from custody on this offense.

CONVICTION AND SENTENCE REVERSED; DEFENDANT ORDERED TO BE RELEASED ON THIS OFFENSE.

STATE OF LOUISIANA

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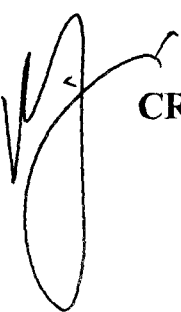
VERSUS

COURT OF APPEAL

SHAWN GILMORE

FIRST CIRCUIT

NO. 2016 KA 0464



CRAIN, J., dissenting.

Viewing the evidence in the light most favorable to the prosecution, particularly the verbal exchanges between the defendant and the victim recorded in the 911 calls, I believe a rational fact finder could have found beyond a reasonable doubt that the defendant did not act in self-defense. *See State v. Williams*, 01-0944 (La. App. 1 Cir. 12/28/01), 804 So. 2d 932, 939, *writ denied*, 02-0399 (La. 2/14/03), 836 So. 2d 135. The jury drew reasonable inferences from the evidence and concluding otherwise requires this court to impermissibly reweigh the evidence. *See Williams*, 804 So. 2d at 939.