STATE OF LOUISIANA	*	**NO. 2008-KA-1157**
VERSUS	*	**COURT OF APPEAL**
CATINA CURLEY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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BELSOME, J. CONCURS WITH REASONS.

I write separately to further address the Defendant's argument that the jury should have returned a verdict of manslaughter because she was acting under provocation sufficient to deprive a reasonable person of self-control and reflection. Distinguishing the facts of the instant case from *State v. Lombard*, 486 So.2d 106 (La. 1986), and from *State v. ex rel. Lawrence v. Smith*, 571 So.2d 133 (La. 1990), the majority notes that in both *Lombard* and *Smith*, cases upon which the Defendant in the instant case relies, the Defendants in those cases established by a preponderance of the evidence that they acted in "sudden passion" or "heat of blood." Defendant in this case also relies upon *State v. Heck*, 560 So.2d 611 (La.App. 4th Cir. 1990), wherein this Court upheld a trial court's reduction of a jury's verdict of second degree murder to manslaughter.

In *Heck*, Defendant Vivian Heck was found guilty as charged of second degree murder of her boyfriend, Mark Stafford, by a twelve member jury. *Heck*, 560 So.2d at 613. On the date of the murder, Heck and the victim had an argument regarding his decision to go "three wheeling" with a friend and her thirteen year old son. *Id*. Heck was angry because she had forbidden her son to accompany the victim and his friend, and also because the victim had chosen to go "three wheeling" rather than work towards resolving a potential seizure of the property

the two shared together by the Internal Revenue Service. *Id*. Heck left the house, and upon returning, discovered that her son, the victim and his friend were gone. *Id*. Heck, along with her mother, subsequently drove to several locations in attempt to find the victim and her son, returning home that evening. *Id*. The victim, his friend, and Heck's son returned at approximately 8:00 p.m.; the victim let the dogs out of the house, leaving the front door open. *Id*. After looking outside, Heck slammed the front door closed and the victim approached the house, at which time a shotgun blast was heard. *Id*. The victim had been shot through the head, chin and neck with triple-aught buckshot. *Id*. Heck emerged from the house and began sobbing hysterically upon seeing the victim lying on the ground. *Id*.

At trial, Heck maintained that the shooting was accidental, and that at the time, she was not angry with the victim. *Id*. at 614. In rebuttal, a ballistics and firearm expert testified that the gun "required four and on half pounds of pressure exerted on the trigger in order to fire it, rebutting the theory of an accidental firing." *Id*. Thus, if the gun had been fired accidentally, it would have flown out of Heck's hands. *Id*. In reducing the jury's second degree murder verdict to manslaughter, the trial judge found that the gun had not been fired accidentally, and that the second degree murder evidence was circumstantial (because there were no witnesses to the actual shooting). *Id*. The trial judge further found that either 1) Heck possessed the specific intent to kill the victim, "but was angry to the point that she was deprived of self control and cool reflection," or 2) Heck "was engaged in the perpetration of an aggravated battery or aggravated assault without the intent to kill or inflict great bodily harm," and that either possibility could result in a manslaughter verdict. *Id*.

On appeal, Heck argued that there was insufficient evidence to support a manslaughter conviction, while the State assigned as error the trial court's grant of Heck's motion for modification of the second degree murder verdict to

manslaughter. *Id*. In reviewing the sufficiency of the evidence, this Court recognized that "a trial court may modify a jury verdict and render a conviction of a lesser included responsive verdict only if it finds that the evidence, viewed in a light most favorable to the state, supports *only* a conviction of that responsive verdict." *Id*. (emphasis in original). Addressing the trial judge's hypotheses, this Court found that because Heck "stated that *she was no longer angry*, and that she did not even know the men had arrived at home," and because the defense failed to prove the mitigating factors of heat of blood or sudden passion, "*the trial court's first manslaughter hypothesis was unavailable* to Heck." *Id*. at 615 (emphasis added).

With regard to the second hypothesis, this Court noted that "[t]he defendant admitted she killed [the victim] while in the perpetration of an aggravated assault without any intent of causing death or great bodily harm" by insisting that she had only intended to "scare him." *Id*. This Court found that this admission comported with the expert's opinion that the shooting could not have been accidental, and that it also supported the trial judge's second manslaughter hypothesis. *Id*. at 616. Additionally, this Court found that the evidence "implie[d] that [Defendant] was angry at the time [of the murder]", as she was aware the men had returned from "three wheeling." *Id*. Noting that there were no witnesses to the shooting, this Court found that the State did not meet its burden of establishing that Heck had the specific intent to kill the victim "to the exclusion of the other reasonable hypothesis that all she wanted to do was scare [the victim]." *Id*.

The facts of this case differ significantly from *Heck*, particularly with regard to the fact that in *Heck*, this Court reviewed a trial court's reduction of the jury's verdict of second degree murder to manslaughter, whereas in this case, the Defendant requests this Court to find that the jury should have returned a manslaughter verdict. Another significant difference from *Heck* is that in this

case, the Defendant repeatedly denied being angry prior to shooting and killing the victim. Furthermore, the Defendant instructed everyone to leave the house immediately before retrieving the weapon from the upstairs bedroom. Live rounds were found on the floor of the bedroom where the Defendant admitted removing the gun from under the mattress. It is undisputed that the gun had to be cocked before it could be shot, and the Defendant admitted doing so intentionally before shooting the victim. Additionally, as the majority acknowledges, the jury could have found Renaldo Boykin's testimony credible. Renaldo testified that he witnessed the victim come downstairs and begin putting on his shoes, and that shortly thereafter, he witnessed the Defendant enter the living room with a gun[1] and point the gun at the victim.[2] Renaldo also testified that he did not witness the victim strike or push Defendant at any time that evening. Considering the foregoing, the record evidences that the jury could have reasonably inferred that the Defendant did not act in sudden passion or heat of blood.[3]

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[1] Renaldo Boykin testified at trial as follows:

Q. After Brittany came downstairs, you said the defendant came downstairs; is that right?
A. Yes.
Q. Did the defendant have anything in her hand?
A. Yes.
Q. What did she have?
A. A gun.
Q. A gun, okay. And where did she go with that gun?
A. She went downstairs. She was standing on the side wall.
Q. She was standing where?
A. By the stairs.
Q. By the wall by the stairs?
A. Yes.
Q. Is that near the front door of the house?
A. Yes.
Q. Did she have to pass up the front door to go to those stairs?
A. She was in front of the door.
Q. She was in front of the door?
A. Yes.
Q. What did she do with the gun?
A. She pointed it.
Q. Who did she point the gun at?
A. At my dad.
Q. If you can, show the ladies and gentlemen of the jury how she had the gun pointed.
A. She had it pointed like this.
Q. Judge, let the record reflect the witness is indicating that the gun was pointed forward.
A. Yes.
Q. Did she say anything?
A. No.
Q. After she pointed the gun, what happened?
A. The gun went off.

[2] At that point, Renaldo testified that he hid behind the television, where he heard one shot fired.

[3] As the majority acknowledges, the jury was aware that they could return a responsive verdict of manslaughter.

In reviewing a claim that a defendant established the presence of sudden passion and heat of blood, this Court must determine whether a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found that the mitigatory factors were not established by a preponderance of the evidence. *Lombard*, 486 So.2d at 111. The record in this case does not evidence that Defendant demonstrated by a preponderance of the evidence that the offense was committed in sudden passion or heat of blood such that "[n]o rational trier of fact could have concluded otherwise." *Id.* Therefore, the trial judge did not err in declining to modify the jury's second degree murder verdict. La. C. Cr. P. art. 821(C). Furthermore, it is well-settled that an appellate court may not substitute its judgment for that of the factfinder, and must accord great deference to a jury's assessment with regard to credibility of witnesses.[4] *State v. Robinson*, 2002-1869, p.16 (La. 4/14/04), 874 So.2d 66, 78. "[A reviewing] court's authority to review questions of fact in a criminal case does not extend to credibility determinations made by the trier of fact." *Id.* I respectfully concur.[5]

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[4] "In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness' testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion." *State v. Robinson*, 2002-1869, p.16 (La. 4/14/04), 874 So.2d 66, 79.

[5] Although no expert testified in this case regarding battered woman's syndrome, an insanity defense, it is worth noting that such a defense has been raised in cases resulting in a manslaughter verdict. *See State v. Sepulvado*, 26,948 (La.App. 2 Cir. 5/10/95), 655 So.2d 623; *State v. Moore*, 568 So.2d 612 (La.App. 4 Cir. 1990). "Descriptions of this syndrome emphasize a husband's repeated and violent beatings and the wife's dependency, economic and emotional, that made it practically impossible for her to leave." *State v. Burton*, 464 So.2d 421, 426 (La.App. 1 Cir. 1985). Therefore, victims of battered women's syndrome, "[w]hen faced with an immediate threat . . . may be driven to take the lives of their mates as the only possible method of escaping the threat." *Id.* In this case, however, the Defendant argued at trial that the shooting was either an accident or self-defense.