NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 1940

STATE OF LOUISIANA

VERSUS

JAVIS K. COUTEAU

Judgment Rendered: May 6, 2011

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Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Assumption, Louisiana
Trial Court Number 09-70

Honorable Guy Holdridge, Judge

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Ricky L. Babin, District Attorney
and
Lana Chaney, Assistant District Attorney
Gonzales, LA

Attorneys for
State – Appellee

Mary E. Roper
Baton Rouge, LA

Attorney for
Defendant – Appellant
Javis K. Couteau

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

The defendant, Javis K. Couteau, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1.[1] The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, assigning error to the trial court's denial of the defense's attempt to discuss the relationship between the defendant and the victim, the trial court's denial of the defense's attempt to introduce motive evidence, and to the sufficiency of the evidence in support of the conviction. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On or about February 11, 2009, at approximately 8:00 p.m., a shooting took place behind Tweed's Bar in Napoleonville, Louisiana. Just before the shooting, Otis Morris and the defendant had a confrontation wherein Morris took the defendant's vehicle. According to witnesses, onlookers began joking and laughing. The defendant had brief remarks with a bystander identified as "Renee." Minutes after Morris left the bar and drove off with the defendant's vehicle, the defendant pulled out a 9 millimeter gun and shot the victim, Marlon Robinson. Upon impact of the gunshot, the victim fell backwards and hit his head on the road. The defendant stepped closer to the victim and fired more rounds as the witnesses fled from the scene. The witnesses did not see the victim with a weapon or witness a confrontation between the defendant and the victim prior to the shooting. Patrice Dorsey ran to the home of an acquaintance and called for emergency assistance.

Morris and other witnesses returned to the scene shortly after the shooting

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[1] The State *nol-prossed* count two (convicted felon possessing a firearm or carrying a concealed weapon) of the indictment.

and encouraged the victim to fight for his life while they waited for the paramedics to arrive. The victim suffered five entry wounds, four exit wounds, and one bullet was recovered from his body. The fatal wound entered the victim's leg and damaged his femoral artery. No weapon was found on the victim.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends that the trial court erred in refusing to allow the defense to inform the jury in its opening statement that the victim and the defendant had a "contentious relationship." The defendant contends that this relationship constitutes the foundation of his defense. The defendant specifically argues that the trial court misinterpreted La. C.E. art. 404 in ruling that the defense could not introduce the nature of the relationship, absent the showing of an overt act by the victim in this particular instance. In this regard, the defendant argues that evidence of his relationship with the victim does not constitute impermissible character evidence. The defendant argues that presenting information that he and the victim did not get along and were "not on friendly terms" does not erode the victim's character. The defendant further argues that the trial court should have ascertained the details of what was sought to be presented before making a "blanket prohibition."

The Sixth and Fourteenth Amendments of the United States Constitution and Article I, § 16 of the Louisiana Constitution guarantee the criminally accused a meaningful opportunity to present a complete defense. See **State v. Blank**, 2004-0204 (La. 4/11/07), 955 So.2d 90, 130, cert. denied, 552 U.S. 994, 128 S.Ct. 494, 169 L.Ed.2d 346 (2007). Under La. C.E. art. 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. A district court judge enjoys broad discretion in admitting or excluding evidence on relevancy grounds. **State v. Miles**, 402 So.2d 644, 647 (La. 1981).

As a general matter, La. C.E. art. 404(A) provides, "Evidence of a person's

character or a trait of his character, such as a moral quality, is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." However, the general rule of inadmissibility does not apply when there is evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense. La. C.E. art. 404(A)(2). Absent evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense charged, evidence of the victim's prior threats against the accused or the accused's state of mind as to the victim's dangerous character is not admissible. La. C.E. art. 404(B)(2). An "overt act" within the meaning of La. C.E. art. 404 is any act of the victim which manifests to the mind of a reasonable person a present intention on his part to kill or do great bodily harm. **State v. Loston**, 2003-0977, p. 12 (La. App. 1st Cir. 2/23/04), 874 So.2d 197, 205-06, writ denied, 2004-0792 (La. 9/24/04), 882 So.2d 1167. The overt act must be directed at the accused. **State v. Cavalier**, 421 So.2d 892, 894 (La. 1982); **State v. Jones**, 451 So.2d 1181, 1185-86 (La. App. 1st Cir. 1984). Consequently, evidence of the victim's character is not appropriate, except when the defendant is claiming self-defense against an aggressor victim. **State v. Dressner**, 2008-1366, p. 19 (La. 7/6/10), 45 So.3d 127, 138, cert. denied, ___ U.S. ___, 131 S.Ct. 1605, ___ L.Ed.2d ___ (2011).

In the instant case, the State filed a motion *in limine* to prevent the defendant from alluding to or introducing evidence or testimony concerning the nature of the victim's character until a proper foundation outside the presence of the jury had been made establishing an overt act on the victim's part. In response to the State's motion, the defense attorney argued to the trial court that he sought to show the jury the relationship between the defendant and the victim and introduce evidence of ongoing arguments between the defendant and the victim. The trial court granted the State's motion, ruling that the evidence of specific arguments between the defendant and the victim would not be allowed without a showing of an overt

act or hostile demonstration. The trial court also specifically ruled that argument regarding the defendant's relationship with the victim could not be made during the defense's opening statement, since there would have been no evidence of or, in particular, a showing of an overt act or hostile demonstration on the victim's part. The trial court informed the defense attorney that the issue could be raised again after the admission of any evidence demonstrating an overt act or a hostile demonstration. The defense attorney clarified that he planned to argue that the third party friend of the victim took the defendant's truck because the victim wanted him to do so and that this constituted an overt act, if not physically by the victim, by the third party. The trial court stated that the defense would need authority in that regard, noting that the statute refers to an overt act or hostile demonstration by the victim and not a third party.

Before being entitled to present evidence of the victim's character, the defendant must present "appreciable evidence" of the overt act. See **Loston**, 2003-0977 at p. 12, 874 So.2d at 205-06. Opening and closing arguments in criminal cases shall be limited to evidence admitted, the lack of evidence, conclusions of fact that may be drawn therefrom, and the law applicable to the case. La. C.Cr.P. art. 774. The argument shall not appeal to prejudice. Based on the information that the defendant sought to include in his opening statement, we find that the trial court correctly required a prerequisite proper showing of a hostile demonstration or overt act on the victim's part. Under these circumstances, the defendant failed to carry his burden of proof that such evidence was even relevant, much less mitigating. La. C.E. arts. 402 & 403. We find no abuse of the trial court's discretion in granting the State's motion *in limine*. Accordingly, the trial court did not deprive defendant of his fundamental right to present a defense. Assignment of error number one lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant contends that the trial court erred and denied him a fair trial in not allowing the defense to introduce information discovered by the investigating officer about a possible motive for the shooting. The defendant contends that the information was relevant to show whether the shooting was planned or provoked in the heat of the moment and integral to his defense. The defendant notes that he had a constitutional right to refuse to testify and argues that the jury should have been able to consider motive-related testimony by the investigating officer.[2]

Detective Jason Terry of the Assumption Parish Sheriff's Office testified the defendant surrendered to the police at approximately 9:40 p.m. on the night of the shooting and was brought to the detective's office at approximately 1:00 a.m. the next morning. Over the State's objection, the defendant was allowed to question the detective regarding the rights that were given to and waived by the defendant, and the specific fact that the defendant voluntarily made a statement to the police. However, the trial court sustained the State's objection to the admission of the defendant's statement and the content thereof as hearsay. The defense attorney was allowed to ask Detective Terry if he ascertained a motive for the shooting from the defendant and the detective responded in the affirmative. The trial court reiterated its ruling that the defense could not introduce the substance of the

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[2] We note that the defendant's brief does not name the "investigating officer" or provide a record reference. However, based on the record, we have determined that the defendant is referring to the testimony of Detective Jason Terry wherein he was not allowed to cross-examine the detective regarding the defendant's statement to the police. The defendant did not proffer the statement in question, as required by La. C.E. art. 103(A)(2). However, this assignment of error is not precluded on that basis as the record reflects the trial court denied the defense's attempt to make such a proffer. To the extent that the defendant argues on appeal that the exclusion of the statement in question interfered with his constitutional right to present a defense (U.S. Const. amends. 6 and 14; La. Const. art. 1, § 16), this argument was not articulated below and will not be addressed herein. A new ground for objection cannot be raised for the first time on appeal. The basis or ground for objection must be sufficiently brought to the attention of the trial court to allow it the opportunity to make the proper ruling and prevent or cure any error. Accordingly, a defendant is limited on appeal to the grounds for the objection that were articulated at trial. See La. C.Cr.P. art. 841; see also **State v. Young**, 99-1264, p. 9 (La. App. 1st Cir. 3/31/00), 764 So.2d 998, 1005.

defendant's statement to the police.

Generally, any out-of-court statement of the accused constitutes hearsay, unless subject to an exception. Such a statement is admissible as an exception to the hearsay rule when it is an admission against interest. Nonetheless, the defendant may not introduce his own self-serving exculpatory statements because they are hearsay. **State v. Melerine**, 236 La. 930, 971, 109 So.2d 471, 486 (1959); **State v. Taylor**, 31,227, p. 7 (La. App. 2nd Cir. 10/28/98), 720 So.2d 447, 451; **State v. Day**, 468 So.2d 1336, 1339 (La. App. 1st Cir. 1985); **State v. Joseph**, 454 So.2d 237, 249 (La. App. 5th Cir. 1984).

In **Day**, this court found that the defendant's utterance to the investigating officer that a sergeant shot him for no reason at all, although made in proximity to the criminal act of aggravated battery, was a non-spontaneous self-serving account of the incident by a participant made after the event, and accordingly, was inadmissible hearsay. The defendant apparently intended to use the voluntary statement for its exculpatory value. This court noted that it was an attempt to introduce evidence of an out-of-court statement to prove the truth of the matters asserted in that statement in finding that the evidence falls within the definition of hearsay. **Day**, 468 So.2d at 1339.

In **State v. Thomas**, 604 So.2d 52 (La. App. 5th Cir. 1992), the Fifth Circuit addressed this issue when the defendant in that case sought to have admitted the entirety of a statement made by him to a police officer. The defendant in **Thomas** argued that because the statement contained an admission of his ownership of the automobile involved in the armed robbery, the entire statement should be admissible, despite the exculpatory nature of the remainder of the statement. The court likewise ruled that the defendant therein may not introduce his own self-serving exculpatory statements, because they were hearsay. **Thomas**, 604 So.2d at 60.

In the present case, the defendant apparently intended to use the statement for its exculpatory value. Since it was an attempt by him to use an out-of-court statement to prove the truth of the matters asserted, the statement clearly falls within the definition of hearsay. Therefore, unless the statement fits within one of the recognized exceptions, the trial judge was correct in ruling the statement inadmissible. The State did not use any part of the defendant's statement, nor seek to offer it against him. Rather, it was the defendant who sought to introduce his own statement, without testifying and allowing the State to cross-examine him. It is precisely this situation that the Louisiana Code of Evidence and the jurisprudence clearly prohibit. La. C.E. arts. 801(C) & 802; **State v. Caldwell**, 28,514, pp. 7-8 (La. App. 2nd Cir. 8/21/96), 679 So.2d 973, 977, writ denied, 96-2314 (La. 2/21/97), 688 So.2d 521. The defendant does not argue and we do not find that the evidence in question fits within one of the recognized exceptions to the hearsay rule. Thus, we find no error in the trial court ruling the evidence in question inadmissible. The second assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

Finally, in the third assignment of error, the defendant contends that the evidence presented was legally insufficient to support a conviction of second degree murder. The defendant argues that a rational review of the sequence of events makes it illogical to conclude that he planned to kill the victim. The defendant further argues that the only rational conclusion is that he was provoked into killing the victim by the course of events set in motion when Morris began taunting him, took his truck, and a group of persons laughed and taunted the defendant about the situation.

The standard of review for sufficiency of the evidence to support a conviction is whether or not, 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. See La. C.Cr.P. art. 821; **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Johnson**, 461 So.2d 673, 674 (La. App. 1st Cir. 1984). 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, p. 5 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the trier of fact reasonably rejects a 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).

The crime of second degree murder, in pertinent part, "is the killing of a human being: (1) [w]hen 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. **State v. Buchanon**, 95-0625, p. 3 (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 may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. Henderson**, 99-1945, p. 3 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

In accordance with La. R.S. 14:31(A)(1), manslaughter is a homicide which would be a first or second degree murder, but 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 will 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. La. R.S. 14:31(A)(1). "Sudden passion" or "heat of blood" are not elements of the offense of manslaughter; rather, they are mitigating factors in the nature of a defense which tend to lessen the culpability. **State v. Rodriguez**, 2001-2182, p. 17 (La. App. 1st Cir. 6/21/02), 822 So.2d 121, 134, writ denied, 2002-2049 (La. 2/14/03), 836 So.2d 131. Because they are mitigatory factors, a defendant who establishes by a preponderance of the evidence that he acted in "sudden passion" or "heat of blood" is entitled to a verdict of manslaughter. *Id.*

State witnesses Patrice Dorsey, Anthony Daggs (the victim's cousin), Otis Morris, Charles Bell, Lashon Bell, Troy Landry, and Jason Terry were present at the time of the shooting. Dorsey, the victim, Daggs, Charles Bell and the defendant were together before the shooting. At some point in the evening, the defendant left the bar, but when he returned Morris had arrived. The defendant parked his truck and re-entered the bar as Dorsey, Charles Bell, Daggs, and Morris stood outside of the bar conversing.

After getting a drink from the bar, the defendant again exited the bar and as he walked towards his truck, Morris made comments about the defendant's new truck and indicated that the defendant had a bad attitude. According to Dorsey and Daggs, Morris called the defendant a derogatory name and threatened to take his truck. Dorsey specifically testified that Morris stated, "You p---- ass n-----, I come and take your truck." The defendant told Morris, "You come take my truck."

Lashon Bell specifically testified that Morris stated, "Man, what's wrong with you, you are going f------ crazy" and the defendant responded, "You ain't seen crazy yet," before Morris replied, "Bitch, who you playing with, I take your f------ truck." Lashon Bell added that the defendant responded, "If you a man, take it." The defendant walked away from his truck to urinate, specifically described as "getting relieved," and Morris got in the truck. As the defendant walked back towards his vehicle, Morris drove away. Daggs testified that he thought Morris and the defendant were joking. During cross-examination, when asked if she had ever seen the defendant and the victim together, Dorsey testified that they were close friends and "hung together." Dorsey confirmed that they had a good relationship and were friends.

Morris testified that he was only taking the defendant's truck for a short ride and had so informed the victim before driving off. While Morris initially stated that he did not recall and was unsure as to whether he could have made a derogatory comment to the defendant before driving off in the defendant's truck, he later testified that he stated, "A n----- like me will take the truck from you." Morris also testified that no one told him to take the defendant's truck. When asked during cross-examination if he was friends with the defendant, Morris stated he never had any problems with him and "never hung with him." Morris further stated that there was no animosity between him and the defendant, and he was "clowning" and had a smile on his face when he took the defendant's truck. Morris testified that he had only driven around the block before returning to the scene within five minutes. Morris stated that he had no idea as to why the defendant shot the victim. When asked if he ever talked to Robinson about his relationship with the victim, Morris gave a negative response.

The defense's witness Chalise Jupiter, the defendant's cousin, took the defendant to the Assumption Parish Sheriff's Office after the shooting. Jupiter

testified that the defendant was crying and emotional at the time. The defendant's uncle, Frank Couteau, also testified. Couteau stated that he was present and saw the defendant arrive at the bar that night between 7:30 and 8:00 p.m., and he heard someone say, "Take his truck." According to Couteau, Morris then jumped in the defendant's truck and "squealed out rocks, skidded down the street in his truck." Couteau then heard a lot of laughing and comments such as, "Man, he took your truck." Couteau did not see who shot the victim but did hear the gunshots.

The verdict rendered against defendant indicates the jury accepted the testimony offered against defendant and rejected the testimony offered in his favor. As the trier of fact, the jury was free to accept or reject in whole, or in part, the testimony of any witness. **State v. Johnson**, 99-0385, p. 9 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332, p. 31 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. 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, p. 4 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331.

As noted on appeal, the defendant contends that the instant offense constituted manslaughter as opposed to second degree murder. However, based on the instant circumstances, the jury could have reasonably concluded that there was a lack of provocation sufficient to deprive an average person of his self-control and cool reflection. The witnesses all testified that the victim did not provoke the defendant in any manner. Most of the witnesses estimated that the shooting took place five minutes after Morris drove away in the defendant's vehicle. While the

defendant may have been taunted as a result of Morris's actions in taking his vehicle, even assuming that the victim was somehow involved in Morris's actions, these circumstances do not constitute provocation sufficient to cause an average person to lose control and take lethal action. We find that the defendant failed to prove the mitigating factors by a preponderance of 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, pp. 14-15 (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, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). After a thorough review of the record, we are convinced that a 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, all of the elements of second degree murder. The third assignment of error is without merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.