NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1887

STATE OF LOUISIANA

VERSUS

RICKY D. DAVIS

Judgment Rendered: May 6, 2011

Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana
Trial Court Number 03-08-0365

Honorable Bonnie P. Jackson, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

The defendant, Ricky D. Davis, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. He pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed a motion for postverdict judgment of acquittal, which was denied. He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating four assignments of error. We affirm the conviction and sentence.

FACTS

On October 29, 2005, the defendant was living at the Plantation Inn Hotel on Airline Highway in Baton Rouge. That evening, near midnight, the defendant went to the hotel room of Johnnie Barcelona, whom the defendant had come to know from living in the same hotels as Barcelona following Hurricane Katrina. Barcelona testified at trial that the man who had raped some women that the defendant knew was downstairs in the parking lot. Two women were upstairs on the balcony, including Latrice Orillion, who called 911 and told the operator that the man who had raped several women, including herself, was at the Plantation Inn.

The defendant and Barcelona went downstairs to talk to the man, later identified as Corey Hawkins. Hawkins, who was in a GMC pickup truck, pulled into a parking space. The defendant and Barcelona were on the driver's side of the truck talking to Hawkins, who had his door open. According to Barcelona, Hawkins "got a little antsy" and one of the women on the balcony yelled to get the license plate number. As Barcelona moved to the back of the truck, Hawkins backed out of his parking space. Barcelona testified he had to jump out of the way

to keep from getting run over. At that point, the defendant ran and stood in front of the truck to prevent Hawkins from leaving. Hawkins drove forward and the defendant "had to kind of jump out of the way because the truck was headed right toward him." As the defendant was standing on the driver's side, Barcelona saw the defendant holding a gun in his hand and shooting. Hawkins was shot in the chest. He drove off, but his truck came to rest a short distance away. He subsequently died as a result of the gunshot wound. Barcelona later identified the defendant in a photographic lineup.

Upon arriving at the crime scene, Baton Rouge Police Department detectives were unable to find the defendant, Barcelona, or Orillion. However, detectives learned that the defendant was the subscriber on the account of the cell phone Orillion used to call 911. Although the detectives were unable to find the defendant or Orillion at the Plantation Inn or other hotels in the area, they were able to find the defendant, Barcelona, and Orillion three weeks later.

Detectives found five spent .380 Winchester cartridge cases at the scene of the shooting. Hawkins's truck had a bullet hole on the hood and a bullet strike to the windshield. There was also a bullet hole in the driver's-side mirror. Inside the truck, the officers found a Larsen pistol with a magazine containing four .25 auto live rounds, and two cell phones on the front seat. There were also .25 auto live rounds found on the floorboard of the truck. A bullet fragment was found and collected from the bed sheets of Hawkins when he was in the hospital. Jeff Goudeau, an expert in firearms examination, testified at trial that he issued a report wherein he stated that the small piece of bullet fragment was too badly damaged to be identified as a match to the pistol found in Hawkins's truck. Thus, he opined that another .25 auto caliber pistol or a firearm of a different caliber with the same

land impression width possibly fired the fragment. Detective Christopher Johnson, with the Baton Rouge Police Department, testified at trial that he did not have any indication from his investigation that Hawkins did any of the shooting that night.

Goudeau was also given pictures by the State of another vehicle in the parking lot of the Plantation Inn Hotel that was struck by the gunfire to see if he could give a general idea from which direction the defendant fired his gun. Goudeau testified he felt the defendant was neither directly on the side of Hawkins nor directly in front of Hawkins when shooting at him, but somewhere in between that angle. However, defense witness, Jeffery Scozzafava, an expert in shooting reconstruction and crime-scene investigation, testified at trial that he did not believe that determinations of impact angles and shooting origin could be determined by only looking at photographs of a bullet hole.

The defendant did not testify. The jury returned a verdict of guilty as charged.

ASSIGNMENTS OF ERROR NOS. 1 AND 2

In his first and second assignments of error, the defendant argues, respectively, that the trial court erred in denying the motion for postverdict judgment of acquittal, and the evidence was insufficient to support the conviction. Specifically, the defendant contends that the State did not prove beyond a reasonable doubt that he did not kill Corey Hawkins in self-defense.

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 LSA-C.Cr.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, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-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.

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. See LSA-R.S. 14:30.1(A)(1). 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. LSA-R.S. 14:10(1). Such state of mind can be formed in an instant. State v. Cousan, 94-2503 (La. 11/25/96), 684 So. 2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. State v. Graham, 420 So. 2d 1126, 1127 (La. 1982). The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. State v. McCue, 484 So. 2d 889, 892 (La. App. 1st Cir. 1986). Deliberately pointing and firing a deadly weapon at close range indicates specific intent to kill or inflict great bodily harm. See State v. Robinson, 2002-1869 (La. 4/14/04), 874 So. 2d 66, 74, cert. denied, 543 U.S. 1023, 125 S. Ct. 658, 160 L. Ed. 2d 499 (2004); State v. Ducre, 596 So. 2d 1372, 1382 (La. App. 1st Cir.), writ denied, 600 So.2d 637 (La. 1992).

As previously codified, LSA-R.S. 14:20 provided, in pertinent part:

A. A homicide is justifiable:

> (1) 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.[1]

Further, LSA-R.S. 14:21 provides:

> 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.

The defendant contends that Barcelona's testimony established that the defendant acted in self-defense. According to the defendant, the poor investigation by law enforcement left Barcelona's testimony as the only explanation of the events that occurred on the night of Hawkins's death. The defendant notes, for example, that the bullet that killed Hawkins was never retrieved and proper measurements were not taken at the crime scene to establish the relative position of the defendant when he fired his weapon.

Since specific intent may be inferred from the actions of the defendant, it is necessary that a determination be made as to whether the circumstances support the jury's finding that the defendant had the specific intent to kill or to inflict great bodily harm. State v. Spears, 504 So. 2d 974, 977 (La. App. 1st Cir.), writ denied, 507 So. 2d 225 (La. 1987). In the instant matter, the victim's death was proved. Moreover, the fact that the defendant shot Hawkins at pointblank range indicates the defendant clearly had the specific intent to kill or to inflict great bodily harm upon the victim. Therefore, the remaining issue is whether or not the defendant acted in self-defense.

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[1]Louisiana Revised Statute 14:20(1) is now codified as 14:20(A)(1).

When self-defense is raised as an issue by the defendant, the State has the burden of proving, beyond a reasonable doubt, that the homicide was not perpetrated in self-defense. Thus, the issue in this case is whether a rational factfinder, viewing the evidence in the light most favorable to the prosecution, could have found beyond a reasonable doubt that the defendant did not kill the victim in self-defense. The guilty verdict of second degree murder indicates the jury accepted the testimony of the prosecution witnesses insofar as such testimony established that the defendant did not kill Hawkins in self-defense. See Spears, 504 So. 2d at 977-78.

The defendant asserts in his brief that Barcelona emphatically testified that the defendant only shot at Hawkins when Hawkins was driving at the defendant in his vehicle. However, our review of the record indicates that Barcelona's testimony was not as clear and unambiguous as the defendant contends. On direct examination, Barcelona testified that when Hawkins backed his truck up, the defendant ran over to the front of the truck to try to stop Hawkins. According to Barcelona, when Hawkins started going forward, the defendant "had to kind of jump out of the way because the truck was headed right toward him." Barcelona recalled that the defendant got to the driver's side of the truck and then Barcelona heard shooting. Later, Barcelona was asked when the first time was that the defendant fired the gun. Barcelona responded, "The first shot I heard was after -- when Ricky jumped out in the front of the truck." Barcelona stated he did not actually see the defendant shooting. However, after Barcelona stated that he did not want to testify against the defendant, he admitted that the defendant had the gun in his hand and was shooting. When asked if he believed that Hawkins was trying to run over the defendant, Barcelona initially responded in the affirmative

because the defendant had to jump out of the way. However, when Barcelona was later asked if he believed that Hawkins was trying to hit the defendant, Barcelona responded, "Sir, I can't say that because I don't know what the man was thinking."

Significantly, Barcelona testified on direct examination that he heard the tires of Hawkins's truck squeal twice, once when he was backing up and once when he went forward. Barcelona stated he did not hear gunshots until after the tires squealed the second time. When asked if there was any shooting before the second squeal, Barcelona responded in the negative and further testified that he was certain about that.

The shooting occurred during the recorded 911 call. Our review of the 911 call reveals a different scenario than the events suggested by Barcelona. While Barcelona is correct that Hawkins's tires squealed twice, there were actually three shots fired before the second squeal. Following the second squeal, the defendant fired two more times. Thus, this evidence establishes that immediately following the first squeal of the tires, as Hawkins was backing out, the defendant fired three shots at him. After the second squeal of the tires, as Hawkins sped away, the defendant fired two more shots at him.

Dr. Gilbert Corrigan performed the autopsy on Hawkins. Dr. Corrigan testified at trial that Hawkins had a gunshot wound on the left side of the chest, and that the wound traced across the victim's abdomen to his right kidney. Thus, the bullet went from the left side of the chest through his intestines and through his abdominal aorta.

In finding the defendant guilty, the jury clearly rejected the claim of self-defense and concluded that the use of deadly force under the particular facts of the case was neither reasonable nor necessary. Based on the evidence, a juror could

have reasonably concluded that the defendant, of his own accord, moved to the front of Hawkins's truck and shot at Hawkins after he backed up his truck, but before he drove forward. These shots appear to have struck the truck, but not Hawkins. As Hawkins began to drive forward, the defendant moved to the driver's side of the truck and fired twice more at the defendant, striking him once on the left side of his chest. In the alternative, the jury could have concluded that the defendant shot at Hawkins three times while standing on the side of the truck as Hawkins was backing up and thereafter, as Hawkins began to go forward, the defendant jumped in front of the truck and fired two more times at Hawkins. Thus, under either assessment of the evidence, a rational juror could have reasonably concluded that the killing was not necessary to save the defendant from the danger envisioned by LSA-R.S. 14:20(1)[2] and/or that the defendant had abandoned the role of defender and taken on the role of an aggressor and, as such, was not entitled to claim self-defense. See LSA-R.S. 14:21. See State v. Bates, 95-1513 (La. App. 1st Cir. 11/8/96), 683 So. 2d 1370, 1377.

Moreover, the defendant's actions in leaving the scene after shooting

[2]Thus, even accepting as true the testimony of Barcelona regarding Hawkins aiming his truck at the defendant, a rational trier of fact could have reasonably concluded that the defendant's conduct in shooting Hawkins to death after safely moving out of the way of the truck was not necessary to save the defendant from the danger envisioned by LSA-R.S. 14:20(1).

Hawkins and failing to report the shooting are inconsistent with a theory of self-defense. See State v. Emanuel-Dunn, 2003-0550 (La. App. 1st Cir. 11/7/03), 868 So. 2d 75, 80, writ denied, 2004-0339 (La. 6/25/04), 876 So. 2d 829; State v. Wallace, 612 So. 2d 183, 191 (La. App. 1st Cir. 1992), writ denied, 614 So. 2d 1253 (La. 1993). Flight following an offense reasonably raises the inference of a "guilty mind." State v. Captville, 448 So. 2d 676, 680 n.4 (La. 1984). Accordingly, the jury's rejection of the defense of justifiable homicide is supported by the evidence.

The jury heard all of the testimony and viewed all of the evidence presented to it at trial and, notwithstanding any alleged inconsistencies, it found the defendant guilty of second degree murder. As the trier of fact, the jury was 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 the evidence to overturn a factfinder's determination of guilt. State v. Taylor, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. 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. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. State v. Quinn, 479 So. 2d 592, 596 (La. App. 1st Cir. 1985).

After a thorough review of the record, we find that the evidence supports the

jury's verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant did not kill his victim in self-defense and, accordingly, was guilty of second degree murder. See State v. Calloway, 2007-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues the trial court erred in denying the defendant's request for a special jury instruction. Specifically, the defendant contends that because he had knowledge that Hawkins committed a felony and approached Hawkins to detain him, the trial court should have instructed the jury on the law of making a "citizen's arrest."

After the defendant rested his case, the trial court asked if either counsel wanted additional jury instructions. Defense counsel asked for an instruction, based on LSA-C.Cr.P. art. 214, that the defendant, believing that Hawkins was a rapist, had a right to detain Hawkins.

A private person may make an arrest when the person arrested has committed a felony, whether in or out of his presence. LSA-C.Cr.P. art. 214. See State v. Jackson, 584 So. 2d 266, 268 (La. App. 1st Cir.), writ denied, 585 So. 2d 577 (La. 1991). The State and the defendant have the right to submit to the court special written charges for the jury. The requested charge shall be given if it does not require qualification, limitation or explanation, and if it is wholly correct and pertinent. LSA-C.Cr.P. art. 807. See LSA-C.Cr.P. art. 802. Any requested special charge must be supported by the evidence. State v. Craig, 95-2499 (La. 5/20/97),

699 So. 2d 865, 869, cert. denied, 522 U.S. 935, 118 S. Ct. 343, 139 L. Ed. 2d 266 (1997).

In denying defense counsel's request, the trial court stated:

> Right. Well, Mr. Damico [defense counsel], the court is not inclined to give that instruction because there has been no evidence, if you will, that the deceased committed a felony. Now, had the complainant who made the call been present to testify and had given testimony in support of the allegation that the deceased committed a rape then I think that 214 might very well apply, but just simply an allegation unsubstantiated by any evidence -- the person making the allegation isn't even present in court. To make that allegation in court and not be subject to cross-examination I don't think that there is sufficient evidence on which we can make the conclusion that the person detained had committed a felony whether in or out of the presence of Mr. Davis. As I said, had that person come to court and testified and given credible testimony as to when, where the circumstances and been subject to cross-examination, that might have been a different matter. But since that didn't happen all we have is a statement made on a 911 call without any substantiation whatsoever, and the court will not give the instruction of -- contained in 214 of the Code of Criminal Procedure.

We find no error in the ruling of the trial court. Other than Latrice Orillion, the 911 caller who stated that Hawkins had raped several women, nothing in the record confirmed or even supported this allegation. Detective Johnson testified at trial that he met with Orillion and looked into her allegations about several rapes. He found no credible evidence of rape. He stated that he consulted with detectives in the Sex Crimes Division about whether there was a rash of rapes involving the names Orillion had given him, and discovered there were no such rapes. Detective Johnson further testified, "[W]e went down Airline Highway, the local hotels where prostitutes hang out, and we located no one by those names."

Moreover, there is nothing in the record to suggest the defendant was attempting to make a "citizen's arrest." Barcelona only testified that the defendant told him that he was going down there to talk to Hawkins and try and keep him there until the police arrived. Further, based only on Orillion's allegation of rape,

any attempt by the defendant to arrest Hawkins would have been improper under LSA-C.Cr.P. art. 214. The right of a private person to make a lawful arrest does not extend to instances where he merely suspects the commission of a felony. See Banks v. Food Town, Inc., 98 So. 2d 719, 721 n.1 (La. App. 1st Cir. 1957).[3] A private person may arrest one whom he has probable cause to believe has committed a felony, and he must subsequently show that the person has actually committed a felony. See State v. Jones, 263 La. 164, 175, 267 So. 2d 559, 563 (1972) (per curiam), cert. denied, 410 U.S. 946, 93 S. Ct. 1406, 35 L. Ed. 2d 612 (1973); Dunson v. Baker, 144 La. 167, 171-72, 80 So. 238, 239 (1918). See also Keys v. Sambo's Restaurant, Inc., 389 So. 2d 1360, 1365 (La. App. 3d Cir. 1980), affirmed, 398 So. 2d 1083 (La. 1981). Neither the defendant nor Orillion testified at trial, so there is nothing of record to establish the defendant had probable cause to believe Hawkins had raped anyone. Also, nothing in the record established that Hawkins actually committed the felony of rape. Accordingly, the requested jury charge was not supported by the evidence and was properly rejected.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 4

In his fourth assignment of error, the defendant argues he was convicted of second degree murder by a 10-2 non-unanimous verdict in violation of the United States and Louisiana Constitutions. Specifically, the defendant contends that LSA-C.Cr.P. art. 782(A) violates the Sixth Amendment right to a jury trial since it must be considered in light of the Fourteenth Amendment right to due process of law.

Whoever commits the crime of second degree murder shall be imprisoned at

[3]The article cited in footnote 1 in Banks is former LSA-R.S. 15:61, which is the source law of LSA-C.Cr.P. art. 214.

hard labor. See LSA-R.S. 14:30.1(B). Louisiana Constitution article I, § 17(A) and Louisiana Code of Criminal Procedure article 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972); State v. Belgard, 410 So. 2d 720, 726 (La. 1982); State v. Shanks, 97-1885 (La. App. 1st Cir. 6/29/98), 715 So. 2d 157, 164-65.

The defendant suggests that Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); and Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), which emphasize the necessity of a unanimous verdict, "implicitly overrule the prior anomalous holding in Apodaca, and must be taken account of by this Court." This argument has been repeatedly rejected by this court. See State v. Smith, 2006-0820 (La. App. 1st Cir. 12/28/06), 952 So. 2d 1, 15-16, writ denied, 2007-0211 (La. 9/28/07), 964 So. 2d 352; State v. Caples, 2005-2517 (La. App. 1st Cir. 6/9/06), 938 So. 2d 147, 156-57, writ denied, 2006-2466 (La. 4/27/07), 955 So. 2d 684. Moreover, our supreme court has affirmed the constitutionality of Article 782. See State v. Bertrand, 2008-2215 (La. 3/17/09), 6 So. 3d 738. In Bertrand, the court specifically found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth,

Sixth, and Fourteenth Amendments. Bertrand, 6 So. 3d at 743.

Accordingly, this assignment of error is also without merit.

CONVICTION AND SENTENCE AFFIRMED.