

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0251

STATE OF LOUISIANA

VERSUS

DIANNA BROWN

**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 380993, Division "G"
Honorable Larry J. Green, Judge Presiding**

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Dianna Brown**

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered September 20, 2006

Handwritten signatures and initials in the left margin, including what appears to be 'RHO', 'MK', and 'Guz'.

PARRO, J.

Defendant, Dianna Brown, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. Defendant pled not guilty and was tried before a jury. The jury found defendant guilty of the responsive offense of manslaughter, a violation of LSA-R.S. 14:31. The trial court sentenced defendant to twenty years at hard labor.

Defendant appeals. We affirm defendant's conviction and sentence.

FACTUAL BACKGROUND

Defendant and Ricky Peters,¹ the victim, shared a residence located at 917½ West 33rd Street in Covington, Louisiana. The couple's relationship began in 2001 and had been marked by several incidents of domestic abuse, including an incident around Thanksgiving in 2003 where defendant sustained a broken jaw. Defendant's jaw was wired shut until one or two months prior to the incident at issue. Defendant claimed that during the tenure of their relationship, she was stabbed, bitten, and beaten by the victim. Although defendant had previously left their residence to live at her mother's home a block away, she claimed the victim threatened to burn her mother's residence with her and her mother inside if she did not return to live with him. The victim was known to the Covington Police Department as having a general reputation for domestic violence.

On the morning of April 22, 2004, at approximately 4:30 a.m., their fatal dispute began. The defendant testified that the victim got angry when she would not perform oral sex on him and would not get up to fix him breakfast before he left for work. According to defendant, she told the victim before he went to work that she was leaving him and was going to pack her belongings. The defendant further testified that she went over to her mother's house later that morning. Around 11:00 a.m. the victim returned from work, went over to her mother's house, and told

¹ Several surnames were used for the victim throughout the record, including Peters (his father's surname), Weary (his mother's maiden name), and Owens (also known as). Since "Peters" was used on the indictment and verdict form, we choose that designation in this opinion.

defendant to go get her things. Defendant claimed she had made arrangements for her sister who lived in Mandeville to pick her up and take her to Mandeville, where she would feel safer than she would have felt at her mother's house. Defendant testified that her sister was late due to a delay at her job.

Defendant's account of the incident was that around 5:30 p.m., as she was in the residence packing to leave the victim, he came into the residence in a "rage." Defendant testified that the victim struck her by slapping her with the back of his hand and said, "I'm going to give you a reason to leave." Defendant stated that the wires had been removed from her jaw approximately one or two months earlier and she feared the victim would reinjure her jaw. According to defendant, the force of the victim's slap caused her to fall against a shelf, knocking a glass over and breaking it. Defendant claimed that because she was in fear, she went to the kitchen to get a knife, and the victim followed her. Once defendant got a knife, the victim backed away and asked her, "Oh, you going to cut me?" Defendant testified that she told the victim that she just wanted him to leave her alone and allow her to finish packing. According to defendant, the victim went to hit her again and she stabbed him. Defendant maintained that she was acting in self-defense. After defendant stabbed the victim, she said he merely walked out of the residence.

Kecia Hurd, who had been visiting her mother,² the couple's next-door neighbor, testified that the victim had been sitting outside with her and her sister for approximately twenty minutes earlier that afternoon. Hurd further testified that the victim, who was later standing just inside the front screen door of their residence, and defendant had been verbally arguing for most of the time she was present. Hurd indicated that the victim did not appear to be angry and kept telling defendant, "Yeah, I love you too." Hurd stated she heard the sound of breaking glass from the couple's residence. At some point, the victim entered the residence and she could hear low arguing. The victim stayed in the residence a short time, perhaps ten

² Kecia Hurd's mother, Cherri Magee, lived in the left side of the duplex next door to defendant and the victim.

seconds, then he walked outside, pulled up his shirt and said, "Look what she did to me." After Hurd saw that the victim had been stabbed, she jumped up and ran to call 911. The victim kept saying that he could "take his lick" and he did not want 911 called. According to Hurd, defendant also indicated that 911 should not be called.

Hurd watched the victim walk out of the gated yard towards the next-door grocery store and turn around and walk back. The victim kept holding his side and repeating, "I can take my lick." The victim then walked back into his residence while spitting blood. Hurd followed the victim into his residence and saw defendant hug the victim and apologize. Hurd attempted to render assistance to the victim by applying pressure to the wound with a towel as he lay on the floor of the bedroom.

The victim's wound proved to be fatal. Dr. Michael DeFatta, a forensic pathologist and chief deputy coroner for St. Tammany Parish, performed the autopsy on the victim. According to Dr. DeFatta, the victim sustained a knife wound approximately six inches deep through the left lateral rib cage that punctured the lower left lobe of his lung. Dr. DeFatta testified that the width of the blade of the knife would have been slightly less than one-half of an inch. The wound was consistent with the defendant facing the victim and inflicting the wound with her right hand. The victim bore no defensive wounds. Tests indicated that the victim had cocaine in his system and a blood-alcohol level of .07 grams percent.

Officer James Blackwell of the Covington Police Department was the first policeman to arrive at the couple's residence in response to the dispatch. Officer Blackwell observed the front door of the residence was open, but the screen door was closed and a large amount of blood was on the front porch. There was also broken glass on the living room floor, consistent with a scuffle. Officer Blackwell entered the residence and came across the victim laying on the bedroom floor with a female kneeling down beside the victim, while defendant was standing over them crying hysterically.

Officers David Avent and Stefan Montgomery, also with the Covington Police Department, arrived soon after Officer Blackwell. Officer Montgomery observed the defendant crying while crouched near the bed, and heard her make statements indicating that she had injured the victim. Defendant admitted stabbing the victim and indicated that the victim had slapped her as she was preparing to leave. Defendant told Officer Montgomery that after the victim slapped her, she went into the kitchen, retrieved a knife and "stuck him." Defendant told Officer Montgomery that she thought the victim was trying to back-hand her again.

Detective Douglas Arrowood of the Covington Police Department also interviewed defendant. In addition to admitting she stabbed the victim, defendant also revealed that she and the victim had smoked crack cocaine earlier that day.

Keanta Magee, the sister of Hurd, lived with her mother next door to the victim and defendant. Magee testified that early that morning around 4:30 a.m. she heard defendant fussing, while the victim just laughed. Around the time she got her son ready to ride the school bus, the victim came into the yard and told her that defendant had been out all night, then began "raising cane" and eventually caused him to get fired. Magee saw defendant later that day and heard defendant state that she was "fixing to pack." According to Magee, the victim was on the porch of the duplex or in the yard most of the afternoon talking with her and Hurd. Magee said defendant would occasionally make "smart comments" directed to the victim and did not appear to be in a good mood.

Defendant testified on her own behalf. She stated that she first met the victim in 2001 after he got out of Faith Bible Rehab. According to defendant, the victim had beaten her many times over the course of their relationship. Because the victim had threatened her and her mother, defendant oftentimes never pressed charges against the victim. The victim always made excuses for his behavior and defendant admitted that she defended herself when the victim did things to her.

On the date of the incident, defendant testified that the victim became angry with her because she refused to perform oral sex on him. She further testified that just before he left for work, she told him she was going to leave him. While he was at work and because she was afraid to stay home, she went to her mother's house, which was one block away. At about 11:00 that morning the defendant returned from work, went over to defendant's mother's house, and told defendant to go and get her things.

Defendant testified that she had basically packed her belongings, but was waiting for her sister to pick her up. According to defendant, the victim initiated the physical violence when he slapped her and told her that he would "give [her] a reason to leave." Defendant claimed the victim was blocking the only exit from the house. Defendant described the victim as being in a "rage" and that he was coming towards her. Defendant testified that she was in fear for her life so she ran to the kitchen and got a knife. Once she got the knife, defendant claimed that the victim moved towards her in an attempt to strike her again. Defendant claimed she stabbed the victim in self-defense.

On cross-examination, defendant admitted that despite the victim's "rage," he took no retaliatory action when she stabbed him. In her initial interview with the police, defendant explained that she stabbed the victim because "I wanted to get him out of my way." Defendant failed to mention to the police that she stabbed the victim in self-defense. Finally, when asked why she stayed after telling the victim earlier that morning she was leaving him, defendant explained that on previous occasions her belongings had been thrown out onto the street, so she was staying there to protect her things.

SUFFICIENCY OF THE EVIDENCE

In defendant's first assignment of error, she argues that the evidence was insufficient to support her conviction for manslaughter. Specifically, she contends the jury should have acquitted her because she acted in self-defense.

The standard of review for the sufficiency of evidence is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the state proved 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, 573 (1979); see LSA-C.Cr.P. art. 821. This standard of review, in particular the requirement that the evidence be viewed in the light most favorable to the prosecution, obliges the reviewing court to defer to the actual trier of fact's rational credibility calls, evidence weighing, and inference drawing. The reviewing court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Black**, 04-1526 (La. App. 1st Cir. 3/24/05), 907 So.2d 143, 148, writ denied, 05-1682 (La. 2/3/06), 922 So.2d 1175.

Pursuant to LSA-R.S. 14:31(A)(1), manslaughter is defined, in pertinent part, as follows:

A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense 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 shall 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[.]

When a defendant claims self-defense in a homicide case, the state has the burden of establishing beyond a reasonable doubt that he did not act in self-defense. A homicide is justifiable only 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. LSA-R.S. 14:20(1). **State v. Black**, 907 So.2d at 148.

However, 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. LSA-R.S. 14:21. For appellate purposes, the standard of review for a claim of self-defense is whether a rational trier of fact, after

viewing the evidence in the light most favorable to the prosecution, could find beyond a reasonable doubt that the homicide was not committed in self-defense.

State v. Black, 907 So.2d at 148.

In this case, the jury obviously rejected defendant's claim that she acted in self-defense. Because there were no other eyewitnesses to the incident, the jury was presented with circumstantial evidence involving defendant's behavior before and after the stabbing. Despite defendant's testimony that the victim was in a "rage," Hurd and Magee, who spent some time with the victim immediately before he was stabbed, used no such description. Hurd specifically testified that the victim had been sitting on the porch of the duplex drinking beer and had only gone inside for a mere ten seconds before he emerged from the residence and showed her his stab wound. Moreover, defendant presented evidence that despite this "rage" she claimed the victim was exhibiting towards her, by all accounts, immediately after he was stabbed, the victim calmly walked out of his residence and made no retaliatory act towards defendant. Finally, defendant's testimony that she was prohibited from leaving the residence was contradicted by the testimony of Hurd and Magee who both stated that the victim was outside visiting with them until he went inside, while the defendant remained in the residence and kept making comments directed at the victim.

It is apparent that defendant is seeking that this court evaluate the credibility of the witnesses, particularly herself and Hurd, and overturn the jury on its factual determination of guilt. Such an evaluation is not the function of the appellate court. LSA-Const. art. V, § 10 (B). Where there is conflicting testimony as to 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; and determinations of credibility are within the sound discretion of the trier of fact. The trier of fact can accept or reject, in whole or in part, the testimony of any witness. **State v. Converse**, 515 So.2d 601, 604 (La. App. 1st Cir. 1987).

Accordingly, in viewing the evidence in the light most favorable to the prosecution, we find the evidence was sufficient to support the jury's verdict of manslaughter beyond a reasonable doubt.

This assignment of error is without merit.

TESTIMONY OF HURD

In her second assignment of error, defendant argues that the trial court erred in allowing Hurd to testify about what the victim was saying throughout the day. Defendant argues that such testimony was inadmissible hearsay and that there is no exception that would allow such statements to be admitted.

We disagree. Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. LSA-C.E. art. 801(C). Hearsay is not admissible except as otherwise provided by the Louisiana Code of Evidence or other legislation. LSA-C.E. art. 802.

Louisiana Code of Evidence article 803 provides for exceptions to the hearsay rule, whether or not the declarant is available as a witness.³ Specifically, Article 803(3) provides:

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or his future action. A statement of memory or belief, however, is not admissible to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's testament.

The state presented testimony from Hurd and Magee regarding the victim's statements made during the course of the day, in particular, statements the victim made in response to defendant's continued comments. These statements

³ In the present case, the declarant's unavailability does not preclude consideration of his statements as admissible under one of the Article 803 exceptions. The availability of the declarant is immaterial to the Article 803 exceptions because the exceptions are based upon the general conclusion that when the qualifying circumstances are met, there is ordinarily a sufficient basis for crediting the trustworthiness of the out-of-court statement to justify making an exception to the hearsay rule. In contrast, Article 804 requires the declarant to be unavailable for its exceptions to operate. See LSA-C.E. art. 803, Comments to Introductory Clause-1988.

by the victim indicated that he did not appear angry at defendant, or that he was preventing her from leaving the residence; rather, the victim's statements portrayed defendant as being angry with him and at least until the point prior to the victim entering the residence, as the verbal aggressor.

The defense was based on a theory that defendant stabbed the victim because she was in fear that the victim would harm or kill her because of his past history of violence against her. Clearly the victim's state of mind was at issue and the state, in attempting to negate that the defendant stabbed the victim in self-defense, was clearly allowed to put on evidence that contradicted defendant's description of the victim as being in a "rage." In other words, the victim's state of mind was clearly a fact at issue. See LSA-C.E. art. 803(3). The statements made by the victim were offered to negate the defense theory that the victim was the aggressor in the physical confrontation. Further, we conclude that the probative value of the statements was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or waste of time. See LSA-C.E. art. 403; **State v. Adams**, 04-0482 (La. App. 1st Cir. 10/29/04), 897 So.2d 629, 633, writ denied, 05-0497 (La. 1/9/06), 918 So.2d 1029.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.