NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0572

STATE OF LOUISIANA

VERSUS

TERRY LEE SMITH

On Appeal from the 16th Judicial District Court
Parish of St. Mary, Louisiana
Docket No. 06-171383
Honorable Paul J. deMahy, Judge Presiding

J. Phil Haney
District Attorney
Jeffrey J. Trosclair
Assistant District Attorney
Franklin, LA

Attorneys for
State of Louisiana

Jane L. Beebe
Louisiana Appellate Project
New Orleans, LA

Attorney for
Defendant-Appellant
Terry Lee Smith

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered October 29, 2010

PARRO, J.

The defendant, Terry Lee Smith, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. The defendant entered a plea of not guilty. Following 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 parole, probation, or suspension of sentence. The defendant now appeals, raising error as to the sufficiency of the evidence to support the conviction. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On or about October 2, 2006, around 2:30 p.m., the defendant, Leonard Rhine, Jr., and Lionel Toussaint arrived at the home of Florida Johnson[1] and Kelly Moore (the victim) in Sorrel, Louisiana.[2] The defendant approached Johnson as she checked the mailbox just outside of her home and asked about the victim's whereabouts, accusing him of stealing his belongings. The three individuals followed Johnson as she approached the back door of her trailer home.

Johnson entered her home and spoke to the victim. The victim followed her outside where the defendant was waiting. After the victim denied stealing the defendant's belongings, the defendant pulled out a gun and fired it. Johnson ran to her brother's residence, just behind her trailer, screaming and asking the occupants to call for emergency assistance. As a result of the shooting, the victim suffered three lethal gunshot wounds, with one bullet entering the right side of his neck and two more entering the back of his right shoulder. The victim had already expired by the time the paramedics arrived at the scene, within eight minutes of the 911 dispatch.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the evidence is insufficient to support his conviction for second degree murder. The defendant

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[1] Florida Johnson is the defendant's maternal aunt and the victim was Johnson's live-in boyfriend of ten years and the father of her children.

[2] The victim was otherwise known or referred to as Jay, Rhine is otherwise known or referred to as P.J., and Toussaint is otherwise known or referred to as Zola.

contends that the testimony of the state witnesses was inconsistent with their pretrial statements to the police. The defendant submits that although trial witnesses testified that he shot the victim three times, the 911 telephone call recordings from the same witnesses to the police after the incident indicated that they did not know who fired the second and third shots. The defendant further contends that the gunshot residue test performed on him was negative. Noting that this was Detective Artis Jackson's first homicide investigation, the defendant argues that the police did a "sloppy" job investigating this case. In this regard, the defendant suggests that the police barely investigated Leonard Rhine, Jr. or Lionel Toussaint, although they were at the scene at the time of the shooting and Toussaint drove the getaway vehicle. The defendant argues that the state failed to prove that he had any specific intent to kill or inflict great bodily harm and failed to prove that the force was not reasonable and apparently necessary. The defendant contends that the evidence "implied" that the victim was "apparently" high and could have been the aggressor. While acknowledging that his defense counsel argued that the offense was committed in self-defense, the defendant submits that the jury should have considered a verdict of manslaughter, based on the testimony.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that 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 (1979); see also LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). When circumstantial evidence is used to prove the commission of an offense, LSA-R.S. 15:438 requires that assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. See **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 00-0895 (La. 11/17/00), 773 So.2d 732. This is not a separate test to be

applied when circumstantial evidence forms the basis of a conviction; all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Ortiz**, 96-1609 (La. 10/21/97), 701 So.2d 922, 930, cert. denied, 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998).

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[.]" LSA-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." LSA-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. 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. Buchanon**, 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 may be inferred from a defendant's act of pointing a gun and firing it at a person. **State v. Delco**, 06-0504 (La. App. 1st Cir. 9/15/06), 943 So.2d 1143, 1146, writ denied, 06-2636 (La. 8/15/07), 961 So.2d 1160.

When the defendant in a homicide prosecution claims self-defense, the state must prove beyond a reasonable doubt that the homicide was not committed in self-defense. 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. On appeal, the relevant inquiry is whether, 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**, 01-0944 (La. App. 1st Cir. 12/28/01), 804 So.2d 932, 939, writ denied, 02-0399 (La. 2/14/03), 836 So.2d 135.

In accordance with LSA-R.S. 14:31(A)(1), manslaughter is a homicide which would be murder, either first or 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[.]" LSA-R.S. 14:31(A)(1). "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, that tend to lessen culpability. See **State v. Rodriguez**, 01-2182 (La. App. 1st Cir. 6/21/02), 822 So.2d 121, 134, writ denied, 02-2049 (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. See **Rodriguez**, 822 So.2d at 134.

Florida Johnson, the defendant's aunt, and Sharon Booker, the defendant's first cousin and Johnson's niece, testified as state witnesses at the trial. The defendant, Johnson, and Booker all lived in very close proximity, with the defendant's house in front of his aunt's trailer, and Booker's home behind the trailer. Johnson testified that she pleaded with the defendant not to shoot the victim before the gun "went off" the first time. After the victim fell to the ground, she ran to the residence occupied by her niece and other relatives. As she stood on the porch screaming and banging on the door, Booker came out. At that point, Johnson observed the defendant stand over the victim and fire the last two shots. Johnson testified that she was certain that it was the defendant who fired all three shots. After the third shot, the defendant, Toussaint, and Rhine fled from the scene in Toussaint's vehicle. Johnson testified that the victim did not provoke, or advance toward, the defendant before the shots were fired. She further stated that the victim was not under the influence of any substance or acting irrationally. The victim was wearing boxer shorts only and did not have a weapon.

During cross-examination, Johnson denied informing the police that the defendant was impaired at the time of the offense. When questioned about her previous testimony that the gun "went off," Johnson specified that the defendant pulled the gun out and fired it, shooting the victim. Johnson testified that the defendant and victim did not argue before the shooting. Johnson was facing the defendant when he fired the initial shot and the victim was behind her. Johnson reiterated that she saw the defendant fire all three shots.

Booker testified that she was listening to music when she heard a gunshot. When she walked toward the door of her home, she heard her aunt screaming and knocking on the door. Her aunt told her, "Terry had shot Jay," and to call the police. Booker ran toward a tree and observed the defendant shoot the victim two more times. The defendant then looked at her and left with "P.J." and "Zola." Booker further testified that the defendant maintained possession of the gun after firing the two shots that she witnessed. Booker called 911 as they fled from the scene. Booker was certain that it was the defendant who shot the victim. The 911 telephone call took place at 2:32 p.m. and was recorded and played during the trial. During the call, the victim and the shooter were not named, and the caller hysterically repeated that "somebody" shot "somebody."

Leonard Rhine, Jr. also testified for the state. Rhine grew up with the defendant in Sorrel and referred to the defendant as a "home-boy." Rhine stated that on the date of the offense, the defendant and Toussaint came to his home. The defendant initially accused Rhine of stealing his belongings. Rhine told the defendant he did not do so, specifically testifying "you know, we talked about it and everything, and, and we, we left." They then went to the defendant's residence. Rhine estimated that the defendant's residence was located approximately ten to fifteen feet, or less, from the victim's trailer. The defendant showed him the results of a break-in of his home. Rhine was still in the defendant's home when the defendant first approached the victim's trailer. When Rhine exited the defendant's home, the defendant and the victim were arguing. Rhine attempted to calm everyone down, but they continued to argue. Rhine specifically testified that the

defendant, "pulled out the gun out of his back pocket and Florida ran out the way and he just shot." The victim fell after the first shot. The defendant turned toward Rhine before firing two more shots. Rhine stated that he was standing approximately ten feet away from the defendant and the victim at the time of the shooting. Rhine was certain that the defendant fired all three shots. Rhine stated that he was in shock after the shooting and told Toussaint to take him home. The defendant also got in Toussaint's vehicle and they left the scene. Rhine stated that the victim did not have a gun to his knowledge and did not provoke the defendant or act irrationally. During cross-examination, when asked if he previously told the police that the defendant appeared intoxicated, Rhine stated that the defendant "wasn't his self." Rhine denied shooting the victim.

Lionel Toussaint also testified that, before the shooting, the defendant showed them how some of his belongings were missing or disturbed after someone broke into his house. Toussaint "went around the house and used the bathroom" and "heard them fussing at the back." As he was leaving, the defendant and Rhine ran to his car. Toussaint dropped them off at the defendant's grandmother's house and went home. Toussaint testified that he did not see the shooting or hear the gunshots.

Detective Artis Jackson of the St. Mary Parish Sheriff's Office processed the crime scene and attended the autopsy. One bullet was recovered from the scene in the wall of the trailer. Two bullets were recovered from the victim's body during the autopsy. Christopher Henderson of the Acadiana Crime Lab, an expert witness in firearm identification and trace evidence, testified that all three bullets were fired from a revolver of a .38 Special or .357 caliber. Testing of two of the bullets was conclusive as to having been fired from the same firearm, while the third bullet had the same class characteristics but was not fully identifiable. The firearm was never recovered and, therefore, was not available to assist in the testing.

The defendant turned himself in to the police at 5:45 p.m. on the date of the shooting and the defendant's clothing that he had worn that day was recovered at that time. The defendant's clothing and hands were tested for gunpowder residue.

The results of the testing of the defendant's hands and clothing were indeterminate. Henderson testified that the results did not exclude the possibility that the defendant discharged a firearm or that gunshot residues may have been deposited on the hands and removed by washing or wiping before the specimens were obtained. Henderson further testified that trace evidence may not exist where the shooter is three or four feet away from the particle distribution. The victim would be the person most likely to have trace evidence, and in this case, gunpowder particles were found on the victim's clothing. During cross-examination, Detective Jackson confirmed that this was his first homicide investigation, but noted that the case was fully investigated with the assistance of other detectives. Detective Jackson testified that after the offense, Johnson stated that the defendant could have been impaired at the time of the offense.

Dr. Karen Ross performed the autopsy in this case. In addition to explaining that all three gunshot wounds were lethal, Dr. Ross testified that the range of fire was medium, with approximately one and one-half to three feet between the skin and the weapon when it was fired. The victim's toxicological test results indicated the presence of cocaine and vitreous ethanol. The results specifically indicate that the victim consumed a small amount of alcohol earlier that day, although he was not under the acute influence at the time, as the alcohol had metabolized out of his blood. Dr. Ross testified that the cocaine was ingested "fairly recently," confirming that it could have specifically been taken a couple of hours before the shooting.

The guilty verdict in this case indicates the jury rejected the defendant's claim that he shot the victim in self-defense. The testimony presented during the trial indicated that the defendant was the aggressor in the incident. There was no evidence that the victim was attacking the defendant before the weapon was fired. Three individuals observed the defendant shoot the victim three times. The 911 communications do not reflect that the caller did not know the shooter, only that the shooter's name was not stated or requested during the call. As to any minor inconsistencies, 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 cannot reweigh the evidence to overturn a fact finder's determination of guilt. **Williams**, 804 So.2d at 939.

Considering the testimony presented in the light most favorable to the prosecution, we conclude that a rational juror could have found the state established beyond a reasonable doubt that the defendant did not act in self-defense. Thus, we find no error in the jury's rejection of the defendant's claim of self-defense. Further, viewing the evidence in the light most favorable to the prosecution, we conclude that a rational juror could have found that the defendant failed to establish by a preponderance of the evidence that he acted in "sudden passion" or "heat of blood" immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. See **State v. Maddox**, 522 So.2d 579, 582 (La. App. 1st Cir. 1988). Viewing the evidence in the light most favorable to the prosecution, we conclude that it excludes any reasonable hypothesis of innocence and supports the jury's verdict. Due to the foregoing conclusions, the assignment of error lacks merit.

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under LSA-C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Price**, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION AND SENTENCE AFFIRMED.