

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 2248

STATE OF LOUISIANA

VERSUS

ANDREW J. ROBERTS

Judgment Rendered: JUN - 8 2012

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 488303

Honorable Peter J. Garcia, Judge Presiding

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and
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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Welch Jr. concurs without reasons

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920.*

McCLENDON, J.

The defendant, Andrew J. Roberts, was charged by grand jury indictment with one count of second degree murder, a violation of LSA-R.S. 14:30.1, and pled not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict. He moved for a new trial and for a post verdict judgment of acquittal, but the motions were denied. He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. He now appeals, contending the evidence was insufficient to support the conviction and the trial court erred in denying his motion for a post verdict judgment of acquittal. For the following reasons, we affirm the conviction and sentence.

FACTS

The victim, Ruby Ann Boland, aged twenty-two months, lived in a trailer with her mother, Helen Teal, and the defendant, who was not the child's father, next to Teal's parents' home in Slidell. On April 1, 2010, the victim was in the care of the defendant while Teal was at work. On that day, the defendant brought the victim to Teal's parents' home to visit Teal's mother, Ruby Teal. The victim was in normal condition when the defendant left the home with her. Thereafter, the defendant ran back to the home, holding the victim in his arms. According to Ruby Teal, the victim's "arms were out and feet were hanging." She was gasping for air, "her eyes were rolled kind of up, slightly open." The defendant told Ruby Teal that the victim had fallen off the sofa.

The victim was transported to Northshore Regional Medical Center. Ruby Teal followed the ambulance to the hospital, but did not see the defendant there at any time she was present. Thereafter, she was informed that the victim was brain dead.

In his initial account of what happened to the victim, the defendant claimed he brought her back to the trailer to change her on the sofa. He stated he changed the victim's diaper and left her on the sofa while he went to the bathroom. He claimed he heard a "thump" while he was in the bathroom and

returned to find the victim on the floor. He stated he then ran to Ruby Teal's home with the victim. The defendant denied seeing any bruises on the victim.

On April 5, 2010, the defendant changed his account of the incident. He claimed the victim had been injured when he stood her up and she "slid out the pants." He then stated she hit her head on the ground after he "was trying to shake her out the pants." When confronted with the fact that his account of the incident was inconsistent with the lack of neck injury to the victim, the defendant stated the victim's head had hit the ground four or five times while he was trying to shake her out of her pants.

On April 6, 2010, when confronted by the injuries suffered by the victim, the defendant claimed he had been playing with the victim and head butting her belly, and she struck her head on the floor and "started twitching" when he bent over with her. He then stated a drug dealer, "Mike," had held him at gunpoint in the trailer, grabbed the victim and hit her in the head because the defendant owed him money.

At trial, the State presented testimony from St. Tammany Parish Chief Deputy Coroner and Forensic Pathologist Dr. Michael B. DeFatta. He performed an autopsy on the victim. She had two recent bruises on her forehead. She had an older bruise on her left cheek. She had bruising on the bottom of her feet. She also had a recent bruise on the left side of her rib cage. She had a very large area of bruising extending from the very top of her head to the front of her head. The bruising was of "different gradations" and "different shapes." Dr. DeFatta testified the bruising was more consistent with multiple impacts, rather than a single impact.

The victim had no skull fractures, but hemorrhage and subarachnoid hemorrhage was present in her brain. Dr. DeFatta testified that "sufficient trauma" to the blood vessels in the brain would cause those vessels to rupture, resulting in bleeding on top of the brain and under the arachnoid layer. Hemorrhage was also present under the bruise on the left side of the victim. Additionally, hemorrhage was present in the optic nerves behind the victim's

eyes. Dr. DeFatta testified this hemorrhage was indicative of "some type of rotational injury."

In Dr. Defatta's opinion, the injuries to the victim's head resulted from blunt force trauma. He testified those injuries were inconsistent with the victim falling from a sofa. According to Dr. DeFatta, the injuries to the victim's feet were also consistent with blunt force trauma, i.e., being hit by someone or something. He stated, "I've never seen kids, adults, teenagers, anyone that walked on rocks that had injuries like that on the bottom of their feet." Dr. DeFatta indicated the records of the victim's clinical visits and hospital records revealed no history of seizure disorder. He testified the victim's cause of death was blunt force head trauma as a result of child abuse, and her manner of death was homicide.

The defense presented testimony from Dr. Thomas William Young, a board certified forensic pathologist. He indicated he was being paid \$300 per hour for his services, but not his opinion. He testified, "It is my opinion, made to a reasonable degree of medical certainty, that the child, Ruby Boland, had seizures, epilepsy, fits. There are some children who are basically born and they develop problems with seizures." In Dr. Young's opinion, the victim's cause of death was complications of a seizure, and she died a natural death.

According to Dr. Young, the bleeding suffered by the victim was due to damage to her brain as a result of lack of oxygen. He indicated the bruising on the victim's body resulted from her being moved around at the hospital after her brain was damaged. He claimed the victim's mother stated she had not noticed the injuries until the victim was moved to the hospital. He stated the bruising to the bottom of the victim's feet resulted from the doctors at the hospital using a reflex hammer to see if the victim had any reflexes. He noted the victim's skull was not broken, and testified "it only makes any kind of common sense that if you basically have trauma to the head, you're going to break the skull."

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, the defendant contends the evidence was insufficient to support the conviction. In assignment of error number 2, he contends the trial court erred in denying his motion for post verdict judgment of acquittal. He combines the assignments of error, arguing the physical evidence failed to support either his confession or the State's theory of the case.

The standard of review for 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 the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601 (La.App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 00-0895 (La. 11/17/00), 773 So.2d 732 (quoting LSA-R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 730 So.2d at 487.

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. LSA-R.S. 14:30.1(A)(1). Specific criminal intent is that state of mind that 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. 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. Henderson**, 99-1945 (La.App. 1 Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235.

Second degree murder is also the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of cruelty to juveniles. LSA-R.S. 14:30.1(A)(2). Cruelty to juveniles is the intentional or criminally negligent mistreatment or neglect by anyone seventeen years of age or older of any child under the age of seventeen whereby unjustifiable pain or suffering is caused to said child. LSA-R.S. 14:93(A)(1).

Once the crime itself has been established, a confession alone may be used to identify the accused as the perpetrator. **State v. Carter**, 521 So.2d 553, 555 (La. App. 1st Cir. 1988).

After a thorough review of the record, we are convinced that any 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, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of second degree murder and the defendant's identity as the perpetrator of that offense. The verdict rendered in this case indicates the jury rejected the defense theory that the victim died of natural causes. When a case involves circumstantial evidence and the jury reasonably rejects the 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. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987). No such hypothesis exists in the instant case. The verdict rendered also indicates the jury accepted the testimony of Dr. DeFatta and rejected the testimony of Dr. Young. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier

of fact may 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. **State v. Lofton**, 96-1429 (La.App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Further, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207 (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**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we affirm defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.