

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0145

STATE OF LOUISIANA

VERSUS

CEDRIC SCOTT

Judgment rendered: JUN 11 2010

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Case Number: 09-06-0670; Section 8
The Honorable Wilson E. Fields, Judge Presiding**

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BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.

DOWNING, J.

The defendant, Cedric Scott, was charged by grand jury indictment with two counts of first degree murder, in violation of La. R.S. 14:30. He pleaded not guilty. Prior to trial, the indictment was amended to charge two counts of second degree murder, in violation of La. R.S. 14:30.1. Following a trial by jury, the defendant was found guilty as charged. He was sentenced to two concurrent terms of life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, urging two assignments of error, as follows:

1. The evidence was insufficient to prove the elements of the crimes charged beyond a reasonable doubt and proves manslaughter.¹ The denial of the defendant's post trial motion for post verdict judgment of acquittal was error.
2. The trial court's denial of the defendant's post trial motion for a new trial was error.

For the following reasons we affirm the defendant's convictions and sentences.

FACTS

On July 28, 2006, Baton Rouge Police Department Officer Joel Pattison was dispatched to a residence on Charles Street in Baton Rouge, Louisiana to investigate a possible double homicide. In a bedroom the lifeless bodies of Roosevelt and Sophia Clarke were found on a bed. Each of the victims had sustained a single gunshot wound to the head. Sofia had been shot with a .357 caliber bullet and Roosevelt with a .9mm bullet. Shortly thereafter, the coroner arrived and both victims were pronounced dead.

Investigation of the matter revealed that the victims and Sophia's daughter had been present in the residence when her parents were shot. Thompson told the police that she was in the bathroom when she noticed a masked individual in the

¹ In his brief, the defendant fails to present any discussion regarding manslaughter. Because all specifications or assignments of error not briefed are considered abandoned, we do not consider this issue. See Uniform Rules-Courts of Appeal, Rule 2-12.4.

hallway with a gun. Thompson ran to her parent's bedroom to try and wake her father. By the time her father awoke, Thompson noticed that two men were standing at the doorway to the bedroom. Both of the men were armed with handguns. One of the men walked over to Thompson and told her to "get down on the floor." Thompson immediately recognized that man as Marvin Harrell, her ex-boyfriend. Harrell pointed the gun at Roosevelt and stated, "what them big words you said now." Thompson explained that Harrell was referring to a verbal altercation between him and Roosevelt that occurred several weeks earlier. As Thompson watched, Harrell placed a pillow over Roosevelt's head and fired a single shot into it. Harrell then instructed the other individual, whom Thompson later identified as the defendant, "[D]o what you got to do." The defendant picked up a pillow, placed it over Sofia's head and shot her. Harrell pulled Thompson up from the floor by her hair and forced her out of the bedroom. He instructed her to get dressed and find the keys to her vehicle.

Shortly thereafter, the defendant, Harrell and Thompson exited the residence. The defendant went to Harrell's vehicle and Harrell forced Thompson at gunpoint into the driver's side of her vehicle. Harrell entered the passenger seat, pointed the gun at Thompson, and told her to drive. Thompson complied. The defendant followed in Harrell's vehicle. Thompson drove, at gunpoint, to Harrell's residence and then to a wooded area in Mississippi. Several hours later, Harrell instructed Thompson to leave the wooded area. Although he had repeatedly threatened to kill her, Harrell eventually exited the vehicle and allowed Thompson to drive away. Thompson stopped at a nearby store and called the police. At the Centreville Police Department, Thompson provided a written statement regarding the incidents. The Baton Rouge City Police were contacted and advised of the possible double homicide at the Charles Street residence.

The Centreville Police Department officers, with the assistance of the Louisiana State Penitentiary at Angola bloodhounds and chase team, located Harrell in the woods. Harrell used a 9mm handgun to commit suicide upon being approached by the police. This handgun was later determined to be the same handgun used to kill Roosevelt Clarke.

The defendant subsequently was arrested for his participation in the killings. He provided a statement to the police wherein he eventually admitted that he accompanied Harrell to the area near the Clarke residence on the night in question, but denied any participation in the shootings. The defendant claimed that he remained in Harrell's vehicle while Harrell and a third individual entered the residence. The defendant also admitted that he was aware that Harrell intended to kidnap Thompson and that Harrell "probably" had a gun. He also admitted that he drove Harrell's vehicle away from the area and returned it to Harrell at his residence.

FIRST ASSIGNMENT OF ERROR **SUFFICIENCY OF THE EVIDENCE**

In his first assignment of error, the defendant argues that the evidence presented by the state at the trial of this matter was insufficient to support the second degree murder convictions. He notes that, at the trial, the state presented two alternative theories in support of the elements of second degree murder. One theory was that the killings occurred during the commission of a second degree kidnapping, in which the defendant was a principal. The alternative theory was that the defendant was actually the individual who shot Sofia Clarke. The argument presented with this assignment of error relates only to the felony-murder theory. The defendant claims the state's evidence showed that he was aware that Harrell intended to kidnap Thompson but it failed to prove that he was aware that Harrell was armed with a weapon, an essential element of the offense of second

degree kidnapping. He argues that evidence indicating that he believed that Harrell "probably" was armed is insufficient to prove the specific intent to commit second degree kidnapping beyond a reasonable doubt.

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, 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 La. C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

When analyzing circumstantial evidence, La. R.S. 15:438 provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the **Jackson** constitutional sufficiency standard. Ultimately, all evidence, both direct and circumstantial, must be sufficient under **Jackson** to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Shanks**, 97-1885, pp. 3-4 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 159.

At the time of the offense, La. R.S. 14:30.1(A) defined second degree murder, in pertinent part, as the killing of a human being: (1) when the offender has a specific intent to kill or to inflict great bodily harm; or (2)(a) is engaged in the perpetration or attempted perpetration of ... second degree kidnapping... even though the offender has no intent to kill or to inflict great bodily harm.

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. La. R.S. 14:10(1). Such state of mind can be

formed in an instant. **State v. Cousan**, 94-2503, p. 13 (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).

Second degree kidnapping is defined, in pertinent part, as the forcible seizing and carrying of any person from one place to another, wherein the victim is imprisoned or kidnapped when the offender is armed with a dangerous weapon. La. R.S. 14:44.1(A)(5) & B(1). La. R.S. 14:24 defines "principals" as "[a]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime[.]"

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. **State v. Houston**, 98-2658, p. 5 (La. App. 1st Cir. 9/24/99), 754 So.2d 256, 259. The reviewing court is not permitted to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Marcantel**, 00-1629, p. 9 (La. 4/3/02), 815 So.2d 50, 56. It is not the function of an appellate court to assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. See **State v. Houston**, 98-2658 at p. 5, 754 So.2d at 259. When a case involves circumstantial evidence and the trier of fact 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. Smith**, 03-0917, p. 5 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 799.

The jury in this case was charged with theories of second degree murder under both La. R.S. 14:30.1(A)(1) and (A)(2)(a). The verdicts were unanimous. The jury was not polled regarding which theory of second degree murder the convictions were based upon. However, a jury is not constitutionally required to agree on a single theory to convict a defendant where it is instructed as to alternate theories. Thus, a conviction can be upheld if there is sufficient evidence based on either of the alternate theories with which the jury is charged. **State v. Patorno**, 01-2585, pp. 12-13 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 149.

After a thorough review of the record, we find that the evidence supports the jury's verdicts under either theory. Contrary to the defendant's assertions, we find the testimony presented at trial in this case was sufficient to establish that the defendant participated in the killings of the Clarkes. Sylvia Thompson testified that she personally witnessed the shooting, which involved only two perpetrators. (R. p. 1047). Thompson told the police that the second perpetrator was Harrell's neighbor "Ced," with whom she was previously acquainted, and she also identified the defendant in open court as the second gunman. Thompson stated there was no doubt in her mind that the defendant was the individual who, in response to Harrell's instruction to "do what you got to do," shot Sofia Clarke in the head. Thompson explained that although she initially stated that the men wore masks, she later realized this was not true. Thompson further testified that she saw the second perpetrator's face in the hallway as he went through her mother's purse before leaving the residence.

On cross-examination, Thompson admitted that when she was initially transported to the Police Department in Centreville, Mississippi, she provided a handwritten statement regarding the incident. Thompson acknowledged that, in this statement, she did not identify the individual who was with Harrell. She also stated that both men wore masks. Thompson further testified that later that same

night, after she was transported to the Baton Rouge Police Department, she provided an oral statement wherein she advised that the second individual was possibly Harrell's neighbor and friend, "Ced," based upon his physical stature and mannerisms. To explain the inconsistencies in her statements, Thompson stated that she was very nervous when she made the written statement. According to Thompson, later, when she spoke with a therapist during a counseling session, she was able to recall more vivid details of the events. It was at this point that Thompson realized that the men had not been masked and she was able to recall more detail regarding the identity of the second gunman.

The state also presented evidence that the defendant was interviewed by news reporters (as Harrell's neighbor) the day after the murders and Harrell's suicide. In the news broadcast, the defendant described Harrell as a good neighbor and stated that he could not believe what he had done. The defendant then voluntarily stated that he first learned of the kidnapping and killings from the news. This broadcast was played for the jury at the trial.

The defendant's taped statement to the police was also introduced into evidence and played for the jury at the trial. In this statement, despite having previously claimed he learned about the matter from the news, the defendant admitted that he accompanied Harrell on the morning in question. He then attempted to minimize his participation by claiming that he remained in the vehicle while someone else acted as the second shooter. The defendant admitted he was aware of Harrell's plans to forcefully kidnap Thompson and he knew it was likely that Harrell was armed with a gun. He further admitted that he observed bullets (9mm and .357) inside Harrell's vehicle on the way to the Clarke residence.

We find that the hypothesis of innocence urged by the defendant, i.e., an unidentified third person went into the residence with Harrell, was rebutted by Thompson's account of the incident. The jury, even while aware of Thompson's

conflicting statements regarding whether the perpetrators wore masks, obviously believed that only two persons were involved and rejected the defendant's claim of a third. Furthermore, the defendant's own statement to the police, which placed him with Harrell en route to the Clarke residence on the day in question, and the fact that Thompson remained consistent in her claim that there were only two perpetrators involved, further strengthens the reliability of Thompson's identification of the defendant as the second shooter.

The fact that the defendant claimed to know nothing about the kidnapping to the news reporters and his later admission that he was with Harrell, were additional credibility factors weighing against the defendant. This credibility evidence tends to impeach the defendant's claims that he remained in the vehicle and he was not sure if Harrell had a gun less likely, and make the Thompson's claim that the defendant actively participated in the shootings, more likely. On the evidence presented, the jury could have reasonably concluded that the defendant agreed to participate in the kidnapping with Harrell, armed himself with a handgun, entered the Clarke residence, shot Sofia Clarke (after Harrell shot Roosevelt), and then drove Harrell's vehicle back to his residence.

Considering the foregoing, 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 was guilty of two counts of second degree murder under either of the alternative theories presented by the state. 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, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error lacks merit.

SECOND ASSIGNMENT OF ERROR
DENIAL OF MOTION FOR A NEW TRIAL

In his second assignment of error, the defendant argues that the state's evidence in support of the theory that he actively participated in the intentional shootings was insufficient. Defendant argues the only evidence connecting him with the offenses was Thompson's testimony, which he claims was not credible. Specifically, he notes that Thompson initially told the police that she could not identify the second man involved in the shootings because he wore a mask. He contends this statement renders her subsequent identification of the second individual as "Ced" unreliable. The defendant notes that he raised the issue of the reliability of Thompson's identification in a motion for a new trial pursuant to La. C.Cr.P. art. 851(1). He argues that the trial court, sitting as a thirteenth juror on the motion for a new trial, should have weighed the evidence and granted the motion.

La. C.Cr.P. art. 851(1) provides that court, on motion of the defendant, shall grant a new trial whenever "[t]he verdict is contrary to the law and the evidence." Under Article 851(1), the trial court, in ruling on a motion for new trial, can only consider the weight of the evidence, not its sufficiency, and must conduct a factual review of the evidence as a thirteenth juror. See State v. Steward, 95-1693, p. 12 (La. App. 1st Cir. 9/27/96), 681 So.2d 1007, 1014; See also State v. Morris, 96-1008, p. 11 (La. App. 1st Cir. 3/27/97), 691 So.2d 792, 799, writ denied, 97-1077 (La. 10/13/97), 703 So.2d 609. An appellate court, on the other hand, is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rest solely within the discretion of the trier of fact. See Steward, 95-1693 at p. 12, 681 So.2d at 1014. Appellate courts may review the grant or denial of a motion for new trial only for errors of law. See La. C.C.P. art. 858.

In the instant case, the defendant has made no showing that an error of law was committed in this case. Accordingly, as the state correctly notes, the denial of the defendant's motion for new trial based upon La. C.Cr. P. art. 851(1) is not subject to review on appeal. See State v. Hampton, 98-0331, pp. 12-13 (La. 4/23/99), 750 So.2d 867, 879-80, cert. denied, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999); State v. Synder, 98-1078, p. 37 n.21 (La. 4/14/99), 750 So.2d 832, 859 n.21. Moreover, the comprehensive discussion of the sufficiency of the state's evidence presented above addressed the arguments raised by the defendant in this assignment of error and found them meritless.

DECREE

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED