NOT DESIGNATED FOR PUBLICATION

COURT OF APPEAL

STATE OF LOUISIANA

FIRST CIRCUIT

2008 KA 2086

STATE OF LOUISIANA

VERSUS

DANIEL W. RICHARDSON, JR.

Judgment rendered: MAR 27 2009

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On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
Number: 423936 "I"
The Honorable Reginald T. Badeaux, III, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

DOWNING, J.

The defendant, Daniel W. Richardson, Jr., was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. The defendant pled not guilty, and following a jury trial, he was found guilty as charged. The defendant filed a motion for post-verdict judgment of acquittal, which was denied. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

On October 28, 2006, sometime before noon, Quincy White, Jr., drove to the home of his friend, Kevin Meyers, Jr., on Rose Street in Abita Springs. White parked his car in the middle of the driveway, and Meyers came outside to speak with White. Shortly thereafter, several other friends showed up to engage in conversation near White's car. The defendant, whom everyone knew, approached the group seemingly upset about something. Moments later, White and the defendant exchanged words. The defendant began swinging at White, but because White held him back, the defendant did not land any punches. Finally, White pulled the defendant toward him, struck him, and then pushed him away.

The defendant said that he would be back and ran to his house, a FEMA trailer. The defendant grabbed a .38 revolver from his trailer. Marilyn Hall, the defendant's mother, was in the trailer and observed that the defendant was angry. The defendant left the trailer with his gun and ran back toward White. Hall got in her car and drove around looking for the defendant.

As the defendant began to approach White with his gun, Meyers grabbed the defendant and walked him across the street to a gazebo, a school bus shelter for children. Meyers sat the defendant down on a bench and attempted to calm him

down. At about this time, Hall arrived and parked her car near White's car. She exited her car, and after attempting to calm down the defendant to no avail, she began speaking to White, who was sitting on the back of his car, unarmed. The defendant broke away from Meyers, walked up to White and shot him in the face. The defendant took a couple of steps and shot White five more times. The gun fell to the ground, and the defendant ran. White died from his gunshot wounds. No one on the scene during the shooting had any weapon, except for the defendant. The defendant turned himself in to the police later that day. The gun the defendant used to kill White was never found.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the evidence was insufficient to support the conviction of second degree murder. Specifically, the defendant contends that the killing of White constituted manslaughter because the shooting was done in the heat of passion, and his blood had not cooled. The defendant does not contest that he shot and killed White.

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 also La. Code Crim. P. art. 821(B); **State v. Ordodi**, 06-0207, p. 10 (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, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence

excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 01-2585, pp. 4-5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

La. R.S. 14:30.1 provides, in pertinent part:

A. Second degree murder is the killing of a human being:

(1) When the offender has a specific 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 the defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982).

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. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932.

At trial, the defendant admitted he repeatedly shot White. The fact that the defendant shot the victim six times with a handgun at close range indicates specific intent to kill. See **State v. Ducre**, 596 So.2d 1372, 1382 (La. App. 1 Cir. 1992). Accordingly, there was sufficient evidence to find that the defendant possessed the specific intent to kill in order to convict him of the second degree murder of White.

Guilty of manslaughter is a proper responsive verdict for a charge of second degree murder. La. Code Crim. P. art. 814(A)(3). Louisiana Revised Statute 14:31(A)(1) provides:

> A. Manslaughter is:
>
> (1) 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[.]

The existence of "sudden passion" and "heat of blood" are not elements of the offense but, rather, are factors in the nature of mitigating circumstances that may reduce the grade of homicide. **State v. Maddox**, 522 So.2d 579, 582 (La. App. 1 Cir. 1988). Provocation is a question of fact to be determined by the jury. Thus, the issue remaining is whether a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the mitigatory factors were not established by a preponderance of the evidence. **Ducre**, 596 So.2d at 1384.

The defendant contends the shooting was provoked by White, who continually taunted and belittled him in the presence of his friends and family. The defendant testified at trial that weeks before the shooting, the defendant began carrying around his .38 revolver with him for protection. The defendant felt like he "was always getting threatened and picked on and hit on," and that carrying a gun "would stop things." The defendant also testified he had a bad relationship with White. White picked on him, hit him for no reason, and treated him like he "was nobody." Sheila Sheridan, the defendant's sister, testified at trial that she observed occasions where White picked on the defendant. Danielle Richardson,

another sister of the defendant, testified at trial that White and others in the neighborhood made fun of the defendant.

The defendant stated that on the day of the shooting, as he walked by White, White "if'd" at him, which is a feign strike at someone. The defendant swung at White, but could not hit him. White pulled the defendant in close and struck him in the face. The defendant got away from White and ran. According to the defendant, he felt "[o]ut of control" and it had gotten to the point where he "couldn't take it no more" of "[b]eing picked on, jumped on constantly." The defendant went to his house to get his gun. The defendant's mother, Hall, testified at trial that, when the defendant came home, he was "in uprage" like she had never seen him before.

When the defendant returned with his gun, Meyers grabbed him, and a struggled ensued. Meyers was unable to calm down the defendant. The defendant walked toward White. The defendant's mother tried to tell the defendant to stop, but he would not. According to the defendant, he was not thinking clearly or listening, and had not calmed down. The defendant stated that, while he could not make out what White was saying, White's tone was hostile. At that point, the defendant shot White.

Alvin Barns, who was hanging out with Meyers and the others on the day of the shooting, testified at trial that White was his cousin. According to Barns, when the defendant came running back with his gun, Barnes recognized it as the gun the defendant had been carrying around with him for weeks. Before the defendant could get to White, Meyers and Patrick Lanore grabbed the defendant and pushed him across the street. Three people tried to calm down the defendant. Barns stated the defendant calmed down for a second, then took a deep breath and ran toward White. White remained sitting on the back of his car. The defendant raised his

gun and shot White in the face. Then defendant turned around, as if to walk off, then turned back toward White and "unloaded the gun on him."

Meyers testified at trial that he was friends with the defendant, and White was his best friend. The defendant and White were at Meyers's house often. Meyers stated he had seen the defendant with a gun before and saw him shoot it. During the defendant's and White's initial struggle, before the defendant ran to get his gun, Meyers testified White did not bully the defendant at that time. White had merely asked the defendant why he was mad, and the defendant started swinging at White. When the defendant returned with the gun, and Meyers took him across the street to the gazebo to talk to him, Meyers stated the defendant was calm enough for him to take his hands off of him, and the defendant was sitting down on his own. On redirect examination, the following exchange took place regarding the defendant's state of mind prior to shooting White:

> Q. Okay. Now when Danny gets away from you, when he was calming down -- I'm sorry. Backup. When he's calming down and he's in the gazebo, what's he saying to you?
>
> A. He just kept saying Quincey snuck him. He kept saying Quincey hit him, Quincey hit him.
>
> Q. Okay. Did he seem to be deranged at that time?
>
> A. No, ma'am. Danny knew what he was doing. That's Danny. That's how he is.

The defendant's house was three streets away from Meyers's house. When the defendant ran to get his gun, he ran through the "cut" or "cuts," which was a shortcut trail to his house. Retired Sergeant Jerry L. Hall, formerly with the St. Tammany Parish Sheriff's Office, testified that the distance by vehicle from Meyers's house to the defendant's FEMA trailer was about a quarter of a mile.

Having found the elements of second degree murder, the jury had to determine whether the circumstances indicated the crime was actually manslaughter. The guilty verdict in this case indicates the jury concluded this was

a case of second degree murder and rejected the possibility of a manslaughter verdict. See **Ducre**, 596 So.2d at 1384. The record established that some type of altercation occurred between the defendant and White in front of Meyers's house. After the altercation, the defendant ran to his house, retrieved his gun, and ran back toward Meyers's house. One or two people interceded by taking the defendant across the street to try to calm him down. Considering these facts, a rational trier of fact could have concluded that when the defendant returned to the scene and shot White, he acted with deliberation and reflection and not in the heat of passion. See **id**. While the defendant maintained he was out of control at the time of the shooting, the facts seem to suggest the defendant was single-mindedly intent on shooting White to get even for having suffered some perceived ignominy. While it was not clear what prompted the defendant to start swinging at White, be it a verbal exchange or White feigning to strike the defendant, the guilty verdict indicates the jury concluded either: (1) the argument and/or scuffle was not sufficient provocation to deprive an average person of his self-control and cool reflection; or (2) that an average person's blood would have cooled before the defendant shot the victim. See **id**. See also **Maddox**, 522 So.2d at 582.

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, p. 8 (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. 1 Cir. 1985).

After a thorough review of the record, we find that the evidence supports the guilty 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 was guilty of second degree murder, and that the mitigatory factors of manslaughter were not established by a preponderance of the evidence. See **Ducre**, 596 So.2d at 1384.

DECREE

For the foregoing reasons, we affirm the sentence and conviction.

SENTENCE AND CONVICTION AFFIRMED