NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 1575

STATE OF LOUISIANA

VERSUS

LEROY "PINESTRAW" JOHNSON

Judgment Rendered: March 27, 2009.

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On Appeal from the
21st Judicial District Court,
in and for the Parish of Tangipahoa
State of Louisiana
District Court No. 99840

The Honorable Elizabeth P. Wolfe, Judge Presiding

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Leroy Johnson

In Proper Person

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

CARTER, C.J.

Leroy "Pinestraw" Johnson, the defendant, was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1. After entering a plea of not guilty, the defendant proceeded to trial before a jury. The jury found the defendant guilty as charged. The trial court subsequently granted the defendant's motion for new trial, and the State sought a writ of certiorari from this Court. In **State v. Johnson**, 2005-0038 (La. App. 1 Cir. 5/5/05) (not designated for publication), this Court granted the State's writ and reversed the granting of a new trial. On June 8, 2005, this Court denied the defendant's rehearing application on the writ. The defendant sought a writ of review from the Louisiana Supreme Court, which was denied in **State v. Johnson**, 2005-1544 (La. 12/16/05), 917 So.2d 1115. The trial court subsequently sentenced the defendant to a term of life in prison at hard labor without benefit of probation, parole, or suspension of sentence. The defendant was granted an out-of-time appeal.

The defendant appeals, citing the following as error:

> 1. The evidence was legally insufficient to convict the defendant of the second degree murder of Donnell Mack because no physical evidence linked the defendant to the crime and the witnesses who claimed that they had seen the defendant shoot Mack gave testimony that was in conflict with the physical evidence.
>
> 2. The trial judge erred in denying the defendant's motion for post verdict judgment of acquittal since the evidence was insufficient to support the conviction.
>
> 3. (Pro Se Assignment of Error) Can the court conclude beyond a reasonable doubt that the defendant shot the victim in light of the fact that two witnesses testified that the defendant was inside the bar at the time the shooting occurred on the outside.

We affirm the defendant's conviction and sentence.

FACTS

In the early morning hours of September 1, 2001, a fight broke out at Jone's Café—also known as Pyjoe's—involving Winston "Pluck" Ellis and Donnell Mack (the victim) and the defendant and Alfred Greely, Jr. Gun shots were fired. The victim was shot in his left upper buttock and later died from bleeding caused by the gunshot wound.

Greely (the victim's brother) and Alfred Montgomery, Jr. both testified as to what occurred in the bar. According to their testimony, an argument erupted between Pluck and the victim over a game of pool. Pluck retrieved a weapon from near the DJ booth inside the bar and again confronted the victim. A physical fight ensued between the victim and Pluck. During this fight, the defendant, who is Pluck's uncle and who had been working at the DJ booth, began fighting with Greely. Greely struck the defendant, and the defendant fell to the floor.

According to Greely, the victim ran out of the club. The defendant, who also had left the club, came back inside holding a long chrome weapon, which Greely described as either a .357 or .45, and later described as a revolver. The defendant looked around and then ran out the club. Greely testified he heard two shots fired inside the club and two shots fired outside; however, he did not see who fired the shots. After approximately ten to fifteen seconds, Greely fled the club. As Greely ran outside, he heard two gunshots and turned and fled to his right. Greely was not aware that his brother had been shot until sometime later when his uncle arrived at his home and told him his brother was in the hospital.

According to Montgomery, after the initial physical fight between Pluck and the victim and the defendant and Greely, the defendant left the club and returned with a weapon in his hand. Montgomery described the weapon used by the defendant as a long black gun, a .44 or a .45. The victim was still inside the club standing near a pool table. Montgomery said that the defendant fired his weapon once, and the victim fled toward the door. The defendant shot at the victim as he went out the door and missed. Once outside, the defendant fired a third shot at the victim, which also missed. Montgomery stated the defendant then took "dead aim" and shot at the victim a fourth time. When the bullet hit the victim, the victim "flipped." Montgomery heard the victim pleading for his life before the defendant and Pluck began kicking him. The defendant and Pluck backed off when a female cousin threw herself on top of the victim.

Crystal Miller, a first cousin of the victim, was standing outside Pyjoe's on the night of the incident. Miller testified that she saw the victim run out of the club as the defendant ran behind him holding a black, long-barreled revolver. The defendant stopped and shot the victim. As Pluck and the defendant began to kick the victim, she ran over and tried to cover the victim in order to protect him. Miller testified she did not hear any shots fired prior to the victim fleeing the club.

Carolyn Gorman, who was familiar with both the defendant and the victim, testified that she was sitting on the back of a truck directly across the street from Pyjoe's on the night of the incident. According to Gorman, when people began running out of the club, she ran toward the door to see the cause. At that time, the victim was running out and bumped her as he fled

the club. Gorman saw the defendant coming up behind the victim with a gun in his hand. Gorman turned and began running for cover behind the truck she was initially sitting on. Gorman heard one shot, then turned and saw the defendant shoot the victim in the back as he was running away. Gorman testified that the defendant stood over the victim while still holding a gun, then walked away. Gorman further testified that Pluck ran up to the victim, who was lying on the ground, and began kicking and beating him until Miller intervened and covered the victim with her body.

Gorman described the gun held by the defendant as having a big black handle, chrome plating, and a barrel. On cross-examination, Gorman admitted that she did not notice the defendant leave the club and retrieve a weapon, but also testified that she was not looking in the direction of the club until people began fleeing. Gorman testified that she did not come forward earlier out of fear.

The defendant did not testify. However, the defense presented testimony from Dorothy Howard, a cousin of the defendant, who was bartending at Pyjoe's on the night of this incident. Howard testified that she witnessed the fight inside the club, but denied ever seeing the defendant with a gun. According to Howard, the defendant never left the club that night.

Elsie Sonnier also testified on the defendant's behalf. Sonnier was the proprietor of Pyjoe's and has known the defendant since he was sixteen. Sonnier testified that she heard shots fired in the bar and saw a big fight. Sonnier also testified that she left the bar to use an outside phone to call the police. Sonnier stated that, at the time the victim was shot, she was on the phone with the police, and the defendant was still in the club.

Hammond Police officers were immediately dispatched following calls to 911 services. Lt. Paul Miller of the Hammond Police Department was the shift commander on duty at the time of this incident and was involved in the investigation. When Lt. Miller arrived at the scene, the police had recovered a .25 pistol outside the bar, near a bloodstain associated with where the victim fell. Based on statements gathered from witnesses at the scene, Lt. Miller concluded that three shots had been fired inside the bar. The police recovered bullet fragments from the jukebox and a wall, but could not account for the third shot they believed to have been fired inside the bar. Based on his investigation, Lt. Miller believed that Winston "Pluck" Ellis had fired the three shots inside the bar.

Before the police arrived on the scene, the victim was taken by private vehicle to North Oaks Medical Center. Officer Thomas Mushinsky attempted to speak to the victim as he was being wheeled into emergency surgery. Officer Mushinsky asked the victim who had done this to him, and the victim replied, "Pluck, and, and." The victim was immediately taken into emergency surgery.

Dr. Jeff Liner, the surgeon who operated on the victim, testified that the victim had an entrance wound in his left upper buttock area and that the trajectory of the bullet went left to right, and upward, so that the bullet could be felt in the right upper quadrant of the victim's abdomen. According to Dr. Liner, the bullet caused massive internal bleeding in the victim's abdominal cavity, which could not be stopped. The victim died later that day of bleeding from the gunshot wound.

Charles R. Watson, Jr., a forensic scientist with the Louisiana State Police Crime Lab, was accepted by the trial court as an expert in firearms examination. Watson examined several pieces of evidence in this matter including the .25 semi-automatic pistol recovered where the victim had collapsed, bullet fragments recovered from the bar, and fragments recovered from the victim. Watson testified that the .25 caliber weapon was not responsible for either set of bullet fragments, because each fragment weighed more than a fully intact .25 caliber bullet. Watson was not able to determine what caliber or type of weapon created the bullet fragments in the bar. However, the bullet fragment recovered from the victim was most consistent with a nine-millimeter. While nine-millimeters are most commonly semi-automatic, Watson testified that he had dealt with one nine-millimeter revolver during his eight years of laboratory work. Watson stated that Ruger was the only company he was aware of that manufactured a nine-millimeter revolver.

Alan Ordeneaux was a patrolman at this time for the Hammond Police Department. During the afternoon of September 1, 2001, he received a dispatch that the defendant was in a vehicle travelling westbound on U.S. Hwy. 190. Officer Ordeneaux was able to observe the vehicle that the defendant was travelling in and initiated a felony stop wherein the defendant was ordered out of the vehicle at gunpoint. The defendant was taken into custody and charged with second degree murder. The defendant's vehicle was searched, but no weapon was recovered.

Dennis Peavey, a detective with the Hammond Police Department, swore out the affidavit in support of the search warrant for the defendant's

residence at 718 North Cherry Street. He reported that no weapon was recovered during this search, but the police recovered a leather holster for a revolver, a .22 caliber cartridge, and a .38 special cartridge. Peavey also took a statement from defendant, wherein the defendant denied shooting the victim.

SUFFICIENCY OF THE EVIDENCE

Through each assignment of error, the defendant argues that the evidence was insufficient to support his conviction for second degree murder. Specifically, defendant contends that no physical evidence linked him to the crime, the testimony of the State's witnesses was in conflict with the physical evidence, and two witnesses testified he was inside the bar while the shooting occurred. In the alternative, the defendant argues the verdict should be reduced to manslaughter.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, when viewing the evidence in the light most favorable to the prosecution, a 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. See La. Code Crim. P. art. 821; **State v. Johnson**, 461 So.2d 673, 674 (La. App. 1st Cir. 1984). The **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), standard of review incorporated in Article 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. **State v. Nevers**, 621 So.2d 1108, 1116 (La. App. 1st Cir.), writ denied, 617 So.2d 906 (La. 1993). When analyzing circumstantial evidence, Louisiana Revised Statute 15:438 provides the fact finder must be

satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **Nevers**, 621 So.2d at 1116.

Louisiana Revised Statutes 14:30.1(A)(1) defines second degree murder, in pertinent part, as the killing of a human being: "When the offender has a specific intent to kill or to inflict great bodily harm[.]" "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." La. R.S. 14:10(1). Specific intent may be proved 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. **State v. Cummings**, 99-3000 (La. App. 1 Cir. 11/3/00), 771 So.2d 874, 876.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). Moreover, where 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. **Richardson**, 459 So.2d at 38. 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. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

The defendant presents three reasons why he believes the evidence presented by the State is insufficient to support his conviction for second

degree murder. First, the defendant maintains that the State's eyewitness accounts of the shooting are inconsistent with the medical testimony regarding the trajectory of the bullet through the victim's body. We disagree. Dr. Liner testified that the bullet traveled left to right and slightly upward through the victim's body. The evidence presented by the State reflects that the victim was fleeing from the shooter and had turned left outside the club when he was shot. The jury had a reasonable basis to conclude that the medical testimony was consistent with the eyewitness accounts of the victim being shot while he ran.

Second, the defendant argues that the physical evidence presented indicated that the bullet fragments recovered from the victim were consistent with a nine-millimeter weapon. The State's eyewitnesses all described the gun held by the defendant as a revolver. Watson, the State's weapons expert, testified that nine-millimeter revolvers, while rare, are manufactured by at least one company. Viewing this evidence in the light most favorable to the State, we cannot say this evidence fails to support the element of proof that the weapon observed in the defendant's hands was used to fire the fatal shot at the victim. Merely because a particular type of weapon is said to be rare or uncommon does not negate the possibility that the defendant possessed such a weapon. Clearly, the jury had a basis to conclude that the defendant fired the weapon in his hands at the victim.

Finally, the defendant argues that when the victim was asked who did this to him shortly before being taken to surgery, he stated, "Pluck, and, and." The State established that the victim and Pluck had engaged in a physical fight shortly before the victim was shot. Moreover, the victim was

shot in the back as he fled the club, thus he may not have known who fired the shot that struck him. Further, there was eyewitness testimony that both the defendant and Pluck stood over the victim after he was shot and that Miller had to throw herself over him to protect him from sustaining further injury due to their actions. Clearly, the jury had a basis to conclude that the victim's purported identification of Pluck as the shooter was inaccurate or that the victim's critical medical condition prevented him from fully answering the question.

On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332 (La. App. 1 Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Smith**, 600 So.2d 1319, 1324 (La. 1992). The credibility of a witness is a matter of the weight of the evidence, not sufficiency. **State v. Johnson**, 446 So.2d 1371, 1375 (La. App. 1st Cir.), writ denied, 449 So.2d 1347 (La. 1984). The fact that the record contains evidence that conflicts with the testimony accepted by the trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Azema,** 633 So.2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460.

Viewing the evidence in the light most favorable to the prosecution, we find the evidence sufficiently supports the jury's verdict of second degree murder. In reviewing the evidence, we cannot say the jury's determination was irrational under the facts and circumstances presented to them. See

State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. Moreover, the circumstantial evidence presented establishes that the jury had a basis to conclude that the defendant was in fact, the person responsible for the victim's death.

We note that the defendant presents an alternative argument that, at the very least, the evidence could reasonably support a finding of manslaughter. In furtherance of this argument, the defendant contends the shooting immediately followed a brawl at the bar, where the shooter and victim were both running out of the bar when the shooting occurred. The defendant argues that because the shooting happened within moments of the brawl, there was no time for reflection or cooling of the blood.

We disagree. First, we note that at no time during opening or closing statements did the defendant argue any mitigating circumstances that would allow a jury to consider a verdict of manslaughter. The only mention of manslaughter can be found in defense counsel's closing statement which provides:

> Well then if you want to say that it was because [defendant's] involved in a fight and therefore he picked up a gun and ran outside, certainly not murder, manslaughter, provocation. But that, they didn't even introduce any evidence of that.

The defense at trial failed to point to mitigating factors that would provide a basis for a reduced verdict of manslaughter. Instead, the defense presented at trial focused on the theory that the defendant did not fire the shot that killed the victim. The defendant cannot raise a new defense for the first time on appeal. Moreover, the record fails to support a reduction of the jury's verdict to manslaughter. The State clearly established that the defendant was engaged in the physical altercation (although not with the

victim), yet he withdrew and left the bar, only to return armed with a weapon. Clearly, under such circumstances, the jury's verdict of second degree murder is supported.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.