NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1605

STATE OF LOUISIANA

VERSUS

RENALDO CLAIBORNE

Judgment rendered March 23, 2012.

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Appealed from the
23rd Judicial District Court
in and for the Parish of Ascension, Louisiana
Trial Court No. 24,627
Honorable Robert Klees, Judge

* * * * * *

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RENALDO CLAIBORNE

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

PETTIGREW, J.

The defendant, Renaldo Claiborne, was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1, and pled not guilty. He waived his right to a jury trial and, following a bench trial, was found guilty of the responsive offense of manslaughter, a violation of La. R.S. 14:31. Thereafter, the State filed a habitual offender bill against the defendant, alleging he was a third-felony habitual offender.[1] Following a hearing, he was adjudged a third-felony habitual offender. He was sentenced to forty years at hard labor without the benefit of probation or suspension of sentence. He now appeals, challenging the sufficiency of the evidence, the alleged exclusion of evidence of the character of the victim, and the trial court's refusal to allow him to present certain witnesses. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On December 12, 2008, at approximately 1:30 p.m., the victim, Alcee Miller, was fatally shot in the back while in his vehicle in the parking lot of Ralph's Supermarket in Gonzales, Louisiana. He had a jammed 9mm Glock handgun on the floor of his vehicle. Seven shotgun shell casings were recovered from the parking lot. No 9mm shell casings were found in the area.

J.D.[2] was a passenger in the victim's vehicle at the time of the shooting. She was fifteen years old. The victim, a friend of hers and her mother's, was taking her to Best Buy in Baton Rouge to get a present for Christmas and her birthday, which was on December 24. On the way to Baton Rouge, the victim stopped at Ralph's Supermarket and asked J.D. if she wanted anything to eat or drink. She answered negatively, and he proceeded toward the store. Thereafter, J.D. saw the victim exiting the store and talking to a man (later identified as the defendant) in a blue jumpsuit. After talking to the

[1] Predicate #1 was set forth as the defendant's February 10, 2000 guilty plea, under Twenty-third Judicial District Court Docket #11886, to possession of cocaine. Predicate #2 was set forth as the defendant's July 14, 2003 guilty pleas, under Twenty-third Judicial District Court Docket #3832, to possession of marijuana, second offense, and possession of a Schedule II controlled dangerous substance.

[2] We reference this witness by her initials only. See La. R.S. 46:1844(W).

defendant, the victim came back to his car. He put a newspaper and two packs of cigarettes down, removed a handgun from behind the passenger seat, and put the weapon in his lap. The victim also had a knife on his keys. The victim then started the car and drove toward the parking-lot exit closest to Gonzales. Another vehicle approached the victim's vehicle. The door of the other vehicle was open, and the driver had his "leg out the door." The other vehicle stopped, and the victim stopped by the exit. According to J.D., the victim rolled his window down and had "a little dispute" with the person who exited the other car. J.D. could not hear what the other person was saying, but heard the victim stating, "What you gon do" and "You're not gon do nothing. I don't have time for this." She saw the other person with a "big black long gun." According to J.D., the victim then rolled up his window, and a shot came into the car. J.D. put her head between her legs and bent over. She heard approximately four shots, and lost some of her hair as shot passed over her head. The victim put his vehicle into gear and drove across the street, fatally wounded. According to J.D., the victim never raised his handgun from his lap and never pointed the weapon at anyone.

After shooting the victim, the defendant fled in his vehicle. The vehicle and shotgun were subsequently recovered, hidden in brush, approximately seven miles from Ralph's. The shotgun was a model 500-Mosberg 12-gauge shotgun with a pistol grip and a collapsible tactical stock.

Brian Scott Sheets testified he pulled into the parking lot of Ralph's during the incident. He claimed "the two were firing at each other, one with a shotgun, the other one was shooting out the window." Sheets conceded, however, in his statement given on the day of the incident, he did not claim the victim was shooting from his vehicle.

Eric Gordon testified he was working at Ralph's on the day of the incident. He claimed while he was outside of the store on his lunch break, and while he was smoking a cigarette and using a cell phone, he saw the victim roll down the window of his car and point a gun at the defendant. At trial, Gordon denied seeing the defendant remove a shotgun from his vehicle. When confronted with his contrary pre-trial statement to the

police, Gordon stated, "I was going in the store. I really wasn't paying attention, but I seen a gun at the end."

The defendant testified at trial and indicated he had convictions for possession of marijuana, first and second offense, and possession of hydrocodone. He stated he worked with the victim for approximately thirteen or fourteen years, but did not know him personally. He claimed he purchased a "bootleg" DVD from the victim, which was blank. He stated, two days before the incident, he saw the victim at the bank and told him about the defective DVD. He claimed the victim told him to "holler at him later." He stated, on the day of the incident, he saw the victim talking to a cashier at Ralph's and approached the victim to ask him about the defective DVD. He claimed he stated, "Uh, Brother, when you gone handle that with the CD?" He claimed the victim replied, "I ain't giving you a m_____ f___ing thing." He indicated he followed the victim as he exited the store, and told him, "Bro, you know, you gave me a blank CD." He claimed the victim threatened him with a knife and stated, "N____r, I'll die for mine." The defendant identified State Exhibit #2 as the knife and indicated there were keys on the knife when the victim used it to threaten him. The defendant claimed he thought the victim was going to cut him with the knife. He stated Blaine Solar walked up, and he (the defendant) "backed off" from the victim, who then covered the knife with his hand. He claimed he made a "break" for his car when the victim was distracted by Solar. He stated he thought the altercation was over, but kept looking over his shoulder, "cause [the victim] is known for pulling weapons and he just pulled a knife on [the defendant]. He's known for carrying a gun." He claimed he looked over at the victim, and saw that the victim had his vehicle's door open and was "fumbling around." The defendant indicated he opened the trunk of his vehicle, took out his gun, and sat in his car with the weapon on the passenger seat. He stated he kept his vehicle's door open so that he could watch the victim and also so that he could get out of the car if the victim opened fire. He indicated he had no intention of confronting the victim, but could not leave because he was waiting for his uncle who had traveled to the store with him and was still inside. He claimed he was in fear of the victim and was "just protecting [himself]." He stated the victim backed up in his direction, so he

turned his vehicle to face the victim. He claimed the victim rode up to him, stopped, rolled down his window, pointed a pistol out of the window at him and asked, "You ready to die, n____r?" He indicated he then started shooting the victim and kept shooting because he did not want the victim to shoot back. He claimed the shooting was necessary to save himself. He indicated Angela Hill was his "youngest baby mama." He conceded he had heard the victim had slept with Hill, but denied he shot the victim for that reason.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, the defendant argues there was insufficient evidence to support a conviction of manslaughter because the State failed to show the requisite specific intent to kill or to commit great bodily harm and failed to negate self-defense.

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, p. 2 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. 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**, 98-0601 at 3, 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. La. 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. La. 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. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. Henderson**, 99-1945, p. 3 (La. App. 1 Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

Manslaughter is a homicide that would be 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 [fact finder] 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." La. 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 which exhibit a degree of culpability less than that present when the homicide is committed without them. The State does not bear the burden of proving the absence of these mitigatory factors. A defendant who establishes by a preponderance of the evidence that he acted in a "sudden passion" or "heat of blood" is entitled to a manslaughter verdict. In reviewing the claim, this court must determine if 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. **State v. Huls**, 95-0541, p. 27 (La. App. 1 Cir. 5/29/96), 676 So.2d 160, 177, writ denied, 96-1734 (La. 1/6/97), 685 So.2d 126.

When a defendant charged with a homicide claims self-defense, the State has the burden of establishing beyond a reasonable doubt that he did not act in self-defense. **State v. Rosiere**, 488 So.2d 965, 968 (La. 1986).

Louisiana Revised Statutes 14:20, in pertinent part, provides:

A homicide is justifiable:

> (1) 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.

However, La. R.S. 14:21 provides:

> A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.

The relevant inquiry on appeal 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. **Rosiere**, 488 So.2d at 968-969; see also **State v. Wilson**, 613 So.2d 234, 238 (La. App. 1 Cir. 1992), writ denied, 93-0533 (La. 3/25/94), 635 So.2d 238.

A thorough review of the record indicates 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 manslaughter and the defendant's identity as the perpetrator of that offense against the victim. The key issue in this case was whether the victim was attempting to shoot the defendant when the defendant shot him. The testimony of J.D. on the issue was diametrically opposed to the testimony of the defendant, Sheets, and Gordon. The trier of fact heard the witnesses, accepted the testimony of J.D., and rejected the contrary testimony. 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, p. 5 (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, in reviewing the evidence, we cannot say that the trial court's determination was irrational under the facts and circumstances presented to it. See **State v. Ordodi**, 2006-0207, p. 14 (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 trial court. See **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

Additionally, under J.D.'s account of the incident, the defendant was the aggressor in the incident, and thus, was not entitled to claim self-defense. The trial court stated it was highly influenced by the number of shots fired by the defendant at the victim and the defendant's position when firing. Further, even if it could be found that the defendant was not the aggressor, any rational trier of fact could find, beyond a reasonable doubt, that the defendant did not act in self-defense. The trial court also stated the defendant was pushed to a certain point, but had the ability to cool down. The defendant sat in his car with a shotgun and waited for the victim. The defendant then ambushed the victim as he was leaving the parking lot, repeatedly firing into the victim's vehicle. Thereafter, the defendant fled from the scene, hid his vehicle, and hid his shotgun. The defendant's actions after the incident were inconsistent with a theory of justifiable homicide. See **State v. Wallace**, 612 So.2d 183, 191 (La. App. 1 Cir. 1992), writ denied, 614 So.2d 1253 (La. 1993).

This assignment of error is without merit.

EVIDENCE OF THE CHARACTER OF THE VICTIM

In assignment of error number 2, the defendant argues the trial court committed reversible error by refusing to allow him to establish for the record that he was aware of the victim's prior violent acts and by refusing to allow him to introduce the criminal record

of the victim into evidence, even though the defense established that the defendant was aware, at the time of the incident, that the victim had a criminal record.

Evidence of a person's character generally is not admissible to prove that the person acted in conformity with his or her character on a particular occasion. La. Code Evid. art. 404(A). However, there are several specific exceptions to this general rule. With respect to evidence of the dangerous character of the victim of a crime, such evidence is admissible (1) when the accused offers appreciable evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense charged, or (2) when the accused, relying on the defense of self-defense, establishes (a) a history of assaultive behavior between the victim and the accused and (b) a familial or intimate relationship between the victim and the accused. See La. Code Evid. art. 404(A)(2). The domestic violence exception is not applicable in this case. Thus, in order to introduce any evidence regarding the victim's character, it had to first be shown that the victim made some hostile demonstration or overt act at the time of the offense charged. The term "overt act," as used in connection with prosecutions where the plea of self-defense is involved, means any act of the victim that manifests to the mind of a reasonable person a present intention on his part to kill or do great bodily harm. **State v. Black**, 2004-1526, pp. 13-14 (La. App. 1 Cir. 3/24/05), 907 So.2d 143, 152, writ denied, 2005-1682 (La. 2/3/06), 922 So.2d 1175.

Moreover, even where a proper foundation is laid, the admissibility of a victim's character trait depends on the purpose for which the evidence is offered. Once evidence of an overt act on the part of the victim has been presented, evidence of threats and of the victim's dangerous character is admissible for two distinct purposes: (1) to show the defendant's reasonable apprehension of danger which would justify the conduct; and (2) to help determine who was the aggressor in the conflict. Only evidence of general reputation, and not specific acts, is admissible in order to show who the aggressor was in the conflict. Evidence of prior specific acts of the victim against a third party is inadmissible for this purpose. When evidence of a victim's dangerous character is offered to explain defendant's reasonable apprehension of danger, such evidence may be

introduced to show the accused's state of mind only if it is shown that the accused knew of the victim's reputation at the time of the offense. When such a showing is made, some courts have held that evidence is not limited to general reputation, but may also include evidence of specific acts. Other courts have held that, even when offered for this purpose, only specific acts committed against the defendant are admissible. **Black**, 2004-1526 at 14-15, 907 So.2d at 152-153.

In the instant case, there were three potential "overt acts" allegedly committed by the victim: (1) the alleged threatening behavior by the victim with his knife; (2) the victim's driving in the direction of the defendant in the parking lot; and (3) the victim's alleged pointing a gun at the defendant. The victim's alleged threatening behavior with his knife was too remote in time from the subsequent shooting. It was undisputed that following the alleged threatening behavior with the knife, both the defendant and the victim went to their cars without incident. The victim's driving in the direction of the defendant and the parking-lot exit toward Gonzales was not an "overt act" because it would not have manifested in the mind of a reasonable person a present intention on the victim's part to kill or do great bodily harm to the defendant. There was no indication the victim attempted to ram the defendant's car, and the defendant drove up to the victim's vehicle at the exit prior to opening fire on him. If the victim had pointed a gun at the defendant immediately prior to the shooting, that would have constituted an overt act. However, the testimony of the defendant, Sheets, and Gordon, on this issue was contradicted by the testimony of J.D., who was a passenger in the victim's vehicle. The trial court accepted the testimony of J.D. and rejected the contrary testimony.

Moreover, even if the trial court erred in finding no appreciable evidence of an overt act on the part of the victim at the time of the offense, no reversible error occurred. The record indicates the defendant introduced evidence of the victim's character into evidence. During the defendant's testimony, defense counsel asked him if he knew of the victim's reputation in the community. The defendant replied:

> Yeah, he was always ... he -- like everybody said, he was a bully. He was always popping off about what he done did. He done killed. He'll kill again. He done been to Angola. He was on Camp A; he'll go to Camp J, all that

> other type of mess. I mean, he always was mouthing off, and for people that went for it, I mean, anybody showed the least bit of weakness, he would just prey on them; I mean, just constantly prey on them.

The trial court sustained the State's objection when the defense asked the defendant if he had heard of any specific things the victim had done to anyone, and the defense objected to the court's ruling. However, on cross-examination, the State asked the defendant, "So you had no reason to fear [the victim]." The defendant replied, "Oh, I had seen [the victim] do a lot of things." Thereafter, the defendant stated, "I have seen -- I have seen [the victim] pull a knife on a guy. I can't call his name. I have seen him try to cut this guy on the shapeup yard.[3] I have seen [the victim] ... stop at the store, a little guy is going in the store to get him a cold drink. He's standing out there with his gun in his hand, got the little guy running and ducking. I have seen this. I saw this with my own two eyes." Accordingly, the record reflects the defendant was able to establish his awareness of the victim's prior violent acts. Thus, this portion of the assignment of error is without merit.

At trial, the defendant also offered into evidence the criminal record of the victim. The State objected, and the court sustained the objection. The defense stated, "Thank you. I had to attempt, Your Honor, for the record."

Only matters contained in the record can be reviewed on appeal. **State v. Vampran**, 491 So.2d 1356, 1364 (La. App. 1 Cir.), writ denied, 496 So.2d 347 (La. 1986). The defendant failed to make a proffer of the alleged criminal record. Accordingly, the issue of error, if any, in the court's failure to allow the alleged criminal record of the victim into evidence was not preserved for review. See La. Code Evid. art. 103(A)(2); **State v. Lynch**, 94-0543, pp. 17-18 (La. App. 1 Cir. 5/5/95), 655 So.2d 470, 480, writ denied, 95-1441 (La. 11/13/95), 662 So.2d 466.

This assignment of error is without merit.

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[3] The defendant indicated the "shapeup yard" was the area where the workers would drive up and sign their names before beginning work.

RIGHT TO PRESENT A DEFENSE

In assignment of error number 3, the defendant argues the trial court arbitrarily refused to allow him to present all of his witnesses.

Under compelling circumstances, formal rules of evidence must yield to a defendant's constitutional right to confront and cross-examine witnesses and to present a defense. Normally inadmissible hearsay may be admitted if it is reliable, trustworthy, and relevant, and if to exclude it would compromise the defendant's right to present a defense. See U.S. Const. amend. VI; La. Const. art. I, §16; **Chambers v. Mississippi**, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); **Washington v. Texas**, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); **State v. Van Winkle**, 94-0947 (La. 6/30/95), 658 So.2d 198; **State v. Gremillion**, 542 So.2d 1074 (La. 1989); see also **State v. Juniors**, 2003-2425 (La. 6/29/05), 915 So.2d 291, cert. denied, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006).

At trial, following the presentation of testimony by the defense from Eric Gordon, Eduardo Armando Beasley, Andrew James, and Patrick Adams concerning the reputation of the victim as being dangerous, the defense called Justin Krol to the stand. The State objected to the cumulativeness of the evidence. The court stated, "I think we're starting to beat it to death." The court asked the defense how many more witnesses it intended to present, and the defense replied it had three more witnesses. The court asked the defense if the remaining witnesses were "all going to testify essentially the same as this" and the defense answered affirmatively. The court found the evidence was becoming "cumulative" and sustained the objection. The defense objected to the court's ruling.

The testimony at issue is not contained in the record because the defendant failed to make a proffer of the testimony. Accordingly, this issue was not preserved for review. Only matters contained in the record can be reviewed on appeal. **Vampran**, 491 So.2d at 1364. See also La. Code Evid. art. 103(A)(2); **Lynch**, 94-0543 at 17-18, 655 So.2d at 480.

Furthermore, this was a bench trial, rather than a jury trial. The defendant sufficiently established through the testimony of several witnesses, as well as his own

testimony, the victim's reputation for dangerousness. Under these circumstances, there was no error in the trial court's ruling that further testimony on this subject was becoming "cumulative."

This assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.