**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NO. 2008 KA 0501**

**STATE OF LOUISIANA**

**VERSUS**

**TERRENCE FLEMING**

***Judgment Rendered:*** SEP 2 3 2008

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**Appealed from the**
**19th Judicial District Court**
**In and for the Parish of East Baton Rouge, Louisiana**
**Case No. 12-05-0389**

**The Honorable Louis R. Daniel, Judge Presiding**

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**Doug Moreau**
**District Attorney**
**Allison Miller Rutzen**
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**Baton Rouge, Louisiana**

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**State of Louisiana**

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**Counsel for Defendant/Appellant**
**Terrence Fleming**

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**BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.**

**GAIDRY, J.**

Defendant, Terrence Fleming, was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1. Defendant entered a plea of not guilty and was tried before a jury. The jury determined defendant was guilty as charged.

The trial court subsequently sentenced defendant to a term of life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.

Defendant appeals, arguing that the jury's verdict was against the weight of the evidence presented and that the testimonial evidence only supported a conviction for the lesser included offense of manslaughter. Defendant alternatively asserts that he acted in self-defense.

We affirm defendant's conviction and sentence.

**FACTS**

Ashley Matthews and defendant had been in a relationship for several years. The couple had a daughter and had previously lived together before financial difficulties forced them to move back into their respective parents' homes.

In August 2005, defendant learned that Matthews was also romantically involved with Raydrian McKneely. Soon thereafter, defendant asked Matthews to choose, and Matthews eventually told defendant that she wanted to be with him. Following this decision, Matthews and defendant began discussing the prospect of getting married. The couple even purchased wedding bands.

On November 10, 2005, defendant phoned Matthews at approximately 10:00 p.m. and asked her to come over to his mother's house and spend the night. Defendant fell asleep, and awoke to find Matthews had not yet

arrived. Defendant again called Matthews to make sure she was coming, because she did not have a key to the house and everyone was going to sleep. After agreeing to leave the door unlocked, defendant again fell asleep.

In the meantime, Matthews received a call from Raydrian McKneely. According to Matthews, McKneely had been released from some type of incarceration a few days earlier and he wanted to see her. Matthews agreed, and she and her four-year-old daughter drove over to McKneely's residence at 6536 Nottingham Drive in Baton Rouge.

Around 1:00 a.m., defendant awoke and discovered that Matthews was not there. Growing worried that something was wrong, defendant tried calling Matthews's cell phone twice, but he got no answer. Defendant went to look for Matthews in his mother's red Ford Explorer. Before he left, defendant moved his stepfather's .45 handgun from the back of the vehicle to the front-passenger seat.

Defendant first drove by the home of one of Matthews's cousins, but did not see her maroon Mitsubishi Galant. According to defendant, he began to reason that if something was wrong, Matthews would have called him. Defendant began to suspect that Matthews had returned to her "cheating ways," and decided to drive by McKneely's residence to see if she was there.

When defendant turned onto McKneely's street, he immediately observed Matthews's vehicle at McKneely's house. Defendant pulled alongside McKneely's driveway and saw that Matthews was sitting in the driver's seat of her vehicle with the door open. McKneely was seated on the frame of the driver's side of the vehicle, facing Matthews. Defendant

testified that he was "mad" and "angry" that Matthews and McKneely were together.

Defendant testified that he got out of his vehicle and McKneely jumped up and asked what he was doing there. According to defendant, McKneely was reaching behind his back and walking toward him. Defendant thought McKneely had a weapon, so he reached back into his vehicle, grabbed the handgun, and fired five "wild shots." Defendant denied that he directed the shots at McKneely. Defendant then got into his vehicle and drove back to his house. According to defendant, he did not think he shot McKneely, because McKneely was still standing as he drove away.

After arriving at his mother's house, defendant called Matthews's cell phone to "make sure everyone was alright." Defendant's first couple of calls to Matthews went unanswered. When Matthews answered his call, she told defendant that she was on the phone with the operator and the ambulance was on the way to the scene. Defendant testified that Matthews told him she was scared and wanted to stay on the phone with him. Defendant further testified he could hear a police officer questioning Matthews, and that her parents had arrived at the scene. Defendant estimated he stayed on the phone with Matthews until approximately 6:00 a.m. Later that morning, defendant drove his mother to work at the Dillard's department store in Cortana Place, and then went over to Matthews's residence.

Defendant testified that when he arrived at Matthews's residence, she was asleep, so he laid down next to her. A short time later, Matthews's cell phone rang, and he woke her up to take the call. According to defendant, during this phone call, Matthews was informed that McKneely had died. Matthews became upset and went to another room. Matthews's mother later took her to the hospital.

In her initial statement to the police, Matthews provided a description of the vehicle driven by defendant, but did not identify defendant as the shooter. In the early afternoon of November 11, 2005, Detective Christopher Johnson, of the Homicide Division of the Baton Rouge City Police Department, received a Crime Stoppers tip regarding this investigation. According to Detective Johnson, the tip indicated that the suspect in McKneely's murder was going to pick up his mother from her job at Dillard's in Cortana Place. By coincidence, Detective Johnson had worked off-duty security at that same Dillard's and personally knew defendant's mother. Detective Johnson was also aware that the defendant's mother's shift ended at 2:00 p.m.

Detective Johnson and his partner, Larry Maples, proceeded to Dillard's and immediately went to the security office. They used electronic surveillance to monitor the parking lot and the employee entrance. When Detective Johnson observed the red, sport-utility vehicle described in the tip, approach the north side of the department store, he radioed the uniform patrol to make contact with defendant. The police made contact with defendant without incident and placed him in the marked police unit.

Detective Johnson obtained consent to search the sport-utility vehicle from defendant's mother. Upon observing the barrel of a gun in the rear compartment of the vehicle, Detective Johnson notified the Crime Scene Unit to seize and process the weapon. Although defendant does not dispute shooting McKneely, the State presented evidence that the weapon seized from the vehicle fired the casings recovered from the scene and the bullets recovered from McKneely's body.

Elvin Howard of the Baton Rouge City Police was the lead detective for this investigation. According to Detective Howard, in Matthews's first

statement to the police, she only provided a description of the vehicle used by the shooter, and she claimed not to have seen or known the shooter. Detective Howard testified that following the Crime Stoppers tip, he interviewed Matthews, who had been brought in by her mother. In the second statement given by Matthews, she indicated defendant was the person who shot McKneely. According to Matthews's second statement, no words had been exchanged between McKneely and defendant prior to the shooting. Matthews also picked defendant's photograph out of a lineup and identified him as the shooter. Matthews's trial testimony was consistent with her second statement in that she claimed McKneely had not said anything to defendant prior to being shot, nor had McKneely jumped up prior to being shot. Matthews did not deny that she picked defendant out of a photographic lineup, but at trial she claimed she identified him only as the father of her child.

Dr. Gilbert Corrigan, who was accepted by the trial court as an expert in forensic pathology, performed the autopsy on McKneely. According to Dr. Corrigan, McKneely died as a result of massive internal hemorrhaging. Dr. Corrigan's autopsy revealed that McKneely sustained gunshot wounds to his left buttocks, a five-centimeter grazing wound to his back; a wrist wound wherein the bullet entered the top part of his hand and exited at his wrist; a wound to his right forearm; and an anterior chest wound wherein the bullet entered the left side of McKneely's chest, and travelled downwards to his liver. According to Dr. Corrigan, none of the gunshot wounds sustained by defendant were from a range closer than three feet.

Sergeant Michael Rarick, a crime scene investigator for the Baton Rouge City Police, assisted in processing the crime scene. Sergeant Rarick collected four spent shell casings, one spent bullet, and one bullet fragment

from the scene. Sergeant Rarick also observed that there were bullet holes at the scene spread over a twelve-foot area. These spent shell casings and the bullet were all found to match the .45 Ruger P90 handgun, bearing serial number 662-07968, that was seized from the back of the vehicle defendant was driving at the time of his arrest. The ballistics testing was performed by Charles Watson, a firearms examiner with the Louisiana State Police Crime Lab. Watson was accepted as an expert in the field of firearms examination. Watson noted that the particular weapon used in this incident had a defect, in that although it was a semiautomatic weapon, for the weapon to discharge when initially loaded, it would have to be either manually cocked or the rack on the top of the weapon would have to be manually slid back.

There was no evidence found at the crime scene of any return fire by McKneely, nor did Matthews testify that McKneely was armed or pulled a weapon.

Defendant testified on his own behalf. Although he expressed remorse for his actions, defendant denied he went to McKneely's residence to kill him. Defendant testified that he believed McKneely was reaching for a weapon when he stood and asked defendant what he was doing there. Defendant explained he did not leave at that point because McKneely would have had time to shoot him. Defendant claimed that this incident was the first time he had fired the weapon, but he had previously seen his stepfather fire it, and knew it had to be manually cocked to discharge. Finally, defendant asserted that he was unaware his daughter was seated in the front-passenger seat of Matthews's vehicle at the time he fired the shots.

Despite the physical evidence from McKneely's autopsy regarding the particular bullet that entered his sternum and travelled downward, defendant claimed he was never standing over McKneely as he shot at him. Defendant

also denied he aimed the weapon directly at McKneely. Defendant admitted that he had allowed his emotions to get the best of him that night because he thought he and Matthews were in a committed relationship.

**SUFFICIENCY OF THE EVIDENCE**

In defendant's sole assignment of error, he contends the trial court erred when it denied his motion for post verdict judgment of acquittal because the record reflects that he shot McKneely in self-defense when McKneely gestured that he was about to pull out a weapon after defendant confronted McKneely about his intimate relationship with Matthews.

The standard of review for the sufficiency of evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. See La. Code Crim. P. art. 821; *State v. Pizzalato*, 93-1415, p. 17 (La. App. 1st Cir. 10/7/94), 644 So.2d 712, 721, writ denied, 94-2755 (La. 3/10/95), 650 So.2d 1174. The *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 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. When analyzing circumstantial evidence, La. R.S. 15:438 provides the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. *State v. McLean*, 525 So.2d 1251, 1255 (La. App. 1st Cir.), writ denied, 532 So.2d 130 (La. 1988).

Second degree murder is defined, in pertinent part, by La. R.S. 14:30.1A(1) as "the killing of a human being ... [w]hen the offender has a specific intent to kill or to inflict great bodily harm.... " Specific intent is defined as "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 need not be proven as a fact and may be inferred from the circumstances present and the actions of the defendant. *State v. Carter*, 96-0337, p. 3 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 434-35.

When the defendant in a homicide prosecution claims self-defense, the State must prove beyond a reasonable doubt that the homicide was not committed in self-defense. *State v. Bates*, 95-1513, p. 9 (La. App. 1st Cir. 11/8/96), 683 So.2d 1370, 1375. Louisiana Revised Statutes 14:20A(1) provides that a homicide is justifiable 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.

On appeal, the relevant inquiry is whether or not, 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. *State v. Fisher*, 95-0430, p. 3 (La. App. 1st Cir. 5/10/96), 673 So.2d 721, 723, writ denied, 96-1412 (La. 11/1/96), 681 So.2d 1259.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. *Bates*, 95-1513 at p. 12, 683 So.2d at 1377. 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. *State v. Willis*, 591 So.2d 365, 372 (La. App. 1st Cir. 1991), writ denied, 594 So.2d 1316 (La. 1992). An appellate court will

not reweigh the evidence to overturn a fact finder's determination of guilt. *Pizzalato*, 93-1415 at p. 17, 644 So.2d at 721.

The guilty verdict in this case indicates the jury rejected defendant's claim that he shot the victim in self-defense. Viewing the evidence in the light most favorable to the prosecution, we find that it supports the jury's conclusion. Defendant has repeatedly asserted that as he exited his vehicle, McKneely stood and asked what he was doing there. Defendant has repeatedly claimed that McKneely began to reach around his back as if he were pulling out a weapon and walking toward him; however, this claim is inconsistent with the evidence presented by the State.

First, Matthews testified that no words were exchanged between defendant and McKneely, nor did McKneely stand and provoke defendant in any manner prior to defendant shooting McKneely. Second, there is no evidence that McKneely was armed or returned fire. Third, despite defendant's assertion that he did not specifically direct gunfire toward McKneely, but only fired five "wild shots," all five shots struck McKneely. Defendant claimed McKneely was standing when the shots were fired and when he left the scene; however, two bullets struck McKneely as McKneely was facing away from defendant, and one .45 bullet entered McKneely's chest and travelled downward, suggesting defendant fired the shot as he stood in a higher position than McKneely. Finally, defendant immediately left the scene. Even after learning of McKneely's death, defendant only claimed that the shooting was in self-defense after he was arrested based on the tip provided to Crime Stoppers.

Under these circumstances, the jury reasonably could have rejected defendant's claim he shot McKneely in self-defense. The jury obviously rejected defendant's version of events. When viewing the evidence in the

light most favorable to the prosecution, we find any rational trier of fact could have concluded that the State established all of the elements of second degree murder and that defendant did not kill McKneely in self-defense.

Defendant presents the alternative argument that the evidence only supports a verdict of manslaughter, based on defendant's emotional response to learning that Matthews was having a relationship with another man.

Louisiana Revised Statutes 14:31(A)(1) defines manslaughter, in pertinent part, as follows:

> 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....

"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. Moreover, provocation is a question of fact to be determined by the trier of fact. The State does not bear the burden of proving the absence of these mitigating factors beyond a reasonable doubt. Consequently, the issue is whether or not any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found that the mitigating factors were not established by a preponderance of the evidence. See *State v. Johnson*, 98-1407, pp. 5-6 (La. App. 1st Cir. 4/1/99), 734 So.2d 800, 804, writ denied, 99-1386 (La. 10/1/99), 748 So.2d 439. As noted above, provocation is a question of fact to be determined by the trier of fact. See *Johnson*, 98-1407 at p. 5, 734 So.2d at 804.

The jury obviously did not find provocation existed in the instant case. The evidence reflected defendant purposely placed the .45 handgun on the

passenger seat beside him before he went to look for Matthews. During his search, defendant began to suspect Matthews was being unfaithful to him. Despite defendant's assertion there was some provocation on McKneely's part prior to the shooting, Matthews testified that no words were exchanged between the two men prior to the shots being fired by defendant. Rather, Matthews testified that upon defendant's arrival at the scene, defendant exited his vehicle and immediately began shooting at McKneely.

After a careful review of the entire record, we conclude a rational trier of fact, viewing all of the evidence, both direct and circumstantial, in the light most favorable to the prosecution, could have determined beyond a reasonable doubt that defendant was guilty of second degree murder to the exclusion of any reasonable hypothesis of innocence, and that no mitigating factors were established by a preponderance of the evidence.

This assignment of error is without merit.

**DECREE**

The defendant's conviction and sentence are affirmed. Costs of this appeal are assessed to the defendant.

**CONVICTION AND SENTENCE AFFIRMED.**