

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 2444

STATE OF LOUISIANA

VERSUS

TOMMY G. FRANKLIN

Judgment Rendered: May 2, 2008

Appealed from the
Eighteenth Judicial District Court
In and for the Parish of Iberville, Louisiana
Trial Court Numbers 102-06 and 502-06

Honorable William C. Dupont, Judge

Richard J. Ward, Jr., District Attorney
Elizabeth A. Engolio, Assistant District Attorney
Plaquemine, LA

Attorneys for
State – Appellee

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Defendant – Appellant
Tommy G. Franklin

BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ.

TGW
gpc
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WELCH, J.

The defendant, Tommy G. Franklin, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. In a separate indictment, the defendant was charged with attempted second degree murder, a violation of La. R.S. 14:30.1 and La. R.S. 14:27. The defendant entered pleas of not guilty. The charges were consolidated for trial. Following a trial by jury, the defendant was found guilty as charged. As to the second degree murder conviction, the defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. As to the attempted second degree murder conviction, the defendant was sentenced to fifty years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The trial court ordered that the sentences be served consecutively. The defendant now appeals, raising error as to the sufficiency of the evidence to support the convictions. For the following reasons, we affirm the convictions and the sentences.

STATEMENT OF FACTS

On or about December 26, 2005, during the early morning hours, mayhem and disputes took place during and after a Christmas party at the American Legion Hall in St. Gabriel. Police officers of the Iberville Parish Sheriff's Office responded to the scene. The defendant had an altercation with the deceased victim, Jennifer Lanaute. The defendant ultimately fired his gun twice, hitting Jennifer Lanaute and her aunt, Erica Houston. Jennifer Lanaute received a fatal gunshot wound to her right-upper chest. Erica Houston received a gunshot wound to her shoulder.

ASSIGNMENTS OF ERROR

In his first and second assignments of error, the defendant argues that the

evidence is insufficient to sustain his convictions for second degree murder and attempted second degree murder. In the third assignment of error, the defendant contends that there was insufficient evidence for the jury to find, beyond a reasonable doubt, that he did not act in self-defense. The defendant stresses that testimony presented during the trial clearly established that fights and chaos were taking place during the moments just prior to the shooting. The defendant further notes that there was inconsistent testimony as to whether the defendant or a person named Donovan Ausbon hit Jennifer Lanaute prior to the start of other fights. The defendant adds that only one State witness testified as to the extent of the defendant's involvement in the fights that took place immediately before shots were fired. The defendant concludes that the lack of evidence coupled with the defense testimony, including that of the defendant, supports a finding of adequate provocation to reduce the second degree murder conviction to manslaughter.

The defendant also notes that the bullet removed from the victim was too mangled to make a definitive connection between the gun in evidence and the bullet. The defendant contends that while the two casings recovered from the scene were definitively connected to the gun in evidence, there was no indication of the circumstances under which the gun was fired. Although a booking photograph was presented to show that the defendant's face was not injured during the incident in question, the defendant contends that there was no evidence that he did not have bruising, scratching, or other physical marks on other parts of his body.

The defendant concedes that the evidence could lead a rational trier of fact to conclude his gun was used to shoot the victims, but argues the evidence does not support a conclusion that the shooting was not in self-defense. The defendant notes there was a significant amount of testimony that established that he was beaten by a good number of people at the scene before the shooting. The

defendant maintains the prosecution failed to exclude all reasonable hypotheses of innocence.

The constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. La. C.Cr.P. art. 821. 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," every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. **State v. Wright**, 98-0601, p. 2 (La. App. 1st 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.

The crime of second degree murder, in pertinent part, "is the killing of a human being: (1) [w]hen the offender has a specific intent to kill or to inflict great bodily harm." La. R.S. 14:30.1A(1). 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). 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. Thus, 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. **State v. Buchanon**, 95-0625, p. 4 (La. App. 1st Cir. 5/10/96), 673 So.2d 663, 665, writ denied, 96-1411 (La. 12/6/96), 684 So.2d 923. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. Delco**, 2006-0504, p. 4 (La. App. 1st Cir. 9/15/06), 943

So.2d 1143, 1146, writ denied, 2006-2636 (La. 8/15/07), 961 So.2d 1160.

In accordance with La. R.S. 14:27(A), any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended. It shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. An attempt to commit second degree murder requires that the offender possess the specific intent to kill and commit an overt act tending toward the accomplishment of that goal. **State v. Herron**, 2003-2304, p. 5 (La. App. 1st Cir. 5/14/04), 879 So.2d 778, 783. See also La. R.S. 14:27A and 14:30.1A(1).

When a 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. Williams**, 2001-0944, p. 5 (La. App. 1st Cir. 12/28/01), 804 So.2d 932, 939, writ denied, 2002-0399 (La. 2/14/03), 836 So.2d 135. Louisiana Revised Statutes 14:20(A)(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. For appellate purposes, the standard of review of a claim of self-defense is whether a rational trier of fact, after viewing the evidence in the light most favorable to the prosecution, could find beyond a reasonable doubt that the homicide was not committed in self-defense. **Williams**, 2001-0944 at pp. 5-6, 804 So.2d at 939; **State v. Lilly**, 552 So.2d 1036, 1039 (La. App. 1st Cir. 1989). However, Louisiana law is unclear as to who has the burden of proving self-defense in a non-homicide case, and what the burden is. In **State v. Freeman**, 427 So.2d 1161, 1163 (La. 1983), the Louisiana Supreme Court indicated, in dicta, that the defendant in a non-homicide case may have the burden of proving self-defense by a preponderance of the evidence without resolving the

issue.¹ In previous cases dealing with this issue, this court has analyzed the evidence under both standards. See State v. Barnes, 590 So.2d 1298, 1300-1301 (La. App. 1st Cir. 1991) (and cases cited therein).

In accordance with La. R.S. 14:31A(1), manslaughter is a homicide which would be a 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 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. See La. R.S. 14:31A(1). "Sudden passion" or "heat of blood" are not elements of the offense of manslaughter; rather they are mitigatory factors in the nature of a defense which tend to lessen the culpability. State v. Rodriguez, 2001-2182, p. 17 (La. App. 1st Cir. 6/21/02), 822 So.2d 121, 134, writ denied, 2002-2049 (La. 2/14/03), 836 So.2d 131. Because they are mitigatory factors, a defendant who establishes by a preponderance of the evidence that he acted in "sudden passion" or "heat of blood" is entitled to a verdict of manslaughter. *Id.*

The incident in question developed as a crowd of individuals exited the American Legion Hall after a party. There was inconsistent testimony as to whether disputes may have taken place, or who was involved in the disputes during the party, inside the Hall. At any rate, several witnesses confirmed that the defendant had an altercation or exchange with Jennifer Lanaute after the party ended.

State witness Deputy Anthony Ray Davis of the Iberville Parish Sheriff's Office testified that he observed the defendant as he argued with and struck Jennifer

¹ Other circuits have expressly held in accordance with the dicta in Freeman. See State v. Perkins, 527 So.2d 48, 50 (La. App. 3rd Cir. 1988); State v. Mason, 499 So.2d 551, 555 (La. App. 2nd Cir. 1986); State v. Barnes, 491 So.2d 42, 47 (La. App. 5th Cir. 1986).

Lanaute. Deputy Davis instructed the defendant to leave, and the defendant stated that he would comply. Moments later, after Deputy Davis walked away from the defendant and began addressing others in the crowd, Deputy Davis observed the defendant fire the two shots. According to Deputy Davis, no one was attacking the defendant before he fired his weapon. After the defendant fired his weapon, he was physically attacked by several people. Deputy Davis instructed the defendant to drop the gun; however, the defendant did not produce the weapon. Deputy Davis later discovered that the defendant's cousin, Taron Johnson (also referred to as Danky), retrieved the gun after the defendant fired it.

The surviving victim, Erica Houston (Jennifer Lanaute's aunt), similarly testified that the defendant bumped into Jennifer Lanaute before the shooting and called her a bitch. She also testified that Donovan Ausbon, the defendant's associate, struck Jennifer Lanaute in the mouth. Erica Houston never saw anyone hit the defendant but did witness the defendant's friends and family members fighting in the parking lot. After the defendant struck the victim, approximately six individuals began fighting with the defendant's friends, including Donovan Ausbon. The fighting continued until the defendant pulled out his gun, aimed at, and shot Jennifer Lanaute before aiming at and shooting Erica Houston. According to Erica Houston, physical altercations (that did not physically involve the defendant) took place as the defendant pulled out a gun and shot the victims. The defendant shot Jennifer Lanaute first and then sought out Erica Houston as she attempted to run away.

Taron Johnson testified that he had a physical altercation with an individual as several people were "jumping on" the defendant. When Taron Johnson walked toward the defendant, he observed a gun on the ground and retrieved it. According to Taron Johnson, someone pinned the defendant against a car before the police could apprehend him. Taron Johnson did not hear the gunshots or observe the

defendant as the shots were fired.

Deputy Paul Porter confirmed that Deputy Davis broke up the altercation involving the defendant prior to the shooting. The defendant fired his gun after being instructed to leave the premises. Deputy Porter specifically stated that the defendant, after Deputy Davis turned his back, walked back toward the crowd and started verbally assaulting individuals. As the individuals reciprocated with verbal assaults to the defendant, the defendant bent over, retrieved an object that appeared to be a gun and two shots were fired. After the shots were fired, someone grabbed the defendant and pinned him against a vehicle. Deputy Porter provided a conflicting account of the facts in his videotaped and written statements to the police shortly after the incident. Deputy Porter's statements indicated that the defendant was being beaten just prior to his retrieval and firing of his gun. According to Deputy Porter, his timing was off when he gave the statements. Deputy Porter further explained that he was a rookie at the time of the incident and was nervous as he had just previously observed a homicide.

Jennifer Lanaute's mother, Anna Lanaute (also the sister of Erica Houston), observed an exchange between the defendant and her daughter before the shooting but she believed it to be civil. She stated that the defendant was not being attacked just before he fired his gun. After the defendant shot Anna Lanaute's daughter and sister, Anna Lanaute grabbed the defendant and pinned him down on the hood of a vehicle. At that point, "Danky" grabbed the gun and ran. When the police approached, Anna Lanaute released the defendant.

Chief Kevin Ambeau, Sr. also stated that the defendant was not being attacked before he fired his gun. Chief Ambeau observed the entire incident while standing behind a parked vehicle. He observed Deputy Davis remove the defendant from the crowd during an altercation. Chief Ambeau also observed Deputy Davis as he spoke to the defendant but could not hear what was being stated. Chief

Ambeau observed the defendant's motions as he heard the gunshots being fired. Chief Ambeau could not clearly see the gun from his standpoint. Chief Ambeau observed Erica Houston as she attempted to run just before the defendant fired the second shot. He observed Anna Lanaute pin down the defendant and Taron Johnson as he took the gun. Chief Ambeau retrieved the gun from Taron Johnson.

Jeff Goudeau, a forensic scientist and expert in firearms examination, linked the two cartridges and the cartridge casings in evidence to the revolver in evidence. Further, the projectile removed from the deceased victim had consistent class characteristics with the revolver, but was damaged and could not be conclusively linked to the weapon.

Defense witness D'Kendris Gipson was Jennifer Lanaute's boyfriend at the time of her death. D'Kendris Gipson observed several altercations that night and was involved in an altercation inside the Hall. After individuals exited the Hall, D'Kendris Gipson observed the defendant when he bumped into Jennifer Lanaute and called her a bitch. D'Kendris Gipson and the defendant had verbal exchanges. D'Kendris Gipson also testified that Donovan Ausbon began verbally assaulting him and Jennifer Lanaute. D'Kendris Gipson and Donovan Ausbon began fighting and several other fights simultaneously occurred. The police separated the individuals who were fighting. D'Kendris Gipson specifically observed the defendant being removed from the crowd and instructed to leave. D'Kendris Gipson heard gunshots as he and Donovan Ausbon resumed a physical altercation. D'Kendris Gipson stated that enough police officers were present to bring the crowd under control just before the shots were fired.

The defendant's brother, Tremaine Franklin, testified that the defendant was on the ground and being stomped on just before shots were fired. Tremaine Franklin stated that he heard the gunshots as the defendant rose up. Letha Smith, the defendant's cousin, encouraged the defendant to leave after altercations had

taken place inside and outside of the Hall. The defendant initially began walking away, but stopped and the fighting resumed. According to Letha Smith, the police stood and observed as the defendant, Larry Grimm, and “Danky” fought nearly fifteen individuals, including members of the Lanaute family, outside of the Hall. Letha Smith could not see through the crowd of individuals as the shots were fired. Letha Smith confirmed having telephone conversations with the defendant during the weeks leading up to the trial, but both stated that she did not discuss the trial with the defendant during those conversations.

Roderick Patterson observed the incident from a good distance and initially testified that he could not see if the defendant was involved in the shooting. During cross-examination, Roderick Patterson stated that he was certain it was the defendant who was being stomped on by several individuals just before the gunfire. He later stated that he could not say for sure who was in the middle of the crowd of individuals who appeared to be stomping and kicking someone. He assumed it was the defendant because he saw the defendant being led away from the crowd in handcuffs after the shooting.

The defendant testified that he spoke with Jennifer Lanaute before the shooting but did not assault her verbally or physically. According to the defendant, as he walked to his vehicle, Jennifer Lanaute bumped into him and he questioned her regarding the bump. The victim’s boyfriend then addressed the defendant. At that point, Officer Davis approached and separated the individuals. The defendant followed his brother and stopped to talk to Jennifer Lanaute when he saw her alone. He again questioned her regarding the bump. Suddenly, several individuals began hitting the defendant in the back of his head. The individuals were behind the defendant and he assumed it was more than two individuals striking him. The defendant went down on one knee after someone pulled his chain from around his neck and as he came up, he fired his gun. The defendant stated that he fired his

weapon because he was being attacked, his chain was taken, and because he was afraid. The defendant stated that he did not know who he was shooting.

During cross-examination, the defendant admitted discussing the case with his cousin, Taron Johnson, and Letha Smith. The defendant stated that he asked Taron Johnson to tell the truth and instructed Letha Smith to gather witnesses who observed the incident and have them make statements. The defendant stated that he was never stomped on or kicked during the incident. The defendant confirmed that he had to cock his gun twice before firing the second shot. The defendant stated that he did not know Jennifer Lanate that well at the time of the shooting but knew her mother well. The defendant reiterated that he did not know who he was shooting and fired his weapon because he believed he was in danger.

The guilty verdicts in this case indicate the jury rejected the defendant's claim that he shot the victims in self-defense. Much of the testimony presented during the trial indicated that the defendant was the aggressor in the incident. It is uncontested that the victims were not attacking the defendant before he fired his weapon. Several individuals testified that the defendant aimed his gun at the victims before shooting them. Furthermore, several individuals indicated that the officers had ended the physical altercation involving the defendant before he pulled out and fired his gun. 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 is not subject to appellate review. Thus, an appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **Williams**, 2001-0944 at p. 6, 804 So.2d at 939.

Considering the testimony presented, we find the evidence sufficiently

negated the possibility that the defendant acted in self-defense with respect to either victim (regardless of who had the burden of proof on the issue of self-defense regarding the charge of attempted second degree murder). Thus, we find no error in the jury's rejection of the defendant's claim of self-defense. We further find insufficient evidence of provocation such that a reasonable person would have used deadly force. The defendant failed to establish by a preponderance of the evidence that he acted in sudden passion or heat of blood. Viewing the evidence in the light most favorable to the prosecution, we find that it excludes any reasonable hypothesis of innocence and supports the jury's verdicts. Due to the foregoing conclusions, the assignments of error lack merit.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.