NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1256

STATE OF LOUISIANA

VERSUS

WALTER C. GIBSON, JR.

Judgment Rendered: March 23, 2012

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Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Case No. 902597

The Honorable Robert H. Morrison, III, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., concurs.

GAIDRY, J.

The defendant, Walter C. Gibson, Jr., was charged by indictment with one count of second degree murder of Kimberly Knox, a violation of La. R.S. 14:30.1. Initially, the defendant pled not guilty. The defendant then filed a motion alleging mental incapacity to proceed to trial and a motion to change his plea to not guilty and not guilty by reason of insanity. The defendant was evaluated by a sanity commission. Subsequently, the trial court found the defendant competent to proceed to trial.

The defendant waived his right to a jury trial. Prior to trial, state and defense experts evaluated the defendant for the purpose of assessing whether he was insane at the time of the offense. Following a bench trial, the defendant was convicted as charged. The trial court sentenced him to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

The defendant now appeals, raising three assignments of error challenging: the trial court's ruling that the defendant was competent to stand trial; the trial court's finding the defendant guilty of second degree murder instead of manslaughter; and the trial court's use of the "average person" standard when the defendant had a mental defect of mental retardation. For the reasons set forth below, we affirm the defendant's conviction and sentence.

FACTS

The defendant met Kimberly Knox in 1993, when Kimberly was just sixteen years old. Kimberly became pregnant and their daughter, Tacara Knox, was born in 1994. The defendant and Kimberly first lived together for a period of time in 1995 in Texas with the defendant's family. That same year, Kimberly returned to Louisiana to live with her mother and

daughter. At some point the defendant was arrested and went to prison in Texas.

Kimberly maintained some form of contact with the defendant while he was incarcerated. When the defendant was released from prison in October of 2007, Kimberly drove to Texas and brought him back to Louisiana. At that juncture, they began living together, in what appears from the record to have been an "off-again" and "on-again" relationship. It also appears that during the "off" periods of their relationship, Chris Pea, an individual known to the defendant and the victim, would carry rumors of infidelity by Kimberly to the defendant. Testimony indicates that Chris Pea took some sort of pleasure in publicly taunting the defendant with these rumors when he was in the presence of other men. The record also shows that before the incident, the defendant and Kimberly were at odds with each other over news that their daughter had become pregnant. Their daughter had moved out of the place where the defendant and Kimberly were living and moved in with Kimberly's mother, Brenda Grant. A few weeks before the shooting, Kimberly left the defendant. She informed him that she would not be returning and she moved in with her mother. In addition to Kimberly and her daughter, Kimberly's sister, Ashley Knox, Ashley's four children, and Kimberly's foster sister, Keyianna Winston, also lived in Mrs. Grant's home.

The shooting occurred on June 6, 2009. That morning, Kimberly needed to be at work for 5 a.m. She woke up Ashley, who offered to drive her to work. Keyianna also got up so she could lock the front door after Kimberly and Ashley left. At approximately 4 a.m., Kimberly opened the front door. After she looked around, she and Ashley walked out of their house and toward their car. Keyianna locked the door behind them. When

they got to their car, Kimberly used the car's remote key fob to unlock the car doors. When the car's lights came on, Ashley saw the defendant "coming out of nowhere." The defendant said something that Ashley could not understand. Ashley began running and fell when she saw him raise his arm. After she fell, she looked up and saw the defendant steadily approaching Kimberly with a gun in his hand. While she was still on the ground, Ashley heard four gunshots. Ashley got up, ran to the house, and began pounding on the door to be let inside. Keyianna opened the door and Ashley ran inside to her mother, screaming, "He shot my sister." Keyianna looked out the door and saw the defendant walk up to Kimberly. Keyianna watched as the defendant pointed the gun at Kimberly and shot her two times. After he shot Kimberly, Keyianna saw the defendant look up, turn around, and then run away on foot. Mrs. Grant was awakened by the sound of the first gunshot. She immediately called 911. While she was on the phone with the 911 operator, Mrs. Grant heard five more gunshots. When Ashley got inside, Mrs. Grant gave the phone to Ashley, who identified the shooter as the defendant. Mrs. Grant ran outside to see about Kimberly. Kimberly told her mother that "Chucky shot me."[1] Sergeant David Copeland of the Tangipahoa Parish Sheriff's Office was dispatched to the scene. He arrived shortly after the shooting. He found Kimberly lying on her side near a ditch in front of the residence with Mrs. Grant sitting beside her. Although Kimberly had several gunshot wounds to her arm and chest and was bleeding profusely, she was able to tell Sergeant Copeland that "Chucky shot her." He asked if she knew his full name and Kimberly responded, "Charles Gibson."

[1] The defendant's middle name is Charles. Friends and some family members referred to him by his nickname, "Chucky."

Kimberly was rushed to North Oaks Medical Center. She died that same day. The autopsy revealed Kimberly had six gunshot wounds to her body. The bullet that killed her traveled through the top of her liver, through her lung, and exited through her chest.

Shortly after the shooting, the defendant called his mother and said, "I think I shot Kim." His mother told him to turn himself in to the police. At approximately 9:45 a.m., Detective Dale Afemann of the Tangipahoa Parish Sheriff's Office received a call from a male who identified himself as the defendant. The caller said he was the one who shot and killed his girlfriend and wanted to surrender to the police. The detective and the caller agreed to meet at a local gas station for the surrender. However, the caller failed to show up.

By 4 a.m. of the next day, the defendant was heading west on Interstate I-10 in a construction zone just outside of Tucson, Arizona, when Deputy Joe Klein of the Pima County Sheriff's Department observed the defendant drifting into another lane. The defendant made a correction then drifted again. Deputy Klein also noted the defendant was exceeding the posted speed limit for the construction zone. When they cleared the construction zone, the deputy conducted a routine traffic stop. The defendant produced expired registration and insurance documents. Initially, the defendant told Deputy Klein he was coming from Texas and was in route to California and did not know how long he would be there. He later recanted, telling the deputy he was initially coming from Louisiana, stopped in Texas, and was ultimately going to California. The deputy noticed there were no items or luggage in the vehicle that indicated the defendant was on vacation or traveling. When asked for identification, the defendant stated he did not have his wallet or any identification on him. He identified himself as

"Orlando Carter" and gave the deputy a date of birth and social security number. The deputy ran a records check on "Orlando Carter," but did not receive any records for that name. Deputy Klein suspected the information was false and asked for the information again. The defendant provided the same name and date of birth, but gave a different social security number. At this point, the deputy had reason to believe the defendant was providing false information concerning his identity. Deputy Klein asked him to step out of the vehicle and he detained the defendant in handcuffs. During this process, the deputy noticed the defendant had a wallet in his back pocket. The wallet contained his driver's license showing his name as Walter Gibson. Deputy Klein learned that there was a warrant for his arrest in Louisiana and the defendant was taken into custody in Arizona.

ASSIGNMENTS OF ERROR

The first assignment of error challenges the trial court's April 7, 2010 ruling that the defendant was competent to stand trial. The defense points out that its expert, psychologist Marc Zimmerman, Ph.D., testified at trial that the defendant met the criteria for intellectual disability due to mental retardation. However, the doctors appointed to evaluate the defendant's competency did not conduct intelligence quotient ("IQ") testing or consider what effect his below normal intelligence might have on his ability to understand the proceedings against him and to assist counsel in his defense. The defense contends this information was necessary to determine the defendant's competency to proceed to trial. Thus, the defense urges the trial court erred when it held a mentally retarded defendant competent to stand trial where there was insufficient evidence presented in the two expert reports to allow the court to reasonably conclude the defendant was competent to proceed to trial.

A criminal defendant has a constitutional right not to be tried while legally incompetent. *State v. Carmouche*, 2001-0405 (La. 5/14/02), 872 So.2d 1020, 1041. It has long been established that a person whose mental condition is such that he lacks the capacity to understand the nature of the proceedings against him, and is unable to assist counsel, may not be subject to trial. Thus, in order to proceed with trial, a defendant must be "legally competent." *State v. Holmes*, 2006-2988 (La. 12/2/08), 5 So.3d 42, 54, cert denied, 130 S.Ct. 70, 175 L.Ed.2d 233 (10/05/2009).

Louisiana law provides that mental incapacity to proceed to trial exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense. La.C.Cr.P. Art. 641. Mere weakness of mentality or subnormal intelligence does not of itself constitute legal insanity. However, when mental retardation, alone or in combination with a mental disease or defect, is so severe as to impair a defendant's capacity to understand the proceedings against him, to consult with counsel in a meaningful way, and to assist rationally in his defense, that defendant is, within the contemplation of our law, incompetent to stand trial. *State v. Bennett*, 345 So.2d 1129, 1136-37 (La. 1977) (on rehearing). Our law also imposes a legal presumption that a defendant is sane and responsible for his actions. La.R.S. 15:432. Accordingly, the defendant has the burden of proving by a preponderance of the evidence his incapacity to stand trial. *Carmouche*, 872 So.2d at 1041.

Although the trial court may receive expert testimony on the issue of a defendant's competency to proceed to trial, the issue of the defendant's mental capacity to proceed shall be determined by the court. La.C.Cr.P. Art. 647. A reviewing court owes the trial court's determination of a defendant's

mental capacity great weight, and its ruling should not be disturbed in the absence of manifest error. *Holmes*, 5 So.3d at 55.

Expert psychiatric and psychological testimony should be descriptive of the defendant's condition rather than conclusive. Medical opinion about the defendant's condition should only be one of the factors relevant to the determination of competency to stand trial. A defendant's abilities must be measured against the specific demands trial will make upon him, and psychiatrists have little familiarity with either trial procedure or the complexities of a particular indictment. *Bennett*, 345 So.2d at 1137-1138.

In *Bennett*, the Louisiana Supreme Court held that the appropriate factual considerations for determining whether the accused is fully aware of the nature of the proceedings include:

> whether he understands the nature of the charge and can appreciate its seriousness; whether he understands what defenses are available; whether he can distinguish a guilty plea from a not guilty plea and understand the consequences of each; whether he has an awareness of his legal rights; and whether he understands the range of possible verdicts and the consequences of conviction.

Bennett, 345 So.2d at 1138. Facts to consider in determining an accused's ability to assist in his defense should include:

> whether he is able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial.

Bennett, 345 So.2d at 1138.

In this case, the defense raised the issue of the defendant's competency to stand trial in a December 2009 motion. The defense's

motion alleged "the defendant has become increasingly delusional to the extent that it has affected his capacity to understand proceedings against him and to assist in his defense," and it requested the trial court to appoint a sanity commission to evaluate the defendant's competency to proceed to trial. The brief motion does not allege the defendant suffers from a mental defect of below normal intelligence or mental retardation. The trial court appointed psychiatrist Jose Artecona, M.D., and psychologist David Hale, Ph.D., to evaluate the defendant's competency and ordered the doctors to report their findings to the court.

At the April 7, 2010 competency hearing, the defense did not raise the issue of the defendant's incompetency due to mental retardation. Moreover, the defense did not offer any evidence or expert testimony to support the factual allegations in its motion. The transcript of the hearing shows the defense stipulated that it had read and accepted the competency reports. The trial court admitted the uncontroverted competency reports into evidence. After stating it had reviewed the reports and considered the testing and the doctors' findings, the trial court ruled the defendant competent to stand trial.

The defendant first raised the issue of his below normal intelligence as a mental defect at the criminal trial. The issue was raised in the limited context of whether, as a result of mental retardation, the defendant was able to distinguish right from wrong at the time he shot Kimberly. The testimony of the defense's expert, Dr. Mark Zimmerman, focused on his findings that the defendant had an intellectual disability due to his mental retardation and his opinion as to how, as a result of this mental defect, the defendant processed information. Specifically, Dr. Zimmerman opined that as a result of the defendant's mental retardation, the defendant would have processed information, specifically right from wrong, as a child rather than as an adult.

Our thorough review of the record reveals the defense did not raise the issue of the defendant's competency at any time during the trial. The defense raised the issue of the defendant's competency to stand trial by written motion, which would not require a contemporaneous objection if the ruling was denied. La.C.Cr.P. Art. 841(B). However, the record shows the defense's new allegation of incompetency as a result of mental retardation was not presented to the trial court. See La.C.Cr.P. Art. 841(A). Accordingly, it represents a new ground for objection which may not be raised for the first time on appeal. *State v. Hawkins*, 496 So.2d 643, 647 (La. App. 1st Cir. 10/15/86), writ denied, 500 So.2d 420 (La. 1987).

As to the defense's contention that there was insufficient information in the competency reports for the trial court to rationally conclude the defendant was competent to stand trial, we disagree. The competency reports are included in the record, and they reveal that Dr. Artecona examined the defendant for over an hour on February 11, 2010, and Dr. Hale examined him for approximately two hours on February 21, 2010. The evaluation process consisted of: taking the defendant's social, psychiatric, educational, work, medical, substance abuse, and legal history; clinical interviews to evaluate the defendant's current mental status; administering standardized instruments to measure the defendant's competence to stand trial; interviewing the defendant under the guidelines set out in *Bennett*; and assessing the likelihood of feigned memory and psychiatric impairments, biased responding, and over reporting of deficiencies and impairments.

The reports included significant factual information about the information the doctors reviewed prior to examining the defendant, the examination and testing process, and the defendant's presentation and responses during each phase of the evaluation. The doctors note with

particularity the defendant's uncooperative stance during the evaluation process and that his clinical presentation was inconsistent with reports of his current behavior, functioning, and history while in the Tangipahoa Parish Jail. The doctors found the defendant was able to describe in detail his whereabouts and actions the night before the shooting and immediately before and after the shooting. He was able to describe conversations he had with the victim, Chris Pea, and other witnesses.

While the defendant presented as being unable to read a simple statement written at a first grade level, the doctors reviewed the defendant's signed written statement to prison officials concerning a fight with another prisoner, which indicated the defendant wrote at a fifth grade level. They found no competent evidence to support the defendant was suffering from delusions, hallucinations, or thought disorders. The doctors independently arrived at a belief that the defendant had greater capacity than he exhibited during the examinations.

We also find the defendant's reliance on *State v. C.C.*, 2008-1040, 2008-1042 (La. App. 3rd Cir. 3/4/09), 5 So.3d 1034, as support for his position, misplaced. Unlike the expert in *C.C.*, Drs. Hale and Artecona did not opine the defendant would be unable to: testify in his own defense; maintain a consistent defense; listen to testimony of witnesses; and inform counsel of any witness misstatements. See *C.C.*, 5 So.3d at 1039-40. Unlike the cases cited within *C.C.*, there is nothing in the instant record to indicate the defendant's behavior during pretrial proceedings or during the trial was such as to raise a concern with the trial court about the defendant's competency to stand trial, which would require the trial court to order further investigation as to his competency. Moreover, there is nothing in the record to indicate defense counsel was experiencing difficulties in communicating

with the defendant because of his below normal intelligence or psychiatric symptoms.

Lastly, we note that the instant matter is factually distinguishable from *C.C.* in that the trial transcript reveals that Drs. Artecona and Hale jointly conducted a second examination of the defendant on February 1, 2011, which is the same month Dr. Zimmerman examined the defendant and the same month as the trial. Their second examination was for the purpose of assessing whether the defendant had a mental defect or disease at the time of the offense that resulted in the defendant not being able to distinguish right from wrong. As experts often do, there was disagreement between Dr. Zimmerman and the doctors appointed by the trial court as to the defendant's adaptive functioning abilities and his likelihood for feigning memory impairment. However, there is no indication in the trial transcript that Drs. Artecona and Hale found the defendant's mental condition had changed since the earlier examinations. For these reasons, we find this assignment of error lacks merit.

In the second assignment of error, the defense urges the trial court erred when it found the defendant guilty of second degree murder instead of the responsive offense of manslaughter. The defense's entire argument hinges on its contention that the evidence produced at trial does not support the trial court's finding that there was at least a three-hour gap between Chris Pea's last communication with the defendant and the time the defendant shot Kimberly Knox. The defendant contends the evidence presented at trial establishes a clear and convincing pattern of teasing, bullying, and provoking of the defendant by Chris Pea right up to the hour before the shooting.

This argument on appeal essentially challenges the sufficiency of the evidence against the defendant. To support a conviction, the evidence, whether direct or circumstantial or both, must be sufficient to satisfy any rational trier of fact that the defendant is guilty beyond a reasonable doubt. *State v. Chisolm,* 1999-1055 (La. App. 4th Cir. 9/27/00), 771 So.2d 205, 210, *writ denied*, 2000-2965, 2000-3077 (La. 9/28/01), 798 So.2d 106, 108. The *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review incorporated in *Chisolm* 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 the overall evidence excludes every reasonable hypothesis of innocence. 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. *State v. Cummings*, 99-3000 (La. App. 1st Cir. 11/3/00), 771 So.2d 874, 876.

To support a conviction for second degree murder, the state is required to show: 1) the killing of a human being; and 2) that the defendant had the specific intent to kill or inflict great bodily harm. La. R.S. 14:30.1(A)(1). Specific criminal intent is the 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 the defendant, or by inference from circumstantial evidence, such as defendant's actions or facts depicting the circumstances. *Cummings*, 771 So.2d at 876.

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 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

In the instant matter, the trial court found that there was no question that the evidence showed the defendant killed Kimberly Knox. Ashley Knox testified that she saw the defendant steadily walk towards the victim with his arm raised and holding a gun. Keyianna Winston testified she watched as the defendant walked up to the victim, stood over her, and shot her two times.

Thus, having found the elements of second degree murder, the trial court had to determine whether, under the circumstances, the crime was actually manslaughter. Louisiana Revised Statute 14:31(A)(1) provides:

> Manslaughter is:
>
> > 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; rather, they are mitigating 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 mitigating 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. *State v. Rodriguez*, 2001-2182 (La. App. 1st Cir. 6/21/02), 822 So.2d 121, 134, writ denied, 2002-2049 (La. 2/14/03), 836 So.2d 131.

At the outset, we note the defense, in its brief, mischaracterized the witness testimony presented at trial and the trial court's finding as to the timing of the provocation by Chris Pea and the defendant shooting Kimberly. Stephanie Davis testified for the defense. She stated that around 11 p.m. the night before the shooting, the defendant came to her house. They left her house and rode around in the defendant's car until he dropped her back home at around 2 a.m. While they were driving around, Ms. Davis testified the defendant received a call on his cell phone from Chris Pea. The defendant put the call on speaker and Ms. Davis testified she heard Chris Pea tell the defendant that "his old lady ain't want him no more, and you know, that she had someone else."

Connie Brown also testified for the defense. The day before Kimberly was killed, Mr. Brown had some people over at his house throwing dice and the defendant came by. Mr. Brown could not remember if Chris Pea also stopped by that night, but he testified that he heard Chris Pea tell the defendant that Kimberly had another man and did not want the defendant. Mr. Brown tried to tell the defendant, without success, that "Chris just be playing with you." Around 7 p.m. Mr. Brown said he made a three-way call to Chris Pea with the defendant listening to the call. Mr. Brown asked Chris Pea, "Why you be telling Chucky about his old lady?", to which Chris Pea responded, "Chucky know I just be playing with him."

The testimony the defense refers to as establishing that Chris Pea called the defendant right up to an hour before the shooting comes from the defense's cross-examination of Dr. Artecona. On cross, the defense asked Dr. Artecona if, when taking the defendant's history, it was revealed the defendant received a call from Chris Pea at 3 a.m. the morning of the shooting. Dr. Artecona stated that the defendant provided that information. There is no witness testimony that corroborates Chris Pea speaking with the defendant an hour before the shooting. As to the trial court's findings as to the timing of the provocation by Chris Pea, the trial court stated:

> [B]ased on the evidence that we actually heard out of someone's mouth here in this courtroom, there was a gap of at least three hours between the last communication by Chris Pea, which obviously was not something anybody would like to be subjected to, Mr. Gibson - - but at least three hours between that and the time of the killing. Possibly he called back, that was reported. It was not testified to. Even if that were the case, it was an hour and a half between that period of time and the time that Kimberly was killed.

In its reasons for judgment, the trial court found the defendant had been armed for hours before the shooting, and there was some significant period of time between the last communications with Chris Pea. More significantly, the trial court found the defendant "is there at her house – just so happens to be at the time that she is leaving to go to work." Under these particular circumstances, the trial court found this to be a deliberate case rather than a sudden passion case and found the defendant guilty of second degree murder.

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

evidence, we cannot say that the trier of fact's determination was irrational under the facts and circumstances presented. See *State v. Ordodi*, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. Moreover, 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 jury. *State v. Calloway*, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Thus, we find this assignment of error lacks merit.

In its third assignment of error, the defense urges that it is a denial of Due Process to employ an "average person" standard when determining the sufficiency of provocation and of the cooling off period for a mentally retarded defendant who has pled not guilty and not guilty by reason of insanity. Our Legislature has defined the measure of provocation sufficient to deprive a person of his self-control and cool reflection in terms of "an average person." La. R.S. 14:31(A)(1). Likewise, the Legislature chose an "average person" standard to guide the trier of fact in determining whether the offender's blood "would have cooled at the time the offense was committed." La. R.S. 14:31(A)(1).

In *State v. Johnson*, 475 So.2d 394, 398 (La. App. 1st Cir. 1985), writ denied, 478 So.2d 143 (La. 1985), this Court noted, as did the Louisiana Supreme Court in *State v. Walker*, 50 La. Ann. 420, 23 So. 967 (1898), "All the writers lay down the doctrine that the assault or provocation must be such as would stir the resentment of an 'ordinary' man, in order to reduce the crime to manslaughter." The fact that a defendant possesses some peculiar mental or physical characteristic, not possessed by the ordinary person, which might cause him in a particular case to lose his self-control, is not to be considered in measuring the adequacy of the provocation. *Johnson*, 475

So.2d at 398. Thus, until the United States Supreme Court, our Legislature, or the Louisiana Supreme Court provides otherwise, provocation and cooling of the blood are defined in terms of an "average person." Accordingly, we find no merit in this assignment of error.

CONCLUSION

For all of the reasons set forth above, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.