**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2008 KA 0443**

**STATE OF LOUISIANA**

**VERSUS**

**WILBERT KELLY, JR.**

Judgment Rendered: OCT 1 4 2008

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On Appeal from the 20th Judicial District Court
In and For the Parish of West Feliciana
Trial Court No. 07-WFLN-177

Honorable William G. Carmichael, Judge Presiding

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**BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.**

**HUGHES, J.**

The defendant, Wilbert Kelly, Jr., was charged by grand jury indictment with two counts of first degree murder, violations of LSA-R.S. 14:30. The charges were subsequently amended to two counts of second degree murder, violations of LSA-R.S. 14:30.1. He pled not guilty. The defendant filed a motion to suppress clothing and, following a hearing on the matter, the motion was denied.[1] Following a jury trial, the defendant was found guilty of two counts of the responsive offense of manslaughter, violations of LSA-R.S. 14:31. He filed a motion for postverdict judgment of acquittal, which was denied. The defendant was sentenced to forty years at hard labor for each count, with the sentence on count two to run consecutively to the sentence on count one. The defendant now appeals, designating three assignments of error. We affirm the convictions and sentences.

## FACTS

On the night of July 16, 2003 Wilfred (aka Wilbert) Kelly, Sr., and his wife, Carolyn Kelly, were killed in the kitchen area of their home on William Hayes Lane in Clinton, Louisiana, which is in East Feliciana Parish. The Kellys' only child was the defendant. Wilfred was shot once in his arm and once in the back of his neck. Carolyn was shot once in her head and three times in her face. The gun used to kill the Kellys was a Taurus .357 six-shot revolver owned by Wilfred. The gun was found on the floor near Wilfred's head.

Earlier that evening on July 16 at about 10:30 p.m. or 11:00 p.m., Kermese Sanders, the defendant's girlfriend, had gone to the Kelly home to see the defendant. The defendant, who was twenty-three years old at the time of the murders, had recently moved back in with his parents after his trailer burned down.

[1] The defendant also filed a motion to suppress statements attributed to him and, following a hearing on the matter, the motion was granted.

Sanders knocked on the door, but no one answered. She noticed that the driver's side window of Wilfred's Chevy Silverado pickup truck was shattered. It was known by family members that Wilfred kept his .357 in his truck. Sanders left the Kelly home and went to her aunt's house where she called the defendant on his cell phone. According to Sanders, the defendant was driving from Wal-Mart. When Sanders told the defendant what she observed, the defendant went to the house of his uncle, Jerry Kelly (Wilfred's brother), to get his uncle to go with him to his house. Jerry lived about four and one-half miles from the Kellys. At close to midnight, Jerry and his wife and the defendant went to the home of defendant's parents. The defendant drove separately in his mother's Honda Accord. The defendant entered the side door by the carport. He then backed out and hollered that his mother was dead. Jerry and his wife left, and the defendant remained. At about 12:45 a.m., the defendant called 911 and told the dispatcher that his parents were dead.

Among the first police officers on the scene was Detective Don McKey, with the East Feliciana Parish Sheriff's Office. According to Detective McKey's testimony at trial, the defendant told Detective McKey that he was at home, but then left about 10:30 p.m. to go to Wal-Mart in Zachary and then to a service station. Detective McKey became suspicious of the defendant because he too readily offered an alibi of his whereabouts. Detective McKey also observed that the defendant was calm and did not show any emotion. Detective McKey found that there was no forced entry in the home, and there did not appear to be any valuables removed. No inventory was done of the contents of the house. He also found a metal gas can in the kitchen area and a plastic gas container in the living room, and noticed a strong odor of gasoline in the house. Detective McKey obtained the clothes and shoes that the defendant was wearing.

Sheila Martin testified at trial that she worked with Wilfred at Wal-Mart on

the night of the killings. Between 10:00 p.m. and 10:30 p.m., she observed the defendant speaking to Wilfred by the produce department. She heard the defendant raise his voice a bit, but she did not hear what was being said. Detective McKey later obtained the security tape from Wal-Mart in Zachary, but the tape was not viewable.

Patrick Lane, with the Louisiana State Police Crime Lab, testified at trial as an expert in crime scene investigation, fingerprint analysis, and firearm identification. Within a few hours of the killings, Lane videotaped the crime scene, including the bodies on the kitchen floor. Lane also videotaped the crime scene later after the bodies had been removed. According to Lane, gasoline was poured on the kitchen floor and lit, but burned only briefly, causing some burn patterns on the ceramic floor. The master bedroom was neat and had not been rummaged through. The gun found at the scene had two fired rounds and four live rounds in the chamber. This meant, at some point during the killings, the gun had been reloaded.

Lane examined microscopically the gleanings from the pockets of the defendant's jeans that he was wearing on the night of the killings. In the front left pocket, there were particles consistent with flattened ball smokeless gunpowder. In the front right pocket, there were very small pieces of suspected glass. The smokeless gunpowder was not consistent with fireworks, but rather was very consistent with what is found in center-fire cartridges. While Lane confirmed that the Kellys had been killed by Wilfred's .357, Lane was unable to determine that the gunpowder in the defendant's pocket came from that gun. He also could not determine how long the gunpowder had been in the pocket. He further was unable to determine if Wilfred's truck window was broken from the inside of the truck or outside.

Lane's theory was that Carolyn was killed first because, during videotaping

the scene, he observed the blood around Carolyn was very dry, whereas the blood around Wilfred was very wet. Lane's rough estimation of the time between killings was at least thirty minutes. Lane also observed a broken piece of a dish that was lying in blood near Carolyn. When the dish piece was lifted, there was no blood on it, which suggested that the blood that it was on had already dried. Lane also pointed out that Carolyn was shot four times, but the gun had only two spent shots. Lane stated that he did no lab tests to determine the rate at which blood dries.

Based on these observations, Lane disagreed with defense counsel's theory, which was that Wilfred was shot first. Defense counsel suggested that a suspect broke into Wilfred's truck. As Wilfred came outside, the suspect grabbed the gun from the console and shot Wilfred in the doorway. As Wilfred lay in the doorway, the suspect dragged him across the kitchen floor around the table. Then, Carolyn walked in the kitchen, and the suspect shot her. Lane acknowledged only that someone had dragged Wilfred around the table.

Defense expert, Lawrence Renner, a forensic analyst, reiterated defense counsel's theory that Wilfred was shot first. He suggested that Wilfred was dragged from the doorway to a spot where he would not be seen easily. Regarding the reloading of the gun, Renner suggested that it was possible that the suspect fired all six rounds at both Kellys, then emptied out only four of the spent rounds and replaced them with four live rounds. Regarding Lane's observations about the wet and dry blood, Renner noted that Lane did no experimentation to document the drying factors of blood at that particular scene. Renner also testified that it was highly likely that the suspect, who was standing by Carolyn's head when he shot her again in the face, would have gotten blood spatter on his shoes or pants. No

blood was found on the defendant's pants or shoes.[2]

On cross-examination, Renner stated that he had never been to the crime scene. Renner did not look at any evidence or documentation involving the killings until three years after the incident. The prosecutor suggested that the defendant broke Wilfred's truck window to cover up what he had done and misdirect the police. The prosecutor further suggested that the defendant poured gasoline on the bodies and attempted to set them and the house on fire. Renner agreed that this was possible and that such acts are known as staging, or doing things at a crime scene that would direct the investigation in a different direction than the action that actually occurred. Renner also agreed that it was possible that the defendant could have killed his parents, gotten a different set of clothes from his room, and changed his clothes when he was away from the house.

Dr. Emil Laga, the forensic pathologist who performed the autopsies on the Kellys, testified at trial that Carolyn was shot first in the left temple while she was probably standing. The gun was about six inches to a foot away from her head. When Carolyn was on the ground, the shooter was standing on the right side of her head and fired three more shots into her right cheek area. The shot to the temple was the fatal shot. Given the angle and proximity of the shooter to Carolyn when she was shot three times in the face, Dr. Laga would have expected some blood spatter on the shooter's shoes or clothing. Wilfred was shot first in his arm. The bullet went in and out of his arm. The second shot, the fatal shot, was to the back of his neck. Both shots were fired from at least two feet away. Both Carolyn and Wilfred had chemical burns on about twenty percent of their bodies. The burns were caused by a corrosive type of fluid. Dr. Laga placed the times of death at

[2] Wilfred's DNA was found on the shoestring of the defendant's right shoe. Alejandro Vera, an expert in forensic DNA analysis, testified at trial that, while the presumptive test was positive for blood, the sample size of DNA on the shoestring was too small to perform the second test which would have determined whether it was human blood or not. Vera confirmed defense counsel's suggestion that it was possible that the DNA on the shoestring was consistent with cells from Wilfred's thumbprint.

roughly 11:00 or 11:30 p.m., give or take two hours. Dr. Laga testified that he could not determine which victim was shot first.

Both Carolyn and Wilfred were working more than one job when they were killed. While they provided for the defendant and the defendant's son, Tyree, financially, they were in a great deal of debt. Carolyn worked at the post office. Vanessa Ghoram, a supervisor and friend of Carolyn, made a written statement to the postal inspector a week after the killings. Ghoram wrote in the statement that Carolyn told her about a year ago that the defendant had been writing checks out of her account and had run up some of her charge cards. Carolyn also told her that she would not recognize the defendant anymore because of the way he was now conducting himself. Ghoram testified at trial that the Kellys were a loving family, the Kellys had no difficulty with the defendant, and the defendant was a good boy and respectful. Other friends and family members also testified at trial about the good relationship the defendant and his parents had, and that the defendant was respectful.

The defendant moved into his parents' home in December of 2002, about seven months prior to the killings. According to Sanders (the defendant's girlfriend), she did not think the defendant was working during this time. However, Patrick Shepherd testified at trial that he used to work with the defendant at VIP for about six months, including in Houston, from January to June of 2003 or 2004. On cross-examination, Shepherd stated that he did not have any VIP employee or payroll records with him.

Veronica Mills, who was married to Carolyn's half-brother, testified at trial that Carolyn told her early in 2003 she was having problems with the defendant because he was not working, and he was "changing on her." He was also demanding a whole lot of money from her. Mills further testified that the defendant was not "doing too much" for Tyree because he was not working.

Carolyn and Wilfred were taking care of Tyree.

Testimony was further presented at trial that Wilfred had been involved in extra-marital affairs and had at least two illegitimate children, one from a relationship with Claudette London. London testified at trial that Wilfred was giving her money "on the side" for their child. London was not married during the affair, and she knew no one who would have been offended by her being impregnated by Wilfred. She also knew no one who would have a motive for killing, or opportunity to kill, Wilfred.

Rosa Kelly, Wilfred's sister-in-law, testified that Carolyn and Wilfred had a good relationship with the defendant, but had a lot of problems in their own relationship. She felt that Wilfred was depressed and stressed out. Wilfred had come to her seeking counsel over the issue of being able to control his sexual needs. In 2002, she noticed the "sexual needs" problem was "out of hand." She also testified that the last time she saw Carolyn, she looked "horrible."

The defendant did not testify at trial.

## ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant argues that the trial court erred in denying his motion to suppress his clothing. Specifically, the defendant contends that his clothes were illegally seized by law enforcement officers without a warrant, probable cause, or consent.

Trial courts are vested with great discretion when ruling on a motion to suppress. Consequently, the ruling of a trial judge on a motion to suppress will not be disturbed absent an abuse of that discretion.[3] **State v. Long**, 2003-2592, p. 5 (La. 9/9/04), 884 So.2d 1176, 1179, cert. denied, 544 U.S. 977, 125 S.Ct. 1860, 161 L.Ed.2d 728 (2005).

[3] In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n. 2 (La. 1979).

A search or seizure without a warrant issued upon probable cause is per se unreasonable subject only to a few well-delineated exceptions. **Schneckloth v. Bustamonte**, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973). A search or inspection conducted with the consent of a defendant is an exception to both the warrant and the probable cause requirements of the law. **State v. Tennant**, 352 So.2d 629, 633 (La. 1977), cert. denied, 435 U.S. 945, 98 S.Ct. 1529, 55 L.Ed.2d 543 (1978).

When the State seeks to justify a search or seizure, based on the consent of the defendant, the State bears the burden of proof that the consent was free and voluntary. **State v. Owen**, 453 So.2d 1202, 1206 (La. 1984). Voluntariness is a question of fact which must be determined on the individual circumstances of each case. The trial judge's factual determination of whether consent is free and voluntary is accorded great weight. **State v. Franklin**, 95-1876, p. 6 (La. 1/14/97), 686 So.2d 38, 41; **State v. Edwards**, 434 So.2d 395, 397 (La. 1983). See also **State v. Young**, 2006-0234, pp. 5-6 (La. App. 1 Cir. 9/15/06), 943 So.2d 1118, 1122, writ denied, 2006-2488 (La. 5/4/07), 956 So.2d 606.

At the motion to suppress hearing, Patrick Lane testified that, based on the information he obtained at the crime scene, it became evident to him that the defendant's clothing was going to be of "potentially critical importance" to the investigation of the case. Lane suggested to Detective McKey that they obtain the clothing. Detective McKey testified at the motion to suppress hearing that, based on Lane's suggestion, he said he would get the defendant's clothes if he could get permission from the defendant. Detective McKey read the defendant his **Miranda**[4] rights and asked if he would consent to having his hand swabbed. Following the swab test, Detective McKey asked the defendant if he would be

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[4] See **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

willing to turn over his clothes to him. Deputy Kenny Stewart, who was employed by the East Feliciana Parish Sheriff's Office at that time, was with Detective McKey when Detective McKey asked the defendant if he would give them his clothes. Deputy Stewart testified at the motion to suppress hearing that the defendant never asked to leave, he never asked for an attorney, and he was cooperative. According to Deputy Stewart, following the request for the defendant's clothes, Deputy Stewart and the defendant walked to a utility room with a bathroom attached to it. The defendant voluntarily took off his clothes and handed them to Deputy Stewart. There was no conversation between Deputy Stewart and the defendant.

The defendant testified at the motion to suppress hearing that Detective McKey did not ask his permission to take his clothes. According to the defendant, Detective McKey told him that he needed him to change clothes, and that he (Detective McKey) was going to give the clothes to the crime lab. The defendant testified that he did not object to giving the police his clothes. However, Detective McKey did not tell him that he could refuse the request and, as such, he felt obligated.

In denying the motion to suppress the clothing, the trial court stated in pertinent part:

> The State relies on the consent or the alleged consent given by Mr. Kelly. The question of whether or not a detainee is made aware of his right to refuse is only one thing that a court has to consider in determining whether or not the consent was validly given. And I have considered as both sides have indicated the totality of the circumstances and these are the facts on which I rely from the evidence that was presented today. First, Mr. Kelly apparently is the one who called the police.
>
> Secondly, he [evidently] lived in the house where his parents met [their] death. He was cooperative while the investigation was proceeding. He remained on the scene, though there is no indication that he was required to do so. Both officers testified clearly that he was asked for his clothes, he was asked to participate in the gunpowder residue test based on the factors which I have enumerated. Specifically, the fact that he appeared to be cooperative during the

> course of the investigation at least while they were at the house, [leads] me to believe that Mr. Kelly consented to relinquish his clothing to the law enforcement officers.

When reviewing a trial court's ruling on a motion to suppress based on findings of fact, great weight is placed on the trial court's determination because the court had the opportunity to observe the witnesses and weigh the relative credibility of their testimony. Appellate courts will not set a credibility determination aside unless it is clearly contrary to the record evidence. **State v. Peterson**, 2003-1806, p. 9 (La. App. 1 Cir. 12/31/03), 868 So.2d 786, 792, writ denied, 2004-0317 (La. 9/3/04), 882 So.2d 606.

We find that the trial court's conclusions are supported by the record. Despite the defendant's contention, there is nothing in the record to suggest the defendant was coerced or compelled to give his clothing to the police. The testimony of the officers at the motion to suppress hearing indicates the defendant voluntarily consented to giving his clothing to the police following a request by Detective McKey for the clothing. As pointed out by Deputy Stewart at the motion to suppress hearing, "We asked a question and he complied."

Further, as noted by the trial court in its ruling, the defendant's testimony that he felt obligated to give his clothes to the police because they did not inform him that he could refuse such a request did not invalidate his consent. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. **Schneckloth v. Bustamonte**, 412 U.S. at 248-49, 93 S.Ct. at 2059. The seizure of the defendant's clothes, predicated on the defendant's consent, offends neither the Fourth Amendment of the United States Constitution nor LSA-Const. art. I, § 5.

We find no abuse of discretion in the trial court's denial of this motion to

suppress. This assignment of error is without merit.

**ASSIGNMENT OF ERROR NUMBER 2**

In his second assignment of error, the defendant argues the trial court erred in denying his cause challenges of prospective jurors Walter Imahara and Pleasant Reid. Specifically, the defendant contends that their responses, as a whole, indicated that they could not be fair and impartial.

Defense counsel challenged for cause Imahara and Reid, but the trial court denied the challenges. The defendant objected to the trial court's rulings. Imahara and Reid were peremptorily struck and, therefore, neither served on the jury.

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination and to the exercise of peremptory challenges. LSA-Const. art. I, § 17(A). The purpose of voir dire examination is to determine prospective jurors' qualifications by testing their competency and impartiality and discovering bases for the intelligent exercise of cause and peremptory challenges. **State v. Burton**, 464 So.2d 421, 425 (La. App. 1 Cir.), writ denied, 468 So.2d 570 (La. 1985). A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to law may be reasonably implied. A trial court is accorded great discretion in determining whether to seat or reject a juror for cause, and such rulings will not be disturbed unless a review of the voir dire as a whole indicates an abuse of that discretion. **State v. Martin**, 558 So.2d 654, 658 (La. App. 1 Cir.), writ denied, 564 So.2d 318 (La. 1990).

A defendant must object at the time of the ruling on the refusal to sustain a challenge for cause of a prospective juror. LSA-C.Cr.P. art. 800(A). Prejudice is presumed when a challenge for cause is erroneously denied by a trial court and the defendant has exhausted his peremptory challenges. To prove there has been

reversible error warranting reversal of the conviction, defendant need only show: (1) the erroneous denial of a challenge for cause; and (2) the use of all his peremptory challenges. See **State v. Juniors**, 2003-2425, pp. 7-8 (La. 6/29/05), 915 So.2d 291, 304-5, cert. denied, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006). It is undisputed that defense counsel exhausted all of his peremptory challenges before the selection of the twelfth juror. Therefore, we need only determine the issue of whether the trial court erred in denying the defendant's cause challenges of Imahara and Reid.

Louisiana Code of Criminal Procedure article 797, states in pertinent part:

> The state or the defendant may challenge a juror for cause on the ground that:
>
> * * *
>
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;
>
> * * *
>
> (4) The juror will not accept the law as given to him by the court; . . . .

During voir dire, the prosecutor asked Imahara if he could be fair and impartial. Imahara responded, "Yes." Later during voir dire, defense counsel questioned Imahara. Following is the relevant portion of the colloquy between defense counsel and Imahara:

> Mr. Calhoun [defense counsel]: You have no children?
>
> Mr. Imahara: No children.
>
> Mr. Calhoun: Did you have any brothers or sisters?
>
> Mr. Imahara: Yes.
>
> Mr. Calhoun: Did your wife [have] any brothers or sisters?
>
> Mr. Imahara: Yes.
>
> Mr. Calhoun: Did you know anybody growing up that didn't have brothers and sisters?

Mr. Imahara: Not really. It seems most everybody's got brothers and sisters.

Mr. Calhoun: Right, except for only children . . . . You know of any families that ever had only children? Only one child, one-child families?

Mr. Imahara: No.

Mr. Calhoun: It's unusual. Do you know of families that have had their children live at home after high school?

Mr. Imahara: Not in my family.

Mr. Calhoun: Not in your family. But you know, have known of other families?

Mr. Imahara: Yes. Caucasian.

Mr. Calhoun: Caucasian families?

Mr. Imahara: Yes.

Mr. Calhoun: Not in your culture?

Mr. Imahara: No. Never.

Mr. Calhoun: Never. Is that correct?

Mr. Imahara: Yes. They have to get educated.

Mr. Calhoun: They have to get educated and go to school or go to work but not stay at home?

Mr. Imahara: Yes.

Mr. Calhoun: Never, right?

Mr. Imahara: Yes.

Mr. Calhoun: Right? Is that what you said?

Mr. Imahara: Yes. In my culture.

Mr. Calhoun: In your culture. And so what is your attitude about, about that. Like in Caucasian families if -- you see more of that in Caucasian families, right, if children are staying at home?

Mr. Imahara: Yes.

Mr. Calhoun: And not working, right?

Mr. Imahara: Yes.

Mr. Calhoun: Becoming a financial burden to their mothers and fathers, right?

Mr. Imahara: Yes.

Mr. Calhoun: Becomes an issue, right, in the family system?

Mr. Imahara: It does.

Mr. Calhoun: And difficulties arise? You've seen it with your own eyes, right?

Mr. Imahara: Yes.

Mr. Calhoun: Do you know anybody who killed their parents because of that?

Mr. Imahara: No.

Defense counsel challenged Imahara for cause based on cultural bias. The following colloquy between defense counsel and the trial court then took place:

The Court: . . . Any other challenges for cause by the defense?

Mr. Calhoun: Mr. Imahara . . . . [H]e's got a cultural bias - -

The Court: Against Caucasians. The challenge for cause is denied. He said, in his culture that's what he did. He noted in other cultures it was different. He made no indication that would make any difference as to whether he was able to be fair and impartial as a juror.

Mr. Calhoun: My objection on the record is because his cultural bias - - he expressed in his own culture that is a negative thing.

The Court: He didn't say it was a negative thing.

Mr. Calhoun: He said nobody in his culture does it.

The Court: That's right. But he didn't say it was a negative thing.

During the voir dire of Reid, defense counsel asked him if he would expect a defendant charged with killing his parents to take the stand. Reid responded, "Yes." Defense counsel asked another prospective juror the same question and then added, "Mr. Reid has indicated that he believes it's significant enough to shift that burden a little bit to the defendant to --." The trial court responded, "Wait a

minute, I don't think that accurately portrays Mr. Reid's response, Mr. Calhoun. He didn't say anything about shifting any burden that I recall. He said he would expect the defendant to testify."

Following this exchange, defense counsel again questioned Reid:

> Mr. Calhoun: You heard Judge Carmichael in the beginning of this case. He said that if anybody could presume the defendant innocent and put the burden on the State to prove guilt beyond a reasonable doubt and not expect or hold the defendant to any requirement to take the stand and explain his side of the story.
>
> Mr. Reid: No. You asked me would I expect him to. Yes, sir, I would. Would I, do I have any problem with him not? No, I do not. I do not have any at all. Quite frankly, sir, if someone is capable of killing their parents, they're capable of lying on the stand. I don't see where it would be necessary for him to take the stand. I don't see where -- but I would expect him to.
>
> Mr. Calhoun: And you would in your mind hold [it] against him if he didn't?
>
> Mr. Reid: No, sir, I would not. In the case we're just looking at the facts, nothing but the facts. The facts are the only thing that's important and not what anyone says. It's only the facts that are important in this case.
>
> Mr. Calhoun: And these facts are such that you have doubts about it, could you return a verdict of not guilty?
>
> Mr. Reid: Yes, sir.
>
> Mr. Calhoun: Even if the defendant did not take the stand?
>
> Mr. Reid: Yes, sir.
>
> Mr. Calhoun: But you would expect him to?
>
> Mr. Reid: Yes, sir. I would expect anyone to.
>
> * * *
>
> Mr. Calhoun: So how . . . do you put [the] burden on the defense?
>
> Mr. Reid: There's no burden on the defense.
>
> Mr. Calhoun: If you expect the defendant to take the stand in any case, aren't you putting somewhat of the burden of proof on the defendant?
>
> Mr. Reid: No, sir.

* * *

Mr. Calhoun: And that's an expectation if they don't follow through on and take the stand it would be something you would consider?

Mr. Reid: Consider it.

Mr. Calhoun: Negatively, intensely?

Mr. Reid: No. They don't have to take the stand.

* * *

Mr. Calhoun: Well, I mean if, if you were on trial would you expect the law that requires the jury that's sitting in judgment of you to be followed by each juror sitting in judgment of you? Would you expect every juror to be able to give you the benefit of every doubt and not to expect you to take the stand and not hold it against you?

Mr. Reid: Sir, I've expressed my opinion as far as I possibly can but if you have a problem with me just stop it and move on. Where are you trying to go with this line of questioning? What is the purpose of it[?]

* * *

Mr. Calhoun: . . . Mr. Reid, I'm trying to understand how you can expect someone to do something in a criminal case and when they don't do it you won't hold it against them or think about it later in the jury deliberations. I'm trying to understand that. I'm trying to get that clear in my mind how you could do that?

Mr. Reid: All right. Then we'll go with this, sir. From the point of my first entrance in this building it's been obvious to me this man's not going to take the stand. So there's no reason to go any further than [sic] in our discussion. It's only going to stand on the merits of the evidence presented against him. He is obviously not going to take the stand. So taking the stand should not have any bearing on this case whatsoever because obviously he's not going to take the stand. So where are we going with this?

Defense counsel challenged Reid for cause because Reid was antagonistic toward him and, contrary to the trial court's instructions, Reid expected the defendant to take the stand. In denying the cause challenge, the trial court stated:

For the record, Mr. Reid expressed and conveyed to you that he found a distinction between . . . his expectation and his duty as a juror. I find that to be an acceptable distinction. We all from earliest time are told that we should hear both sides of the story so we expect to do so. The question for Mr. Reid is whether or not, considering his expectation, he would hold it against the defendant if the defendant decided not to

> testify. He -- and I don't think he was antagonistic to you, I think he was annoyed with your persistent questioning of the same thing and therefore your challenge is denied and your exception is noted.

A prospective juror's seemingly prejudicial response is not grounds for an automatic challenge for cause, and a trial judge's refusal to excuse him on the grounds of impartiality is not an abuse of discretion, if after further questioning, the potential juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence. See **State v. Lee**, 559 So.2d 1310, 1318 (La. 1990), cert. denied, 499 U.S. 954, 111 S.Ct. 1431, 113 L.Ed.2d 482 (1991). See also **State v. Kang**, 2002-2812, pp. 8-9 (La. 10/21/03), 859 So.2d 649, 655; **State v. Copeland**, 530 So.2d 526, 534 (La. 1988), cert. denied, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989).

The line-drawing in many cases is difficult. Accordingly, the trial judge must determine the challenge on the basis of the entire voir dire, and on the judge's personal observations of the potential jurors during the questioning. Moreover, the reviewing court should accord great deference to the trial judge's determination and should not attempt to reconstruct the voir dire by a microscopic dissection of the transcript in search of magic words or phrases that automatically signify the jurors' qualification or disqualification. See **State v. Miller**, 99-0192, p. 14 (La. 9/6/00), 776 So.2d 396, 405-06, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).

We find nothing in the overall responses of either Imahara or Reid that suggest they would have been unable to render impartial verdicts according to the law and the evidence. Imahara's responses, as noted by the trial court, did not indicate that adult children living at home in his culture was a negative situation. Imahara was simply pointing out that, in his culture, such a scenario is very atypical, and is more common in Caucasian culture. Reid repeatedly insisted that he would base his verdict on the facts and the evidence, and that he would not hold

against the defendant his decision to not take the stand. Reid made clear he could separate his personal expectations from what the law required of him as a juror. The trial court was in the best position to determine whether Imahara and Reid could discharge their duties as fair and impartial jurors, and based upon our review of the voir dire in its entirety, we find no abuse of discretion by the trial court in denying defense counsel's cause challenges of Imahara and Reid.

In his brief, the defendant suggests that the trial court granted his defense counsel's cause challenge of potential juror Jason Swan for the same reason proposed for the cause challenge of potential juror Pleasant Reid, namely that the potential juror expected the defendant to take the stand. Thus the defendant argues that because the challenge of Swan was granted, the challenge as to Reid should also have been granted.

However the responses of Swan and Reid to voir dire questions were distinguishable. Whereas Reid explained, somewhat in depth, that he would consider only the evidence and that he would not hold it against the defendant if he did not take the stand, Swan simply stated that he expected the defendant to take the stand and that, if the defendant did not take the stand, Swan would wonder why he did not. Following is the colloquy between defense counsel and Swan:

> Mr. Calhoun: Mr. Swan, what about you, do you expect [the] defendant to take the stand and explain to you personally and here today or whenever he would take the stand, that what he did in the case in which he is charged with killing his mother and father?
>
> Mr. Swan: Yes, sir.
>
> Mr. Calhoun: You would expect him to take the stand and tell you about that, wouldn't you?
>
> Mr. Swan: Yes, sir.
>
> Mr. Calhoun: I mean . . . the Judge explained in the beginning that a defendant does not have to take the stand no matter what the charge. . . . You think he would have to take the stand -- I mean, you would prefer him to take the stand?

Mr. Swan: Yes, sir.

Mr. Calhoun: And if he didn't take the stand you would wonder about that?

Mr. Swan: Yes, sir.

Mr. Calhoun: And you would wonder why he didn't take the stand?

Mr. Swan: Everyone has to have, has to voice their side of the story.

Mr. Calhoun: Everyone has to voice their side --

Mr. Swan: I mean, everyone should be, should have the right to voice their side.

Mr. Calhoun: And you expect it?

Mr. Swan: Yes, sir.

Swan's responses offered minimal explanation or qualification, unlike Reid's full, protracted responses. More importantly, whereas Reid's responses, based on extensive questioning by defense counsel, indicated he could be fair and impartial, Swan's limited responses, based on limited questioning by defense counsel, suggested he could not be fair and impartial because he expected the defendant to take the stand and tell his side of the story.

This assignment of error is without merit.

## ASSIGNMENT OF ERROR NUMBER 3

In his third assignment of error, the defendant argues that the evidence was insufficient to support the manslaughter convictions. Specifically, the defendant contends that the State did not prove that he was the person who killed his parents.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789,

61 L.Ed.2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson v. Virginia** 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, LSA-R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, pp. 4-5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statute 14:30.1 provides in pertinent part:

> A. Second degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm; . . . .

Specific 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. LSA-R.S. 14:10(1). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503, p. 13 (La. 11/25/96), 684 So.2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982).

The defendant was charged with two counts of second degree murder, but was convicted of two counts of manslaughter, a violation of LSA-R.S. 14:31, which provides, in pertinent part:

> A. Manslaughter is:
>
> (1) 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 defendant does not argue that the facts of this case are inappropriate for a manslaughter conviction. Instead, he contends that the evidence is insufficient to prove that he killed the victims. We note the instant verdicts of manslaughter apparently represent "compromise" verdicts. Arguably, the crimes of manslaughter were not proven because there was no evidence of "heat of blood" or "sudden passion," the mitigating factors which reduce a charge of murder to manslaughter. See **State v. Jones**, 593 So.2d 1301, 1312 (La. App. 1 Cir. 1991), writ denied, 620 So.2d 868 (La. 1993).

The defendant did not object to the unanimous verdicts of manslaughter. Absent a contemporaneous objection, a defendant cannot complain if the jury returns a legislatively-approved responsive verdict (such as manslaughter in this case), even where there is not sufficient evidence to support such a verdict, provided that the evidence is sufficient to support the charged offense. **Jones**, 593 So.2d at 1312-3. See also **State v. Schrader**, 518 So.2d 1024, 1034 (La. 1988). In the instant matter, it is clear the close-range multiple gunshot wounds to Mr. Kelly's arm and neck, and the multiple gunshot wounds to Mrs. Kelly's head and face, were inflicted with a specific intent to kill. See LSA-R.S. 14:10(1) and 14:30.1(A)(1); **State v. Wallace**, 612 So.2d 183, 190 (La. App. 1 Cir. 1992), writ denied, 614 So.2d 1253 (La. 1993). Accordingly, the evidence was sufficient to support a conviction of the charged offenses of second degree murder. See **Jones**, 593 So.2d at 1313.

The issue before us is whether the evidence was sufficient to prove the defendant's identity as the perpetrator of the killings. See **Jones**, 593 So.2d at 1313. The jury was presented with two theories of the homicides: the State's theory that the defendant intentionally shot the victims and the defense theory that an unidentified assailant inflicted the fatal wounds. The jurors obviously

concluded that the defense version of the events immediately preceding the fatal shots was a fabrication designed to deflect blame from the defendant. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. See **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

The jury's verdict reflected a reasonable construction of the events of the evening based upon the evidence viewed in the light most favorable to the prosecution. The State presented evidence of discord between the defendant and his parents. Testimony established that the once good relationship between the defendant and his mother had lately deteriorated to the point that Carolyn had told a friend that she would not recognize the defendant anymore because of the way he was now conducting himself. Carolyn also told her sister-in-law, Veronica Mills, that the defendant was demanding money from her and "changing on her." On the night of the murders, the defendant was seen at Wal-Mart in what appeared to be an argument with his father. The Kellys were in a great deal of debt, yet they continued to support the defendant, who was unemployed and living with them. The Kellys were also taking care of the defendant's son, Tyree. Despite the Kellys taking the defendant into their home and caring for him, the defendant had been spending his mother's money and using her credit cards. The evidence also established that Carolyn had a $100,000 life insurance policy designating the defendant as the primary beneficiary.

Some witnesses testified that, shortly following the killings, the defendant was calm and unemotional. According to Detective McKey, the defendant offered him an unsolicited alibi.

There was conflicting evidence as to which victim was shot first. The State's

expert suggested that Carolyn was killed first because the blood near her was dried, while the defense expert suggested that Wilfred was killed first, and that his body was dragged from the doorway into the kitchen. It was not clear from the testimony at trial why a particular order of death would have eliminated the defendant as a suspect.

There was also a dispute between experts as to how and when the gun was reloaded. The experts did agree, however, that at some point the gun was reloaded. As such, empty bullet casings would have to have been removed from the gun and placed somewhere. The State's theory is that the defendant placed the casings in his pants pocket. The evidence established that particles consistent with flattened ball smokeless gunpowder, a type of gunpowder found in center-fire cartridges, were found in the front left pocket of the defendant's jeans, and very small pieces of what appeared to be glass were found in the front right pocket of the defendant's jeans.

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 evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83.

Based on the foregoing and after a thorough review of the record, we find that the evidence supports the unanimous guilty verdicts. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of

fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant killed Wilfred and Carolyn Kelly. See **Moten**, 510 So.2d at 61-2.

This assignment of error is without merit.

**CONVICTIONS AND SENTENCES AFFIRMED.**