Judgment rendered April 3, 2019.
Application for rehearing may be filed
within the delay allowed by Art. 992,
La. C. Cr. P.

* * * * * *

ON REMAND

* * * * * *

No. 51,977-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA Appellee

versus

DUMAURIEA LEON MCGEE Appellant

* * * * *

On Remand from the
Louisiana Supreme Court

Originally Appealed from the
Third Judicial District Court for the
Parish of Lincoln, Louisiana
Trial Court No. 65002

Honorable Cynthia T. Woodard, Judge

* * * * *

LOUISIANA APPELLATE PROJECT Counsel for Appellant
By: Edward Kelly Bauman

JEFFREY M. LANDRY Counsel for Appellee
Attorney General

BROOKE A. HARRIS
Assistant Attorney General

* * * * *

Before WILLIAMS, STEPHENS, and BLEICH (*Pro Tempore*), JJ.

STEPHENS, J.

This criminal appeal arises from the Third Judicial District Court, Parish of Lincoln, State of Louisiana. The defendant, Dumauriea Leon McGee, was charged by grand jury indictment with second degree murder, in violation of La. R.S. 14:30.1. After a jury trial, McGee was found guilty as charged and sentenced to life imprisonment without the benefit of probation, parole, or suspension of sentence. No motion to reconsider sentence was filed. Initially, on appeal McGee argued he received ineffective assistance of counsel at trial (among other assignments of error). This court ordered the matter remanded to the trial court with instructions for an evidentiary hearing on the issue of ineffective assistance of counsel. *State v. McGee*, 51,977 (La. App. 2d Cir. 5/23/18), 247 So. 3d 1142 ("*McGee I*"). However, that decision was reversed and remanded by the Louisiana Supreme Court. *State v. McGee*, 2018-1052 (La. 2/25/19), --- So. 3d. ---, 2019 WL 911299 ("*McGee II*"). For the following reasons, we affirm McGee's conviction and sentence.

FACTS

DeAnthony Mardis was shot and killed on May 30, 2013, in Ruston, Louisiana, while trying to purchase marijuana from McGee, who immediately fled the scene. McGee was arrested in Tallahassee, Florida, by officers with the Tallahassee Police Department and was interviewed by Detective Craig Isom on June 3, 2013. United States Marshals transported McGee to Louisiana, where he was taken into custody by the Ruston Police Department on June 13, 2013. McGee was charged by grand jury indictment with the second degree murder of Mardis, and at arraignment, McGee pled not guilty. McGee's trial commenced on January 9, 2017, at

which he was represented by a court-appointed attorney. The jury was presented with the following testimony and evidence.

Officer Lloyd Anthony Pollard, who was employed by the Ruston Police Department on May 30, 2013, testified that he was dispatched to a house at 1307 Benton Street in Ruston shortly after 9:00 p.m. in response to a shooting. Upon arriving, Ofc. Pollard observed Mardis lying partially underneath a blue truck parked in the front yard of the residence. Emergency medical services ("EMS") and other officers were already at the scene and informed Ofc. Pollard that Mardis was still alive but had a weak pulse. In an effort to preserve the scene, Ofc. Pollard took photographs prior to EMS taking Mardis to the hospital. He also testified that he believed Mardis crawled under the vehicle in an attempt to hide from his shooter. Mardis was transported to a hospital, where he later died.

Officer Gerald Jenkins of the Ruston Police Department was also dispatched to 1307 Benton Street and sketched the scene, documenting where the following evidence was recovered: a cigarette lighter, a cigarette butt, a digital scale, $11.00 in cash, three .38 caliber cartridges, a shoe impression, a machete, two Corona beer cartons (one of which contained marijuana), and two spent .38 caliber shell casings.

Officer Jenkins specifically noted that the digital scale was discovered in the ditch by Benton Street. The three live .38 caliber bullets were located near the truck, two on the opposite side of the truck from where Mardis's body was found and one near the rear of the truck. The two spent shell casings were located in the paved parking lot of the Royal Crest Apartment complex where McGee lived, which is next to the house at 1307 Benton Street. While examining the scene, Ofc. Jenkins noted that although there

was a large bloodstain near the truck, it was unclear where Mardis began bleeding. Further, there were several shoe prints discovered on the truck's driver's side but none indicated there was a struggle. A machete was discovered in the bushes, but Ofc. Jenkins stated his opinion that it did not appear connected to the crime. The machete was not fingerprinted, and defense counsel did not request it be fingerprinted. A map of the crime scene entered into evidence at the trial indicates the machete was located separately from the marijuana found at the scene.

Patina Goldsmith testified that she was visiting her sister at 1307 Benton Street on the night of the shooting. Goldsmith heard gunshots around 9:00 p.m., went outside with her sister's boyfriend, Roderick Doss, and discovered Mardis lying underneath her sister's truck. Doss also testified and corroborated Goldsmith's version of events, adding that after the shooting, Doss looked out the window before going outside and observed McGee, whom Doss knew as "Cali," running toward the apartment complex. Doss did not see anything in McGee's hands. Doss identified McGee in open court as the man he saw running on the night of the shooting.

Robert Womack testified he discovered bullets and a rusty black gun several months after the shooting while visiting a friend who lives at 1305 Benton Street. The gun was in some underbrush. Womack contacted the police, and Officer Harriet Sykes collected the gun, which was loaded. She brought the gun to the Ruston Police Department. Both Womack and Ofc. Sykes identified the gun in open court.

Mary Catherine Zoll, a chemist with the North Louisiana Crime Lab ("NLCL"), was accepted as an expert in forensic chemistry and testified that

she performed a chemical analysis on the suspected marijuana (State's Exhibit Nos. 9 and 10) collected from the scene. Zoll confirmed at trial that the substance recovered was marijuana. Other testimony established that it is common for drug dealers to hide their merchandise, in packages similar to the Corona six-pack carton containing marijuana recovered from the crime scene.

Dr. Frank Peretti, an accepted expert in medicine with a specialty in forensic pathology, performed the autopsy on Mardis and testified that he was killed by two gunshot wounds, one in his upper left chest and the other in his mid-back. The first wound was a "through and through" and no bullet was recovered; however, Dr. Peretti was able to retrieve a bullet from the second wound. Both wounds appeared to be "distant gunshot wounds," which are injuries inflicted when the gun is two or more feet away from the target when fired. Mardis also had two abrasions on his upper left back and sand on his face and back. Mardis had marijuana, hydrocodone, and THC (tetrahydrocannabinol) in his system at the time of his death.

Troy Kendall Stracener, another analyst with the NLCL and accepted expert in forensic firearm identification, testified that the .38 caliber revolver found by Womack had its serial number filed off, and Stracener used chemicals to recover the number. Due to the rust inside the barrel of the revolver, which altered the unique grooves therein, Stracener was not able to determine whether the bullet recovered from Mardis's body was fired from that particular revolver; however, Stracener noted that the bullet possessed the same class of characteristics as the referenced bullets fired during analysis. The two spent shell casings recovered from the scene were fired from the revolver. Finally, the bullets and shell casings recovered from the

scene, including the one removed from Mardis's body, were all the same caliber, brand, size, and shape.

Nicholas Moore was a witness at the scene, and he testified to meeting with Mardis, Lamarro Moore, and Patrick Pringle at Lamarro's house on the night of the shooting at approximately 9:00 p.m. Pringle drove the four men to Benton Street and parked near the bushes located between the Royal Crest Apartments and the house at 1307 Benton Street. Mardis exited the vehicle. Nicholas saw Mardis meet with a person wearing a hood, whom Nicholas did not recognize. Mardis eventually returned to the vehicle, and Pringle drove them back to Lamarro's house. Nicholas did not exit the vehicle and could not recall whether anyone else did; however, Pringle drove the men back to Benton Street, where Mardis got out of the vehicle and met with the person a second time. Nicholas, Lamarro, and Pringle remained in the vehicle, while Mardis spoke with the person. Nicholas noted that Mardis and the person were out of his line of vision, but he suddenly heard what sounded like a fight. Mardis and the person appeared in the yard of 1307 Benton Street, where Nicholas saw the two men "swinging" at each other. Nicholas heard a gunshot. Mardis fell, and Nicholas heard a second gunshot—the shots were "seconds" apart—a very short time, Nicholas described. Nicholas fled the scene on foot and hid behind nearby houses.

Ultimately, Nicholas gave a statement to Ofc. Jenkins on June 3, 2013. Following the shooting but prior to giving his statement, Nicholas saw a television news report on the shooting, which identified McGee as a suspect. While giving his statement, Nicholas told Ofc. Jenkins that the man he saw in the news report, McGee, looked like the man who shot Mardis.

Nicholas also stated that Mardis was unarmed when he exited Pringle's vehicle and did not have anything in his hands when he was shot.

Lamarro Moore was also in the vehicle when the crime occurred and testified that on the night of the shooting, Pringle picked him up prior to 9:00 p.m. The pair drove to Mardis's house and collected Mardis. While driving back to Lamarro's house, Mardis stated that he wanted to buy some marijuana. Lamarro suggested a dealer, later identified as McGee, he had met through a friend and seen a few days before at an EZ Mart, where Lamarro got his cell phone number. Lamarro texted McGee, who instructed Lamarro, Pringle, and Mardis to meet him at Benton Street, behind the Royal Crest Apartments. Prior to meeting McGee, Nicholas joined them and the four drove to Benton Street. Arriving at the meeting place, Lamarro heard McGee and Mardis state that they did not have a scale to weigh the marijuana. Mardis got back into Pringle's vehicle, and he, Pringle, Lamarro, and Nicholas returned to Lamarro's house to get a scale.

Lamarro recounted that upon returning to Benton Street, Mardis got out of Pringle's vehicle while the others remained in the vehicle. Lamarro was seated in the front passenger's seat, the side closest to where Mardis and McGee were conducting their deal, when the shooting occurred—he had an unobstructed view. However, Lamarro also testified that he fell asleep for a few seconds, "because he was full of pills." He woke to the sound of an argument, and Lamarro heard Mardis ask, "[W]here the marijuana at?" Lamarro was about to get out of the vehicle to break up the fight when he claimed McGee shot Mardis. Like Nicholas, Lamarro stated that Mardis was unarmed when he left the vehicle and when he was shot. After Mardis was shot, Lamarro described how the victim attempted to crawl underneath

the truck parked in the front yard of 1307 Benton Street, but McGee shot him a second time. Pringle called the police, and Lamarro exited the vehicle and fled the scene on foot. While fleeing, Lamarro saw McGee run toward the EZ Mart. Lamarro called the police and informed Ofc. Jennifer Windsor with the Ruston Police Department where McGee had fled. Lamarro later identified McGee as the shooter in the police station with a photographic lineup and again at trial.

Captain Eric Hanna of the Ruston Police Department led the investigation into Mardis's death and testified that he developed McGee as a suspect after Lamarro identified McGee as the shooter in a photographic lineup. Captain Hanna obtained an arrest warrant for McGee, but McGee fled Lincoln Parish before the warrant could be executed. He noted McGee was eventually apprehended in Florida on June 3, 2013, by the Tallahassee Police Department and transported back to Louisiana by United States Marshals. According to Cpt. Hanna, McGee was booked at the Lincoln Parish Detention Center on June 13, 2013, where he was fingerprinted. Captain Hanna executed a search warrant on McGee's apartment at the Royal Crest Apartments on June 11, 2013, which produced a digital scale used for weighing drugs and an empty Corona carton in the refrigerator. Captain Hanna also stated that he discovered a usable fingerprint on one of the beer bottles recovered from the crime scene, which was later identified by Lieutenant Owen McDonnell, an expert in latent fingerprint identification, as being McGee's fingerprint.

Following Lt. McDonnell's testimony, the state rested. McGee rested without calling any witnesses or admitting any evidence. After deliberation, the jury returned a verdict of guilty as charged for second degree murder, a

violation of La. R.S. 14:30.1. McGee filed a motion for a new trial and for a post-verdict judgment of acquittal, both of which were denied. A presentence investigation report was ordered, and on March 9, 2017, McGee was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. No motion to reconsider sentence was filed.

This appeal ensued, in which McGee argued he received ineffective assistance of counsel at trial (among other assignments of error). This court ordered the matter remanded to the trial court with instructions for an evidentiary hearing on the issue of ineffective assistance of counsel. *McGee I, supra*. However, that disposition was reversed and remanded by the Louisiana Supreme Court, which noted that the "information contained in the writ application and the opinion below is adequate to support a finding that defendant failed to demonstrate ineffective assistance of counsel or entitlement to a hearing at this stage of the proceedings." *McGee II*, *supra* at 2. The Supreme Court, citing La. C. Cr. P. art. 924 *et seq.*, instructed that McGee could urge his "claim of ineffective counsel in future post-conviction proceedings, subject to all the procedural requirements thereof." *Id.* Thus, we consider the remaining assignments of error originally argued by McGee.

DISCUSSION

Legal Principles: Sufficiency of the Evidence

In his first assignment of error, McGee argues that the evidence introduced at trial was insufficient to find him guilty of second degree murder. Specifically, he argues that the evidence admitted at trial was circumstantial at best and did not exclude the possibility that he acted in self-defense beyond a reasonable doubt. Whereas McGee admits that his self-

defense claim was not fully developed at trial, he argues that the evidence demonstrated that he shot Mardis in self-defense after Mardis threatened him with a machete—a weapon which was never fingerprinted, but was recovered in bushes near the crime scene. Despite testimony from eyewitnesses that Mardis was not armed, McGee argues that when Mardis obtained the scale to weigh the drugs, the evidence did not exclude the possibility that Mardis also collected the machete and was armed with it at the time of the shooting. McGee further asserts that the machete did not belong to him, and he had no need of a machete as he was already armed with a gun. McGee also challenges Nicholas Moore's testimony regarding whether multiple people, rather than only Mardis, left Patrick Pringle's vehicle and accompanied Mardis to purchase the marijuana from McGee.

Alternatively, McGee argues that, at most, he should have been convicted of the lesser offense of manslaughter, claiming that he acted with sudden passion and/or heat of blood. Specifically, McGee argues that he and Mardis, who had several narcotics in his system at the time, tussled, and the fight was the catalyst for the shooting.

The standard of appellate review for a sufficiency of the evidence claim is whether, after 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 proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *State v. Tate*, 2001-1658 (La. 5/20/03), 851 So. 2d 921, *cert. denied*, 541 U.S. 905, 124 S. Ct. 1604, 158 L. Ed. 2d 248 (2004); *State v. Bass*, 51,411 (La. App. 2 Cir. 6/21/17), 223 So. 3d 1242, *writ not cons*., 2018-0296 (La. 4/16/18), 239 So. 3d 830. This standard, now legislatively embodied in La.

C. Cr. P. art. 821, does not provide the appellate court with a vehicle to substitute its own appreciation of the evidence for that of the fact finder. *State v. Pigford*, 2005-0477 (La. 2/22/06), 922 So. 2d 517; *State v. Burch*, 52,247 (La. App. 2 Cir. 11/14/18), 259 So. 3d 1190.

The *Jackson* standard is applicable in cases involving both direct and circumstantial evidence. An appellate court reviewing the sufficiency of evidence in such cases must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of every essential element of the crime. *State v. Sutton*, 436 So. 2d 471 (La. 1983); *State v. Norman*, 51,258 (La. App. 2 Cir. 5/17/17), 222 So. 3d 96, *writ denied*, 2017-1152 (La. 4/20/18), 240 So. 3d 926.

Direct evidence provides proof of the existence of a fact, for example, a witness's testimony that he saw or heard something. *State v. Lilly*, 468 So. 2d 1154 (La. 1985); *State v. Baker*, 49,175 (La. App. 2 Cir. 8/27/14), 148 So. 3d 217. Circumstantial evidence consists of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. *State v. Broome*, 49,004 (La. App. 2 Cir. 4/9/14), 136 So. 3d 979, *writ denied*, 2014-0990 (La. 1/16/15), 157 So. 3d 1127. For a case resting essentially upon circumstantial evidence, that evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438; *State v. Christopher*, 50,943 (La. App. 2 Cir.

11/16/16), 209 So. 3d 255, *writ denied*, 2016-2187 (La. 9/6/17), 224 So. 3d 985.

The appellate court does not assess the credibility of witnesses or reweigh evidence. *State v. Smith*, 1994-3116 (La. 10/16/95), 661 So. 2d 442; *State v. Walker*, 51,217 (La. App. 2 Cir. 5/17/17), 221 So. 3d 951, *writ denied*, 2017-1101 (La. 6/1/18), 243 So. 3d 1064. Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. *State v. Ward*, 50,872 (La. App. 2 Cir. 11/16/16), 209 So. 3d 228, *writ denied*, 2017-0164 (La. 9/22/17), 227 So. 3d 827. In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. *State v. Hust*, 51,015 (La. App. 2 Cir. 1/11/17), 214 So. 3d 174, *writ denied*, 2017-0352 (La. 11/17/17), 229 So. 3d 928. The trier of fact is charged to make a credibility evaluation and may, within the bounds of rationality, accept or reject the testimony of any witness; the reviewing court may impinge on that discretion only to the extent necessary to guarantee the fundamental due process of law. *State v. Sosa*, 2005-0213 (La. 1/19/06), 921 So. 2d 94; *State v. Hust*, *supra*.

A reviewing court accords great deference to a fact finder's decision to accept or reject the testimony of a witness in whole or in part. *State v. Brown*, 51,352 (La. App. 2 Cir. 5/2/17), 223 So. 3d 88, *writ denied*, 2017-1154 (La. 5/11/18), 241 So. 3d 1013.

When a defendant challenges both the sufficiency of the evidence to convict and one or more trial errors, the reviewing court first reviews

sufficiency, as a failure to satisfy the sufficiency standard will moot the trial errors. *State v. Hearold*, 603 So. 2d 731 (La. 1992); *State v. Patterson*, 50,305 (La. App. 2 Cir. 11/18/15), 184 So. 3d 739, *writ denied*, 2015-2333 (La. 3/24/16), 190 So. 3d 1190.

Second degree murder, as defined by La. R.S. 14:30.1, "is the killing of a human being: (1) [w]hen the offender has a specific intent to kill or inflict great bodily harm[.]" La. R.S. 14:20(A) provides for justifiable homicide, and states, in pertinent part:

> "A homicide is justifiable: (1) When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.

When self-defense is raised as an issue by the defendant, the state has the burden of proving, beyond a reasonable doubt, that the homicide was not perpetrated in self-defense. *State v. Allen*, 50,703 (La. App. 2 Cir. 8/10/16), 200 So. 3d 376, *writ denied*, 2016-1734 (La. 9/6/17), 224 So. 3d 981.

A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict. La. R.S. 14:21. Not every act of a defendant will make him or her an aggressor. It is the character of the act coupled with the intent of the defendant that determines whether the defendant is the aggressor. *See, State v. Spivey*, 38,243 (La. App. 2 Cir. 5/12/04), 874 So. 2d 352.

Manslaughter is defined in La. R.S. 14:31(A), which states, in pertinent part:

> (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 had actually cooled, at the time the offense was committed; or
>
> (2) A homicide committed, without any intent to cause death or great bodily harm.

Thus, for murder to be reduced to manslaughter, the following elements must be proved: (1) the homicide was committed "in sudden passion or heat of blood"; (2) that sudden passion or heat of blood was immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection; (3) the defendant's blood did not cool between the provocation and the killing; and (4) an average person's blood would not have cooled between the provocation and the killing. *State v. Efferson*, 52,306 (La. App. 2 Cir. 11/14/18), 259 So. 3d 1153. In a prosecution for murder, a defendant who claims provocation (as a means of reducing murder to manslaughter) bears the burden of proving these elements by a preponderance of the evidence; additionally, provocation and the time for cooling are questions for the jury to determine according to the standard of the average or ordinary person. *State v. Leger*, 2005-0011 (La. 7/10/06), 936 So. 2d 108, *cert. denied*, 549 U.S. 1221, 127 S. Ct. 1279, 167 L. Ed. 2d 100 (2007).

La. C. Cr. P. art. 814 provides that manslaughter is an appropriate responsive verdict to the charge of second degree murder.

Analysis: Sufficiency of the Evidence

Here, there was sufficient direct and circumstantial evidence to support McGee's conviction of second degree murder. As the state argues,

McGee was found guilty as charged, and the evidence presented by the state included forensic evidence clearly linking McGee to the crime scene, as well as eyewitness testimony. We agree.

There is no dispute that McGee shot Mardis, and McGee's trial counsel even argued that fact in his opening and closing statements; however, the defendant maintained at trial that shooting was in self-defense. On appeal, McGee again raises the self-defense claim. But in this case, a review of the record shows that the evidence presented by the state more than sufficiently negated the possibility that McGee acted in self-defense when he shot the unarmed Mardis twice. Notably, the second gunshot in the back was while Mardis apparently attempted to hide under a vehicle—an action reasonably signaling to the jury that Mardis was withdrawing from the supposed conflict.

At trial, both Lamarro and Moore testified that Mardis was not armed when he left the vehicle to meet McGee, and he had nothing in his hands when he was shot by McGee. Lamarro, who had an unobstructed view of the fight and shooting from the front-passenger seat of Pringle's vehicle, clearly identified McGee as the man he contacted on Mardis's behalf for the purchase of drugs and as the man who shot Mardis. Although Lamarro admitted to being on drugs at the time of the shooting, the jury apparently found Lamarro to be a credible witness. Reassessing Lamarro's credibility is not within this court's realm. Further, while a machete was found in the bushes separating the house at 1307 Benton Street and the Royal Crest Apartment complex, Ofc. Jenkins testified that it was not taken into evidence because it did not appear to have any bearing on the case, despite McGee's

reference to "a machete" when he was questioned by Florida law enforcement.

As previously stated, when self-defense is raised as an issue by a defendant, the state bears the burden of proving beyond a reasonable doubt that the homicide was not perpetrated in self-defense. McGee's self-serving assertion in his opening and closing statements, as well as on appeal, that Mardis was armed when McGee shot him is not corroborated by any of the evidence recovered from the scene (except for the consistent self-serving statements by McGee regarding a machete). Significantly, Dr. Peretti, an expert in forensic pathology, testified that Mardis's wounds were inflicted at a distance of more than two feet, and the second wound was located in his mid-back. He further noted that Mardis had sand on his face and abrasions on his back, which are consistent with Lamarro's testimony that Mardis crawled under a truck in an attempt ***to get away*** from McGee. Although eyewitness testimony establishes that Mardis and McGee scuffled prior to the shooting, there is no evidence suggesting that McGee acted reasonably by using lethal force to end the fight. Moreover, by crawling under a vehicle in an attempt to shield himself, Mardis was withdrawing and disengaging from the conflict. Thus, McGee was no longer acting in self-defense when he shot Mardis a second time. The jury reasonably accepted the evidence before it and was not in error in concluding that the state met its burden, proving that beyond a reasonable doubt the homicide was not perpetrated in self-defense.

McGee's alternate argument that he should have been convicted of the lesser offense of manslaughter is also without merit. It is unclear from the record what caused the fight between Mardis and McGee. However, dealing

drugs is a rough business fraught with tension, potentially consisting of lawless individuals with erratic behavior. McGee, the illegal seller of marijuana, should have been cognizant of the possibility of a recalcitrant customer such as Mardis. There is no evidence to show the interaction between the two (*i.e.*, a drug deal) was caused by any provocation sufficient to deprive an average person of his self-control and cool reflection—the standard employed when considering the crime of manslaughter. The jury acted within its discretion by finding McGee guilty as charged rather than guilty of manslaughter. As the jury's decision was reasonably based on a credibility call, it should not be disturbed on appeal. This assignment is without merit.

Legal Principles: Admissibility of McGee's Statements to Police

In his second assignment of error, McGee submits that the trial court erred in not allowing defense counsel to question Cpt. Hanna as to statements made to him by McGee. Specifically, when McGee was arrested by Tallahassee police officers, he allegedly made a statement to Detective Craig Isom that Mardis threatened him with a machete, prompting McGee to shoot Mardis in self-defense. McGee alleged that he made a similar statement to Cpt. Hanna. During trial, defense counsel asked Cpt. Hanna about any statements McGee made concerning the case, and the state objected on the grounds that the statement would be hearsay. The state argued that McGee's statement would only be admissible under La. C.E. art. 801(D)(2)(a) by a party opponent, which is the state, and not the defense. Defense counsel contended that it was admissible under La. C.E. art. 804(A)(1) because McGee was "unavailable" to testify due to his asserted privilege against self-incrimination. The trial court sustained the objection,

finding that McGee's own self-serving exculpatory statements were inadmissible hearsay, citing jurisprudence in support, and McGee objected.

Specifically, on appeal McGee argues that the record is unclear what type of statement defense counsel attempted to elicit from Cpt. Hanna—exculpatory or not. McGee surmises that it related to McGee's assertion to Cpt. Hanna that "they" were trying to rip him off and contends that as the statement was not necessarily offered to prove the truth of the matter asserted, it was not hearsay. Alternatively, McGee argues that should it be determined that the statement constitutes hearsay, his Sixth Amendment right to present a defense under the U.S. Constitution supersedes the state hearsay rules, and omission of his statement violates his constitutional rights. Furthermore, because the statement objected to at trial is similar to the one given to Det. Isom and a machete was found at the scene, the statement meets the standard of reliability and should have been admitted at trial pursuant with *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). We disagree.

Generally, any out-of-court statement of the accused constitutes hearsay unless subject to an exception. *State v. McDonald*, 387 So. 2d 1116 (La. 1980), *cert. denied*, 449 U.S. 957, 101 S. Ct. 366, 66 L. Ed. 2d 222 (1980); *State v. Palmer*, 45,627 (La. App. 2 Cir. 1/26/11), 57 So. 3d 1099, *writ denied*, 2011-0412 (La. 9/2/11), 68 So. 3d 526; *State v. Freeman*, 521 So. 2d 783 (La. App. 2 Cir. 1988), *writ denied*, 538 So. 2d 586 (La. 1989). Under La. C. E. 801(D)(2), such a statement is admissible as an exception to the hearsay rule when it is an admission against interest. Thus, a defendant's self-serving statement asserting self-defense, not an admission against

interest, is hearsay and, accordingly, is inadmissible. *State v. Freeman, supra.*

La. R.S. 15:450 provides that "[e]very confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford." Thus, if the state introduces portions of a defendant's pretrial statement, the defendant is entitled to have the remaining portions admitted so that the jury is not misled as to the statement's true nature. *State v. Manning*, 44,403 (La. App. 2 Cir. 6/24/09), 15 So. 3d 1204, *writ denied*, 2009-1749 (La. 4/5/10), 31 So. 3d 355. Where, on the other hand, the state has not introduced any statement of the defendant, *i.e.*, the state has not sought to use a statement of the defendant against him or her, the defendant may not introduce his or her own self-serving statement in an effort to avoid testifying at trial. *Id.* at 1217.

Louisiana courts have long forbidden defendants from introducing pretrial self-serving statements because they allow defendants to testify without taking the witness stand and without running the risk of impeachment on cross-examination. *State v. McDonald*, *supra*; *State v. Melerine*, 236 La. 930, 109 So. 2d 471 (1959); *State v. Wilson*, 46,340 (La. App. 2 Cir. 5/18/11), 69 So. 3d 598; *State v. Taylor*, 31,227 (La. App. 2 Cir. 10/28/98), 720 So. 2d 447; *State v. Caldwell*, 28,514 (La. App. 2 Cir. 8/21/96), 679 So. 2d 973, *writ denied*, 1996-2314 (La. 2/21/97), 688 So. 2d 521.

Analysis: Admissibility of McGee's Statements to Police

The trial court was not in error in disallowing the admission of McGee's self-serving exculpatory statement made during the investigation of Mardis's murder; those statements were inadmissible hearsay. The facts in *State v. Freeman*, *supra*, are similar to those in this case. There, the defendant had made a statement to investigators regarding the incident and claimed the murder was in self-defense. She attempted to introduce that taped confession/statement at trial, and the trial court refused. On appeal the trial court's ruling was affirmed, determining the statement constituted self-serving hearsay. *Id.* at 786.

Similarly, the defendant in *State v. Caldwell*, *supra*, attempted to introduce self-serving portions of his police statement. While cross-examining the investigating officer, defense counsel attempted to question him about the substance of a statement given by the defendant after his arrest. Defense counsel sought to elicit testimony from the officer about the defendant's assertion that another individual grabbed the gun from his pocket and shot the victim. The state objected and the trial court sustained the state's objection. On appeal, we reaffirmed the long-held principle that defendants cannot offer pretrial statements made to the police in lieu of testifying at trial. *Id.* at 977.

Here, McGee's arguments are inapposite to the fact at hand. The state did not offer into evidence ***any*** statement given by McGee; therefore, McGee is not entitled to offer self-serving portions of his statements to police. As previously stated, La. R.S. 15:450 was enacted to ensure that the state offered a defendant's complete statement to prevent the state from

editing the statement to make it more inculpatory and mislead the jury as to its true meaning.

Further, McGee's defense counsel, not the state, raised the issue of McGee's interview with Cpt. Hanna, directly asking what McGee told Cpt. Hanna about the case. In his appellate brief, McGee initially states it is unclear what testimony defense counsel sought to elicit from Cpt. Hanna; however, McGee later assumes that it was regarding McGee's assertion that Mardis attempted to rob him. Because this account further supports McGee's claim of self-defense by justifying his actions, the statement is exculpatory in nature and inadmissible unless the state had previously introduced portions of the same statement. It appears that McGee wanted to use his self-serving statement in lieu of testifying and avoid being subject to cross-examination. The trial court, therefore, did not err in sustaining the state's objection and preventing defense counsel from questioning Cpt. Hanna about McGee's statements.

Finally, McGee's reliance on *Chambers v. Mississippi*, *supra*, is misplaced, as the facts are easily distinguished from the instant case. In *Chambers*, the defendant sought to admit testimony from another individual who had made admissions of the murder on three separate occasions to three separate people. Chambers, the defendant, was convicted of the murder because he was not allowed to cross-examine that individual (whom he called as a witness when the state failed to do so), since under Mississippi's common-law "voucher" rule, a party may not impeach his own witness, or introduce the testimony of the three friends to whom the person had confessed. The United States Supreme Court held that under the facts and circumstances of that case, the application of the "voucher" rule prevented

the defendant from having a fair trial. *Id.* at 297. Notably, in *Chambers*, the evidence establishing that defendant's innocence was overwhelming and corroborated by independent witnesses. In contrast, McGee sought to introduce self-serving evidence of his statements that was clearly negated by eyewitness testimony and forensic evidence. For the reasons stated, we conclude this assignment is without merit.

CONCLUSION

For the foregoing reasons and pursuant to the Louisiana Supreme Court dictate in *McGee II*, the conviction and sentence of Dumauriea Leon McGee are affirmed.

AFFIRMED.