

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-3619  
Summary Calendar

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PAUL MAYHO,

Petitioner-Appellant,

versus

RICHARD L. STALDER and  
RICHARD P. IEYOUB, Attorney  
General, State of Louisiana,

Respondents-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CA 93-391-H)

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(May 24 1994)

Before POLITZ, Chief Judge, JONES and EMILIO M. GARZA, Circuit  
Judges.

POLITZ, Chief Judge:\*

Convicted by a Louisiana state jury of second degree murder  
and sentenced to life,<sup>1</sup> Paul Mayho exhausted state remedies and  
then filed the instant 28 U.S.C. § 2254 petition challenging the

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\*Local Rule 47.5 provides: "The publication of opinions that  
have no precedential value and merely decide particular cases on  
the basis of well-settled principles of law imposes needless  
expense on the public and burdens on the legal profession."  
Pursuant to that Rule, the Court has determined that this opinion  
should not be published.

<sup>1</sup>The conviction and sentence were affirmed on appeal. **State  
v. Mayho**, 601 So.2d 783 (La.Ct.App.), writ denied, 605 So.2d 1121  
(La. 1992).

sufficiency of the evidence. The district court found the evidence sufficient, dismissed the petition, and granted Mayho a certificate of probable cause for appeal. We find no error and affirm.

Mayho contends that the evidence is insufficient to support his conviction for second degree murder urging that he acted in self defense or, alternatively, that he was so provoked that he was incapable of rational thought and, therefore, the homicide should be reduced to manslaughter.<sup>2</sup>

We review a challenge to the sufficiency of the evidence by asking "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 beyond a reasonable doubt."<sup>3</sup> We overlay this standard to the elements of the offense as defined by state law.<sup>4</sup> In doing so we recognize that it is "the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."<sup>5</sup>

Mayho does not deny that he shot the victim, Marvin Mitchell. Louisiana law defines second degree murder as the killing of a human being "when the offender has a specific intent to kill or

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<sup>2</sup>Mayho lists in his brief, but does not discuss, three other issues. They are deemed abandoned. **Yohey v. Collins**, 985 F.2d 222 (5th Cir. 1993).

<sup>3</sup>**Jackson v. Virginia**, 443 U.S. 307, 319 (1979).

<sup>4</sup>**Foy v. Donnelly**, 959 F.2d 1307 (5th Cir. 1992).

<sup>5</sup>**Jackson v. Virginia**, 443 U.S. at 319.

inflict great bodily harm."<sup>6</sup> When a defendant asserts self defense the State must prove beyond a reasonable doubt that the killing was not justified.<sup>7</sup>

Louisiana law defines manslaughter as a homicide which would be 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."<sup>8</sup> "Sudden passion" and "heat of blood" are not separate elements of the offense but are factors which may mitigate the grade of the offense. The defendant bears the burden of proving, by a preponderance of the evidence, the existence of either factor.<sup>9</sup>

After reviewing the evidence, the state appellate court concluded that a reasonable jury could have found that the victim was not armed and did not threaten Mayho, that Mayho did not act in self defense, and that there was no proof of a mitigating factor warranting a verdict of manslaughter.<sup>10</sup> That determination is entitled to "great weight" in our federal habeas review.<sup>11</sup>

Mayho testified that he shot Mitchell in self defense as an armed Mitchell and three family members ran toward him. Imprecina

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<sup>6</sup>La. R.S. 14:30.1(A)(1).

<sup>7</sup>La. R.S. 14:20(1); **State v. Rosiere**, 488 So.2d 965 (La. 1986).

<sup>8</sup>La. R.S. 14:31.

<sup>9</sup>**State v. Lombard**, 486 So.2d 106 (La. 1986).

<sup>10</sup>**State v. Mayho**, 601 So.2d at 791-92.

<sup>11</sup>**Porretto v. Stalder**, 834 F.2d 461, 467 (5th Cir. 1987).

Wilson, who accompanied Mayho to the victim's house, testified that Mitchell was armed, testimony which was directly contrary to her initial statement to the police that Mitchell was not armed. Several witnesses called by the State testified that Mitchell was unarmed. Further, testimony reflected that the red light projected by the laser on Mayho's pistol, indicating where the pistol is aimed, flashed across the face of the victim's brother, then across an adjacent mailbox, before coming to rest on Mitchell's head just as he was shot. A rational trier-of-fact could have concluded, as did the trial jury, that Mayho was not acting in self defense.

A review of the record also makes it abundantly clear that Mayho's conduct did not warrant a verdict of manslaughter. Uncontradicted testimony established that Mayho calmly awaited Mitchell, using expletives to salt his invitation to Mitchell to "come on . . . that's right . . . come on, get right there . . . that's right . . . come on, just a little closer . . . just a little closer," as he aimed his pistol and shot Mitchell in the head. Two witnesses described Mayho's behavior before, during, and after the shooting as "cool." A rational jury could have concluded, as this trial jury did, that Mayho failed to prove either "sudden passion" or "heat of blood" actions when he shot Mitchell.

AFFIRMED.