

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARBARA EVANS,

Defendant-Appellant.

---

UNPUBLISHED

April 8, 1997

No. 187824

Berrien Circuit Couer

LC No. 94-001406

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of involuntary manslaughter, MCL 750.321; MSA 28.553. She was sentenced to two to fifteen years in prison. Defendant appeals as of right and we affirm.

This case arises out of a domestic dispute between defendant and the decedent, who is the father of defendant's children and a frequent visitor to defendant's apartment where the altercation took place. On the date in question, the decedent arrived at defendant's apartment. Thereafter, defendant and decedent began arguing. The argument continued off and on throughout the evening, progressing into a wrestling match and then into "slap fighting." Several times throughout the evening, defendant retrieved her gun only to put it away again later. The last time defendant retrieved her gun, however, it was fired resulting in the death of decedent.

The sole issue on appeal is whether the prosecution presented sufficient evidence of the second element of this crime, that defendant acted without legal justification or excuse. *In re Gillis*, 203 Mich App 320, 321; 512 NW2d 79 (1994). Defendant argues that she was acting in self-defense when she got her gun because she believed the decedent had returned to her apartment to harm her. In reviewing a sufficiency of the evidence argument, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). However, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Id.*, 514-515.

The test for determining whether defendant acted in lawful self-defense requires: (1) defendant's honest and reasonable belief that she was in danger; (2) the degree of danger was a fear of serious bodily harm or death; and (3) the action taken by defendant appeared at the time to be immediately necessary, i.e., defendant is permitted to use the amount of force necessary to defend herself. See *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990); *People v Amos*, 163 Mich App 50, 56; 414 NW2d 147 (1987); CJI2d 7.15. In this case, a review of the record in the light most favorable to the prosecution indicates that defendant's actions were not justified by self-defense. First, considering all of the circumstances as they appeared to defendant on the evening in question, the jury could have found that defendant's belief that she was in danger was neither honest nor reasonable. For example, the detective in this case testified that defendant never told him that the decedent was trying to get the gun away from her as she later testified at trial. Additionally, defendant's two daughters testified that they did not see the decedent with a weapon while he was in the apartment. Similarly, there was conflicting testimony from the two daughters and defendant about when or how long the decedent was wearing his coat, which allegedly contained a weapon. Finally, defendant stated at trial and to the detective before trial that she herself was unsure on the evening of the conflict whether the decedent had a weapon or whether he was "bluffing" as on previous occasions.

Second, the jury could have found that defendant was not afraid of death or serious injury on the evening in question, but a threat of only minor injury. For example, although defendant alleges that the decedent was a strong man, defendant was bigger than the decedent. More importantly, defendant did not deny stating to the decedent that if he did not leave her apartment, then "we was going to have a memory on our hands." Finally, although defendant testified that the decedent saw her gun, defendant testified that she never saw the decedent armed with a dangerous weapon, but only suspected he had a weapon because he was reaching into his pockets and moving toward his coat.

Third, the jury could have found that defendant's retrieval of her gun on the evening in question was more force than was immediately necessary. The testimony at trial revealed that defendant was capable of protecting herself during much of the two-hour dispute by hitting or pushing the decedent, holding on to the decedent's hair, or putting her fingers in his face. Also, the gun may not have been immediately necessary when defendant retrieved it the final time because their wrestling started and stopped several times. Finally, defendant could have protected herself from the decedent by calling the police, but refused this option because she did not want to see the decedent go to jail for an alleged warrant for unpaid child support.

In short, the jury could have found that defendant's actions were not justified by self-defense because she did not honestly and reasonably believe that her life was in imminent danger or that there was a threat of serious bodily harm. Therefore, viewed in the light most favorable to the prosecutor, there was sufficient evidence for a rational trier of fact to find that the second element of involuntary manslaughter, that defendant acted without legal justification or excuse, was proved beyond a reasonable doubt.

Defendant makes a related argument on appeal that she had the right to stay and protect herself from the decedent because of the general rule that there is no duty to retreat while in one's own home.

See *People v Fisher*, 166 Mich App 699, 710-712; 420 NW2d 858 (1988), rev'd on other grounds 442 Mich 560; 503 NW2d 50 (1993). Although we agree that this rule is applicable to this case, the no-duty-to-retreat rule, as one facet of the plea of self-defense, is premised on necessity. *People v Oster*, 97 Mich App 122, 130-135; 294 NW2d 253 (1980). Thus, the no-duty-to-retreat rule, like the doctrine of self-defense, allows a defendant to use only as much force as the defendant honestly and reasonably believes is necessary in light of the nature of the attack. *Id.* If the jury in this case found that defendant's belief was neither honest nor reasonable for the reasons relating to her self-defense argument above, then it could have considered the trial court's no-duty-to-retreat instruction and still found defendant's argument to be without merit.

Affirmed.

/s/ Joel P. Hoekstra

/s/ William B. Murphy

/s/ Michael R. Smolenski