STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DAVID POREMBA,

Defendant-Appellant.

UNPUBLISHED
November 21, 1997

No. 197911
Wayne Circuit Court
LC No. 95-010950

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to fifteen to thirty years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction, the two sentences to run consecutively. We affirm.

Defendant argues on appeal that the trial court erred in denying his motion for a directed verdict because the evidence presented at trial was insufficient to support his conviction and that a new trial is warranted because the jury's finding that defendant did not shoot Eric, defendant's roommate, in self-defense was against the great weight of the evidence. We disagree. In determining whether the prosecution has introduced sufficient evidence to avoid a directed verdict, this Court must consider all of the evidence presented by the prosecution up to the time the motion is made, view the evidence in the light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

A new trial may be granted if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *People v Herbert,* 444 Mich 466, 477; 511 NW2d 654 (1993). The test is whether the verdict is against the overwhelming weight of the evidence. *People v Timmons*, 300 Mich 653, 659; 2 NW2d 804 (1942). Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. *Herbert, supra* at 475. Although not capable of doing so

when reviewing a motion for a directed verdict, when considering a motion for new trial based on a claim that the verdict is against the great weight of the evidence, the trial court can act as the "thirteenth juror" and evaluate the credibility of the testifying witnesses. *Id.* at 476-477. On appeal, this Court reviews the trial court's grant or denial of the motion for new trial based upon a claim that the verdict is against the great weight of the evidence for an abuse of discretion and gives substantial deference to the trial court's opportunity to hear the witnesses and its unique ability to assess the credibility of the witnesses. *Id.* This Court must analyze the record on appeal in detail. *Arrington v Detroit Osteopathic Hosp (On Remand),* 196 Mich App 544, 560; 493 NW2d 492 (1992).

To establish the crime of second-degree murder, it must be shown that the defendant caused the death of the victim and that the killing was done with malice and without justification. *People v Kemp,* 202 Mich App 318, 323; 508 NW2d 184 (1993). Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be the probable result. *Id.* Malice may be inferred from the facts and circumstances of the killing. *Id.*

The killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm. *People v Heflin,* 434 Mich 482, 502; 456 NW2d 10 (1990). A defendant's honest belief in danger must also be a reasonable belief, *id.* at 502-503, measured by the circumstances as they appeared to the defendant rather than as they actually existed. *People v Green,* 113 Mich App 699, 704; 318 NW2d 547 (1982). A defendant is not entitled to use any more force than is necessary to defend himself. *Kemp, supra* at 323. If a defendant introduces evidence of self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense. *People v Fortson,* 202 Mich App 13, 20; 507 NW2d 763 (1993).

Defendant first argues that the evidence was insufficient to convict him of either the charged offense of second-degree murder or the lesser offense of voluntary manslaughter because he acted in self-defense. We disagree. In the present case there is ample evidence from which the jury could conclude that the prosecution had met its burden of excluding the possibility that defendant acted in self-defense.

Viewing the evidence in the light most favorable to the prosecution, the jury could have reasonably concluded that defendant did not honestly and reasonably believe that his life was in imminent danger or that there was a threat of serious bodily harm. The evidence is conflicting with respect to whether defendant was actually being choked by his roommate at the time he pulled the trigger. Defendant testified that he could not breath and Eric's thumb was pushing on his windpipe at the time he pulled the trigger. However, an investigating officer, who took a statement from defendant, testified that defendant told him that Eric was not choking him. This officer also testified that when defendant assumed the role of Eric to demonstrate Eric's hold on him, defendant's left hand was on the officer's right shoulder and defendant's right hand was near the neck with the thumb down at the officer's collar bone. Moreover, in defendant's own statement, defendant simply stated that Eric came back at him, pinned him against the wall, and out of fear, defendant raised the gun and pulled the trigger.

Defendant made no mention of being choked. Finally, Rick, an eyewitness, testified that Eric had one hand on defendant's shoulder and one hand on defendant's neck. During the prosecution's case in chief, Rick demonstrated the hold, which the prosecutor described for the record as "indicating with your right hand on my right shoulder with the thumb over in the neck tie or throat area."

The evidence is conflicting with respect to whether Eric was actually choking defendant or simply had his hands near or around defendant's neck. Because these facts bear upon whether defendant reasonably and honestly believed that his life was in imminent danger at the time he pulled the trigger, whether defendant was acting in self-defense was properly left to the jury to determine. Assessing the credibility of the testifying witnesses is a matter for the trier of fact. This Court will not resolve it anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Additional facts compel this Court to conclude that there was sufficient evidence to support the jury's finding that defendant was not acting in self-defense. It should be noted that defendant and Eric were of comparable size. Defendant is 5' 11'' and weighed 165 pounds. Eric was 5' 9'' and although he weighed two hundred pounds, the medical examiner described him as having a heavy, as opposed to muscular, build. There is no significant size differential which might suggest a severe intimidation factor in this case. The jury could have reasonably inferred from this evidence that defendant did not have a reasonable belief that his life was in danger.

Evidence of the events that preceded the actual shooting also had bearing upon whether defendant, at the time of the shooting, reasonably believed that his life was in imminent danger. Rick, who was present during the altercation, intervened the first time Eric attempted to physically attack defendant. Rick is 6' 1'' tall and weighed two hundred pounds. There was testimony as to his muscular build. When Eric attacked defendant the second time, Rick was in the process of intervening again, however, defendant fired the shot which eliminated the need to intervene. Considering Rick's prior conduct, the jury could have reasonably found that defendant's belief that his life was in imminent danger was unreasonable.

The fact that Rick had intervened was also relevant to whether the force used by defendant was immediately necessary. To be lawful self-defense, the action taken must appear at the time to be immediately necessary. *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). Rick had protected defendant on one occasion. It would have been reasonable for defendant to believe that Rick would intervene, if necessary, again. The jury could have properly found that defendant used an unreasonable amount of force in light of the existing circumstances.

When reviewing the evidence in the light most favorable to the prosecution, we conclude that sufficient evidence was presented for the jury to find that the prosecution had met its burden of excluding the possibility that defendant had not acted in self-defense. Furthermore, based on the evidence discussed above, defendant cannot sustain his assertion that his conviction is against the great weight of the evidence.

Defendant also raises two evidentiary issues on appeal. Defendant argues that the trial court erred in admitting improper character evidence and excluding the written statement given by a witness to the police. The decision to admit or exclude evidence is within the sound discretion

of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no excuse or justification for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

At the time of trial, several witnesses testified that defendant, on the night in question and as a matter of habit, was drinking vodka straight from the bottle. Testimony was also elicited regarding defendant's repeated attempts to make advances upon his roommates' female friends and the fact that defendant repeatedly watched the martial arts movie, The Crow. With respect to testimony regarding defendant's conduct on the night of the shooting, including testimony regarding the verbal argument over defendant's attempt to make a pass at Cathy the week before which preceded the actual shooting, we find that the trial court did not abuse its discretion in admitting this evidence. It is essential that the prosecution be able to give the jury a complete presentation of the full context in which disputed events occurred. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996).

The trial court may have abused its discretion when it admitted evidence of defendant's propensities other than on the night in question, including his drinking, womanizing, and his obsession with the movie, The Crow. Such evidence was offered solely for the purposes of establishing that defendant was a man of bad character who acted in conformity with that character on the night of the shooting. Where evidence is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith its admission is precluded. MRE 404(b)(1); *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993). While it does appear that the prejudicial value of the character evidence substantially outweighed its probative value, MRE 403, the error, if any, was harmless. There is not a reasonable probability that the error affected the outcome of the trial. *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995); MCL 769.26; MSA 28.1096.

Next, defendant contends that the trial court erred when it charged the jury using the reasonable doubt instruction found in the standard criminal jury instructions, CJI2d 3.2(3). In *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 593 (1996), this Court considered this precise issue and found the reasonable doubt instruction to be satisfactory.

Finally, defendant argues that his sentence of fifteen to thirty years for the second-degree murder conviction, although within the guidelines' recommended range, is disproportionate. We disagree.

Because defendant's sentence falls within the guidelines' recommended range of four to fifteen years, his sentence is presumed to be proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has failed to present unusual circumstances that would overcome the presumption of proportionality. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995). Defendant's age, employment, or claim to a lack of culpability do not constitute "unusual circumstances." *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 292 (1995); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Given this Court's resolution of the above issues, we need not address defendant's final argument regarding reassignment in the event of remand.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer

I concur in the result of the majority opinion, however, I would find no MRE 404(b) violation.

/s/ Peter D. O'Connell