

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN C. MUNDEN,

Defendant-Appellant.

UNPUBLISHED
September 13, 2002

No. 234046
Wayne Circuit Court
LC No. 00-010216-01

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a bench trial, of second-degree murder, MCL 750.317, and felony-firearm, MCL 750.227b. The trial court sentenced defendant to 15 to 60 years' imprisonment for second-degree murder and 2 years' imprisonment for felony-firearm. We affirm.

This case arises out of the shooting of the victim, Spencer Lee. At trial, Lee's girlfriend, Deshawn Reese, testified that defendant went to her house and shot Lee unprovoked. Defendant acknowledged going to Reese's house and shooting at Lee, but claimed Lee threatened him with a gun. Defendant further acknowledged that after the shooting, he left his gun at his friend Donald Walker's house. On searching Walker's house, the police found defendant's gun.

Defendant first argues the trial court improperly refused to allow defense counsel to question Walker regarding whether Reese possessed a gun. According to defendant, evidence of Reese's gun possession was relevant to establish that Lee threatened defendant with a gun and that a gun found at Walker's house could have come from Reese. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Generally, all relevant evidence is admissible. *Starr, supra* at 497. Evidence is relevant if it has any tendency to make the existence of a consequential fact more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998).

The trial court properly required defense counsel lay a foundation before questioning Walker regarding Reese's alleged gun ownership. Defense counsel attempted to elicit the information in an attempt to establish that Lee threatened defendant with a gun. Reese had previously testified that she did not possess a gun and that Lee did not have a gun. Whether Reese had a gun in the house on the night of the incident may have been relevant to defendant's theory of self-defense; however, on the evidence presented at the time of Walker's testimony, there was no basis to conclude Walker had any knowledge that there had been a gun at Reese's house at the time of the incident or that any gun found at Walker's house could have been that same gun.

The trial court gave defense counsel the opportunity to lay a foundation, but defense counsel stated its objection and declined to further question the witness regarding the matter. Had defense counsel attempted to lay a foundation, the evidence may have been admissible. However, counsel waived any further challenge to the trial court's ruling by failing to attempt to lay a foundation for the evidence. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). The trial court did not abuse its discretion by refusing to admit the evidence without defense counsel first laying a foundation for relevancy.

Defendant also argues the prosecution presented insufficient evidence to convict him. This Court reviews a challenge to the sufficiency of the evidence in a bench trial de novo, in the light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). Special deference must be given to the trial court's findings when based on the credibility of witnesses. *Id.* at 267.

The elements of second-degree murder include: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001), quoting *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). Malice includes the intent to kill, the intent to do great bodily harm, or the intent to commit an act in wanton and willful disregard of the likelihood that death or great bodily harm will occur. *Aldrich, supra* at 123. A homicide is justified by self-defense if the defendant honestly and reasonably believed his life was in danger or that there was a threat of serious bodily harm. *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992). Once the defendant produces evidence of self-defense, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

Here, the trial court was faced with a credibility contest between Reese and defendant. Reese testified Lee did not have a gun and that defendant shot Lee unprovoked. Defendant testified Lee threatened him with a gun, and as a result, defendant feared for his safety. The trial court discredited defendant's testimony. It is within the province of the trial court to determine witness credibility. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to disprove the theory of self-defense and find defendant guilty of second-degree murder.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Hilda R. Gage