

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLEINTE J. BUCKNER,

Defendant-Appellant.

UNPUBLISHED

January 21, 2010

No. 281384

Oakland Circuit Court

LC No. 2006-211290-FC

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of voluntary manslaughter, MCL 750.321, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 40 months to 15 years in prison for the manslaughter conviction, and two years in prison for the felony-firearm conviction.¹ There is no dispute that defendant shot the victim to death. Defendant argues that the evidence was insufficient to disprove his claim of self-defense beyond a reasonable doubt. We agree, and we reverse.

In reviewing a sufficiency of the evidence claim, we review the evidence de novo to determine whether, when that evidence is viewed in the light most favorable to the prosecution, a reasonable trier of fact could find the elements of the charged offense proven beyond a reasonable doubt. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). We may not engage in any evaluation of witness credibility, and we must resolve any conflicting evidence in the prosecutor's favor. *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). However,

[t]he fact that some evidence is introduced does not necessarily mean that the evidence is sufficient to raise a jury issue. . . . In quantitative terms, the fact that a

¹ Defendant was originally sentenced on May 2, 2007, but resentenced after remand from this Court. See *People v Buckner*, unpublished order of the Court of Appeals, entered February 4, 2009 (Docket No. 281384). At resentencing, the trial court sentenced defendant to the same terms of imprisonment as at his original sentencing.

piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of that fact beyond a reasonable doubt. [*People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).]

We review any underlying questions of law de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

At common law,² homicide is justifiable if the defendant honestly and reasonably believes under the totality of the circumstances that he or she is in imminent danger of death or great bodily harm, that the use of deadly force is necessary, and, depending on the circumstances, that there is no safe way to retreat (although a sudden attack or impending use of a deadly weapon negates the need even to consider retreat). See *People v Riddle*, 467 Mich 116, 119-120; 649 NW2d 30 (2002). Once some evidence of self-defense is introduced, it is the burden of the prosecutor to *disprove* the elements of self-defense beyond a reasonable doubt. *People v Stallworth*, 364 Mich 528, 535; 111 NW2d 742 (1961); *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). Stated differently, “[w]hen a defendant introduces evidence of self-defense, the prosecution bears the burden of *excluding the possibility* that the defendant acted in self-defense.” *People v Bell*, 155 Mich App 408, 399 NW2d 542 (1986) (emphasis added).

Thus, the prosecution bore the burden to overcome the evidence supporting self-defense and instead to show beyond a reasonable doubt that defendant did not have an honest and reasonable belief that he was in imminent danger of death or great bodily harm and that the use of deadly force was not necessary. See *Riddle*, 467 Mich at 119. Therefore, taking into account our standard of review under the sufficiency of the evidence standard, the question is whether a rational trier of fact could have found *beyond a reasonable doubt* that defendant shot the victim without honestly and reasonably believing that he was in imminent danger of death or serious bodily harm and that the use of deadly force was not necessary.

The major complication in this case is that no witnesses directly viewed the shooting itself, and even defendant testified that it was a “blur.” Nevertheless, there is no serious dispute that defendant introduced enough evidence of self-defense to shift the burden of proof to the prosecutor to disprove it. Furthermore, the jury was properly instructed regarding the elements of self-defense and regarding the prosecutor’s burden of proving that those elements did not exist.

The facts in the record are these.

² The Self-Defense Act, MCL 780.971 *et seq.*, became effective after the shooting in this case, so it does not apply and common-law self defense does instead. See *People v Conyer*, 281 Mich App 526, 531; 762 NW2d 198 (2008).

Defendant was sitting in his van at his mother's residence, talking to one witness. Another witness was sitting in his own van in the same (or a parallel) driveway, and two other witnesses were present. Defendant was carrying a loaded gun in a holster under his shirt, and he was apparently planning to go to a shooting range later that evening. It was established that defendant's gun was properly registered, that defendant was carrying all of the correct and required paperwork for his gun, and that defendant had a valid concealed pistol license.

The victim drove up in his Jeep and spoke to defendant and other witnesses in a friendly manner. At least one of the witnesses was a friend of the victim; others at the scene merely knew the victim. An unidentified black truck approached, and the victim had a conversation with the driver of that truck. After the conversation, the victim suddenly became very angry, as if "he was a totally different person." The victim began arguing with one of the witnesses and making threats to kill everyone present. In fact, when the victim started walking toward his Jeep, one of the witnesses assumed that the victim was going to retrieve a gun.

Several witnesses, including the friend of the victim and defendant, testified that the victim was well-known for having a violent reputation and for always carrying a gun. Some of those witnesses had known the victim for many years, one of whom explained that shooting up someone's house would be "consistent with [the victim's] MO." All of the witnesses who were present and who testified concluded that the victim's threats were genuine and serious. This included the testimony of a neighbor five houses away who heard the shouted threats and told her daughter to call 9-1-1.

Defendant initially did not believe that the victim was entirely serious, but concluded that he was as the victim got angrier. Defendant got out of his van, told someone to call the police, and interceded in the situation with the victim. Defendant told everyone to leave and told the victim to take the matter away from his mother's house. The victim responded by again threatening to "shoot this bitch up," among other things. The victim then grabbed defendant by the shirt collar, at which point defendant's gun, which had been concealed by his shirt, became visible. The victim tried to grab defendant's gun, but when he was unable to take the gun from defendant, the victim, while still holding onto defendant's shirt, got into his Jeep and put it into gear.,

One of the witnesses testified that when the victim tried to grab defendant's gun, he became concerned for his own life and left the scene. The last thing that witness saw as he left was that the victim had managed to get the driver's door of his Jeep open, where that witness believed the victim had his gun. The witness believed that the victim, having accessed his vehicle, was going to carry out his threats, rather than attempt to leave. Specifically, the witness stated, "He didn't say he was fixin' to leave. He said he was going to shoot this mother f---r up." As that witness drove away, he heard six or seven gunshots and assumed that victim had shot defendant. He did not see the shooting.

Another witness testified that after "[the victim] ended up putting the car in drive or whatever, [defendant] somehow got a loose and was trying—he was trying to run out of the way. That's when I heard the truck go vroom and I saw [the victim] reach for something. I didn't stay up to see exactly what it was he was reaching for." She assumed that the victim was probably reaching for a gun because of his reputation and his threats to kill everybody. She testified that she went down on the ground, but she last saw defendant in the path of the oncoming Jeep. And

although the witness testified that she was not sure what the victim was going to do, she did not think he was attempting to leave the scene. She then heard gunshots, and when they stopped, she saw defendant standing “like he was in a daze and disbelief.” The witness then fled the scene.

Another witness, who remained present in his own van, was facing the wrong way to see all of the encounter prior to the shooting. He testified that he would have fled the scene, but his van was blocked from leaving by the victim’s Jeep. But he further testified that he saw that the victim actually had a gun in hand when the victim’s Jeep drove past his van. The witness then lay down until the shooting stopped. He did not see the actual shooting, but he opined that the shooting only lasted a matter of seconds before it was all over.

Defendant testified that he shot at the victim in response to seeing the victim point a gun at him while driving the Jeep toward him. Defendant also testified that, based on his firearms training, he instinctively reloaded his gun after he finished shooting. The victim’s Jeep continued to coast forward until it came to a rest against the side of a house. Police arrived on the scene within minutes, where they found defendant standing alone in his driveway, apparently, according to one officer, in a state of shock. The police initially assumed that he was a witness. But upon questioning, defendant told the police that he had shot the victim. Specifically, when asked what had happened, defendant told the police, “[H]e pointed a gun at me . . . I have a CCW permit and I shot him.” Upon investigation of the victim’s Jeep, police discovered that the victim was dead, with an unregistered, loaded, cocked and chambered gun resting between his legs.

As stated previously, we conclude that there was sufficient evidence of self-defense introduced to shift the burden to the prosecutor to prove beyond a reasonable doubt that defendant did *not* kill the victim in self-defense. Thus, we next consider the evidence tending to disprove the defendant’s self-defense theory.

The prosecution established that defendant’s gun could hold up to ten rounds and that he fired at least eight shots. The neighbor five houses away, who had her daughter call 9-1-1, testified that she heard six gunshots, a pause of “a minute,” and two more gunshots. Three of those shots struck the victim and would each have been independently fatal, although the victim would have remained active for 30 to 45 seconds after receiving them. One of those shots entered the victim’s shoulder area, the other two were on either side of the victim’s chest. The victim also received a graze to the chest and a shot through his right forearm. Three shots went through the windshield, and the driver’s-side windows were destroyed. Several shots came from different angles. The victim’s gun had been fired at least once in its lifetime, but no tests were performed to determine whether the victim fired it during the incident here. Both guns were tested for fingerprints, but no identifiable fingerprints were found on either. The victim’s injuries would have been consistent with either a defensive or offensive posture. The victim’s mother testified that the victim always wore sunglasses and a watch, but neither item was recovered from the victim. The victim had used marijuana recently, and was probably a regular user, but the pathologist explained that marijuana was a sedative rather than a stimulant.

The prosecutor argued that defendant’s self-defense was disproved by the testimony that there was a pause between the first six and the final two shots, the fact that the victim had entry wounds on both sides of his body, and the fact that there was no evidence that the victim returned fire. The prosecutor theorized that defendant pursued the victim as he was trying to

leave the scene, shot the victim six times, then attempted to cover the incident up and make it look like self-defense. Thus, the prosecutor argued that defendant reloaded his gun after firing six times, opened the passenger-side door of the Jeep, shot the victim twice more, planted a gun on the unarmed victim, and took the victim's watch and sunglasses.

We reiterate that we cannot weigh the evidence before the jury, and even if we could, the jury is in the superior position to do so. Furthermore, the jury is entitled to disbelieve any or all of the evidence presented, or to draw inferences from the evidence, and it is not for us to question its wisdom in doing so. However, there must actually be evidence from which the jury's conclusions can be reasonably deduced. If "we find a total want of evidence on any essential point, then it becomes a clear duty to sustain the exceptions taken." *People v Howard*, 50 Mich 239, 243; 15 NW 101 (1883). The jury need not have believed the defense witnesses, but there must still have been "some evidence," *Hampton*, 407 Mich at 368, from which the essential elements of self-defense could reasonably be found *disproved* beyond a reasonable doubt.

We conclude that the prosecutor did not present such evidence to the jury. We simply do not find in the record any evidence that affirmatively shows that (1) defendant did not honestly believe he was in imminent danger of death or great bodily harm; (2) defendant's belief that he was in imminent danger of death or great bodily harm was unreasonable; (3) defendant did not honestly believe that deadly force was necessary to defend himself; or (4) defendant's belief that he needed to use deadly force was unreasonable. Presuming the jury chose—as it might—to disbelieve the defense's evidence, the remaining evidence was at most equivocal and did not reveal anything inculcating about defendant's mental state or actions at the time of the shooting.

To the contrary, the undisputed evidence is that before the shooting, at the time defendant decided to ask all persons present to leave his mother's residence, he also asked someone to call the police. These actions were taken before any engagement between defendant and the victim. Such a request is inconsistent with a formulation of an intention to kill. There is, in addition, absolutely *nothing* in the record showing that defendant planted the gun found in the victim's lap. Further, the fact that bullets struck the victim from different angles is consistent with the victim being shot in a moving vehicle, which was undisputedly the case.³ Moreover, there is no evidence that defendant was in a heat of passion caused by the victim's provocation;⁴ to the contrary, one witness specifically noted apparent disappointment over defendant's failure to fight back while the victim was attempting to take his gun from him.

³ If the jury had found all of the prosecution's assertions to be true—that is, that while the victim was attempting to flee, defendant, without provocation, shot the victim six times, reloaded his gun, shot the victim twice more, and then planted a gun—then it would have convicted defendant of first-degree or second-degree murder, and not voluntary manslaughter. See *People v Fortson*, 202 Mich App 13, 20 n 1; 507 NW2d 763 (1993).

⁴ "[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *People v Mendoza*, 468 Mich 527, 664 NW2d 685 (2003).

In summary, we conclude that the prosecution did not carry its burden of proving beyond a reasonable doubt that defendant did not shoot the victim in self-defense. While this Court's review for sufficiency of the evidence must defer to the fact-finder's role in weighing the evidence and testing the credibility of the witnesses, there must nevertheless exist evidence in support of the jury's verdict. *Howard*, 50 Mich at 242-243. And the prosecution's arguments are not evidence. See *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). We conclude that there was insufficient evidence to support a verdict of voluntary manslaughter in this case because defendant presented evidence in support of a theory of self-defense and the prosecution did not present sufficient evidence to disprove that theory beyond a reasonable doubt.

In light of this conclusion, we need not consider defendant's other arguments on appeal. Reversed.

/s/ Alton T. Davis

/s/ William C. Whitbeck

/s/ Douglas B. Shapiro