2015 IL App (2d) 131264-U
No. 2-13-1264
Order filed December 7, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-120
RICHARD G. NIELSEN,	)	Honorable Michael W. Feetterer,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not entitled to a reduction of his murder conviction from first-degree to second-degree: although the evidence conflicted, a rational trier of fact could have found that the victim presented no threat of death or great bodily harm that could have led defendant to believe, even unreasonably, that he had to respond with deadly force.

¶ 2 On February 6, 2012, defendant, Richard G. Nielsen, was told that he had to move out of the house he had lived in for four months. When attempts were made to prohibit defendant from reentering the house, defendant, who was intoxicated, became angry and started fighting with Jeremy Lechner, the homeowner's boyfriend who also lived in the house. Defendant pulled out

a knife and stabbed Lechner. Lechner subsequently died. Following a jury trial, defendant was convicted of first-degree murder (720 ILCS 9-1(a)(2) (West 2012)), and he was sentenced to 32 years' imprisonment. On appeal, defendant argues that his conviction should be reduced to second-degree murder, because his use of deadly force, though unreasonable, was an act of self-defense. See 720 ILCS 5/9-2(a)(2) (West 2012). We affirm.

¶ 3 I. BACKGROUND

¶ 4 Evidence presented at trial revealed that Rebecca Meyers, the homeowner, lived in her house with her brother (Tim Meyers), defendant, and Lechner. On February 6, 2012, Rebecca and Tim had a conversation about defendant moving out of the house. That afternoon, Lechner and Rebecca had a conversation in the house with defendant about defendant moving out. Defendant was told that he could keep his personal effects in the home for a few days but had to leave. After that conversation, defendant, who agreed that it was time for him to move out, went outside. Lechner went outside to talk to defendant, and, according to Rebecca, Lechner, who felt sorry for defendant, told defendant that he could live in the house for a few more days. Apparently, Tim, who was at work that day, was never told this.

¶ 5 After his conversation with Lechner, defendant went to the home of Wayne Konecny, defendant's friend. Konecny testified that defendant was in a very good mood, as defendant had recently become employed. Defendant left Konecny's house at about 8:30 p.m.

¶ 6 At about 9:30 p.m., Tim saw defendant ride up to the house on his bicycle. Because Tim believed that defendant was no longer living in the house, Tim locked the front door. Soon thereafter, defendant, who, according to Rebecca, smelled of alcohol, entered the house through the side door, yelling and screaming about Tim locking the front door. Defendant proceeded to Tim's room, and Lechner followed.

¶ 7 Tim testified that, when defendant arrived at the door to Tim's room, Tim could definitely tell that defendant was angry. Defendant asked Tim why he locked the door, and Tim explained that he did not think that defendant was supposed to be in the home anymore. Defendant told Tim that he was not leaving. Tim testified that, at that point, Lechner walked up to him and defendant.

¶ 8 Both Tim and Lechner told defendant that Tim and Rebecca wanted defendant to move out, and Lechner asked defendant to "please, will you leave." At that point, defendant pulled out a pocket knife and opened it.

¶ 9 Tim and Rebecca heard Lechner ask, "[Y]ou're going to pull a fucking knife on me[?]" Tim stated that defendant then put the knife down at his side, but Tim could not remember if the knife remained opened or was closed.

¶ 10 When Rebecca, who was in another room, heard Lechner ask about the knife, she decided to see what was going on. She went into the kitchen and saw defendant and Lechner standing face-to-face and yelling at each other. Tim was standing off to the side. Rebecca, who was standing behind Lechner, and Tim then saw defendant take a step around Lechner, as if, according to Rebecca, defendant was going to come toward her. Tim and Rebecca then saw Lechner grab defendant's wrist. Rebecca testified that Lechner yelled at Rebecca to move and pushed her out of the way. Tim testified that, after Lechner grabbed defendant's wrist, Lechner and defendant "bounced off a couple of walls and stuff like that." Rebecca testified that she saw defendant's hand move in front of her and then saw blood everywhere.

¶ 11 Lechner, realizing that he had been stabbed, turned to defendant and said, "[Y]ou fucking stabbed me." Lechner then punched defendant one time in the face. Both Rebecca and Tim

testified that, prior to that, no one was throwing any punches, and, according to Rebecca, the fight between defendant and Lechner was not physical before Lechner was stabbed.

¶ 12 After being stabbed, Lechner staggered to the front door, and Tim called 911. Tim saw defendant move toward the side door and told defendant that he needed to stay. Defendant then went to the front door, and Rebecca asked defendant to perform mouth-to-mouth resuscitation on Lechner. Rebecca testified that defendant refused to help her, explaining to her that Lechner had something in his mouth and that, therefore, breathing into Lechner's mouth would be "disgusting." According to Rebecca, defendant then leaned over and started dry heaving as if he was going to throw up.

¶ 13 Both Rebecca and Tim were confronted with various statements they made during their interviews with the police. For example, Rebecca admitted that she told the police the night of the incident that she hoped that defendant spends the rest of his life in jail.[1] Moreover, in a videotaped statement, Rebecca asserted that defendant performed mouth-to-mouth resuscitation on Lechner. In her written statement, Rebecca contended that, when she went into the kitchen that night, she "saw [defendant] and [Lechner] fighting" and she "tried getting in the middle of it." Rebecca explained at trial that the fight was verbal and that she wanted to interject because she does not like to see the people whom she loves and trusts fighting. Rebecca testified that defendant was a person whom she trusted. Rebecca also admitted that she never told the police that defendant stepped around Lechner to come toward her or that she saw defendant's hand move in front of her before Lechner was stabbed. When confronted with the fact that her

[1] After reviewing the videotape and considering the testimony of Officer Michelle Asplund, we gather that Rebecca made this and similar statements soon after she was told at the police station that Lechner had died.

statements to the police differed in some respects from her trial testimony, Rebecca asserted that her memory at trial was clearer, because she was no longer taking Xanax and fentanyl, which she was taking the night of the incident. Moreover, Rebecca stated that she was "completely devastated" after Lechner was stabbed.

¶ 14 Tim admitted that, when he talked to the police, he classified the altercation between defendant and Lecher as a "huge fight." Tim explained that, to him, any fight is a huge fight. Moreover, Tim admitted that he told the police that Lechner followed defendant after defendant came in the side door; that defendant closed the knife after showing it to Lechner; that many punches were thrown; that Lechner grabbed defendant by the shirt, not the wrist, and turned him around in an effort to get him to leave; and that the altercation between defendant and Lechner grew into a "fist fight." Tim explained that his statements at trial differed from what he told the police, because, now, he had calmed down and could better remember what happened.

¶ 15 Officer David Mullen spoke with Tim at the police station. Tim described the altercation as a "big wrestling match." Tim told Mullen that Lechner grabbed defendant by the wrist or shirt, that he saw only one punch thrown, and that, after defendant showed the knife to Lechner, defendant put the knife away. Mullen testified that photographs taken of defendant showed abrasions or bruising on defendant's cheek and redness on his knees.[2]

¶ 16 Officer Trevor Vogel arrived at the house at about 10 p.m. He described the scene as "pretty chaotic," noting that Rebecca was screaming. Defendant, who appeared extremely intoxicated and had a slightly swollen and cut lip, was standing two or three feet away from Rebecca and Lechner. Defendant appeared to be in shock and was very quiet. After Vogel

[2] We reviewed the photographs. Any redness, bruising, or abrasions appear very minor.

learned that defendant was responsible for stabbing Lechner, Vogel had defendant step outside where he was handcuffed. Defendant cooperated with the police and did not resist arrest.

¶ 17 Officer William Bacon transported defendant to the police department. During the approximately 15-minute ride, defendant told Bacon what had happened. Defendant was very angry and agitated when he talked about being kicked out of the house, but, when he talked about the fight, he spoke very matter-of-factly. Defendant repeatedly stated that he stabbed Lechner, but defendant claimed that it was self-defense. Although, at one point, defendant contended that Lechner fell on the knife, defendant reverted back to his claim of self-defense when Bacon pointed out that defendant was changing his story. Defendant also claimed that he stabbed Lechner after Lechner punched him two or three times. Bacon testified that defendant did not look like he had been beaten up, and Bacon did not notice any injuries to defendant's hands. Defendant also told Bacon that he gave Lechner mouth-to mouth resuscitation.

¶ 18 John Rice, a firefighter and paramedic, treated Lechner that night. As part of that treatment, Lechner was not given any Xanax or fentanyl.

¶ 19 Dr. Mark Witeck performed the autopsy on Lechner. Witeck testified that defendant's knife penetrated Lechner's skin and muscle, cut a rib bone in half, went through a lung and the pericardial sac, and then went into the heart itself. During the exam, Witeck did not observe any injuries to Lechner's hands. Witeck did discover that Lechner had Xanax, fentanyl, marijuana, naproxen, morphine, hydrocodone, and hydromorphone in his system. Witeck stated that, other than Xanax, which is used to treat anxiety, the medications are used to treat pain, and some of these medications in Lechner's system were found at a level greater than the therapeutic range.

¶ 20 The jury, which was given instructions for self-defense, involuntary manslaughter, second-degree murder, and first-degree murder, found defendant guilty of first-degree murder.

Thereafter, defendant filed a posttrial motion, arguing that his conviction should be reduced to second-degree murder. Defendant claimed that the evidence established that he unreasonably believed that he needed to use deadly force to defend himself. The trial court denied that motion, defendant was sentenced, and this timely appeal followed.

¶ 21 II. ANALYSIS

¶ 22 Defendant argues that his conviction of first-degree murder must be reduced to second-degree murder. As relevant here, a defendant commits first-degree murder when, "in performing the acts which cause the death," the defendant, "without lawful justification," "knows that such acts create a strong probability of death." 720 ILCS 5/9-1(a)(2) (West 2012). In certain circumstances, a defendant's acts are done with lawful justification. For example, a defendant acts with lawful justification when he "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself." 720 ILCS 5/7-1(a) (West 2012). A defendant commits second-degree murder when, for example, he commits first-degree murder, but, at the time of the killing, the defendant has an unreasonable belief that such force is necessary to prevent imminent death or great bodily harm. 720 ILCS 5/9-2(a)(2) (West 2012).

¶ 23 In order for a defendant to be guilty of second-degree murder, the State must first establish beyond a reasonable doubt that the defendant is guilty of first-degree murder. 720 ILCS 5/9-2(c) (West 2012). If the State meets this burden, the burden shifts to the defendant to prove, by a preponderance of the evidence, the existence of mitigating factors, such as the unreasonable belief that deadly force was necessary. *Id.* "A proposition is proved by a preponderance of the evidence when the proposition is more probably true than not true." *People v. Love*, 404 Ill. App. 3d 784, 787 (2010).

¶ 24 Here, defendant does not dispute that the State proved him guilty beyond a reasonable doubt of first-degree murder. Rather, defendant claims that he proved by a preponderance of the evidence a mitigating factor. That is, as relevant here, he unreasonably believed that deadly force was necessary. Accordingly, we must decide whether the evidence supported the conclusion that defendant unreasonably believed that deadly force was necessary, such that his conviction of first-degree murder should be reduced to second-degree murder.

¶ 25 In resolving that issue, we must defer to the trier of fact, as the reasonableness of a defendant's belief that the use of deadly force was necessary presents a question of fact. See *People v. Hawkins*, 296 Ill. App. 3d 830, 836 (1998). The trier of fact is responsible for assessing the credibility of the witnesses, weighing the evidence, resolving conflicts and inconsistencies presented in the testimony, and drawing reasonable inferences from the evidence. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 52. We will not disturb the trier of fact's finding of guilt of first-degree murder if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence an unreasonable belief in the need to use deadly force. *Id.*

¶ 26 We determine that a rational trier of fact could have found that defendant did not prove by a preponderance of the evidence that he had an unreasonable belief that the use of deadly force was necessary. Specifically, viewed in the light most favorable to the State, the evidence revealed that defendant was asked to move out of the home earlier in the day. When defendant returned to the house later that night and found the front door locked, he became angry and decided to enter the house from a side door. Once inside the house, defendant, who was clearly infuriated about being locked out, proceeded to confront Tim, who he knew had locked the front door. Defendant then engaged in an argument with Tim and Lechner.

¶ 27 Neither Tim nor Rebecca, the only witnesses to the stabbing who testified, indicated that Lechner threatened defendant in any way before defendant stabbed him. In fact, Tim testified that defendant threatened Lechner with deadly force by pulling out his knife when Lechner merely asked defendant to "please *** leave" the home. Although Tim indicated that defendant and Lechner were scuffling before Lechner was stabbed, neither Tim nor Rebecca testified that either Lechner or defendant threw any punches before Lechner was killed. At best, the testimony, when viewed in the light most favorable to the State, revealed that Lechner grabbed defendant's wrist before defendant stabbed him. This act, which was preceded by a verbal argument, certainly was not a threat of imminent death or great bodily harm that could have created a belief, unreasonable or otherwise, that the use of deadly force was necessary. *Cf. People v. Ellis*, 107 Ill. App. 3d 603, 609, 611 (1982) (the defendant unreasonably believed that the use of deadly force was necessary when, after the defendant asked the victim to leave his apartment and fired a warning shot from his gun, the victim lunged at the defendant).

¶ 28 The fact that Rebecca and Tim's testimony was contradicted by statements they made to the police does not mandate a conclusion that defendant's conviction must be reduced to second-degree murder. Although both Rebecca and Tim made statements to the police that might have supported a finding that defendant unreasonably believed that the use of deadly force was necessary, they explained why their statements differed from their trial testimony. Specifically, Rebecca testified that her trial testimony was more accurate because she was "[c]ompletely devastated" the night she saw her boyfriend killed and was no longer taking medication that clouded her memory. Similarly, Tim testified that he was more calm at trial, and thus better able to relay what happened, than he was on the night he saw his roommate stabbed to death. Vogel's testimony supported Rebecca and Tim's contention that their trial testimony was more accurate,

as he described the scene of the stabbing as "pretty chaotic." In any event, "[i]t is well established that the trier of fact is in the best position to *** resolve any factual disputes arising from conflicting or inconsistent testimony." *People v. Myles*, 257 Ill. App. 3d 872, 884 (1994). The jury clearly credited Rebecca and Tim's trial testimony over the statements they gave the police soon after Lechner was killed. We will not reevaluate the jury's assessment of the evidence. See *People v. Garcia*, 407 Ill. App. 3d 195, 203-04 (2011) (refusing to reduce the defendant's first-degree-murder conviction to second-degree murder where "there was ample evidence to support the conclusion that [the] defendant did not believe his actions were necessary to protect his life and, therefore, that he was not acting in self-defense"); *People v. Parker*, 194 Ill. App. 3d 1048, 1056 (1990) ("In sum, the evidence, viewed in the light most favorable to the prosecution, does allow a rational trier of fact to find that [the defendant] did not act with a belief, reasonable or unreasonable, in the need for self-defense.").

¶ 29 Defendant claims that his conviction of first-degree murder must be reduced to second-degree murder given several factors. Specifically, defendant asks this court to consider (1) the statements he made to the police and photographs taken of him, which allegedly reveal that Lechner physically assaulted him; (2) defendant's intoxication, and Lechner's consumption of various drugs; (3) the fact that defendant allegedly attempted to give mouth-to-mouth resuscitation to Lechner; (4) the fact that defendant admitted stabbing Lechner; (5) the fact that defendant complied with police demands and did not resist arrest; (6) the fact that defendant did not flee from the scene; and (7) the fact that defendant stabbed Lechner only once. These facts do not warrant reducing defendant's first-degree-murder conviction to second-degree murder.

¶ 30 Specifically, although defendant told Bacon that Lechner punched him more than once, and even if he implied that those punches were thrown before Lechner was stabbed, the jury was

presented with evidence, namely Rebecca's and Tim's trial testimony, indicating that only one punch was thrown and that Lechner punched defendant *after* he was stabbed. As noted, the jury was free to accept that testimony over the contradicting evidence, and we will not reweigh the evidence. See *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Moreover, in making his argument, defendant overlooks the fact that other testimony supported Rebecca's and Tim's statements that defendant was not punched more than once. Specifically, Bacon testified that defendant did not look like he had been beaten up. Vogel confirmed Bacon's testimony, noting that defendant had only a slightly swollen and cut lip. The photographs taken of defendant were consistent with both Bacon's and Vogel's testimony, as the photographs revealed only slight bruising and superficial abrasions to defendant's face. Consistent with this evidence suggesting that defendant and Lechner's fight was not very physical is the testimony of Witeck, who, in performing the autopsy, did not observe any injuries to Lechner's hands.

¶ 31 We also do not find persuasive defendant's claim that his intoxication, and Lechner's consumption of various drugs, supported a belief that deadly force was necessary. While we agree that intoxication may *contribute* to a defendant's unreasonable belief, intoxication alone cannot create the unreasonable belief. See *People v. Mocaby*, 194 Ill. App. 3d 441, 449 (1990). Because, here, no evidence established that defendant was put in a situation of serious risk, we cannot conclude that defendant's intoxication contributed to any unreasonable belief that the use of deadly force was necessary. Likewise, no evidence indicated that Lechner's consumption of drugs made him aggressive. Rather, with the drugs in his system, Lechner asked defendant, who was yelling and screaming, to "please *** leave."

¶ 32 Further, the claim that defendant attempted to give Lechner mouth-to-mouth resuscitation does not warrant reducing his conviction to second-degree murder. Although defendant told

Bacon that he made such attempts, other evidence suggested that he did not. For example, while Rebecca told the police that defendant did perform mouth-to-mouth resuscitation on Lechner, she testified that defendant refused to do so. As noted, the jury was free to credit Rebecca's trial testimony over the statements she gave to the police. See *Sutherland*, 223 Ill. 2d at 242. Moreover, we note that, consistent with Rebecca's trial testimony, Vogel stated that, when he arrived at the scene soon after Lechner was stabbed, he saw defendant standing several feet away from Lechner, not kneeling before Lechner and performing mouth-to-mouth resuscitation on him.

¶ 33 Additionally, while it is true that defendant admitted stabbing Lechner and complied with police demands, those facts do not suggest that defendant possessed an unreasonable belief that he needed to use deadly force. See *Hawkins*, 296 Ill. App. 3d at 836 (the reasonableness of a defendant's belief that deadly force is necessary is based on the surrounding facts and circumstances). Moreover, although defendant did not leave the scene and was standing at the front door when the police arrived, Tim testified that defendant tried to exit the side door after he stabbed Lechner. Only after Tim told defendant that he could not leave did defendant go to the front door to, presumably, wait for the police.

¶ 34 Finally, the fact that defendant stabbed Lechner only once does not support an inference that defendant did not intend to kill Lechner and thus must have unreasonably believed that deadly force was necessary. Aside from the fact that Lechner was stabbed after a verbal argument where Lechner merely grabbed defendant's wrist, Witeck's testimony revealed that the force with which defendant stabbed Lechner was great. Specifically, with his pocket knife, defendant, in an intoxicated state, was able to not only pierce through Lechner's skin and muscle, but also cut one of Lechner's ribs in half, cut Lechner's lung, cut through the pericardial sac

surrounding Lechner's heart, and cut Lechner's heart itself. Given the force with which defendant stabbed Lechner, we cannot conclude that the mere fact that Lechner was stabbed once supports an inference that defendant did not intend to kill Lechner and must have unreasonably believed that deadly force was necessary.

¶ 35 III. CONCLUSION

¶ 36 In conclusion, we determine that, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that defendant did not prove by a preponderance of the evidence that he had an unreasonable belief that he needed to use deadly force to defend himself. Accordingly, we will not reduce defendant's first-degree-murder conviction to second-degree murder.

¶ 37 For this reason, the judgment of the circuit court of McHenry County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014): see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 38 Affirmed.