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2014 IL App (3d) 120572-U

Order filed April 14, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. |
| Plaintiff-Appellee, |) | |
| v. |) | Appeal No. 3-12-0572 |
| DANIEL HUIZAR, |) | Circuit No. 08-CF-861 |
| Defendant-Appellant. |) | The Honorable Amy Bertani-Tomczak, Judge, Presiding. |

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Where defendant asserted self-defense and defense of others to first degree murder charge, the State presented sufficient evidence to establish beyond a reasonable doubt that the offense was not carried out in self-defense or defense of others and that defendant's use of force was not legally justified.
(2) Defendant's first degree murder conviction should not be reduced to second degree murder.
- ¶ 2 Defendant, Daniel Huizar, was charged by indictment with aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2008)) and three counts of first degree murder (720

ILCS 5/9-1(a)(1), (2), (3) (West 2008)) in the shooting death of Alfredo Lopez. Following a bench trial, he was found guilty of intentional first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and sentenced to 45 years in prison. On appeal, defendant claims that (1) the State failed to prove beyond a reasonable doubt that he did not act in self-defense or defense of others when he fired his gun, and (2) his first degree murder conviction should be reduced to second degree murder because he proved that he had an actual, though unreasonable, belief that use of deadly force was justified. We affirm.

¶ 3 At trial, Nicholas and Nathan Lopez testified that they went to Walgreens with their father, Alfredo Lopez, around 7:00 p.m. on April 16, 2008. As they walked from the parking lot to the store, they heard three or four gunshots. The boys ran inside the store. Their father was struck in the back by a stray bullet and fell to the ground. He later died at the hospital.

¶ 4 A diagram of the location depicting the area where the shooting took place was admitted into evidence. It shows Collins Street, running north and south, and Cass Street, running east and west. The strip mall runs north and south along the west side of Collins Street. A Subway restaurant is at the south end of the strip mall. H & R Block and U.S. Cellular are adjacent to Subway. Hollywood Video is two stores north of H & R Block, located at the opposite end of the strip mall. The strip mall and Walgreens are separated by an alley. Walgreens is pictured at the north end of the diagram at the corner of Collins and Cass.

¶ 5 Julio Perez worked at the Subway restaurant in the strip mall. He testified that on April 16, 2008, he was working with defendant, Pedro Sanchez and Reyes Velasquez (Reyes). Reyes got off work earlier that evening and waited with "Mike" (later identified as Miguel Garcia) in defendant's car parked on the south side of the Subway parking lot. While Perez and defendant were still working, two young men came into the restaurant and argued with defendant. They

then walked outside and began arguing with Miguel and Reyes in the car. Three other men joined the first two and someone took a chair that was being used to prop open the Subway door and threw it at the car. All five men ran past Subway and headed north toward Walgreens. Miguel and Reyes then got out of the car and walked toward the Subway entrance. Defendant walked out the front door, where he met Miguel and Reyes, and fired a gun in the direction of Walgreens. Perez testified that he heard three shots. Miguel and Reyes ran back to defendant's car and started to leave the parking lot, but they were stopped by police.

¶ 6 A videotape taken from Subway surveillance cameras was then played in open court. The video depicts a group of men gathering near the Subway entrance. One of the men has on a white hooded sweatshirt. After a few minutes, the man in the white sweatshirt grabs a chair that is propping open the Subway door and runs to the right of the screen. He disappears out of the view of the surveillance camera at approximately 18:07:24 on the video. Once the chair is thrown, five men reappear in the video frame and walk quickly past the Subway entrance, heading north toward Walgreens. Defendant is first seen coming from the back of Subway, followed closely by another man, Pedro Sanchez, at 18:07:39. He exits Subway at 18:07:44. He then turns to his right, tries to give the gun to two men approaching from the right, and then quickly turns to his left at 18:07:45. He then raises the gun up and shoots at 18:07:46. As he fires, those around him cover their ears. People inside the store quickly run to the back and duck behind the counter. None of the four men standing outside the restaurant attempt to shield themselves. Sanchez stands at the Subway entrance with a phone to his ear, holding the door open and looking toward Walgreens. His demeanor does not change before or after defendant raises his hand and fires the gun. Defendant runs away, and Sanchez walks back into the

restaurant, still talking on the phone. At the conclusion, Perez testified that the surveillance video accurately depicted the events of that evening.

¶ 7 On the day of the shooting, Henry Lawson and a friend went to Subway to eat. While he was waiting in line to order, Lawson saw a Subway employee go outside and get in a blue car. He heard people arguing and saw someone throw a chair at the car. The man who threw the chair and several others then walked past Subway and headed north toward Walgreens. As the group left, two young men got out of the car and walked toward Subway. At that point, Lawson noticed a Subway employee come from the back of the restaurant and walk to the front door; he was holding a gun. According to Lawson's testimony, the employee walked out the front door into the parking lot area and "pretty much started shooting." Lawson heard more than three or four shots. The man who fired the gun ran toward the car but did not get inside. Lawson identified defendant in court as the person who fired the shots. He also stated that the surveillance video accurately reflected what he saw that day.

¶ 8 Roger Mercer was driving into the strip mall parking lot in front of Subway around 7:00 p.m. on April 16, 2008. He saw what he described as "some action" and stopped his vehicle. He noticed a man in a black hooded sweatshirt take a chair that was propping open the Subway door and throw it at a parked car outside the restaurant. Five people were standing outside the car. After the young man threw the chair, he and the others around him ran down the sidewalk toward Walgreens. Three or four seconds later, two Subway employees exited the restaurant. One of them was carrying a gun. The two men who were sitting in the car emerged and ran to Subway. The employee holding the gun tried to hand it off to them as they approached him, but they would not take it. He then turned, stepped off the sidewalk and fired in the direction of Walgreens. Mercer heard four shots. He did not hear any other gun fire. He testified that at the

time the man was firing his weapon, the person who threw the chair and his friends were "long gone." According to Mercer, that group was in the alley between Subway and Walgreens. He described the shooter as no older than 21, approximately 5'8", skinny and Hispanic.

¶ 9 Officer Jeffery Fornoff arrived at the scene shortly after the shooting. As he walked from Walgreens toward Subway, he found a copper jacketed projectile and a piece of lead on the sidewalk in front of Hollywood Video. He testified that the canopy frame above Hollywood Video appeared to have been struck by a bullet. Witnesses informed Fornoff that a blue Oldsmobile was involved in the incident and was parked near Subway. He found part of a stool underneath the Oldsmobile. He also noticed that a Saturn, parked north of Subway, had a flat tire. He found a projectile hole in the tire but did not recover a bullet. Fornoff further testified that he attended the victim's autopsy and recovered a projectile taken from inside the victim's chest.

¶ 10 Forensic scientist Patricia Wallace compared the projectiles collected at the scene with the bullet recovered from the victim's chest. She testified that the projectile found on the sidewalk near Hollywood Video and the one retrieved from the victim were fired by the same gun, a .38 caliber or a .357 class. The prosecution then rested.

¶ 11 Pedro Sanchez testified for the defense. He stated that on April 16, 2008, he was working with defendant and Reyes at Subway. Around 1 p.m., a young "Mexican" male wearing a white hooded sweatshirt came into the restaurant and ordered a sandwich. He then said to defendant and Reyes, "what's up, bitches, I'm the one that shot your house up... I'm going to get you again." At 3:30 p.m., the same man came into the restaurant with five or six guys and tried to challenge Reyes to a fight.

¶ 12 Around 7 p.m., the group returned, apparently looking for Reyes. The one wearing a white hooded sweatshirt took a chair that had been used to prop open the restaurant door and started "busting up Danny's car." Reyes and his friend were inside the car waiting for defendant to get off work. Sanchez went to the back of the store and told defendant what was happening. Sanchez testified that as defendant walked to the front of the restaurant, the group "started running the opposite way." Defendant and Sanchez then walked outside. Defendant had a gun. Sanchez saw the man who had threatened them earlier standing next to Hollywood Video pointing a gun toward Subway. Sanchez described the weapon as a steel-chromed .38 caliber handgun with a black handle.

¶ 13 On cross-examination, Sanchez stated that he talked to Detective Avila at the police station on April 16, 2008, the same day of the shooting. He admitted that during his interview he did not tell Avila that he saw a man wearing a white hooded sweatshirt with a steel-chromed, black-handled .38 in his hand. He later testified that although he did not tell Avila that the man was holding a .38, he did tell the detective that he saw a man with a gun standing in front of Hollywood Video.

¶ 14 Sanchez heard four shots. No shots were fired at him. Defendant then pointed his gun where the man in the white hooded sweatshirt was standing and fired four times. Sanchez testified that there was only one guy standing near Hollywood Video when the shots were fired. The other people who had been with that man were no longer around.

¶ 15 Next, the defense presented the testimony of Fabian Vargas, Erik Perez, Sergio Garcia, Juan Ornelas and Jose Aguirre. All five witnesses testified that they pled guilty to intimidation resulting from the events in front of Subway on April 16, 2008, and that they were sentenced to 10 years in prison. Vargas admitted that he and the other four men were Vice Lords. He stated

that they all went to Subway around 5 or 6 p.m. on April 16, 2008, to get something to eat. Vargas, Perez, Garcia and Ornelas testified that they saw Reyes and Miguel in a car parked outside Subway. They recognized Reyes as a Latin Kings because they had a prior confrontation with him. Vargas yelled "Latin King killer" at the car and tried to get them to come out. When Reyes and Miguel refused, Vargas threw a rock at the car and broke a window. Reyes and Miguel started to get out of the car, but Perez threw a chair, causing them to jump back inside. After Perez threw the chair, the Vice Lords walked back toward Subway and then continued north in the direction of Walgreens.

¶ 16 As the group walked down the sidewalk, Vargas saw Reyes and Miguel run toward Subway and heard someone yell "get the gun." Sergio testified that, as he and his friends were still walking away, he said, "[T]here's a gun, they're going to shoot," and they all started running. Garcia threw himself to the ground near a vehicle parked in front of Hollywood Video. He heard five or seven shots and then got up and ran to Walgreens. Ornelas was also near Hollywood Video. He heard four gunshots and ran to a dumpster in the alley between Hollywood Video and Walgreens. On cross-examination, Sergio testified that there had been no physical contact between their group and Reyes and Miguel that day.

¶ 17 Aguirre testified that he was with the Vice Lord group on April 16, 2008. After urinating in the alley between Walgreens and Hollywood Video, he heard someone say "gun," and everyone started running. He admitted that he pled guilty to unlawful possession of a weapon for a 2007 incident in which his brother fired a gun out the window of a car he was driving.

¶ 18 Defendant testified that he was 18 years old when the shooting occurred. On April 16, 2008, he was working at Subway with Pedro and another friend. His shift began at noon. Around 6 p.m., a man wearing a white hooded sweatshirt came into the store and ordered a

sandwich. Defendant turned his back to get something and when he turned around, the customer was gone. He saw everyone looking out the window and someone told him that a man had broken a window in his car. His car was parked outside and his cousins, Reyes and Miguel, were inside it. He saw a group of men surrounding his car, and then the group walked toward Subway. Defendant thought they were going to attack him, so he went to the back of the store and grabbed his gun. He bought the gun a few weeks earlier for protection after someone shot at his car while he, Reyes and Miguel were riding in it. When defendant went to the back of the store, Sanchez followed him and said "they're trying to get your cousins again." He and Sanchez walked to the front of Subway, and Reyes and Miguel exited the car and ran toward them.

¶ 19 At that time, defendant testified that he did not know the location of the attackers. He walked out the Subway door, turned to his right and asked what was going on. Reyes and Miguel looked past him, and said "shoot." Defendant testified that they appeared to be scared. He then turned to his left and saw a man in a white hooded sweatshirt, whom he later identified as Perez, "pointing what looked to be a gun at me." Another man, identified as Aguirre, was standing nearby, and three other guys were a few feet behind them. Defendant was afraid Perez was going to shoot at them. He fired his gun toward Perez three times. He fired the gun about ten seconds after exiting Subway. Defendant testified that he was looking at the men for three to five second before he started shooting. Once the man in the white hooded sweatshirt raised the gun and pointed it at defendant, defendant pointed his gun at him and fired three shots.

¶ 20 In rebuttal, Miguel testified that as Perez and the others walked past Subway, he and Reyes got out of the car. They walked to the Subway entrance and ran into defendant. At that point, Perez and his companions were near Hollywood Video. Miguel heard gunshots and closed

his eyes. He did not recall seeing defendant with a gun, and he did not see Perez or his friends with a gun.

¶ 21 Detective Moises Avila testified that he interviewed Sanchez a few hours after the incident. Sanchez never told him that he saw a man point a gun at defendant, nor did he say that a man wearing a white hooded sweatshirt came into Subway around 1 p.m. or 3:30 p.m. The videotape of the interview was admitted into evidence. During the interview, Sanchez does not mention that a man pointed a gun toward him or defendant.

¶ 22 In closing arguments, the defense argued that defendant fired his gun in self-defense or in defense of his cousins, Reyes and Miguel, and that Perez and the other Vice Lords were primarily responsible for the death of Lopez. In the alternative, the defense argued that defendant was guilty of second degree murder and not first degree murder because he had unreasonable belief in self-defense. The State argued that the Vice Lords had disengaged from the attack on defendant's car and that there was no imminent threat of harm to defendant or his cousins at the time defendant fired his gun.

¶ 23 The trial court rejected defendant's claim of self-defense or defense of others and found him guilty of first degree murder. Following a sentencing hearing, the court sentenced defendant to 45 years in prison.

¶ 24 I. Self-Defense or Defense of Others

¶ 25 To raise the affirmative defense of self-defense or defense of others, the defendant must establish some evidence that (1) force was threatened against him or others, (2) he was not the aggressor, (3) the danger of harm was imminent, (4) the threatened force was unlawful, (5) he actually and subjectively believed a danger existed which required use of the force applied, and (6) his beliefs were objectively reasonable. *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995).

The question is whether the facts and circumstances would induce a reasonable apprehension of serious bodily harm in light of the defendant's perception of the situation at the time force was used. *Id.* at 128. When defendant presents some evidence of self-defense or that he acted in the defense of others, the State has the burden of proving beyond a reasonable doubt that the defendant did not reasonably believe deadly force was necessary to counter the imminent use of unlawful force. *People v. Jones*, 176 Ill. App. 3d 460, 464 (1988). If the State negates any one of the self-defense elements, the defendant's claim must fail. *Jeffries*, 164 Ill. 2d at 128.

¶ 26 Here, defendant contends that the State failed to prove that he did not act in self-defense or in defense of others beyond a reasonable doubt. He argues that his testimony and Miguel's testimony show that he actually, subjectively and reasonably believed that deadly force was necessary to protect himself or his cousins from imminent harm.

¶ 27 In a bench trial, the trial judge is responsible for making credibility determinations regarding the witnesses, the weight to be afforded their testimony and the reasonable inferences to be drawn from the evidence. *People v. Emerson*, 189 Ill. 2d 436, 475 (2000). It is not our job to re-try the defendant. *People v. Collins*, 106 Ill. 2d 237, 261-62 (1985). Our role as a reviewing court is to determine, considering all the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 261.

¶ 28 We agree with defendant that there is evidence suggesting he acted in self-defense. Defendant testified that his cousins appeared to be scared and that he believed Perez had a gun, and Sanchez testified that he saw Perez holding a gun. However, there is also evidence suggesting otherwise. Notwithstanding defendant's claim that Perez had a gun, the surveillance

video and witnesses testimony indicate that the threat of danger was not imminent and that the use of deadly force was unnecessary.

¶ 29 The surveillance video shows Perez taking the chair from the door and leaving. Shortly thereafter, he and four other men reappear in the video frame and walk quickly in the opposite direction. None of the men appear to be carrying a weapon. A few seconds later, defendant walks out the front door and turns to his right (south). He attempts to give the gun to Reyes and Miguel. They are walking toward defendant and do not appear frightened; they refuse to take the gun. Without assessing his surroundings, defendant turns back to his left (north), aims his weapon and fires four shots in the direction of Walgreens. Sanchez is standing by his side, along with Miguel and Reyes. None of them appear threatened. None of them shield themselves or attempt to avoid return gunfire.

¶ 30 Mercer's testimony provides unbiased support of the scene depicted in the video. He witnessed the events unfold from outside Subway. He had a clear view of the store front, as well as the sidewalk from Subway to Walgreens. He stated that once Perez threw the chair at the car, he and four others ran off and were at the other end of the strip mall by the time defendant exited Subway. He testified that defendant tried to hand the gun to someone else, but then simply turned and fired. Mercer did not hear any other gun fire or see anyone else with a gun. His testimony was corroborated by Sergio, Ornelas and Aguirre who testified that they were all near or past Hollywood Video when defendant fired the gun.

¶ 31 Several witnesses also testified that Reyes and Miguel exited the vehicle and joined defendant at the Subway entrance *after* the Vice Lords ended the attack and walked away from the car. All the witnesses who threw things at the car agreed that they were walking or running away when defendant appeared with a gun. Even defendant's cousin, one of the victims of the

initial attack, testified that the group was walking away. None of the witnesses who testified at trial indicated that the attack was on going or that the Vice Lords were returning when Reyes and Miguel emerged from the car. Thus, there was sufficient evidence to find beyond a reasonable doubt that defendant was not acting in self defense or defense of others.

¶ 32 Defendant argues that his testimony that he saw what appeared to be a gun and Sanchez's testimony that Perez pointed a gun at defendant undermine the State's case. However, the evidence was sufficient to disprove an imminent threat beyond a reasonable doubt. Although Sanchez testified that the man in the white hooded sweatshirt had a gun, he failed to mention that Perez had a gun to detective Avila in an interview just hours after the shooting. Moreover, Miguel was standing at defendant's side when he fired his gun, and he testified that he did not see anyone else with a gun. Defendant's self-serving testimony, the inconsistent testimony of Sanchez and the reactions depicted on the surveillance video, establish beyond a reasonable doubt that there was no imminent threat of harm that required the use of a deadly weapon.

¶ 33 II. Second Degree Murder

¶ 34 Defendant also argues that his conviction for first degree murder should be reduced to second degree murder because he proved he had an actual, though unreasonable, belief that he needed to use deadly force to protect himself and others.

¶ 35 A person commits second degree murder when he commits first degree murder and "at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing *** but his or her belief is unreasonable." 720 ILCS 5/9-2(a)(2) (West 2008). When evidence of an unreasonable belief has been presented, it is the defendant's burden to prove the existence of the mitigating factor by a preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2008). A reviewing court's power to reduce a first degree murder

conviction to second degree murder should be "cautiously exercised." *People v. Hooker*, 249 Ill. App. 3d 394, 403 (1993). The power to reduce the degree of an offense is available where there is an evidentiary weakness with regard to an element of the offense charged and where the trial court has express dissatisfaction with imposing the mandatory minimum sentence. *Id.*

¶ 36 Here, defendant was unable to prove that he had an actual but unreasonable belief that his use of deadly force was justified. Although defendant and Sanchez testified that they saw Perez holding a gun, the trial court was not required to accept their testimony. See *People v. Rivera*, 255 Ill. App. 3d 1015, 1026 (1993). Defendant's testimony was only corroborated by the inconsistent testimony of his friend who failed to mention the existence of another gun when he was interviewed on the night of the shooting.

¶ 37 Again, the surveillance video is telling. In the video, no one standing outside the restaurant appears to be afraid as the defendant raises his hand and fires the gun. Their body language does not indicate that a gun is pointed in their direction. Immediately after defendant walks out the front door, he turns to the right and then turns to the left. As he turns to the left, he steps off the sidewalk, raises his hand and starts shooting. Defendant was not afraid; he did not attempt to assess the danger. The evidence establishes that defendant had no belief, reasonable or unreasonable, that he or Reyes and Miguel faced an imminent threat of deadly force. Thus, there is no evidentiary weakness that would warrant reducing defendant's first degree murder conviction to second degree murder.

¶ 38

CONCLUSION

¶ 39

The judgment of the circuit court of Will County is affirmed.

¶ 40

Affirmed.