

No. 1-09-2624

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SECOND DIVISION
FEBRUARY 15, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 12404
)	
MICHAEL DELICH,)	Honorable
)	John J. Scotillo,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Karnezis concurred
in the judgment.

O R D E R

HELD: The evidence supported the trial court's determination that defendant's belief that the use of deadly force was necessary was unreasonable, and he was thus proved guilty of second degree murder; judgment affirmed.

Following a bench trial, defendant Michael Delich was convicted of second degree murder and sentenced to 20 years'

imprisonment. On appeal, defendant contends that the trial court erred in finding that the State proved beyond a reasonable doubt that he was not justified in using deadly force.

Defendant was charged with first degree murder in connection with the June 7, 2008, fatal stabbing of the victim, Dariuz Lewandowski, in the parking lot of Martini's Bar in Norridge, Illinois. At trial, Krzysztof Matachowski testified that at 9 p.m. on the evening prior to the incident, he and his cousins Pawel Wrobel, Jacwk Mikos and the victim, went to a bachelor party where they had several drinks. At midnight, they left that party and drove to Martini's Bar in Norridge, where they saw defendant urinating outside. As they walked towards the bar, defendant yelled at them, and said to the victim, "do you want to go," but the victim walked away.

Matachowski further testified that defendant then stood in front of him, and that he told defendant that the victim was intoxicated and not to do anything. Matachowski noticed that defendant had a blue folding knife in his hand, and tried to get the victim inside the bar. The victim, however, pulled away and exchanged words with defendant. Mikos then placed the victim in a bear-hug, and tried to drag him away from defendant. Matachowski also tried to restrain the victim and told him that defendant had a knife, but he broke loose.

Defendant and the victim then exchanged punches and one of defendant's friends hit the victim with something that looked like a baseball bat. He stopped after being told by one of the victim's cousins to let defendant and the victim settle it. A few seconds later, the fight ended when the victim fell to the ground bleeding, and defendant fled with the knife in his hand. Matachowski noted that the victim did not have anything in his hands during the fight.

Wrobel testified that, as they exited their car at Martini's Bar, defendant shouted at them, "I have open fists," and continued to shout at them as they walked towards the bar. The victim wanted to confront defendant, but his cousins held him back. Wrobel further testified that defendant, who had a knife in his hand, continued shouting, and the victim broke loose, exchanged words with defendant and punched him. The two then swung wildly at each other, and at the end of the 10-second fight, the victim staggered and fell.

Mikos testified that when defendant initially came towards them, he told him to leave them alone, but defendant and the victim began to argue. Matachowski told the victim to go into the bar, but he pushed past him and Mikos. Then, a man, later identified as Joseph Kelley, swung at the victim with a little baseball bat. Mikos pleaded with Kelley to stay out of it, and defendant and the victim fought alone. Mikos, however, did not

see the fight, and when he turned around, he saw the victim collapse and defendant holding a knife.

John Viteri testified that he met defendant for the first time on the night in question and went with him and his stepson, Kelley, to a bar in Norridge. After they had a few drinks there, they drove to Martini's Bar. While they were in the parking lot of that establishment, Viteri saw the victim and some other people walking towards their car. Viteri and Kelley testified that defendant exchanged words with the victim, and Kelley acknowledged that defendant was "egging on" the victim.

Kelley further testified that he exited the car with a "mini-baseball bat," and hit the victim once. Kelley and Viteri both testified that the blow did not faze the victim. Kelley also stated that one of the victim's friends told him to let the victim and defendant fight one on one. At that point, Kelley saw defendant running backwards as the victim charged him, but was not afraid for defendant's safety because he thought it was a fist fight. He went back to the car, and did not watch the fight.

Viteri testified that he did not see who threw the first punch, but, as defendant and the victim fought, they moved towards the bar with the victim facing the bar. Viteri saw defendant punch the victim three times, and when the victim fell over, Viteri and Kelley started to drive away. Defendant then

got in the car, told them he cut the victim and where to drive. Kelley drove to another bar where he sat down with Viteri for a drink, and defendant went his own way in the bar.

Defendant testified that he was urinating outside when the victim pointed at him and laughed with his friends. Defendant asked them what the problem was, and the victim swore at him. The victim then ran towards him, and when his friends tried to restrain him, he broke loose, and punched defendant in the face. Defendant threw his hands up without anything in them and said he did not want to fight, but the victim charged him.

Defendant further testified that Kelley struck the victim with a little souvenir bat, but that he still moved towards him. When defendant backed up, the victim hit him in the face. He then punched the victim a few times to get him off of him, backed up some more, and when the victim came at him again, he saw a shiny object in his hand coming towards his face. Defendant could not describe the shiny object or which hand the victim had it in, but recalled it because of the light coming down from the awning. When defendant was asked how close the victim was to him, he said that he was "in [his] face."

Defendant further testified that the victim kept coming at him, and swinging his fist. He thought the victim was going to kill him because he was coming at him like a "mad man." When the victim was a foot away, defendant pulled out his pocket knife,

opened it, and showed it to the victim, who began to swing his hands "fiercely." Defendant, fearing for his life, swung at the victim, cutting him in the chest. When the victim fell, defendant thought his friends were going to attack him, so he fled. He went to a bar with Kelley and Viteri, but stayed only a few seconds; and as he was walking home, he was detained by police who took the closed knife out of his pocket and tossed it.

Defendant further testified that he had a pair of sunglasses on his head when the incident occurred, which are now mangled. He also testified that the only injury he sustained in the skirmish was to his right hand.

Norridge police officer Victor Wendt testified that he recovered a pair of broken sunglasses in the parking lot of Martini's bar. He also recovered a blue folding knife with the blade open from the area where defendant was detained. The officer also collected the victim's personal belongings from the hospital, which included a silver wristwatch.

Norridge detective Salvatore Auriemma testified that defendant's driver's license reflected that he weighed 227 pounds and was 6 feet 2 inches tall; the parties stipulated that the victim weighed 178 pounds and was 5 feet 9 inches tall. The parties further stipulated that an autopsy of the victim showed that he had numerous abrasions to his body and a stab wound to his chest. The parties also stipulated that the victim's blood

alcohol level at the time of death would have left him physically impaired to some degree.

The defense then called John Manos in support of its self-defense theory. Manos, a sergeant with the Cook County Department of Corrections, testified regarding his prior incident with the victim. Manos stated that on March 10, 2004, he was standing outside with some people when the victim came up to him and shoved him. Manos asked the victim "what's going on," and he swore at him. The victim kept coming towards him, and when Manos identified himself as an officer, the victim swore at him again. Manos then drew his weapon, ordered the victim to the wall and had someone call police.

In announcing its decision at the close of evidence, the court noted that the victim was obviously emboldened by the alcohol in his system when he charged defendant and his cousins were unable to hold him back. The court further noted that it was unlikely that defendant was backing up and acting as a peacemaker, especially where the others had backed off and one had said let them fight. The court also observed that the victim and defendant hit one another, and after a short time, defendant fatally stabbed the victim. The court found that it was unreasonable for defendant to believe he was in danger of imminent death or great bodily harm, considering that he was 50 pounds heavier than the victim who was obviously intoxicated.

The court further found that if defendant had displayed his weapon as defendant claimed, the victim would have backed off as he did in his prior incident with Manos; and contrary to defendant's contention, the police would not have thrown the weapon away. The court then found defendant guilty of second degree murder based on his unreasonable belief that he was justified in the use of deadly force.

On appeal, defendant contends that the State did not prove beyond a reasonable doubt that he was not justified in using deadly force. He maintains that the victim presented an imminent threat of great bodily harm to him, and his belief that he was in danger of great bodily harm was not unreasonable.

When a defendant challenges the sufficiency of the evidence to sustain his conviction, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). This standard recognizes the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill 2d. 363, 375 (1992). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt of guilt. *People v. Jordan*, 130 Ill. App. 3d 810, 813 (1985).

For the reasons that follow, we do not find this to be such a case.

Defendant maintains that he was acting in self-defense when he stabbed the victim who was charging at him with his hands swinging "fiercely." To establish self-defense, defendant must show that: (1) unlawful force was threatened against him; (2) he believed the danger of harm was imminent; (3) he was not the aggressor; (4) the force used was necessary to avert the danger; and (5) his beliefs were reasonable. *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). Once defendant offers some evidence on each of these elements, the State must prove beyond a reasonable doubt that he did not act in self-defense. *People v. Rodriguez*, 336 Ill. App. 3d 1, 15 (2002). The State may satisfy its burden, however, by negating any one of the self-defense elements. *Jeffries*, 164 Ill. 2d at 128.

Here, the trial court rejected defendant's claim of self-defense, finding, under the circumstances, that it was unreasonable for defendant to believe that he was in danger of imminent death or great bodily harm. The reasonableness of defendant's belief that deadly force was necessary is a question of fact, and depends upon the surrounding facts and circumstances. *Rodriguez*, 336 Ill. App. 3d at 15.

The trial evidence in this case shows that both the victim and defendant had been drinking, that words were exchanged in the

parking lot, and that the victim charged defendant after his cousins could not hold him back. A fist fight ensued, although it is unclear who started it, and concluded within 15 seconds when defendant stabbed the victim in the chest. The evidence further shows that the victim was 50 pounds lighter and nearly six inches shorter than defendant, and sustained numerous abrasions in addition to the fatal stab wound, whereas the only injury sustained by defendant was to his hand. The fact that defendant was practically unscathed compared to the victim (*In re Jessica M.*, 399 Ill. App. 3d 730, 737 (2010); *People v. Grayson*, 321 Ill. App. 3d 397, 402 (2001)) and the victim was significantly smaller than defendant (*People v. Anderson*, 234 Ill. App. 3d 899, 906 (1992)), along with the condition of the participants, the location and surrounding circumstances support the court's conclusion that defendant was unreasonable in his belief that the victim posed an imminent threat of great bodily harm to him and that the use of deadly force was justified.

Defendant, however, claims in his appellate brief that he was reasonable in his belief that the use of deadly force was justified since he believed that the victim's silver wristwatch was a knife and he was retreating. The record, however, contradicts defendant's claim that he believed the victim had a knife where he never testified to such. Instead, he testified that he noticed a shiny object in the victim's hand but could not

describe it. Further, any belief that the victim had a knife was unreasonable where the evidence showed that the victim did not have a weapon, and there was enough light for other people, who were farther away, to see that defendant had a blue folding knife in his hand, and Kelley was holding a miniature bat.

We also observe that the trial court found that it was unlikely that defendant was retreating. We find no reason to disturb that finding (*Jordan*, 130 Ill. App. 3d at 813), where the evidence shows his active participation in the short fight in which the victim suffered numerous injuries compared to his single hand injury which was most likely caused by him punching the victim.

We also find no merit to defendant's contention that his use of deadly force was necessary since the victim was unfazed after being struck with a baseball bat. Given the victim's sobriety, or lack thereof, and the heated circumstances, he was unlikely to be fazed by a single blow to the arm with a miniature souvenir bat. In addition, and contrary to his contention, there is no evidence that the victim's punches damaged the sunglasses on his head which could have fallen off his head and been stepped on.

Defendant further maintains that this incident is strikingly similar to the victim's attack on Manos, but acknowledges that the prior incident cannot be used to show that he knew of the victim's violent propensity. This is consistent with *People v.*

Lynch, 104 Ill. 2d 194, 199-200 (1984), cited by defendant, where the court recognized that a victim's violent history may be offered to show defendant's knowledge of the victim's violent propensities affected his perceptions of and reactions to the victim's behavior. However, this evidence is only relevant if defendant was aware of the victim's history, and here there is no indication that defendant was aware of it at the time of the offense. *People v. Figueroa*, 381 Ill. App. 3d 828, 841 (2008). As a result, the first approach does not apply.

The court in *Lynch*, 104 Ill. 2d at 200, also recognized that such evidence may be used to support defendant's version of the facts where there are conflicting accounts of what happened. *Figueroa*, 381 Ill. App. 3d at 841. Defendant, however, has not explained how this second *Lynch* factor applies. He merely cites *Lynch*, and states that his situation with the victim was strikingly similar to the victim's prior incident with Manos. The court allowed this evidence, and found that it did not support his claim where the victim backed off when a weapon was displayed. Here, it was defendant who produced the weapon, and stabbed the unarmed victim. Thus, *Lynch* provides no basis for reversal.

Defendant further claims that based on *People v. White*, 87 Ill. App. 3d 321 (1980) and *People v. Baker*, 31 Ill. App. 3d 51 (1975), his use of deadly force was reasonable under the

exigencies that existed in the moment. In *White*, defendant's belief that he was in danger of great bodily harm or death was found reasonable where the victim had cut him with a knife during a prior incident, and his threats and aggressive conduct were real at the time of the incident. *White*, 87 Ill. App. 3d at 324. *White* is clearly factually inapposite to this case where there is no showing that defendant was aware that the victim had a violent history.

In *Baker*, the reviewing court found that defendant was justified in using deadly force to protect himself and his female friend where the victim, who had a propensity for violence, and his friend had chased them after they cut them off, were much larger than them, and while in a foggy, dark deserted area exited their car and attacked the woman. *Baker*, 31 Ill. App. 3d at 55-56. *Baker* is factually inapposite to this case where defendant was larger than the victim and was not defending anyone from a much larger man in a deserted area, but had fatally stabbed a man who had been drinking and engaged in a fist fight with him.

In sum, the trial court rejected defendant's claim of self-defense finding that his belief that he was in danger of imminent death or bodily harm was unreasonable under the circumstances, and was therefore guilty of second degree murder. We find that the evidence supports that determination, and we affirm the judgement entered. *Rodriguez*, 336 Ill. App. 3d at 16-18.

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Affirmed.