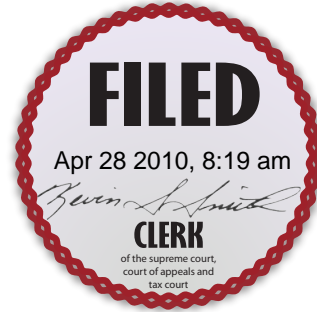


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**IN THE
COURT OF APPEALS OF INDIANA**

KEITH MCCRAY,)

Appellant-Defendant,)

vs.)

No. 49A05-0909-CR-536)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0808-MR-189705

April 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant Keith McCray was convicted of Class A felony Voluntary Manslaughter¹ and Class A misdemeanor Carrying a Handgun Without a License,² for which he received an aggregate forty-year sentence in the Department of Correction with ten years suspended, five to probation. Upon appeal, McCray challenges his voluntary manslaughter conviction by arguing that there was insufficient evidence to rebut his claim of self-defense. We affirm.

FACTS AND PROCEDURAL HISTORY

The evidence most favorable to the verdict reveals that in the late night and early morning hours of August 9-10, 2008, two groups of persons were gathered near the intersection of Narrow Leaf Drive and Narrow Leaf Court in Indianapolis. McCray, S.W., her boyfriend Kameron Wells, and Devon Williams were gathered outside S.W.'s mother's home at 11422 Narrow Leaf Drive. Lonnie Banks, Nick Martin, Amanda Renner, Lanee Harlin, and others were gathered outside their friend Diamond's aunt's home on Narrow Leaf Court, which is a cul de sac branching off of Narrow Leaf Drive.

At some point Banks and Martin walked toward the intersection of Narrow Leaf Drive and Court after hearing that the other group had a "beef" with Banks's friend Baron Mays. Tr. p. 505. Banks yelled at S.W.'s group, "Who[']s got a problem with Baron Mays?" Tr. p. 252. McCray, who was in possession of a handgun at the time, responded by yelling, "I don't f*** with Baron." Tr. p. 255. Banks then stated, "All right. It don't concern you. It don't matter to you." Tr. p. 508. Shortly thereafter,

¹ Ind. Code § 35-42-1-3(a)(1) (2008).

² Ind. Code § 35-47-2-1 (2008).

gunshots rang out, and Banks was hit in the chest with a bullet. Martin could not identify the shooter but claimed that McCray's group fired first. Renner similarly claimed that the first shots were fired at, rather than by, Banks and Martin. Wells and Williams did not dispute that McCray fired shots but claimed that he did so only after Banks's group fired shots at them. S.W. similarly testified that McCray fired shots in response to gunfire, but she admitted having initially told authorities that McCray's were the first shots. According to S.W., within two minutes after McCray left the scene immediately following the shooting, he called her and instructed her not to identify him.

Banks died as a result of his gunshot wound. The bullet causing Banks's death was recovered from his body and later determined to have been shot by a .45 caliber gun containing McCray's fingerprints on the magazine. Authorities at the scene discovered multiple spent casings, including four .25 caliber casings and one .45 caliber casing, as well as a .38 caliber revolver containing four live rounds and one spent casing.

On August 14, 2008, the State charged McCray with murder (Count I) and Class A misdemeanor carrying a handgun without a license (Count II). At the close of the August 10-12, 2009 jury trial, the trial court submitted instructions permitting the jury to consider, with respect to Count I, the lesser-included offense of voluntary manslaughter. The jury subsequently found McCray guilty of voluntary manslaughter and carrying a handgun without a license. During an August 27, 2009 sentencing hearing, the trial court sentenced McCray to concurrent terms of forty years in the Department of Correction, with ten years suspended, five to probation, on Count I, and one year in the Department of Correction on Count II. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, McCray challenges the sufficiency of the evidence to negate his self-defense claim. Specifically McCray points to conflicting evidence concerning who began shooting first. According to McCray, he merely returned fire out of fear once he was shot upon.

A valid claim of self-defense of oneself or another person is legal justification for an otherwise criminal act. *Wilson v. State*, 770 N.E.2d 799, 800 (Ind. 2002) *see* Ind. Code section 35-41-3-2(a) (2008). In order to prevail on such a claim, the defendant must show that he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. *Id.* When a claim of self-defense is raised and finds support in the evidence, the State has the burden of negating at least one of the necessary elements. *Id.* If a defendant is convicted despite his claim of self-defense, this court will reverse only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt. *Id.* at 800-01. In any event, a mutual combatant, whether or not the initial aggressor, must declare an armistice before he or she may claim self-defense. *Id.* at 801; *see* Ind. Code section 35-41-3-2(e)(3) (2008) (“[A] person is not justified in using force if: ... the person has entered into combat with another person or is the initial aggressor, unless the person withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action.”). The standard of review for a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same as the standard for any sufficiency

of the evidence claim. *Id.* We neither reweigh the evidence nor judge the credibility of witnesses. *Id.* If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed. *Id.*

In evaluating McCray's claim, we are mindful that the jury, in convicting him of manslaughter, found that he acted in sudden heat. Sudden heat is not an affirmative defense to murder; rather, it is a mitigating factor that reduces the defendant's culpability from murder to voluntary manslaughter. *See Adkins v. State*, 887 N.E.2d 934, 938 (Ind. 2008). Insults or taunts alone do not constitute sudden heat and are not sufficiently provocative to merit a conviction for voluntary manslaughter instead of murder. *See Watts v. State*, 885 N.E.2d 1228, 1233 (Ind. 2008). A claim of self-defense is not necessarily inconsistent with finding killing in sudden heat. *Clark v. State*, 834 N.E.2d 153, 157 (Ind. Ct. App. 2005).

With respect to McCray's self-defense claim, there was evidence, which the jury was entitled to believe, supporting the reasonable inference that he fired the first shots. Both Martin and Renner testified that the first shots were fired *at* Banks and Martin immediately following their dispute with McCray's group, and S.W.'s testimony that McCray did not fire the first shots was undercut by her admission to having initially told authorities that he had. Of course, the jury found that McCray acted in sudden heat, suggesting that it may have discredited the evidence that McCray fired the first shots. Regardless of whether McCray instigated the violence, however, there was ample evidence that he willingly participated in it. According to both Williams and Wells, after hearing gunshots, McCray used his car as a shield to fire at least two gunshots in the

other group's direction. He then ducked behind the car, and later, shot again. Firing multiple shots undercuts a claim of self-defense. *Randolph v. State*, 755 N.E.2d 572, 576 (Ind. 2001). Moreover, as McCray fled the scene immediately after the shooting, he fixed Williams's jammed gun, causing it to fire, and he called S.W. to instruct her not to identify him. These facts, demonstrating McCray's ongoing participation in the violence and his attempt to avoid detection, support the reasonable inference that McCray was a willing participant in the violence, if not the instigator. Accordingly, there was sufficient evidence to rebut McCray's claim of self-defense.

The judgment of the trial court is affirmed.

RILEY, J., and MATHIAS, J., concur.