# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KUPHENIA LAWRENCE,

Defendant-Appellant.

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UNPUBLISHED
March 3, 2000

No. 212881
Wayne Circuit Court
LC No. 97-009225

Before: O'Connell, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to seven to twenty years' imprisonment for the assault with intent to commit murder conviction and a consecutive two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

This case arises out of a shooting in the City of Detroit. Defendant shot five bullets at her boyfriend, MacArthur Duncan, after a verbal confrontation on East Warren, near Beaconsfield. Duncan survived his injuries, although he sustained two bullet wounds to the head and two to the chest. Defendant admits that she shot Duncan, but claims she did so in self-defense.

Defendant first argues that the prosecutor presented insufficient evidence to support the trial court's finding that defendant did not act in self-defense. When reviewing a challenge to the sufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The use of deadly force is justifiable under Michigan law "if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). However, a defendant is not entitled to use any more force than is necessary to defend himself. *Id*. at 509. A person must avoid using deadly force by retreating when it is safe to do so and deadly force may only be used if immediately necessary

to repel an imminent threat. CJI2d 7.16. We review a trial court's findings of fact for clear error. *People v Everard*, 225 Mich App 455, 458; 571 NW2d 536 (1997). A finding of fact is clearly erroneous if, after reviewing the entire record, this Court is "left with a definite and firm conviction that a mistake has been made." *Id.*

Defendant initially contends that the trial court clearly erred in finding that Duncan did not have the present ability to harm defendant. The only witnesses to the shooting who testified at trial were defendant, Duncan and William Alexander. Duncan testified that he did not approach defendant in a threatening manner. Similarly, Alexander testified that Duncan approached defendant "[w]alking at a regular pace," and that Duncan never raised his hand as though he might strike defendant. Alexander further testified that Duncan did not "go after" defendant in the sense of lunging at her. Alexander's testimony is also contrary to defendant's claim that she shot the gun as the only way to stop Duncan from grabbing her from behind. Defendant claimed Duncan ran at her and got as close as one foot away when she shot him. In contrast, Alexander testified that Duncan was approximately twelve feet from defendant when defendant began shooting and that defendant was facing Duncan at the time. All three witnesses testified that Duncan was yelling at and directing profanity toward defendant. However, all three witnesses also agreed that Duncan was not carrying a weapon. Despite defendant's testimony that she feared Duncan had a weapon, she specifically testified that she saw nothing in his hands. Alexander also testified that Duncan did not make any motions toward his body, waist or head, and that he never saw a bulge that would suggest Duncan had a weapon.

Although the testimony conflicted regarding Duncan's behavior when he approached defendant just before the incident, the trial court's resolution of factual issues is entitled to deference when a question arises regarding the credibility of witnesses and their conflicting testimony. *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983). The court found that Duncan did not physically threaten defendant, and we possess no definite and firm conviction that the trial court made a mistake in reaching this conclusion. *Everard, supra* at 458. Defendant nevertheless contends that the prior acts of Duncan placed defendant in reasonable fear of serious bodily harm. Prior acts of violence by the victim may be relevant to the issue of self-defense. *People v Rockwell*, 188 Mich App 405, 408-410; 470 NW2d 673 (1991). However, a defendant's reason to fear someone because of prior threats or assaults does not excuse the requirement that the defendant be in imminent danger at the time of the use of deadly force. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Defendant also contends that the trial court clearly erred in finding that she had the ability to retreat from the confrontation. A defendant's failure to retreat from the confrontation may be considered in determining whether her actions were justified. *People v Dabish*, 181 Mich App 469, 477; 450 NW2d 44 (1989). Here, the record reflects that defendant had both a route of retreat and an opportunity to safely escape before she chose to use deadly force against Duncan. Alexander testified that the confrontation took place in an alley and that defendant was backing up toward a street where she could have run in any one of four directions to get away from Duncan. Both Alexander's and Duncan's testimony also contradicts defendant's claim that Duncan ran at her or grabbed her. Their testimony instead supports the trial court's finding that Duncan was some feet away from defendant

when she started shooting. Further, defendant herself testified that after an initial confrontation, she watched Duncan go back to his car and take off items of jewelry before he approached her again. Such action on the part of Duncan would clearly have given defendant time to run in whichever direction she chose. Given this testimony, the trial court did not clearly err in finding that defendant had the ability to retreat from Duncan before she used force. *Everard, supra* at 458. The evidence was sufficient to prove, beyond a reasonable doubt, that defendant did not act in self-defense when she shot Duncan. *Johnson, supra* at 723.

Defendant next argues that there was insufficient evidence to establish the intent element of the crime of assault with intent to commit murder. A conviction for assault with intent to commit murder must be premised on the defendant's specific intent to kill. *People v Edwards*, 171 Mich App 613, 620; 431 NW2d 83 (1988). Circumstantial evidence and the reasonable inferences arising from that evidence may constitute satisfactory proof of the intent element. *Truong, supra* at 337. Further, minimal circumstantial evidence is sufficient to prove an actor's state of mind. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). All conflicts in the evidence must be resolved in favor of the prosecution *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The court first inferred that defendant had the specific intent to kill because she carried a concealed gun on her person the day after an argument with Duncan. The court next noted that defendant fired five bullets and hit defendant four times. Because Duncan did not have the present ability to harm defendant, this amount of force also supports the inference of an intent to kill. That the bullets hit Duncan in the head and chest further evidences that intent. In addition, defendant admitted that she did not shoot in the air or at the ground to warn Duncan away, despite her claim that her intent was simply to scare Duncan. Considering the evidence in the light most favorable to the prosecution, there was sufficient evidence that defendant had the specific intent to kill when she shot Duncan. *Johnson, supra* at 723; *Edwards, supra* at 620.

Finally, defendant argues that her minimum seven-year sentence was excessive and disproportionate. This Court reviews a defendant's sentence for an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). A court abuses its discretion if the sentence imposed is disproportionate to the offense committed and to the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The trial court followed the sentencing guidelines range of seven to fifteen years as calculated for the offense of assault with intent to murder. The court also articulated reasons for placing defendant at the low end of the guidelines range. If a sentence is within the proposed sentencing guidelines range, it is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-55; 408 NW2d 789 (1987). To overcome this presumption, the defendant must articulate unusual circumstances demonstrating that the sentence is disproportionate. *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). Such unusual circumstances are not present in this case.

First, defendant contends that the seven-year minimum sentence is not proportionate to the offense in this case because she justifiably defended herself after attempting to retreat from the conflict. Because there was sufficient evidence for the trial court to find that defendant did not act in self-defense

in shooting Duncan, this argument is without merit. Defendant next contends that her minimum seven-year sentence is not proportionate to the offender. Specifically, defendant claims that the sentence is excessive because she was attending school, had a job, and had no criminal record at the time of the incident. However, defendant's employment and lack of criminal history are not unusual circumstances that overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). We likewise find that while some evidence suggests that defendant was attending school before her arrest, this factor alone is not enough to render her sentence disproportionate. We hold that defendant's sentence was proportionate to both the offense and the offender. *Milbourn, supra* at 636. There was no abuse of discretion.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kathleen Jansen