

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JONES,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 215831

Wayne Circuit Court

LC No. 98-007270

Before: Cavanagh, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Defendant, who claimed at trial that he fatally stabbed his longtime friend and lover, Walter Arrington, in self-defense, appeals by right from his conviction following a bench trial of voluntary manslaughter, MCL 750.321; MSA 28.553. The trial court sentenced him to 2½ to 15 years in prison. We affirm.

Defendant first contends that the trial court clearly erred in finding that defendant did not honestly and reasonably believe that he was in imminent danger of death or serious bodily harm. This Court reviews the trial court's findings of fact in a bench trial for clear error. *People v \$207.41 US Currency*, 148 Mich App 326, 332; 383 NW2d 633 (1986). A decision was clearly erroneous if, after review of the entire record, we are firmly convinced that a mistake occurred. *People v Thenghkam*, 240 Mich App 29, 43; 610 NW2d 571 (2000); *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996). We will not weigh the credibility of witnesses or substitute our assessment of the testimony for that of the trial court. MCR 2.613(C).

To lawfully defend himself using deadly force, a defendant must honestly and reasonably believe himself to be in immediate danger of death or serious bodily harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990); *People v Truong*, 218 Mich App 325, 337; 553 NW2d 692 (1996); *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). The trial court must consider the circumstances surrounding an act claimed as self-defense as they appeared to the defendant at the time of the act, not as they actually existed. *People v Perez*, 66 Mich App 685, 692; 239 NW2d 432 (1976). In the instant case, the trial court found that, based on the circumstances, defendant did not have the requisite fear for his own safety to justify his actions through self-defense.

Defendant testified that (1) he and Arrington had been fighting the day of the stabbing; (2) during an initial confrontation in their home, Arrington attacked defendant with a knife; (3) defendant disarmed Arrington, set down the knife, and left the house; (4) a short time later, defendant returned to the house to retrieve his personal belongings; (5) Arrington then attacked defendant with a knife a second time; and (6) as the two men struggled, defendant took his knife out of his pocket and stabbed Arrington in the neck. There were no witnesses to verify defendant's story. The upstairs neighbors testified that when they saw both men after the stabbing, defendant told them that he had stabbed Arrington and then left the premises.

The trial court concluded that, based on all the circumstances, defendant's claim that he acted out of fear for his safety was not credible. Although the trial court believed most of defendant's testimony, it noted that certain facts conflicted within defendant's story and weighed against a finding of self-defense. First, although defendant claimed that he was afraid of Arrington, he set the knife down after the first attack and later returned to the house without asking for help. Second, although defendant claimed that he acted in self-defense when he stabbed his longtime friend and lover, he did not stay to see how badly Arrington was injured or to explain what had happened. Third, defendant claimed at trial that Arrington choked him during the struggle, but defendant did not include this assertion in his statement to police. Fourth, although defendant claimed that Arrington attacked him with a knife, Arrington had no weapon in his hand, and the folded knife in Arrington's pocket was free of blood. Based on the forgoing facts, the trial court concluded that, as "a matter of credibility . . . the facts conflict with what [defendant is] saying." Although it was not clear exactly what happened the night of the stabbing, the trial court determined, as a matter of credibility, that the events did not warrant defendant's use of deadly force in self-defense. Based on a thorough review of the record and this Court's deference to the trial court's assessment of defendant's credibility, we are not firmly convinced that a mistake has been made. Accordingly, we hold that the trial court did not clearly err when it found that defendant did not have the requisite fear of death or serious bodily harm to justify his act.

Next, defendant argues that the trial court applied an improper law of self defense. This Court reviews a trial court's conclusions of law de novo. See, e.g., *Thenghkam, supra* at 69. Defendant points to the trial court's statement in its findings that "you may not kill or seriously injure another person just to protect [yourself]," which, at first blush, appears to be an erroneous statement. However, defendant takes the trial court's statement out of context. A review of the trial court's entire findings of fact and conclusions of law reveals that it applied the correct law of self-defense. After an exhaustive review of the evidence, the trial court stated:

The defendant must have honestly and reasonably believed that he was in danger of being killed or seriously injured. That this belief was honest and reasonable, could act [sic] immediately to defend himself even if it turned out later that he was wrong about how much danger he was in. In deciding that defendant's belief was honestly reasonable you should consider all the circumstances that occurred to defendant at that time.

This was a correct statement of the law. *Heflin, supra* at 502. The statement at issue, which immediately followed the language quoted above, becomes clear when read in context with the

preceding statement and with the court's subsequent statement that "[t]he defendant must have been afraid of death or serious physical injury." The trial court was merely emphasizing the fact that a defendant may not use deadly force "just to protect himself" without an honest and reasonable belief that he was in immediate danger of being killed or seriously injured. Accordingly, we find no error in the trial court's conclusion of law.

Next, defendant argues that the prosecutor committed misconduct requiring reversal by introducing evidence of Arrington's character in rebuttal. Following defendant's testimony, the prosecutor called two rebuttal witnesses, a friend of Arrington and Arrington's cousin, who testified to Arrington's reputation for peacefulness and nonviolence. Defendant argues that the prosecutor could not introduce evidence of Arrington's character because defendant did not first submit evidence that Arrington was a violent person. Further, he argues that the prosecution was required to present any evidence of Arrington's character in its case-in-chief, that the evidence of Arrington's reputation for nonviolence was cumulative, and that it served to impeach defendant on a collateral matter. We review issues of prosecutorial misconduct on a case-by-case basis, examining the prosecutor's conduct in the context of the record. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The question we must answer on appeal is whether the alleged misconduct denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

A prosecutor's good faith effort to introduce evidence cannot be the basis of prosecutorial misconduct. *Noble, supra* at 660-661. In general, rebuttal evidence is admissible to contradict, explain, or disprove evidence presented by the other party. *People v Rice (On Remand)*, 235 Mich App 429, 442; 597 NW2d 843 (1999). The Michigan Rules of Evidence specifically allow the introduction of "evidence of a character trait of peacefulness of a victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor." MRE 404(a)(2). When a defendant introduces evidence that the victim was the initial aggressor, he puts the victim's character at issue. Wade & Kolenda, *Michigan Courtroom Evidence* (3d ed), pp 4-73. In the instant case, defendant testified that Arrington attacked him twice without provocation on the night of the stabbing. Accordingly, the prosecution was entitled to introduce evidence of Arrington's character for peacefulness in rebuttal.

Defendant's argument that the prosecution should have introduced the character evidence in its case-in-chief is without merit. The Michigan Rules of Evidence only permit the prosecution to introduce rebuttal evidence of a victim's character following evidence that the victim was the initial aggressor. MRE 404(a)(2). In this case, that evidence came only from defendant's testimony, after the prosecution had rested. Thus, the prosecution could not have introduced the evidence at issue in its case-in-chief. *People v Edwards*, 139 Mich App 711, 717-719; 362 NW2d 775 (1984). Similarly, in light of the fact that defendant's own testimony identified Arrington as the initial aggressor, defendant's argument that the evidence was cumulative must fail. Nor, contrary to defendant's argument, did the rebuttal testimony constitute impeachment on a collateral matter; indeed, it went to a central issue in the case. No prosecutorial misconduct occurred.

Finally, defendant argues that the trial court abused its discretion by admitting the evidence of Arrington's peaceful character. In order to find an abuse of discretion in the trial court's admission of rebuttal evidence, we must be convinced that an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling made. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996); *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997); *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). As explained above, the rebuttal evidence was indeed admissible, and the trial court therefore did not abuse its discretion by admitting it.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Patrick M. Meter