STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 26, 2010
v	No. 288006 Wayne Circuit Court
BRANDON MASHON STARKS, Defendant-Appellant.	LC No. 08-006636-FC

Before: Bandstra, P.J. and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a second habitual offender, MCL 769.10, to 83 to 180 months in prison for each assault with intent to cause great bodily harm less than murder conviction, 30 to 48 months in prison for the felonious assault conviction and two years in prison for the felony-firearm conviction.[1] We affirm.

Defendant first argues on appeal that there was insufficient evidence to disprove his theory of self-defense. This Court reviews claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Additionally, once a theory of self-defense is raised by the defendant, this Court must determine whether a rational trier of fact could find that the prosecutor presented sufficient evidence to disprove the defense beyond a reasonable doubt. *People v Roper*, ___ Mich App ___; ___ NW2d ___ (Docket No. 285137, issued October 22, 2009), slip op at 5. Further, this Court must defer to the fact finder's role in

[1] Defendant also pleaded guilty to being a felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, arising out of the same facts underlying this case. He was sentenced at the same sentencing hearing to 40 to 60 months in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. These convictions and sentences are not the subject of this appeal.

determining the weight of the evidence and the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). "[C]onflicts in the evidence must be resolved in favor of the prosecution." *Id.*

Defendant argues that the evidence did not support a conclusion that he intended to cause great bodily harm because he acted out of self-defense. Defendant has not presented any argument on the discrete issue of whether there was evidence to prove his intent. His entire argument, rather, is whether there was evidence to disprove his proffered theory of self-defense.

Defendant's theory of self-defense is that he was threateningly confronted by three men, Riyah Al-Saaidi, Qusay Al-Naiyer, and Hassan Al-Sabbar, reasonably feared he was in imminent danger of death or great bodily harm, and defended himself with his gun. MCL 780.972(1), which governs self-defense, provides, in part:

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> > (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

The touchstone of a claim of self-defense is necessity. *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). Once evidence of self-defense is presented, it is the prosecutor's burden to disprove it, beyond a reasonable doubt. *Roper, supra*, slip op at 5.

Defendant was walking toward a gas station with two friends, DaQuan Drewery and Raymond Allen, when they claim that Al-Saaidi, Al-Naiyer, and Al-Sabbar drove by and stared at them from their car in a way that made them nervous. Shortly thereafter, Al-Saaidi, Al-Naiyer, and Al-Sabbar returned to the gas station and pulled up 15 to 20 feet from defendant and his friends. The evidence that Al-Saaidi, Al-Naiyer, and Al-Sabbar threatened defendant and his friends was circumstantial. Drewery and Allen testified that they had a feeling there was going to be a fight, but could not explain why.

Drewery testified that Al-Naiyer got out of the car in a way that gave Drewery reason to believe that Al-Naiyer might have a gun. No weapons were ever found on the victims or in their car. Drewery originally testified that Al-Saaidi, Al-Naiyer, and Al-Sabbar never said anything, but on cross-examination changed his story to claim that one of them said something threatening to defendant, Drewery, and Allen as they exited the car. Finally, Allen testified that he did not see the shooting at all, but that Al-Naiyer told him after the shooting that Al-Saaidi, Al-Naiyer, and Al-Sabbar were looking for a group of men who had attacked his brother recently. Al-Naiyer denied this.

In contrast, there is no evidence that Al-Saaidi, Al-Naiyer, or Al-Sabbar ever had a weapon. Every witness testified that the shooting took place almost immediately after Al-Saaidi exited the car, while he was still 15 to 20 feet away from defendant. There is no evidence of any actual physical confrontation between the groups. Drewery's and Allen's testimony that a fight

was imminent was based on their gut feelings. Allen testified that defendant was intoxicated and angry; he became immediately agitated after the car passed them. Drewery described him as hyper and ready to fight.

Even assuming defendant and his friends were correct that Al-Saaidi, Al-Naiyer, and Al-Sabbar were spoiling for a fight, there is little evidence that defendant was in danger of imminent death or great bodily harm. MCL 780.792(1)(a); *Riddle*, 467 Mich at 127. Further, it is the province of the jury to resolve conflicts in the testimony and make credibility determinations of the witnesses. *Fletcher*, 260 Mich App at 562. There was sufficient evidence to support the jury's conclusion that defendant did not act in self-defense.

Defendant next argues that the trial court violated MCR 6.414(J) by denying the jury's request to hear testimony again and foreclosing the opportunity to do so later on. Defendant did not object to the trial court's comments to the jury. Thus, this issue is unpreserved. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). This Court reviews unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999); see also *People v Holmes*, 482 Mich 1105; 758 NW2d 262 (2008) (applying *Carines* to MCR 6.414(J) issue).

MCR 6.414(J) provides:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Defendant argues that the trial court refused to allow the jury to review the testimony it requested and foreclosed the opportunity for future review because its response was "unclear" regarding what it would provide for the jury. The trial court's response was:

> We don't have transcripts. They have to be typed out and that will take weeks. And then you want my jury instructions. I can't give you that. See, you have to listen to the testimony and talk amongst yourselves. The law—everything—is talked out. you communicate with one another and use your recollection.
>
> Now, in terms of the jury instructions, if you want me to reread certain portions of them I will reread [them] and, um, but, you know, you got to get in there and, you know, talk to each other and try to come up with some type of an agreement in terms of what the testimony was as well as the law. *And if there are—if you are at an impasse or not sure, then I can start playing back the testimony. Maybe you can isolate some of it.* Do you want me to tell you about the instructions?

The trial court explicitly stated that it would "play back" the testimony if the jury was at an impasse. The trial court conformed exactly with MCR 6.414(J) by asking the jury to deliberate

further, but offering to provide some testimony if later deemed necessary. The trial court did not err.

Finally, defendant argues that the trial court failed to consider his current and future ability to pay court-appointed attorney fees, in violation of *People v Dunbar*, 264 Mich App 240, 254; 690 NW2d 476, overruled by *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009). The requirement of *Dunbar* was overruled by our Supreme Court in *Jackson*, 483 Mich 271, thus, we need not determine whether the trial court made such a consideration.

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens