

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT HENRY VARTANIAN,

Defendant-Appellant.

UNPUBLISHED

June 24, 2010

No. 291112

Wayne Circuit Court

LC No. 07-013087-FC

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant, Robert Vartanian, appeals as of right his jury conviction of one count of possession of firearm during the commission of a felony (felony-firearm).¹ The trial court sentenced Vartanian to two years' imprisonment for the felony-firearm conviction. We affirm. We decide this appeal without oral argument.²

I. BASIC FACTS AND PROCEDURAL HISTORY

On June 29, 2007, Aaron Zimmnicki, Jeffrey Miller, Adam Arm, Eric Arm, Nicholas Budka, and Martin Kline all gathered at the home of Zimmnicki's cousin. Zimmnicki and the other men were told that Zimmnicki's niece had been involved in an altercation earlier that day with a few girls from the neighborhood. They were also told that some people related to the altercation were driving by the house in a white sports car and harassing the people in the house.

About 15 minutes after the men gathered at the house, they saw Vartanian's white Corvette sports car driving in front of the house. They were intent on confronting the driver of any white sports car. Consequently, when they saw Vartanian in his white Corvette sports car, they threw their hands in the air and began shouting at Vartanian from the porch of the house. Vartanian returned the profane language.

¹ MCL 750.227b.

² MCR 7.214(E).

As Vartanian's car continued past the house, the men from the house left the porch and moved to the street. After passing the house, Vartanian put his car in reverse and drove backwards quickly towards the group of men. The men had to scatter to avoid being hit by the car. Then Vartanian shot at Zimnicki, who was standing by the passenger window. The passenger window was up when Vartanian started shooting. Consequently, the window was shattered by the gunfire. After Vartanian shot Zimnicki six times, he got out of his car, aimed his gun at Miller, and threatened to shoot again.

An off-duty police officer was in the vicinity of the shooting. He arrived at the scene first and ordered Vartanian to put his gun down. Then another officer arrived and arrested Vartanian. As Vartanian was being arrested and led to the back of the police car, Vartanian told the arresting officer that he shot Zimnicki because six men approached his car with baseball bats and were beating his car. He also said that the group of men broke the window and tried to pull him out of his car. Vartanian said he shot Zimnicki when they were pulling him from the car. However, all of the men who testified denied having a baseball bat or any other weapon in hand when the shooting occurred. Likewise, the police did not find a baseball bat when they searched the scene.

The police inspected the car. Although the inspection revealed that there was a footprint on the back of the car, the police were unable to determine how long the footprint had been there. The car's antenna was bent, as well.

Vartanian was charged with one count of assault with intent to murder,³ regarding Aaron Zimnicki; one count of assault with a dangerous weapon,⁴ regarding Aaron Zimnicki; one count of assault with a dangerous weapon,⁵ regarding Jeffrey Miller; and one count of possession of firearm during the commission of a felony (felony-firearm).⁶

The jury acquitted Vartanian on all of the assault charges. However, the jury convicted Vartanian of one count of felony-firearm. The trial court sentenced Vartanian to two years' imprisonment for the felony-firearm conviction. Vartanian now appeals.

II. DENIAL OF MOTION FOR NEW TRIAL

A. STANDARD OF REVIEW

Vartanian argues that the trial court erred in failing to grant his motion for a new trial, asserting that his conviction was against the great weight of the evidence. Because Vartanian's challenge was preserved, the Court reviews for an abuse of discretion the trial court's denial of the motion for a new trial on the ground that the verdict was against the great weight of the evidence.⁷ A new trial may be granted when "the evidence preponderates so heavily against the

³ MCL 750.83.

⁴ MCL 750.82.

⁵ *Id.*

⁶ MCL 750.227b.

⁷ *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

verdict that it would be a miscarriage of justice to allow the verdict to stand.”⁸ Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.⁹ The trial court must defer to the jury’s determination unless the contradictory evidence was so deprived of probative value, or so defied physical facts or realities, that the jury could not believe the evidence.¹⁰

B. AGAINST THE GREAT WEIGHT OF THE EVIDENCE

The jury convicted Vartanian of felony-firearm. To prove felony-firearm, the prosecutor must prove that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.¹¹ Vartanian argued that he was defending himself. Once evidence of self-defense is introduced, the prosecutor must disprove the elements of self-defense beyond a reasonable doubt.¹² MCL 780.972 provides:

(1) 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 . . . :

(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.

This statute gives a defendant the right to stand his ground and not retreat before using deadly force.¹³ But the defendant must have had an honest and reasonable belief that he was in danger of death or of great bodily harm.¹⁴

The jury’s verdict was not against the great weight of the evidence. The testimony offered by the prosecution’s eyewitnesses was largely consistent. They testified that when the group of men first encountered Vartanian, Vartanian was in a car, whereas the men were on the porch and unarmed. By the time they left the porch and entered the street, Vartanian had already driven past the house, put his car in reverse, and drove back toward the house so as to be in the physical proximity of the men. A window was shattered on Vartanian’s car; however, the witnesses testified that it was shattered not because the men broke the window, but because Vartanian shot Zimnicki through the window. Likewise, the police failed to discover a baseball

⁸ *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

⁹ *Id.* at 219.

¹⁰ *Id.*

¹¹ *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

¹² *People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009).

¹³ *People v Conyer*, 281 Mich App 526, 530; 762 NW2d 198 (2008).

¹⁴ *Roper*, 286 Mich App at 86.

bat or any other weapon when they conducted a search of the crime scene. Because this testimonial evidence was largely consistent, it was not so deprived of probative value that the trial court should have granted a new trial. Instead, this evidence, if the jury found it credible, showed that Vartanian used a firearm to shoot an unarmed man. Moreover, Vartanian's claim of self-defense fails because he could not have honestly and reasonably believed that he was in fear of his life or of great bodily harm as he was in a car, and the men were unarmed. Consequently, the trial court did not abuse its discretion in deferring to the jury's verdict.

Vartanian also argues that his felony-firearm conviction was against the great weight of the evidence because the jury agreed with his theory of self-defense by acquitting him of one count of assault with intent to murder and two counts of assault with a dangerous weapon. Vartanian's argument is flawed. In a case with multiple counts, Michigan law allows a jury to reach different conclusions regarding the same elements in separate counts.¹⁵ Thus, a defendant may be acquitted of an underlying felony, yet still be convicted of felony-firearm.¹⁶ There are many possible explanations for inconsistent verdicts; for instance, the jury may have decided to be lenient.¹⁷ Consequently, inconsistent jury verdicts are not grounds for a new trial. Therefore, Vartanian's conviction was not against the great weight of the evidence and there were not grounds for a new trial.

III. DENIAL OF MOTION FOR DIRECTED VERDICT

A. STANDARD OF REVIEW

Vartanian argues that the trial court erred in denying his motion for a directed verdict. When reviewing a preserved challenge to the trial court's decision to deny a motion for directed verdict, the Court reviews the record de novo to determine whether the evidence produced by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt.¹⁸

B. SUFFICIENCY OF THE EVIDENCE

As stated, in order to convict a defendant of felony-firearm, the prosecution must prove that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.¹⁹ Once evidence of self-defense is introduced, the prosecutor must disprove the elements of self-defense beyond a reasonable doubt.²⁰ Michigan's self-defense statute²¹ essentially

¹⁵ *People v Goss*, 446 Mich 587, 597; 521 NW2d 312 (1994).

¹⁶ *People v Lewis*, 415 Mich 443, 452; 330 NW2d 16 (1982).

¹⁷ *Id.* at 450-451.

¹⁸ *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

¹⁹ *Avant*, 235 Mich App at 505.

²⁰ *Roper*, 286 Mich App at 86.

²¹ MCL 780.972.

provides that a defendant may use deadly force if the defendant honestly and reasonably believes that he is in fear of his life or of great bodily harm.²²

There is no dispute that Vartanian shot Zimnicki. Thus, the only real question is whether the prosecutor submitted sufficient evidence to prove beyond a reasonable doubt that Vartanian did not act in self-defense. The prosecution's eyewitnesses were unanimous in their testimony that the men were unarmed. The police corroborated this testimony. Although Vartanian was outnumbered, the prosecution's eyewitnesses were unanimous in their testimony that Vartanian's car had moved past the house and that Vartanian had to stop and then put the car in reverse to be in close physical proximity to the men. They also testified that Vartanian broke his own car window by shooting at Zimnicki. In light of this testimony, the prosecutor presented sufficient evidence to allow a rational trier of fact to conclude that Vartanian was not acting in self-defense when he shot Zimnicki because Vartanian was in no danger of being harmed until he put his car in reverse and drove back towards the men. Therefore, since the prosecutor submitted sufficient evidence, the trial court did not err in failing to grant Vartanian's motion for a new trial.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

²² *Roper*, 286 Mich App at 87.