

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 15, 2012

v

JERZE JACOB JANOVSKI,

Defendant-Appellant.

No. 305714
Wayne Circuit Court
LC No. 10-010117-FC

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Following a bench trial, defendant appeals his conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm.

Defendant's conviction arose out of an altercation with his neighbor's cousin, Steven Hatten, during which defendant stabbed Hatten at least three times with a sword. Defendant had gone into his own home to obtain the sword while Hatten was outdoors scuffling with defendant's wife. The trial testimony established that Hatten was unarmed during the altercation. There was conflicting testimony, however, concerning whether the altercation was instigated by defendant or by Hatten. The testimony also conflicted concerning the location of the altercation, specifically, whether it occurred on the neighbor's property or on defendant's property. Defendant contended that he was acting in self-defense on his own property at the time he stabbed Hatten.

An individual may use deadly force in self-defense if, among other things, the individual "honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily injury to himself or herself or to another individual." MCL 780.972(1)(a). Under those circumstances, the individual has no duty to retreat if he or she is not committing a crime at the time he or she uses deadly force, and if the individual is in a place he or she has a legal right to be. MCL 780.972(1). In addition, an individual has no duty to retreat if he or she is attacked in his or her own home or its curtilage. MCL 768.21c; see generally CJI2d 7.16(2). When a defendant presents evidence that he or she acted in self-defense, the prosecution bears the burden of disproving self-defense beyond a reasonable doubt. *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005).

In this case, the trial court found that the prosecution had proved beyond a reasonable doubt that defendant did not act in self-defense. The court identified four reasons for its finding.

First, defendant and Hatten had a separate altercation less than an hour before the sword incident, during which defendant had knocked Hatten down multiple times. The trial court found that defendant could not have reasonably believed he was in danger of imminent death or serious injury, given that defendant had “got the better of” Hatten shortly before the sword incident. Second, Hatten had not attacked defendant, but had merely walked unarmed toward defendant, apparently expecting a fistfight. The trial court found that under those circumstances defendant could not have had a reasonable belief of death or serious injury. Third, defendant had several opportunities to retreat, but did not do so. Fourth, defendant could not have reasonably believed that his wife was in danger of imminent death or serious injury, because Hatten was unarmed and defendant left Hatten scuffling with his wife while he went to get his sword.

Defendant’s sole argument on appeal is that the trial court erred by considering the duty to retreat when defendant had no duty to retreat as a matter of law. This argument presents a mixed question of law and fact. We review the trial court’s factual findings for clear error and review de novo the legal issue. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

We find no error warranting reversal of defendant’s conviction. To use deadly force in self-defense against Hatten, defendant must have had an honest and reasonable belief that he or his wife was in danger of death or serious injury. MCL 780.972; see also *People v Conyer*, 281 Mich App 526, 529-530; 762 NW2d 198 (2008). The record supports the trial court’s finding that defendant could not have had a reasonable belief of death or serious injury. Testimony indicated that during the first altercation, defendant voluntarily confronted Hatten and pushed him to the ground at least three times. During the second altercation, defendant voluntarily came out of his home to confront Hatten. When defendant’s wife joined the scuffle, defendant left his wife outside alone with Hatten while he went back inside their home to retrieve his sword. Therefore, the testimony supported the trial court’s finding that the prosecution disproved defendant’s self-defense claim.

Regarding the duty to retreat, the trial court found that Hatten had not attacked defendant on defendant’s property. The court noted that the location of the first altercation was unclear. The court did not make a finding about the location of the sword altercation, but did find that Hatten committed no attack, stating: “[t]here had been no attack on Mr. Hatten’s part other than [defendant’s] testimony saying that Mr. Hatten was walking toward him.” Having found that Hatten did not attack defendant, the home/curtilage exception to the duty to retreat was inapplicable as a matter of law.

The court’s other references to the duty to retreat were consistent with the court’s general finding that defendant could not have reasonably believed he or his wife was in danger of imminent death or serious injury. Given the trial court’s initial finding that defendant had no reasonable belief of imminent death or serious injury, the court could properly consider the duty to retreat as a secondary indication of whether defendant honestly and reasonably believed deadly force was necessary. See generally *People v Goree*, 296 Mich App 293, 297-298, 304; 819 NW2d 82 (2012) (reciting with approval the jury instructions on self-defense and the duty to retreat).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ William C. Whitbeck