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ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-17-153

JIMMY LEE CREWS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered December 6, 2017

APPEAL FROM THE HOT SPRING
COUNTY CIRCUIT COURT
[NO. 30CR-15-181]

HONORABLE CHRIS E WILLIAMS,
JUDGE

AFFIRMED

LARRY D. VAUGHT, Judge

Jimmy Lee Crews appeals the sentencing order entered by the Hot Spring County Circuit Court, finding him guilty of first-degree murder and sentencing him to forty years' imprisonment with a consecutive term of fifteen years' imprisonment for a firearm enhancement. On appeal, Jimmy argues that the circuit court erred in (1) refusing to give the justification jury instruction; (2) refusing to give the extreme-emotional-disturbance-manslaughter jury instruction; and (3) denying his motion for a directed verdict.¹ We affirm.

¹There is a fourth argument listed in Jimmy's points on appeal—that the circuit court erred in allowing improper rebuttal testimony. However, Jimmy sets forth no argument in this brief on this fourth point; consequently, we consider this argument abandoned. *Hale v. State*, 343 Ark. 62, 85 n.7, 31 S.W.3d 850, 864 n.7 (2000) (declaring an argument abandoned on appeal when the appellant mentioned it in the points on appeal but made no argument regarding it).

The record establishes that Jimmy lived in a camper on property owned by his niece, Loni DiGiacomo, and her husband, Scott, located on Camp Road near Bismarck, Arkansas. Loni, Scott, and their children lived in a separate home—a trailer with a connected workshop—approximately 100 feet from the camper where Jimmy lived. The victim, Ken Baum, also lived on Camp Road and owned two rental properties nearby. Ken was a friend of Scott's, but Ken and Jimmy did not like each other.

On the afternoon of September 19, 2015, Ken went to the DiGiacomo home and asked Loni if she knew whether Jimmy had gone to one of Ken's tenant's trailers and asked to take a shower. Ken asked, as he had before, if she and Scott would order Jimmy to move off their property. Loni said no because Jimmy had no place to go. Ken left but returned later that afternoon to discuss the matter with Loni and Scott. Ken was persistent about Jimmy moving, and Loni again said no. Loni said Ken was frustrated and left.

When Jimmy came home that evening, Scott told Jimmy about Ken's allegation. Jimmy became very upset and denied having been on Ken's property. At Scott's request, Ken agreed to ask his tenant to meet him, Scott, and Jimmy at the end of Ken's driveway on Camp Road to resolve the matter. At the beginning of the meeting, according to Scott, Ken and Jimmy verbally confronted each other for a few seconds before both men backed away without touching each other. Shortly thereafter, the tenant and an unidentified man arrived in a vehicle. Scott testified that Jimmy stuck his head into the car so the tenant could see his face, and she tentatively identified Jimmy as the man who had come to her trailer. Still upset, Jimmy left and headed to the DiGiacomo home. Loni testified that when Jimmy returned, he was frantic, scared, and very upset with Scott, calling him a liar, a child molester, and a rapist.

Jimmy asked Loni to call the police on Scott, but she refused. Loni said that Jimmy did not say anything about Ken. Loni did not see any bruises, blood, red marks, or scratches on Jimmy.

Scott arrived home a few minutes after Jimmy. Scott said that Jimmy was very mad at him for letting Ken treat Jimmy poorly. Scott and Jimmy were arguing in the workshop for about four minutes when Ken entered, leaned against a table with his arms crossed against his chest, and glared at Jimmy. As Ken glared, Jimmy started pacing and asked Ken why he was doing this to him. Scott described the tension in the workshop as “an environment of terror.” After a few minutes, Jimmy turned around, and said to Scott, “I’ll show you what I’ll do,” and he left. Scott stated that after two or three minutes, he heard Jimmy storm back into the workshop, say “All right, mother fucker,” and fire a shotgun at Ken. Jimmy fled but surrendered the next morning.

A diagram drawn by a law-enforcement officer showed that Jimmy was approximately twenty feet from Ken when he shot him. The medical examiner testified that the victim sustained “massive injury to both lungs and massive shredding injury to the heart.” The medical examiner also stated that the barrel of the shotgun was close enough to the victim to leave paper wadding from the shotgun shell on the victim’s coat.

Scott testified that before Ken was shot, he never said a word, never pulled out a gun, and never advanced toward Jimmy. Loni testified that when Ken entered the workshop, he was not screaming or acting out and that she did not see him with a gun. Law-enforcement officers testified that they did not find a firearm on Ken at the crime scene and that they did not find any evidence consistent with Jimmy’s claim of self-defense.

At trial, Jimmy testified that Ken had made allegations against him for years and that Ken had pointed his Derringer pistol, which he was known to carry, at Jimmy twice before the night of the shooting. According to Jimmy's testimony, when he and Scott walked down to Ken's driveway, Ken shoved, hit, and scratched Jimmy. Jimmy further stated that when Ken entered the workshop, he pointed his Derringer pistol at Jimmy. Jimmy said he was scared, no one would help him, no one would call the police, he felt trapped, and he panicked. He said that he left the workshop, got the shotgun from his camper, returned to the workshop, and shot Ken in self-defense.

In rebuttal, Ken's daughter, Sherry Caldwell, testified that within hours of the shooting, she located Ken's Derringer pistol in his home between the mattresses of his bed. Sherry's cousin, Rebecca Gibbs, corroborated Sherry's testimony.

Based on this evidence, the jury convicted Jimmy of first-degree murder. This appeal followed.

Although Jimmy's challenge to the sufficiency of the evidence is his third point on appeal, double-jeopardy considerations require this court to review a challenge to the sufficiency of the evidence before we review the other issues on appeal. *Jones v. State*, 349 Ark. 331, 335, 78 S.W.3d 104, 107 (2002). Jimmy challenges the sufficiency of the State's proof supporting the first-degree-murder conviction, claiming that evidence that he purposely caused Ken's death was lacking because the State failed to negate his justified use of deadly force against Ken. Jimmy argues that the evidence showed that Ken had recently battered him, had followed Jimmy to his home, and had pointed a pistol at him; that Jimmy

was agitated, pacing, scared and felt trapped; and that Scott described an “environment of terror” in the workshop.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Scott-Paxson v. State*, 2015 Ark. App. 149, at 1, 457 S.W.3d 311, 312. When a defendant challenges the sufficiency of the evidence that led to a conviction, the evidence is viewed in the light most favorable to the State. *Id.*, 457 S.W.3d at 312. Only evidence supporting the verdict will be considered. *Id.*, 457 S.W.3d at 312.

First-degree murder, defined in Arkansas Code Annotated section 5-10-102(a)(2) (Repl. 2013), provides that a person commits murder in the first degree if, with a purpose of causing the death of another person, the person causes the death of another person. A person acts purposely with respect to his or her conduct or a result of his or her conduct when it is the person’s conscious object to engage in conduct of that nature or to cause the result. Ark. Code Ann. § 5-2-202(1) (Repl. 2013). A criminal defendant’s intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Scott-Paxson*, 2015 Ark. App. 149, at 3, 457 S.W.3d at 313. Our supreme court has recognized that the intent necessary for first-degree murder may be inferred from the type of weapon used, from the manner of its use, and the nature, extent, and location of the wounds. *Id.*, 457 S.W.3d at 313.

The substantial-evidence standard of review also applies when reviewing the sufficiency of the State’s negation of a justification defense. *Jones v. State*, 2011 Ark. App. 92, at 3. Deadly physical force is justified as self-defense only if the use of such force cannot be

avoided by retreating. Ark. Code Ann. § 5-2-607(a), (b)(1)(A) (Repl. 2015). Our supreme court has interpreted this statute to mean that a condition precedent to a plea of self-defense is an assault on the defendant “of such a character that it is with murderous intent, or places the defendant in fear of his life, or great bodily harm.” *Jones*, 2011 Ark. App. 92, at 3 (citing *Girtman v. State*, 285 Ark. 13, 16, 684 S.W.2d 806, 807 (1985)). A critical inquiry is whether the defendant reasonably feared he or she was in danger of losing his or her life or receiving great bodily injury. *Id.* at 3. The belief must be objectively reasonable and not arrived at via fault or carelessness. *Id.*

Having viewed the evidence in the light most favorable to the State, we hold that the jury’s first-degree-murder conviction is supported by substantial evidence. The undisputed evidence established that Jimmy left Ken in the workshop, retrieved a shotgun from his camper, returned to the workshop, and shot Ken in the chest. Jimmy admitted at trial that he shot and killed Ken. There was evidence that Jimmy was only twenty feet from Ken when he fired the shotgun and that the bullet from the gun caused “massive” damage to Ken’s chest. There was evidence that Ken never said a word after he entered the workshop, that he did not point a firearm at Jimmy, and that he did not move toward him at any time. No firearm was found on Ken. In fact, the pistol Jimmy claimed Ken pointed at him was found at Ken’s home. Finally, Jimmy fled after shooting Ken. Our supreme court has consistently held that flight to avoid arrest or trial is admissible as a circumstance in corroboration of evidence tending to establish guilt. *Mason v. State*, 285 Ark. 479, 481, 688 S.W.2d 299, 300 (1985).

While Jimmy claims he acted in self-defense, the jury did not believe him. It is well settled that the credibility of witnesses is an issue for the jury and not this court. *Airsman v.*

State, 2014 Ark. 500, at 10, 451 S.W.3d 565, 571. The jury is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*, 451 S.W.3d at 571. In doing so, the jury may choose to believe the State's account of the facts rather than the defendant's. *Id.*, 451 S.W.3d at 571. Accordingly, we hold that there was substantial evidence for the jury to conclude that Jimmy purposely caused Ken's death and that the State negated Jimmy's claim of self-defense. *See Girtman*, 285 Ark. at 15–16, 684 S.W.2d at 807 (holding that substantial evidence supported the jury's first-degree-murder conviction and rejection of the justification defense where the evidence demonstrated that after an altercation between the appellant and the victim, the appellant retreated to his home, retrieved a pistol, encountered the unarmed victim in an alley, and shot and killed him). We affirm Jimmy's conviction for first-degree murder.

Jimmy's next two arguments concern the circuit court's refusal to give two jury instructions. The law is clear that a party is entitled to an instruction on a defense if there is sufficient evidence to raise a question of fact or if there is any supporting evidence for the instruction. *Sharp v. State*, 90 Ark. App. 81, 91, 204 S.W.3d 68, 75 (2005). When the defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense; however, there is no error in refusing to give a jury instruction when there is no basis in evidence to support the giving of the instruction. *Id.*, 204 S.W.3d at 75. The standard of review regarding the use of jury instructions is abuse of discretion. *Gould v. State*, 2014 Ark. App. 543, at 5, 444 S.W.3d 408, 411.

Jimmy's counsel submitted a jury instruction on the use of deadly force in defense of a person, also known as the justification defense. The circuit court refused to give that instruction, finding that Jimmy had the obligation and responsibility to retreat, he did retreat, and he was out of danger, but he returned to Ken with a shotgun and killed him. The court also found that Jimmy's testimony that Ken had a pistol was contrary to all of the other evidence in the case.

Jimmy argues that the circuit court erred in refusing to give the justification instruction because there was evidence that Ken had previously threatened Jimmy and had a reputation for carrying a Derringer pistol; Jimmy was frightened and felt trapped; and he shot Ken only after Ken had physically attacked him, followed him home, and pointed the Derringer pistol at him.

Jimmy's proffered justification instruction, AMI Crim. 2d 705,² stated, in pertinent part:

Jimmy Crews asserts as a defense to the charge of Murder in the First Degree that deadly force was necessary to defend himself. This is a defense only if:

First: Jimmy Crews reasonably believed that Kenneth Baum was using or was about to use unlawful deadly physical force; and

Second: Jimmy Crews only used such force as he reasonably believed to be necessary.

A person is not justified in using deadly force if he knows that the use of deadly physical force can be avoided by retreating.

One who asserts the defense of justification for a homicide must show not only that the person killed was using deadly force, but also that he or she responded with only such force as was necessary and that he or she could not have avoided the killing. *Ghoston v. State*, 84

²AMCI2d 705 is patterned after Arkansas Code Annotated section 5-2-607.

Ark. App. 387, 392, 141 S.W.3d 907, 911 (2004). Arkansas Code Annotated section 5-2-607(b)(1)(A) provides that a person may not use deadly force in self-defense if he or she knows that he can avoid the necessity of using that force with complete safety by retreating. *Id.*, 141 S.W.3d at 911.

In *Martin v. State*, 290 Ark. 293, 718 S.W.2d 938 (1986), the appellant, convicted of first-degree murder, appealed the circuit court's refusal to give the justification instruction where the evidence demonstrated that he had walked away from the confrontation with the victim, went to a car, retrieved a gun, walked back to the victim, shot, and killed him. The appellant argued that it was for the jury, not the court, to decide whether the appellant could have safely avoided killing the victim. Our supreme court disagreed and affirmed the circuit court's ruling, holding that based on the undisputed evidence of the appellant's retreat, he could have walked away from the victim and avoided the use of force with complete safety. *Id.* at 296–97, 718 S.W.2d at 939.

For the same reasons stated in *Martin*, Jimmy is not entitled to the justification instruction. The evidence in this case shows that Jimmy did not use all reasonable means to avoid killing Ken. When Jimmy walked away from the confrontation with Ken and went to his camper, he reached a place of safety and could have avoided killing Ken. However, he decided to retrieve a loaded shotgun, return to Ken, shoot, and kill him. The evidence claimed by Jimmy to support the justification instruction is insufficient. The circuit court is not required to submit a jury instruction when the only basis for the instruction is the defendant's uncorroborated self-serving testimony, contradicted by other witnesses or evidence. *Pollard v. State*, 2009 Ark. 434, at 8–9, 336 S.W.3d 866, 870. In the case at bar,

Jimmy claimed that Ken battered him on the driveway, but Scott testified that Ken did not touch Jimmy, and Loni testified that Jimmy did not have any bruises, blood, red marks, or scratches on him. Jimmy also claimed that Ken pointed his pistol at him; however, Scott and Loni testified that Ken did not have a pistol, law enforcement did not find a pistol on Ken, and Ken's daughter found the pistol at Ken's home. Accordingly, we hold that the circuit court did not abuse its discretion in refusing to submit the justification instruction, and we affirm on this point.

Jimmy also requested the circuit court to give the jury an instruction for the lesser-included offense of extreme-emotional-disturbance (EED) manslaughter,³ which provided:

Jimmy Crews is charged with the offense of Manslaughter. To sustain this charge the State must prove beyond a reasonable doubt that Jimmy Crews caused the death of Kenneth Baum under circumstances that would be murder, except that he caused the death under the influence of extreme emotional disturbance for which there was a reasonable excuse. You should determine the reasonableness of the excuse from the viewpoint of a person in Jimmy Crews's situation under the circumstances as he believed them to be.

The circuit court refused to give this instruction, stating that there was no proof before the court to justify it.⁴ On appeal, Jimmy argues that evidence was presented to support the EED manslaughter instruction—he and Ken had a history of problems; Ken physically attacked Jimmy and then followed him to his home; Loni said Jimmy was angry, scared, and frantic; Jimmy asked Loni to call the police; Jimmy was pacing in the workshop after Ken walked in; and the workshop was an “environment of terror.”

³The EED manslaughter instruction, AMCI2d 1004, is patterned after Arkansas Code Annotated section 5-10-104(a)(1)(A) (Repl. 2013).

⁴The court did, however, find that the evidence supported the jury instruction for the lesser-included offense of manslaughter found in Arkansas Code Annotated section 5-10-104(a)(3)—recklessly causing the death of another person.

In *Pollard v. State*, 2009 Ark. 434, at 3–4, 336 S.W.3d at 867–68, the appellant requested the EED manslaughter instruction based on his testimony at trial that he feared the victim because the victim had a reputation for violence, accused the appellant of being a “snitch,” showed the appellant the butt of a gun, and threatened the appellant on the night of the shooting. The appellant testified that when he saw the victim later that night, he shot and killed him because the appellant thought the victim had a gun. The evidence revealed that the victim did not have a gun. The circuit court refused to give the instruction. *Id.* at 4, 336 S.W.3d at 868.

On appeal, our supreme court held that a jury instruction on EED manslaughter under section 5-10-104(a)(1) requires evidence that the defendant killed the victim following provocation such as “physical fighting, a threat, or a brandished weapon.” *Id.* at 4, 336 S.W.3d at 868. The court stated:

The passion that will reduce a homicide from murder to manslaughter may consist of anger or sudden resentment, or of fear or terror; but the passion springing from any of these causes will not alone reduce the grade of the homicide. There must also be a provocation which induced the passion, and which the law deems adequate to make the passion irresistible. An assault with violence upon another who acts under the influence thereof may be sufficient to arouse such passion. . . . [M]ere threats or menaces, where the person killed was unarmed and neither committing nor attempting to commit violence on the defendant at the time of the killing, will not free him of the guilt of murder.

Id. at 4–5, 336 S.W.3d at 868 (citing *Rainey v. State*, 310 Ark. 419, 423, 837 S.W.2d 453, 455 (1992)). The court further explained that “adequate provocation can occur when the victim is armed or is attempting to commit violence toward the defendant.” *Id.* at 5, 336 S.W.3d at 868 (citing *Rainey*, 310 Ark. at 423–24, 837 S.W.2d at 455–56).

The *Pollard* court noted that while there was evidence from the appellant that he “believed” the victim had a gun, no weapon was found on the victim or at the crime scene. *Id.* at 8, 336 S.W.3d at 870. Thus, the court held that “the only evidence of threats or provocation that remotely approached the level required for a manslaughter instruction [was the appellant’s] own self-serving testimony,” which was held to be insufficient to warrant the giving of the instruction. *See also Butler v. State*, 2011 Ark. 369, at 5–6 (holding that the circuit court did not abuse its discretion in denying the EED manslaughter instruction when there was no evidence that the victim posed an immediate threat to the defendant). *See contra Rainey, supra*, and *Whittier v. State*, 84 Ark. App. 362, 141 S.W.3d 924 (2004) (reversing the circuit court’s denial of the EED manslaughter instruction because there was evidence that the victim actually possessed a gun and either fired it or threatened to fire it at the appellant at the time of the homicide).

As in *Pollard*, there is no evidence of provocation in the instant case to warrant an EED manslaughter instruction. No pistol was found on Ken or at the crime scene—the pistol Jimmy claims Ken brandished was found at Ken’s house. The only evidence of the alleged provocation in this case was Jimmy’s uncorroborated, self-serving testimony, which is insufficient. *Pollard*, 2009 Ark. 434, at 9, 336 S.W.3d at 870. Accordingly, the circuit court did not abuse its discretion by refusing to instruct the jury on EED manslaughter.

Affirmed.

KLAPPENBACH and WHITEAKER, JJ., agree.

Gregory K. Crain, for appellant.

Leslie Rutledge, Att’y Gen., by: *Rebecca Kane*, Ass’t Att’y Gen., for appellee.