

ARKANSAS COURT OF APPEALSDIVISION IV
No. CACR 11-599

GARLAND GREEN

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered NOVEMBER 16, 2011

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIFTH DIVISION, [NO. CR-08-4448]HONORABLE EARNEST SANDERS,
JR., JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Garland Green appeals his convictions for criminal attempt to commit capital murder, possession of a firearm by certain persons, and first-degree battery. He was tried to the bench in Pulaski County Circuit Court and was sentenced to concurrent ten-year terms of imprisonment. On the night of July 12, 2008, Green and Rufus Brian Worsham engaged in a physical altercation at the Royal Motorcycle Club in Little Rock. After the physical fight, Worsham ran outside, Green followed him, and Green repeatedly shot Worsham. Green's defense was that Worsham was the aggressor who created circumstances necessitating that Green defend himself. The trial judge found him guilty on all three counts. Green contends on appeal that (1) the attempted murder and battery convictions are not supported by sufficient evidence because Green was justified in shooting Worsham to defend himself, and (2) the felon-in-possession-of-a-firearm conviction is not supported by sufficient evidence based on the defense of choice of evils. We disagree with his arguments and affirm.

In considering the attempted murder and battery convictions, Green asserts that he was justified in shooting Worsham, negating the necessary mental state required for each of those crimes. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State and affirm if the evidence is of sufficient force to compel a conclusion without resort to suspicion or conjecture. *Coleman v. State*, 315 Ark. 610, 869 S.W.2d 713 (1994). The appellate court does not make credibility determinations; that is for the finder of fact, here the trial judge at the bench trial. *Meadows v. State*, 360 Ark. 5, 199 S.W.3d 634 (2004). Intent is rarely capable of direct proof but must usually be inferred from the circumstances. *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003). The fact-finder is permitted to draw on common knowledge and experience to infer intent from the circumstances. *LaFort v. State*, 98 Ark. App. 202, 254 S.W.3d 27 (2007).

The State first contends that Green failed to preserve the justification issue for appeal because he failed to specifically argue justification as part of his motions to dismiss, thus not complying with Ark. R. Crim. P. 33.1(b). We disagree.

In defense counsel's motions, he argued for dismissal of all three criminal counts. Therein, defense counsel asserted that the State failed to demonstrate that Green acted with premeditation and deliberation as to attempted capital murder, adding that "the Defendant defended himself with a gun." Defense counsel moved for dismissal of the felon-in-possession-of-a-firearm charge on the choice-of-evils defense, contending that Green took away Worsham's firearm in self defense. Defense counsel offered "a similar motion" on first-degree battery, contending that Green did not have the purpose to cause physical injury to

Worsham. The State responded that the testimony of Green and Worsham “do differ in possibly he [Worsham] was the aggressor,” but that the prosecution had presented a prima facie case to survive dismissal. The trial judge agreed, denying the motion to dismiss. Green renewed his motions at the conclusion of all the evidence, pointing out that “the justification defense has been established.” We hold that this was sufficient to apprise the trial judge of the specific basis asserted for dismissal.

Justification becomes a defense when any evidence tending to support its existence is offered; once raised, it becomes an element that must be disproved by the State beyond a reasonable doubt. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003). Whether one is justified is largely a matter of the defendant’s intent and is generally a fact question. *Smith v. State*, 30 Ark. App. 111, 783 S.W.2d 72 (1990). A person is justified if he can show that the victim was the aggressor and also that the accused used all reasonable means within his power and consistent with his safety to avoid the use of deadly force. *Martin v. State*, 290 Ark. 293, 718 S.W.2d 938 (1986). Critical to this inquiry is the reasonableness of the accused’s apprehension that he was in danger of death or of suffering great bodily harm. *Humphrey v. State*, 332 Ark. 398, 966 S.W.2d 213 (1998). Also critical is whether the accused used all reasonable means, consistent with personal safety, to avoid the use of deadly force. *Id.*; see also Ark. Code Ann. § 5-2-607 (Repl. 2006).

The evidence, viewed most favorably to the State, is as follows. Rufus Brian Worsham went to the club located near Woodrow Street around 10:00 p.m. intending to see Dennis Barton, his uncle by marriage. Worsham was familiar with appellant Green, also known as

“Loco,” who was at the club that night. Worsham brought marijuana with him and made a foul remark about a woman there, stating “I ain’t letting no crack head roll my weed.” Green struck Worsham, and a brawl ensued. Tables and chairs were overturned.

Ricky Howard testified that he was present at the motorcycle club that night, and he saw Barton and Worsham inside. Howard said Barton had a knife in his waistband and Worsham had a gun in his waistband. Howard saw Green strike Worsham in the face, leading to their fight. Howard said Green ended up with the gun.

Worsham ran out of the building to his truck parked out front, but the truck doors were locked so he could not get inside. Looking back toward the building’s door, Worsham saw that Green had a gun, now pointed at Worsham, which he began firing. Howard corroborated Worsham’s account about running out, being locked out of his truck, and Green shooting at Worsham.

Janice Frye testified that she was in the club that night, spoke to Worsham, and saw a gun in Worsham’s waistband area. She observed Green and Worsham arguing and then physically fighting inside the building. She also observed Worsham go outside to his truck afterward, followed by Green, who stood at the front door yelling at Worsham to leave on foot. Frye believed that Worsham moved toward Green in a threatening manner, resulting in Green repeatedly firing the gun.

Worsham ran to get away, but he was struck in the arm. Green shot Worsham’s truck windshield several times. Worsham attempted to hide, but Green drove around the neighborhood and found him. Green yelled at Worsham and shot from the driver’s window,

striking Worsham several more times in the torso. Worsham denied ever threatening Green's life that night.

Detective Martin of the Little Rock Police responded to the disturbance call, finding Worsham's GMC truck parked in front of the establishment with six bullet strikes to the windshield. Officer Woodall confirmed that Worsham had five bullet injuries: two gunshot wounds in his upper-right chest, one in his lower-left stomach, and two in his right arm. A crime scene specialist verified that Worsham's locked GMC truck sat right outside the establishment. She found five nine-millimeter casings around the truck's exterior. No gun was found inside the truck. The crime-scene specialist also stated that she saw what appeared to be blood on the ground about 100 yards away from the establishment.

Green testified in his own defense. He said that he told Worsham to take his marijuana outside, which led to the verbal argument. He agreed that he hit Worsham in the face and that they fought. Green said he took Worsham's gun when it hit the floor, following Worsham outside and telling Worsham to get away from his truck. He said Worsham's uncle, whom Green had known for about ten years, stood nearby the door. Green said he saw that the uncle had a knife. Green said he thought Worsham might try to retrieve another gun, although the truck was obviously locked. Green said that Worsham "rushed" at him threatening to kill him, so he began firing the gun at Worsham. He testified that Worsham ran away, "like he was running track." Green agreed that he was angry, which was why he "spent the gun on [Worsham] and the truck." He denied chasing Worsham down to shoot him more times.

On this evidence, the trial judge found Green guilty of attempted-capital murder and first-degree battery. The judge remarked that Green's testimony was inconsistent with the number of gunshots to Worsham and the truck, considering the number of shell casings found just outside the motorcycle club. The judge found Green's act of following Worsham outside with the gun, after the bar fight was over, compelling evidence. The finder of fact found that the State had sufficiently rebutted any claim of justification and had sufficiently established the necessary level of intention for these two crimes. *Compare Humphrey v. State*, 332 Ark. 398, 966 S.W.2d 213 (1998); *Lagoy v. State*, 2011 Ark. App. 101; *Metcalf v. State*, 2011 Ark. App. 55.

Green also argues on appeal that his conviction for being a felon in possession of a firearm is not supported by sufficient evidence because he established the defense of choice of evils. This defense is set forth in Ark. Code Ann. § 5-2-604(a)(1) (Repl. 2006), which explains that the defendant's action must be "necessary as an emergency measure to avoid an imminent public or private injury." Green states that he justifiably continued to possess Worsham's gun after their fight because he (1) "had no choice but to follow Mr. Worsham outside with the pistol to ensure that Mr. Worsham did not get another gun from his truck" and (2) needed to ensure that Worsham "left the area and everyone was safe." We disagree.

In rendering findings, the trial judge remarked that had Green remained inside after taking the gun, he might have found Green not guilty of this count. The judge stated that the additional act of going outside with the gun and continuing interaction with Worsham was sufficient evidence to sustain the conviction.

The choice-of-evils defense is to be rarely used, narrowly construed and applied. *Prodell v. State*, 102 Ark. App. 360, 285 S.W.3d 673 (2008). The defense has been rejected in a felon-in-possession-of-a-firearm case where the defendant placed himself in the situation calling for use of the defense, and he could have surrendered the firearm more quickly. *Compare Polk v. State*, 329 Ark. 174, 947 S.W.2d 758 (1997).

Having reviewed this appeal under the proper standards, we affirm Green's convictions.

GLADWIN and HOOFFMAN, JJ., agree.