

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL DAUGHERTY,

Defendant-Appellant.

UNPUBLISHED

November 15, 1996

No. 179543

LC No. 90-013014

Before: Reilly, P.J., and White, and P.D. Schaefer,* JJ.

PER CURIAM.

After a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to a six-month to ten-year prison term for assault with intent to do great bodily harm and to a consecutive two-year prison term for felony firearm. After his conviction, defendant filed a motion for new trial on the ground that the jury verdict was against the great weight of the evidence. The trial judge stated that in her opinion the verdict was against the great weight of the evidence, but denied the motion explaining that she was not the trier of fact. On appeal in Docket No. 144577, this Court remanded the case for reconsideration in light of *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993). On remand, the trial court again denied defendant's motion. Defendant now appeals the trial court's August 12, 1994, order denying his motion for new trial on the ground that the verdict was against the great weight of the evidence. We affirm.

A trial court may grant a new trial if the verdict is against the great weight of the evidence. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). To determine whether a verdict is against the great weight of the evidence, the trial court must review the whole body of proofs and may consider the credibility of the witnesses. *Id.* at 475-477. This Court reviews a trial court's denial of a motion for new trial for an abuse of discretion.

* Circuit judge, sitting on the Court of Appeals by assignment.

At trial, defendant's theory was self-defense. Once a defendant introduces evidence of self-defense, the prosecution bears the burden of excluding the possibility that the defendant acted in self-defense. *People v Bell*, 155 Mich App 408, 414; 399 NW2d 542 (1986). A defendant may act in self-defense only if he honestly and reasonably believed his life was in imminent danger or there was a threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). A defendant is only entitled to use the amount of force necessary to defend himself. *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985).

The victim in this case, Alphonso Williams, had confrontations with defendant before the day of the shooting that was the basis of defendant's conviction. Although the record contained considerable evidence that defendant had an honest and reasonable belief that his life was in danger when he saw Williams approaching defendant's car, the record also contained adequate, material evidence providing reasonable support for a jury finding that defendant used excessive force to defend himself. *People v DeLisle*, 202 Mich App 658,661; 509 NW2d 885 (1993). Williams testified that he was approximately twenty to twenty-seven feet away from defendant when Williams was shot, and that he was shot in the back as he was walking back to his car. The evidence also indicated that Williams did not have a weapon when he approached defendant's car.

Following remand, the trial judge explained that she would not have come back with the same verdict as the jury did had she been a juror, but denied the motion for new trial, stating:

I think the credibility of the witnesses came out real clear in this trial. It is a kind of case where the jury made an evaluation, and I cannot say based on the fact they had everything before them, that the credibility of the witnesses was so bad that it was against the great weight of the evidence.

* * *

I don't see the new trial ought to be granted. The same thing is going to come out, and triers of fact can see it differently. Some triers of fact are going to say this was excessive force, some triers of fact are going to say that it wasn't.

The trial judge indicated that she reviewed the trial testimony and considered the credibility of the witnesses. The judge's statements indicate her recognition that the exercise of the judicial power to grant a new trial on the basis that the verdict was against the great weight of the evidence should be "undertaken with great caution, mindful of the special role accorded to jurors under our constitutional system of justice." *Herbert, supra*, at 477. The trial court's denial of defendant's motion for new trial was not an abuse of discretion. The jury's verdict was not manifestly against the clear weight of the evidence. *DeLisle, supra* at 661.

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Helene N. White

/s/ Philip D. Schaefer