

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON DAVID BURGHER,

Defendant-Appellant

UNPUBLISHED

July 7, 2000

No. 217704

Wexford Circuit Court

LC No. 98-005462-FH

Before: Jansen, P.J., and Hood and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82; MSA 28.277, and sentenced to serve three to six years in prison. He appeals as of right, arguing that the prosecution failed to disprove his self-defense claim beyond a reasonable doubt. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In reviewing a claim of insufficient evidence to sustain a verdict, we view the evidence in a light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proved beyond a reasonable doubt. *People v Truong*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993); *People v Bell*, 155 Mich App 408, 414; 399 NW2d 542 (1986).

Because assaulting someone with a dangerous weapon is presumed wrongful, and because the level of evidence that the prosecutor will need to meet the burden of proof beyond a reasonable doubt is proportional to the level of proof introduced by the defendant to support a self-defense claim, the question whether the prosecution will obtain a conviction largely depends on the strength of the defendant's evidence. *People v Pegenau*, 447 Mich 278, 319-320; 523 NW2d 325 (1994) (opinion of Boyle, J). "The defendant who produces more evidence of self-defense causes the prosecutor's burden on rebuttal to rise. The defendant who introduces only slight evidence raises the prosecutor's burden only slightly." *Id.* at 320.

Here, the evidence established that the victim was the initial aggressor in the altercation. However, the testimony was conflicting as to what led to the victim's injury. Viewing the evidence in a light most favorable to the prosecution, we find that an intermediary was standing between the two arguing men when the victim raised his arm and defendant swung around the intermediary striking the victim in the face and neck with his beer bottle. Even assuming that the victim was raising his arm to strike or punch defendant, a reasonable jury could have found that defendant's use of a beer bottle to strike the victim was excessive force under the circumstances.

Further, because defendant was not in his own home, he was under a duty to retreat if possible. *People v Lenkevich*, 394 Mich 117; 229 NW2d 298 (1975). The elimination of the element of retreat clearly decreases the burden upon the prosecution to negate a self-defense claim. *People v Paxton*, 47 Mich App 144; 209 NW2d 251 (1973). Here, a reasonable jury could have found that defendant was able to retreat, but chose instead to continue or escalate the aggression. Accordingly, we conclude that the prosecution introduced sufficient evidence, in the face of defendant's contradictory evidence, to convince a rational jury of defendant's guilt beyond a reasonable doubt. See *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

Affirmed.

/s/ Kathleen Jansen

/s/ Harold Hood

/s/ Henry William Saad