STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 5, 2004
v	No. 243337 Wayne Circuit Court
EDDIE DAVIS, Defendant-Appellant.	LC Nos. 01-006061-01 ; 01-006079-01

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from convictions following a bench trial for assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227b, and second-degree home invasion, MCL 750.110a(3). He was sentenced to concurrent prison terms of ten to twenty years and forty-three months to fifteen years on the assault and home invasion convictions, respectively, to be served consecutively to the mandatory two-year term for felony-firearm. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the evidence was insufficient to sustain the verdicts as to the assault and felony-firearm charges because the shooting which led to the charges was justified or, alternatively, committed under mitigating circumstances. The shooting followed defendant's unauthorized entry of Yolanda Williams' home and a later violent confrontation between defendant and a group of Williams' friends, including the victim of the shooting, Keith Wilson.

"In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The evidence showed that defendant, who was armed with a gun, approached a vehicle in which Yolanda Williams and Keith Wilson were sitting. He struck Williams in the face and then

reached in and shot Wilson. After Wilson exited the car, defendant followed him and shot him several more times, including once after Wilson started running away. This evidence was sufficient to prove the crimes charged. *People v Avant,* 235 Mich App 499, 505-506; 597 NW2d 864 (1999); *People v Johnson,* 54 Mich App 303, 304; 220 NW2d 705 (1974). However, to constitute assault with intent to murder, the shooting must occur "under circumstances that did not justify, excuse, or mitigate the crime." *People v Lipps*, 167 Mich App 99, 105; 421 NW2d 586 (1988).

Defendant contends that the shooting was justified because the evidence showed that he acted in self-defense. We disagree.

"A claim of self-defense or defense of others first requires that a defendant has acted in response to an assault." *Detroit v Smith,* 235 Mich App 235, 238; 597 NW2d 247 (1999). "A simple assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Adrian Terry,* 217 Mich App 660, 662; 553 NW2d 23 (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).

When a defendant uses deadly force, the defendant acted in lawful self-defense if he honestly and reasonably believed that he was in danger of serious bodily harm or death, and the defendant only used the amount of force necessary to defend himself and was not the initial aggressor. *People v Heflin,* 434 Mich 482, 502, 509; 456 NW2d 10 (1990).

"The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat." *People v Riddle,* 467 Mich 116, 119; 649 NW2d 30 (2002). This is because if an attack can be safely avoided, the use of deadly force is not necessary. *Id*. at 129. However, a defendant is not "required to retreat from an attacker who he reasonably believes is about to use a deadly weapon." *Id*. at 119. Under such circumstances, as long as the defendant honestly and reasonably believes that deadly force is necessary, "he may stand his ground and meet force with force." *Id*.

The evidence showed that defendant had been assaulted and battered by Wilson and another man the day before the shooting. The day of the shooting, however, only Williams and Wilson were present. Neither one actually touched defendant and neither made any effort to assault him. Williams simply sat in the car and Wilson, upon seeing the gun, reached for the car door to try to get out. Wilson did not attempt to strike or shoot or otherwise physically harm defendant. While defendant claimed to believe that Wilson was about to shoot him, that belief, even if true, was based on the fact that Wilson reached for the door handle. Wilson did not threaten to shoot defendant or display a weapon. Moreover, defendant shot Wilson again after Wilson left the vehicle and was scrambling, unarmed, away from defendant. Defendant's initiation of the violent altercation and continued shooting after Wilson clearly posed no deadly threat to him eliminate all grounds for finding the requisite element of necessity. Because the evidence did not show that defendant was assaulted under circumstances giving rise to a reasonable belief of imminent serious injury or death, the trial court did not err in rejecting defendant's claim of self-defense.

Defendant next contends that the evidence did not support a finding of an intent to kill because he acted in the heat of passion.

A necessary element of assault with intent to murder is that the defendant acted with an intent to kill such that if death resulted, the killing would constitute murder. *Hoffman, supra*. Thus, "if a defendant would have been guilty of manslaughter had the assault resulted in death (due to an absence of malice), there can be no conviction of assault with intent to murder." *Lipps, supra* at 106. Defendant contends that he acted in the heat of passion and thus, had death resulted, the killing would constitute voluntary manslaughter rather than murder.

"The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000). Passion "describes a state of mind incapable of cool reflection." *People v Townes*, 391 Mich 578, 589 n 3; 218 NW2d 136 (1974). The provocation must be "that which would cause a *reasonable person* to lose control," i.e., it must be "so severe or extreme as to provoke a reasonable man to commit the act." *Sullivan, supra* at 518-519.

The trial court did not clearly err in finding that the evidence did not demonstrate that defendant acted in the heat of passion such that he was incapable of reflection. It can be inferred that defendant was angry at having been assaulted the previous day and angry when he found Williams and Wilson loitering near his home on the day of the shooting. Their mere presence, however annoying or upsetting, is not so extreme, though, as to cause a reasonable person to lose all control and start shooting them. In the light most favorable to the prosecution, the trial court could reasonably find that, rather than calling the police or taking other lawful action, defendant coolly approached the car armed with a handgun and initiated a one-sided altercation. Applying the same deference, defendant also had a chance to take a second look after he realized that Wilson was not reaching for a gun, but the door handle. Nevertheless, he walked around the car and there resumed shooting his unarmed victim. Therefore, the trial court did not clearly err in concluding that defendant acted with a cool head.

Defendant next contends that the evidence was insufficient to sustain the verdict as to the home invasion charge because it did not show that he acted with the intent to commit a larceny.

The elements of second-degree home invasion are (1) that the defendant (a) broke and entered a dwelling or (b) entered a dwelling without permission, and (2) that when the defendant broke and entered the dwelling or entered the dwelling without permission, he intended to commit a felony, larceny, or assault therein. MCL 750.110a(3). The defendant's intent "may be inferred from the facts and circumstances of a case," *In re People v Jory*, 443 Mich 403, 419; 505 NW2d 228 (1993), including "the nature, time, and place of his acts before and during" the breaking and entering. *People v Hughes*, 27 Mich App 221, 222; 183 NW2d 383 (1970). Minimal circumstantial evidence is sufficient to support a finding that the defendant harbored the requisite intent. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

There was no dispute that defendant entered Williams' home without permission. He admitted to police that he went there with the intent to steal anything of value and that he kept the home under surveillance before entering in an attempt to insure that no one was there to

prevent him from carrying out the theft. He then entered the home by crawling though a basement window, a means of ingress generally inconsistent with innocent intent. Although defendant never actually took any items, "it is not necessary that the larceny be successful, only that the defendant had intended to commit a larceny when he broke and entered." *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). Such evidence, viewed in a light most favorable to the prosecution, was sufficient to prove that defendant entered with the intent to commit a larceny.

Defendant also contends that the court erred in finding him guilty of second-degree home invasion because it initially stated that he was guilty of entry without breaking, which defendant argues was supported by the evidence.

A court, before entering a judgment in a case, may reconsider and modify, correct, or rescind any order it concludes was erroneous. MCR 6.435(B). This rule permits the court to alter a verdict erroneously based on a substantive mistake prior to entry of a judgment. *People v Carlos Jones*, 203 Mich App 74, 80; 512 NW2d 26 (1993). "A substantive mistake is a conclusion or decision that is erroneous, because it is based on a mistaken belief in the facts or applicable law." *Id*.

In this case, the court expressly stated that it had made a mistake regarding the applicable law. Specifically, after acquitting defendant of first-degree home invasion, MCL 750.110a(2), it considered the lesser included offense of entry without breaking, MCL 750.111, without first considering the greater offense of second-degree home invasion. The two offenses are similar but not identical. Second-degree home invasion may be established by proof that the defendant entered a dwelling without permission with intent to commit a larceny therein. MCL 750.110a(3). Entry without breaking may be established by proof that the defendant entered a dwelling without breaking with intent to commit a larceny therein. MCL 750.111. The only difference is that the former includes the element of lack of permission whereas the latter does not. This is a fundamental difference because if a defendant has a right to enter a building, he is not guilty of breaking and entering even if he intends to commit or does commit a larceny in the building. *People v Brownfield (After Remand)*, 216 Mich App 429, 431-432; 548 NW2d 248 (1996). Here, however, the court prematurely considered the entering without breaking verdict despite having previously found that defendant did not have a right to enter the house. Because the court correctly found that defendant did not have permission to enter, making second-degree home invasion the appropriate offense, its initial verdict was the result of a substantive mistake that was subject to correction.

Finally, defendant contends that the court's factual findings were insufficient because it failed to explain how it resolved credibility issues and any conflicts in the evidence in determining that he was guilty of second-degree home invasion rather than entry without breaking. We disagree. There were no significant conflicts in the evidence with respect to the home invasion charge. Williams and her daughter testified that defendant entered their home without permission and defendant admitted as much, confessing that he had gone to the house to steal valuables and that he had entered through a basement window. After the court discovered its error regarding the law, it went on to find each of the elements of second-degree home invasion. Because the court here demonstrated an awareness of the factual issues, resolved them, and ultimately applied the correct law, its findings were sufficient. *People v Johnson (On*

Rehearing), 208 Mich App 137, 141-142; 526 NW2d 617 (1994); *People v Legg*, 197 Mich App 131, 134-135; 494 NW2d 797 (1992).

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood