

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VERDELL REESE,

Defendant-Appellant.

UNPUBLISHED
September 16, 2010

No. 292153
Wayne Circuit Court
LC No. 08-007283

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Verdell Reese challenges his bench trial conviction for voluntary manslaughter¹, alleging there was insufficient evidence that he was the original aggressor in the confrontation with the victim Leonardo Johnson. Reese contends that his claim of self-defense should have resulted in his acquittal rather than the trial court's determination of imperfect self-defense, which was used to mitigate the crime of second-degree murder to voluntary manslaughter. Reese also asserts error by the trial court in the denial of his motion for a new trial or evidentiary hearing based on newly discovered evidence from an eyewitness to the events and, commensurately, the ineffective assistance of his counsel in failing to investigate and call this individual as a witness at trial. We affirm in part, we set aside Reese's conviction for voluntary manslaughter and remand for further proceedings.

We have difficulty reconciling the evidence in this case with the trial court's findings of fact and conclusions of law to justify the use of imperfect self-defense to convict Reese of voluntary manslaughter. In the end we are unable to reconcile the uncontroverted facts with what appears to be the trial court's inaccurate application of the doctrine of imperfect self-defense.

The trial court acknowledged the paucity of the evidence when it rejected the propriety of convicting Reese of the charged crime of second-degree murder, stating "I don't think the People have proven its case beyond a reasonable doubt, but what the Court has found is that in this case

¹ MCL 750.321.

there's no question that the victim shot at Mr. Reese." The trial court, nonetheless, proceeded to convict Reese of voluntary manslaughter using the doctrine of imperfect self-defense.

There were three witnesses to the shooting besides Reese and Johnson: Lakeshia Williams, James Long and John Smith. The trial court found Williams to be credible but characterized Long as being untruthful. Smith did not testify. The evidence primarily relied on by the trial court consisted of Williams' assertion that while walking away from Long's home she passed Johnson walking in the opposite direction and then heard a shot, which she attributed to Reese discharging a gun from his passing vehicle. Williams specifically denied actually seeing who fired the shot and only averred that it came from a vehicle that she identified as belonging to Reese. The direction of the shot was not known as Williams could only indicate she heard the shot behind her after the vehicle passed. Seconds later she heard another shot but could not identify its source or location. Williams saw Johnson continue down the street in the opposite direction toward 2045 W. Grand Boulevard and she continued to walk toward her residence a few houses away. Long places Reese on the porch steps of his home as Johnson approached. Words were briefly exchanged between the men consisting merely of "[W]hat's up with that?" and then Long has Johnson drawing and first firing a weapon with Reese then pulling his gun out and returning fire. Williams indicated she observed someone limping from the porch. Reese was injured and taken to the hospital by Long in Reese's vehicle. This coincides with one of the blood trails observed by evidence technicians at the scene. The second blood trail led through a lot to Johnson, who was found dead on another street.

Based on the trial court's verbal recitation at the end of trial, the above facts were accepted as accurate. The trial court then determined that Reese "did not act in lawful self-defense" and was "clearly . . . the aggressor" finding that Reese "fired the first shot prompting Mr. Johnson to be on guard, prompting Mr. Johnson to pull his weapon on you, prompting you then to pull your weapon on him and no question, this was a shoot-out." The trial court opined that Reese would have been entitled to a claim of self-defense if he had "backed off . . . and made peace."²

"Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter. Where imperfect self-defense is applicable, it serves as a method of negating the element of malice in a murder charge."³ "The doctrine applies only where the defendant *would have been entitled to self-defense* had he not been the initial aggressor."⁴ For the shield of imperfect self-defense to be available to Reese, the trial court had to first determine whether he was entitled to a claim of self-defense had he not served as the aggressor in provoking Johnson into a confrontation.

² "The [claim of self] defense is not available when a defendant is the aggressor unless he withdraws from any further encounter with the victim and communicates such withdrawal to the victim." *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993).

³ *Id.*

⁴ *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992) (emphasis added).

On the one hand the trial court implicitly acknowledged Reese acted in self-defense during the deadly confrontation by its indication that Johnson drew and fired his weapon first when it stated, “there’s no question that the victim shot at Mr. Reese.” But the trial court also indicates “Defendant did not act in lawful self-defense” and that the prosecution proved Reese “did not act in lawful self-defense because he was the initial aggressor.” At best these statements are confusing. At worst they raise questions regarding the trial court’s misapprehension of the requirements for imposition of the doctrine of imperfect self-defense.

The trial court indicated that imperfect self-defense was applicable because Reese was the initial aggressor. The evidence indicates the initial firing of two shots in an unknown direction and by an unknown individual before the face-to-face confrontation between Reese and Johnson. Only the first shot was attributed to Reese based on Williams indicating she heard the shot and assumed it was from his vehicle. Williams could not place whether the shooter was in the driver’s seat or back seat of the vehicle. There is no testimony or evidence to identify who fired the second shot or where it originated. Based on Johnson’s continued ambulation toward Reese and Long’s house and engaging Reese in conversation, albeit very briefly, it seems reasonable to assume that Johnson did not feel threatened or intimidated by this random, preceding gunfire, which requires us to question the trial court’s labeling of Reese as the initial aggressor to justify the use of imperfect self-defense to convict him of voluntary manslaughter.

Contrary to the trial court’s statements, the status of being the first aggressor does not suffice as the basis for determining the applicability of imperfect self-defense.⁵ “In determining whether an initial aggressor is entitled to a claim of imperfect self-defense, the focus is on ‘*the intent with which the accused brought on the quarrel or difficulty.*’”⁶ The trial court failed to address Reese’s “state of mind at the time of initiating the confrontation.”⁷ A defendant is not entitled to invoke the doctrine of imperfect self-defense “if the circumstances surrounding the incident indicate that he initiated the confrontation between himself and the victim with the intent to kill or do great bodily harm.”⁸

The trial court made the factual determination that “pumping five rounds into somebody is pretty much evidence that you intended to at least, at the very least, do great bodily harm to Mr. Johnson or knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of your actions.” This statement is problematic on a number of levels. The first problem is the lack of evidence that Reese personally fired five shots during the events involved. While there were five fired rounds in Reese’s subsequently acquired gun, there is no evidence that five shots were expended during these events. The medical examiner identified only two wounds to Johnson. Reese also suffered a bullet wound, but the trial court impliedly recognized that his injury was the result of being shot by Johnson.

⁵ See *People v Bailey*, 485 Mich 1083, 1086; 777 NW2d 424 (2010) (Kelly, CJ, concurring), citing *People v Riddle*, 467 Mich 116; 649 NW2d 30 (2002).

⁶ *Kemp*, 202 Mich App 324 (citations omitted, emphasis in original).

⁷ *Id.* at 325.

⁸ *Id.* at 324.

At most, based on the testimony and evidence only three gunshots can be attributed to Reese, not five as stated by the trial court.

The second problem is that the state of mind attributed to Reese by the trial court would contraindicate the applicability of imperfect self-defense. The trial court implied that Reese had the intent to murder or cause great bodily harm when she noted Smith's physical interference with Williams' ability to see the ensuing confrontation "[be]cause he knows something is coming down and he's going to try to hold her off so that . . . she can't do anything." But this comprises mere speculation and conjecture on the part of the trial court. The attribution by the trial court of Smith's state of mind to Reese is unsupported by the evidence and if, as suggested by the trial court, Reese had the intent to kill or do great bodily harm when he engaged in the provocative behavior of firing the initial gunshot, such a state of mind would preclude the use of imperfect self-defense.

Even if this weren't enough to call the trial court's ruling into question, there exists a third difficulty inherent in this statement by the trial court, which is insurmountable. While the statement presumably refers to the outcome of the final confrontation between Reese and Johnson, it would appear from the record before us that the trial court failed to address Reese's intent at the crucial point in time - the initial provocation. The trial court's failure to identify or address Reese's state of mind at the relevant point in the event sequence is a glaring omission, which prevents this Court from ascertaining whether the use of imperfect self-defense was justified.

While the trial court appears to assume Reese's deadly intent, the evidence does not support this assumption. The evidence only indicates the firing of two shots preceding the deadly confrontation. Even presuming that Reese fired both of these shots there is no evidence that he aimed his weapon at Johnson. We know shots were fired but have no evidence regarding their direction or even that Reese actually fired these shots, as Williams did not identify him as the shooter, only that one of the shots came from the driver's side of his vehicle. Other than some cryptic comments between Johnson and Reese before they exchanged fire, there is nothing to suggest Reese's state of mind or intent. Clearly, because he continued to approach Reese and stopped to exchange words with him after these initial shots, even Johnson did not perceive Reese to possess an intent to do him immediate harm. While the trial court elected to interpret the evidence as proof of Reese's motive or intent, this is not a reasonable assumption from the facts.

Of greater concern for this Court is the trial court's conflation of the timeline of events. The trial court suggests a smooth, uninterrupted progression of interaction between Reese and Johnson. Yet the evidence, regardless of which witness is deemed credible, raises a factual question, which the trial court did not resolve. Viewing the consistencies in the testimony and the physical evidence there was a delay between the first shots and any further aggression between these combatants. While the duration of that lapse is undetermined it had to be sufficient to permit Reese to park, exit his vehicle and traverse the yard up to the porch area. While the trial court determined that Reese didn't withdraw and "make peace" it fails to explain this temporal discrepancy between the first shot from a moving vehicle and the actual face-to-face confrontation between Reese and Johnson that resulted in Johnson's death. Arguably, Reese withdrew from the conflict by discontinuing any aggressive act, parking and exiting his vehicle, standing on Long's porch steps and exchanging non-threatening words with Johnson

before the second volley of shots ensued, which, according to the trial court, were initiated by Johnson. The evidence suggests that Johnson knew when he approached and engaged Reese verbally that he was no longer in imminent danger but elected to initiate a new conflict. There was no evidence or testimony that placed a gun in Reese's hand when Johnson approached him. In fact, the trial court indicated that Johnson drew and fired first, which is consistent with Long's testimony. The timeline for the sequence of events must be addressed in order to determine whether sufficient time had lapsed for Reese to withdraw and for a new confrontation to be initiated by Johnson.

We also find troubling inaccuracies that exist between the trial court's recounting of the testimony relied on for its findings of fact. We note that the trial court's recitation of the testimony was imprecise and did not accurately reflect the testimony actually elicited and deemed to be credible. Although the trial court verbally indicated it discounted Long's testimony it implicitly had to embrace it based on its factual finding that Johnson drew and fired first in the final confrontation. We note that Long's testimony did not completely fail to coincide with that of Williams and was, in part, corroborated by physical evidence at the scene. Although we are precluded from challenging the trial court's credibility determinations as the trier of fact, we are troubled by these inaccuracies and discrepancies.

"When the right to a trial by jury has been waived by a defendant, the trial court, sitting as factfinder, must make specific findings of fact and state its conclusion of law. Factual findings are sufficient as long as it appears that the trial court was aware of the issues and correctly applied the law."⁹ In this instance, we cannot state with any confidence that either the factual findings or the conclusions of law by the trial court are sufficient to sustain Reese's conviction for voluntary manslaughter. Remand and retrial is necessitated. We wish to make clear that this opinion does not impact Reese's remaining convictions and sentences. We specifically affirm Reese's convictions and sentences for felon in possession of a firearm¹⁰ and possession of a firearm during a felony (felony-firearm)¹¹ as they are not dependent on the voluntary manslaughter conviction.¹²

Based on our determination that Reese is entitled to a new trial on his conviction of voluntary manslaughter we need not address his remaining issues pertaining to the failure to call Smith as a witness at trial and the related claims of ineffective assistance of counsel.

⁹ MCR 6.403; *Kemp*, 202 Mich App at 322 (citations omitted).

¹⁰ MCL 750.224f.

¹¹ MCL 750.227b.

¹² See *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001).

Affirmed in part and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio