STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 30, 2014
v	No. 316559 Oakland Circuit Court
DAVID GEORGE KEATS, Defendant-Appellant.	LC No. 2012-243355-FC

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to consecutive sentences of 51 months' to 20 years' imprisonment for the assault conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

It is undisputed that defendant shot the victim, his neighbor, in the face. The victim claimed that defendant shot him after he told defendant's barking dog to "shut up." Defendant claimed that he shot the victim in self-defense.

Defendant first argues that the jury was erroneously deprived during its deliberations of a video recording of defendant's police interrogation following his arrest.[1] Defendant asserts that the jury asked to see "the evidence" in this case and only the documentary evidence was provided. Defendant raised this issue in a motion for a new trial, which was denied by the court. "A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). Further, the "admission of evidence and taking of exhibits to the jury room lies within the discretion of the trial judge . . . ." *Socha v Passino*, 405 Mich 458, 471; 275 NW2d 243 (1979), mod on other grounds by *Johnson v Corbet*, 423 Mich 304; 377 NW2d 713 (1985). "An abuse of discretion occurs when the court

[1] Although defendant nominally takes issue with the trial court's failure to give the jury both a videotape and audiotape that had been admitted, he focuses only on the videotaped interrogation.

chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

The video recording of defendant's police interrogation was played for the jury. During his cross-examination of the officer who performed the interrogation, defense counsel played parts of the recording a second time. The prosecutor asked the trial court to "indicate to the jury that they can see this again, they're not limited to this here today." The court responded, "Oh, absolutely. You have every right to when you go back to the jury room, you can take the video and watch it as many times as you wish or whatever parts that you wish." When defense counsel had trouble playing the recording a third time during closing argument, the trial court reiterated, "The jury can look at it if they wish during their deliberations." Defense counsel then "implore[d]" the jury to listen to and watch the tape, adding, "the judge will give you accommodations to listen to the tape and watch the video . . . ."

Defendant's trial counsel averred that following defendant's sentencing he asked the trial court's clerk whether the jury had requested to view the video during its deliberations. Counsel averred that the clerk told him that at the beginning of its deliberations, the jury "asked for the evidence." However, according to counsel, while the clerk said that she had "provided the jury with all of the documentary evidence and the photographs," she said that she had not provided the jury with the video of defendant's interrogation. Counsel averred, "Had I been aware that the jury had asked for the evidence, I would have insisted that the jury be provided the videotape . . . ."

In denying the motion for a new trial, the trial court noted that "[t]he jury never requested to review . . . the interview video." The trial court stated:

> The jury in this case heard the recordings. With respect to the police interview, the jury heard portions important to the defense a second time during the cross exam of [the officer who questioned defendant]. At several stages of the trial, the jury was told that it would have access to the recordings if it so desired. In other words, the Court made it very clear that the jury had the opportunity to review the recordings. The jury did not ask to review the recordings or hold the physical discs containing the recording.

The recording of the interrogation was played at trial, and selections therefrom were replayed during defense counsel's cross-examination of the interrogating officer. Assuming that the jury did ask to see "the evidence," we can also reasonably assume under the circumstances of this trial that had the jurors meant that they wished to watch the interrogation video, they would have made this request. Indeed, the jurors were clearly aware they could contact the judge if

they deemed it necessary, because they had sent other notes to the court. Under the circumstances, no error occurred.[2]

Defendant next argues that there was insufficient evidence to disprove that he acted in self-defense. When examining whether there was sufficient evidence to support a conviction, we review the evidence in the light most favorable to the prosecution to determine "whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). "The question is whether the evidence presented at trial, together with all reasonable inferences arising therefrom, was sufficient to allow a rational trier of fact to find each element of the crime proven beyond a reasonable doubt." *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). In reviewing the sufficiency of the evidence, this Court must not interfere with the role of the trier of fact of determining "'the weight of the evidence or the credibility of witnesses.'" *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012), quoting *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "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). "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

"'Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.'" *People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009), quoting *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). "'In Michigan, the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.'" *Roper*, 286 Mich App at 86, quoting *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

At the outset, defendant's account of the incident that gave rise to this case arguably does not represent a valid assertion of self-defense. The purported evidence of self-defense came almost entirely from defendant's police interview. Even if defendant honestly believed that his life was in imminent danger or that there was a threat of serious bodily harm, such belief would, arguably, not have been reasonable under the facts of this case. According to defendant, the victim remained on his side of the fence throughout the incident, although defendant said that it appeared that the victim was about to climb the fence and he was leaning over it. The fact that the victim needed to climb the fence before he could even begin to attack defendant tends to negate the assertion that any threat the victim posed was "imminent."

Further, even assuming that defendant's account represents a valid example of self-defense, the victim's testimony contradicted that claim. The victim testified that defendant shot

[2] We note that we denied defendant's motion to remand this case to the trial court for an evidentiary hearing regarding this issue. *People v Keats*, unpublished order of the Court of Appeals, issued March 4, 2014 (Docket No. 316559).

him during an argument over defendant's dog. Under this version of the facts, defendant did not have a valid assertion of self-defense. It was within the province of the jury to credit the victim's account over defendant's. On appellate review, "conflicts in the evidence must be resolved in favor of the prosecution." *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). Consequently, the victim's testimony provided sufficient evidence to disprove defendant's assertion that he acted in self-defense.

Finally, defendant argues that the trial court erroneously excluded evidence that he had sought a personal protection order (PPO) against the victim. This issue arose when defense counsel questioned the officer who interrogated defendant about an alleged PPO:

> *Q.* You also came to find out that there was a personal protection order that my client sought against [the victim]; is that right?
>
> *A.* I did not.
>
> *Q.* Did you not provide that to the prosecutor in this case?
>
> *A.* A PPO, no.

The prosecutor objected, stating, "Certainly this was never discovered, so I can't imagine why it would be admitted here today." A bench conference was then held off the record.

After the jury was excused, the trial court stated: "There is a big difference between requesting a PPO and a PPO being granted. You're asking about a PPO. There was no PPO entered. There was a petition for a PPO. It was not granted." The court then stated, "There was a request made, it was not granted. It's not coming in. It's not—it's not relevant to this situation. That's my ruling."

Defense counsel requested to make a record, which the court allowed. Counsel stated, "The—the PPO request by my client was against . . . [the victim]. He was in fear and he made a request. The request ultimately through ex parte, there was not a hearing, was denied. I want to bring in the official document and request." The prosecutor noted that he did not have notice that defendant would be introducing the PPO petition, although defense counsel claimed that he had received the petition from the prosecutor.

The court then indicated that the evidence was inadmissible under MRE 403:

> You know, I'm not going to let it in. I think it's more prejudicial than it is probative. I know what you're saying, but so what? So he put something down on paper. When I was on family court, I saw them all the time and half the time there was nothing to them. So I think it's very, very—it's not involved in this case.

The court then inquired when the petition was filed. Defense counsel responded that it was filed in 2005 and that it involved "the snow blower attack . . . ." The court stated, "No, that's way too far. It's not going to come in." The court concluded, "I don't think—it's five, six years ago. You know, it's not going to come in. It's more prejudicial than it is probative."

At the outset, review of this issue is hampered because defendant has failed to provide this Court with the PPO petition. The petition presumably contains defendant's written account of "the snow blower attack," which would be hearsay, inadmissible under any exception apparent under this record. See, e.g., MRE 801, 803, and 804. In addition, the trial court did not abuse its discretion in concluding that the petition was inadmissible under MRE 403.[3] As stated by the trial court, the petition emanated from an incident that occurred several years before the incident in this case, and it only contained defendant's side of the story. Under these circumstances, it was not unreasonable for the trial court to conclude that the petition would have diverted the jury's attention from the charged offenses.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly

[3] That rule provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.