STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2011
v	No. 299272 Wayne Circuit Court
DONALD LOUIS GREEN-GREGORY, Defendant-Appellant.	LC No. 10-000632-FC

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

After a bench trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; felonious assault, MCL 750.82; and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant appeals as of right. We affirm.

This case arose out of a nonfatal shooting at a picnic at the Hamtramck Projects in Hamtramck, Michigan. The evidence at trial established that defendant and the victim, Jemal Hitchcock, were involved in an altercation with each other that resulted in a nonfatal but "large destructive [gunshot] injury" to Hitchcock's scalp. The evidence at trial presented two different accounts of the events surrounding the shooting and, particularly, the identity of the aggressor.

The prosecution's evidence showed that Hitchcock was socializing at the picnic when defendant approached his table and began arguing with him. The argument escalated, and defendant pushed Hitchcock in the face. Both unsuccessfully attempted to punch the other. Hitchcock eventually withdrew from the conflict and, later, approached defendant to apologize. Defendant responded by attempting to choke Hitchcock. An observer separated them. Defendant appeared "distraught" and "kind of crazy."[1] About five to ten minutes later, defendant "bum rushed" Hitchcock and put him in a head lock. Hitchcock saw defendant

[1] Although the facts of this case could support a conviction for assault with intent to murder, the trial judge pointed to defendant's severe agitation as a factor that would have reduced his crime to voluntary manslaughter, rather than murder, had the victim died, thus justifying a conviction for the lesser-included offense of assault with intent to do great bodily harm less than murder.

holding a gun and tried to get control of it. Hitchcock fell to the ground. Defendant straddled Hitchcock, and the men wrestled for the gun. Defendant told Hitchcock, "Man, I told you I'm a [expletive] killer. I'm a kill your [expletive], man." Defendant pulled the gun's trigger twice, but the gun did not discharge. Defendant pulled the trigger again, and a shot fired just behind Hitchcock's temple. Defendant walked away, got into a car, and left.

Both defendant and the defense witnesses testified that Hitchcock started the initial argument when he interrupted defendant's conversation to ask where to get a drink. They testified that, after defendant ignored Hitchcock, Hitchcock attacked defendant, running at him with a 40-ounce bottle of beer. Defendant felt threatened and pulled out his gun. The gun fired when defendant and Hitchcock were on the ground struggling with each other for the gun.

The only issue before this Court is whether the trial court erroneously determined that defendant was the aggressor and rejected his claim of self-defense.

"We review a trial court's findings of fact for clear error, giving deference to the trial court's resolution of factual issues" because of the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613; *People v Wilkens*, 267 Mich App 728, 732; 705 NW2d 728 (2005). Whether self-defense applies in a particular set of circumstances is a question of fact. *People v Prather*, 121 Mich App 324, 330; 328 NW2d 556 (1982). "A finding of fact is clearly erroneous if, after a review of the entire record, [we are] left with a definite and firm conviction that a mistake has been made." *Wilkens*, 267 Mich App at 732 (quotations omitted). We review questions of law de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

"At common law, the affirmative defense of self-defense justifies otherwise punishable criminal conduct . . . if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself." *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010) (quotations omitted). In *People v Riddle*, 467 Mich 116, 126-142; 649 NW2d 30 (2002), our Supreme Court outlined when, at common law, a person has a duty to retreat from danger to life or limb instead of using deadly force in self-defense. "With the enactment of the Self-Defense Act (SDA), MCL 780.971 *et seq.*, the Legislature codified the circumstances in which a person may use deadly force in self-defense . . . without having the duty to retreat." *Dupree*, 486 Mich at 708. The SDA extinguishes the common-law duty to retreat to allow for the use of deadly force in certain circumstances. See *Riddle*, 467 Mich 116, 126-142 (outlining the duty to retreat at common law); MCL 780.972 (providing that an individual may use deadly force in circumstances that are inconsistent with the common-law duty to retreat); MCL 780.973 (providing that the SDA does not modify the common-law duty to retreat except to the extent provided in MCL 780.972). But, notwithstanding the SDA's impact on the duty to retreat in Michigan, the rule in Michigan remains that a person does not act in self-defense when acting as the aggressor. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993) ("[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."); see also *Dupree*, 486 Mich at 707 (stating that self-defense is available to "one who is not the aggressor").

The trial court in the present case concluded that defendant was the ultimate aggressor, indicating that it accepted the testimony of the prosecution's witnesses, who were largely disinterested parties. At trial, Crystal Evans, an eyewitness, testified that defendant was the aggressor in each encounter with Hitchcock. In the first interaction, defendant pushed Hitchcock in the face. In the second, defendant began choking Hitchcock after Hitchcock attempted to apologize. After the men were separated, defendant ran at Hitchcock, put him in a head lock, drew a gun, pushed him to the ground, and pulled the trigger multiple times. Larry Knowles and Larry Macks, additional eyewitnesses who did not know defendant and Hitchcock, corroborated Evans's testimony. Hitchcock also testified that he never attacked defendant. In light of this evidence, we are not left with a definite and firm conviction that the trial court made a mistake by finding that defendant was the aggressor. *Wilkens*, 267 Mich App at 732. And, given the trial court's finding, we conclude that it did not err when it rejected defendant's claim of self-defense.[2] *Kemp*, 202 Mich App at 323; *Dupree*, 486 Mich at 707.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause

[2] Given our conclusion above, we need not address the prosecution's argument that the SDA does not apply to defendant because he was a felon in possession of a firearm at the time of the shooting.