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SECOND DIVISION
September 11, 2012

No. 1-09-0997
2012 IL App (1st) 090997-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	05 CR 28525
)	
CURTIS GREER,)	Honorable
)	John J. Fleming,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

ORDER

Held: Evidence was sufficient to support finding of guilty on first-degree murder and finding that defendant did not kill the victim during mutual combat. Defendant did not demonstrate that trial court's alleged misunderstanding of the law and use of evidence from outside the record constituted plain error.

¶1 Defendant Curtis Greer was found guilty of first-degree murder at a bench trial.

Defendant appeals, arguing that his conviction should be reduced to second-degree murder because he killed the victim during mutual combat or, alternatively, that he should receive a new trial because the trial court misunderstood the applicable law and considered facts not in evidence. We affirm.

¶2 After a night of heavy crack cocaine abuse, defendant and a man whom he knew as Dre (or Andre) snuck into a residential apartment building and fell asleep in a stairwell. Sometime later, defendant was awakened by Petrit Turkeshi, the building's janitor. Turkeshi woke defendant and Dre, and he ordered them to leave the building. Turkeshi walked the two men down to the bottom of the stairwell, which opened up near a laundry room. As Turkeshi escorted them out of the building, however, Dre turned around, punched Turkeshi in the face, and fled out the back door of the building. As defendant turned to follow, Turkeshi grabbed defendant's neck. When defendant knocked Turkeshi's hand away, Turkeshi punched defendant in the eye.

¶3 Defendant and Turkeshi then began fighting in earnest, trading punches and hitting each other in the face. Turkeshi grabbed defendant's coat and held on, but defendant punched and kicked Turkeshi until he was able to pull away, tearing several buttons off of his own coat in the process. At some point during the struggle, defendant and Turkeshi ended up in the laundry room and knocked a fire extinguisher off of the wall. According to defendant, Turkeshi grabbed the fire extinguisher and raised it over his head. Defendant, thinking that Turkeshi was about to throw the fire extinguisher at him, rushed Turkeshi and wrested the fire extinguisher from his grasp. Defendant slammed the fire extinguisher down on top of Turkeshi's head and Turkeshi fell to one knee. Defendant then fled.

¶4 Turkeshi's body was discovered some time later, and an autopsy concluded that he had died of blunt force trauma to the head. The autopsy also found numerous scrapes and bruises on his body, in addition to significant damage to his skull and brain. Defendant was apprehended about 11 months later and, after initially blaming Dre for the killing, confessed to the crime.

Over the course of several interrogations, defendant told police a number of different versions of the incident that varied only in certain minor details.

¶5 Given defendant's multiple confessions, defense counsel argued at trial that the evidence showed that defendant had killed Turkeshi during mutual combat, which if true would mean that defendant could only be guilty of second-degree murder rather than first-degree murder. The trial court considered the defense's argument but rejected it, instead finding defendant guilty of first-degree murder. Defendant was sentenced to 20 years in prison.

¶6 Defendant's primary argument on appeal is that he acted in justifiable self-defense when he killed Turkeshi. Defendant contends that the State failed to offer sufficient evidence to disprove any of the elements of self-defense, and so his conviction must therefore be reversed.

¶7 Self-defense is an affirmative defense to first-degree murder. See 720 ILCS 5/7-14 (West 2010) (affirmative defenses); 720 ILCS 5/7-1 (West 2010) (use of force in defense of person). Once properly asserted by the defendant, however, the State has the burden of both proving the elements of first-degree murder and disproving at least one of the elements of self-defense beyond a reasonable doubt. See *People v. Washington*, 2012 IL 110283, ¶ 34 (2012); see also *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995).

¶8 It is important to note that the relative burdens and elements for a self-defense claim under section 7-1 (so-called perfect self-defense) are distinct from those of an "imperfect" self-defense claim under section 9-2(a)(2). Compare 720 ILCS 5/7-1 (West 2010), with 720 ILCS 5/9-2(a)(2) (West 2010). The State bears the ultimate burden of disproving one of the elements of a perfect self-defense claim, and the State's failure on this point will result in acquittal. Success, in contrast, will result in a verdict of guilty on either first- or second-degree murder. A defendant can be convicted of second-degree murder only by proving the elements of imperfect

self-defense by a preponderance of the evidence. See generally *Jeffries*, 164 Ill. 2d at 127-29 (clarifying the burdens on proof and for first- and second-degree murder and perfect and imperfect self-defense). For our purposes, the important point is that defendant argues only that he should have been acquitted because the State failed to disprove his claim of perfect self-defense beyond a reasonable doubt, as is required under section 7-1. We therefore do not consider whether defendant should have been found guilty only of second-degree murder based on a claim of imperfect self-defense under section 9-2(a)(2). See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶9 So far as perfect self-defense goes, there is a significant problem with defendant's argument: defendant never raised perfect self-defense in the trial court. Although defendant's answer to the State's motion for discovery noted that he may or may not raise self-defense at trial, the record is clear that he did not at any time claim perfect self-defense at trial. In fact, defense counsel specifically noted during his opening statement that "at the conclusion of all the evidence that [the trial court] will have sufficient evidence produced by the Defense to find [defendant] guilty of second degree murder rather than first degree murder." Defense counsel reinforced this during closing arguments by asserting that the confrontation between defendant and Turkeshi was simply a fight that got out of hand, and defense counsel never argued that defendant should be found not guilty by reason of self-defense. It is well settled that self-defense is an affirmative defense that is forfeited if not properly raised by the defendant at trial (see, e.g., *People v. Worsham*, 26 Ill. App. 3d 767, 771-72 (1975)), so we will not consider this issue on appeal.¹

¹

The State brought our attention to defendant's failure to raise perfect self-defense at trial in its response brief on appeal. (See State's Br. at 21.) Defendant did not dispute this in his reply brief, so we assume that he has conceded the point. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶10 This brings us to defendant’s second argument on appeal. Defense counsel’s strategy was to concede that defendant killed Turkeshi but argue that defendant was guilty of only of second-degree murder based on provocation. This is in line with section 9-2(a)(1) (West 2010), which allows first-degree murder to be reduced to second-degree murder if a defendant committed first-degree murder while “acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill.” 720 ILCS 9-2(a)(1) (West 2010). The provocation in this case is mutual combat, which is “a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat.” *People v. Austin*, 133 Ill. 2d 118, 125 (1989). As with all defenses under section 9-2, the defendant bears the initial burden of proving the elements of the defense by a preponderance of the evidence, and the burden then shifts to the State to disprove an element of the defense beyond a reasonable doubt. See *People v. Thompson*, 354 Ill. App. 3d 579, 586 (2004).

¶11 Defendant contends the he carried his burden under section 9-2(a)(1) but that the State failed to present sufficient evidence to disprove the offense beyond a reasonable doubt. When faced with a challenge to the sufficiency of the evidence, “our inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. [Citations.] Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State.” *People v. Baskerville*, 2012 IL 111056, ¶ 31 (2012). When dealing with a defense under section 9-2, however, we also must consider whether “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were *not* present.” (Emphasis in original.) *Thompson*, 354 Ill. App. 3d at 587.

¶12 The problem with the mutual combat defense in this case is the mutuality element. The undisputed evidence in the case is that Turkeshi, the victim here, did not enter the fight willingly. *Cf. Austin*, 133 Ill. 2d at 125 (no mutual combat because victim “did not enter the struggle willingly”). This case is slightly unusual because Dre, not defendant, began the fight when he punched Turkeshi in the face and then fled. That fact means that defendant is not subject to the rule that “[o]ne who instigates combat cannot rely on the victim's response as evidence of mutual combat sufficient to mitigate the killing of that victim from murder to manslaughter.” *Id.* Defendant entered the fight when Turkeshi grabbed him by the neck, so it can be argued that in this instance Turkeshi was the instigator, not defendant. But this fact does not help defendant because it was defendant who killed Turkeshi rather than the other way round. Even if, for the sake of argument, we consider the facts in the light most favorable to defendant (which is of course not the standard), it cannot be said that the fight was mutual: Turkeshi did not enter the fight willingly because Dre started it when he punched Turkeshi in the face without provocation, and defendant did not enter the fight willingly because he was turning to leave the building when Turkeshi grabbed him by the neck. Even if we assume that the fight was on equal terms (which is questionable given that the fight began with fists but defendant ultimately killed Turkeshi with a bludgeon), there is no mutuality here. Based on these facts, a rational finder of fact could have found that defendant failed to carry his initial burden of showing mutual combat. There is therefore sufficient evidence to support defendant’s conviction for first-degree murder.

¶13 Defendant’s last argument on appeal is that he should receive a new trial because the trial court failed to apply the proper law and considered facts not in evidence. Defendant bases this argument on comments that the trial court made during its ruling:

“So, probably [defendant] was not intending anything. He was woken up and going down the stairs, and Mr. Turkeshi, according to the Defendant’s statements, is the only who testified that he was actually there, and got into it with Andre. Andre got into it more or less with Mr. Turkeshi, made his escape, and Mr. Turkeshi then was stopping defendant from leaving because, *presumably, the fact was that he was probably he was stopping him at that point to call the authorities or whatever*, and that’s when [defendant] entered into his altercation with Mr. Turkeshi and his attempts to leave.

Mr. Turkeshi was attempting to detain him and holding him in place, and threatening him. That’s when he was holding the fire extinguisher over his head, and gave [defendant], he took the fire extinguisher and pulled it down, which caused the fatal blows.

So, that would be reasonable to justify or exonerate him.

I have given a lot of thought to this, but I think that since he wasn’t supposed to be there, and he wasn’t really in self-defense, he knew he wasn’t supposed to be there, so it wasn’t reasonable to fight back and enter into it.

He could have done the reasonable thing, which would be to wait at that point, wait for the authorities. People don’t do that, but *I would think being somewhere illegally, it would not justify fighting with someone who is trying to detain you from being there illegally.*” (Emphasis added.)

¶14 Defendant takes exception to the emphasized text above, arguing first that the trial court misstated the law by saying that defendant was not entitled to defend himself because he was a trespasser and, second, that the fact that Turkeshi was trying to detain defendant for the police

was a fact not in evidence. Defendant did not object at the time and did not include these points in his posttrial motion, so they are forfeit and can only be considered under the plain error doctrine. See *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). We may reverse based on a forfeited issue only if

“(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the defendant must prove ‘prejudicial error.’ That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process. *** Prejudice to the defendant is presumed because of the importance of the right involved, ‘*regardless* of the strength of the evidence.’ *** In both instances, the burden of persuasion remains with the defendant.” (Internal quotation marks omitted.) *People v. Adams*, 2012 IL 111168, ¶ 21.

¶ 15 When considering the closely balanced prong of the test, we undertake a “commonsense assessment” of the evidence in the case. *Id.* ¶ 22; see also *People v. White*, 2011 IL 109689, ¶ 139 (noting that the analysis is qualitative, not quantitative). Even if we assume for the purpose of argument that the trial court’s comments were in error, there are two flaws in defendant’s argument. First, the pertinent question is whether the evidence regarding defendant’s mutual

combat theory is closely balanced. The question of self defense was not before the court because defendant did not assert it at trial, so whether trespassers are entitled to defend themselves is irrelevant. Indeed, as part of its comments the trial court noted that defendant “wasn’t really in self-defense,” indicating that self-defense was not under consideration. Second, the evidence regarding mutual combat was not closely balanced. The sequence of events was undisputed because the entire account of the incident came from one source: defendant himself. As we discussed above, the evidence regarding lack of mutuality is clear and there is no strong evidence to the contrary. Defendant has therefore not carried his burden under the closely balanced prong.

¶16 Nor can defendant rely on the fundamental-fairness prong of the doctrine. Defendant contends that his right to a fair trial was compromised because of the trial court’s alleged misunderstanding of the law and use of evidence from outside the record. When taken in context, however, it is apparent that the trial court’s comments do not reflect a statement about the law but rather the trial court’s thoughts about the reasonableness of defendant’s actions. We presume that the trial court knows and follows the law unless the record “affirmatively shows otherwise” (*People v. Yancy*, 368 Ill. App. 3d 381, 386 (2005)), and although the trial court could have expressed itself more clearly during its ruling, there is nothing in the record that shows the trial court applied the wrong law.

¶17 The same is true regarding the trial court’s comments about presuming that Turkeshi intended to detain defendant. Although defendant contends that this statement reflects a fact not in evidence, the trier of fact may “draw[] any reasonable inferences from the evidence.” *People v. Alvarez*, 2012 IL App (1st) 92119, ¶ 51; see also *id.* (“[T]he trier of fact is not required to disregard inferences that flow from the evidence.”). The facts in evidence showed that Dre

attacked Turkeshi as Turkeshi was escorting defendant and Dre from the building. When Dre fled defendant also attempted to flee, and it was only at that point that Turkeshi grabbed defendant. It is an entirely reasonable inference that Turkeshi grabbed defendant in order to prevent him from leaving until police arrived to deal with the trespass into the building and the battery to Turkeshi. The trial court was not prohibited from making this inference merely because it was not explicitly spelled out in the evidence at trial.

¶ 18 In sum, there was sufficient evidence in the record to support defendant's conviction for first-degree murder rather than second-degree murder, and defendant has not demonstrated that the trial court committed any errors that are reversible under the plain-error doctrine.

¶ 19 Affirmed.