SIXTH DIVISION
November 4, 2016

No. 1-14-3133

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.	)	No. 11 CR 3443
	)	
MICHAEL PRESTON,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** The evidence was sufficient to convict defendant of second degree murder, and in particular to prove that his use of deadly force in defense of dwelling was not justified.

¶ 2 Following a bench trial, defendant Michael Preston was convicted of second degree murder and sentenced to 15 years' imprisonment. On appeal, he contends that the State failed to disprove his affirmative defense of defense of dwelling. We affirm.

¶ 3 Defendant was charged with the first degree murder of David Mason for allegedly stabbing him with a knife on or about February 5, 2011.

¶ 4 The evidence at trial established that, on the night of February 4-5, 2011, defendant and Mason were at the home defendant shared with his aunt and uncle, Clydoria Johnson and her brother Charlie Johnson. Defendant, Mason, Dora Wilson and another man were playing cards for money. Wilson testified that defendant and Mason began grappling over the game pot, laughing during the "wrestling." The struggle moved outside briefly but defendant and Mason then kept "playing" or wrestling indoors until Clydoria told them to stop or leave. When Clydoria went to her room, defendant and Mason resumed wrestling. Defendant obtained a kitchen knife, but gave up the knife when Clydoria told him to. Clydoria told Mason to go home. Mason was unarmed.

¶ 5 Wilson heard defendant call 9-1-1 "on speaker to show that he wasn't playing." He told the operator his name and address and that he had a warrant against him. Defendant went outside but then came back inside after a few minutes, when the police did not respond. Wilson, Mason, and Jerry Chillis were talking in the living room when defendant rushed into the living room, angry because he could hear what Wilson and Mason were saying. Defendant got a kitchen knife and stood in front of Mason, who was seated and eating. Mason asked if defendant was going to stab him, and defendant then stabbed him. Wilson admitted to using heroin that night. She testified that Mason and others had been drinking and taken pills, probably ecstasy. She also admitted to convictions for possession of a controlled substance in 2008 and 2013, and to being on medication for bipolar disorder that she was not taking in February 2011.

¶ 6 Clydoria testified that she was in her room during the card game but came out when she heard defendant and Mason wrestling and laughing inside the home. She told them that she

would call the police if they did not go home. She returned to her room but later heard Wilson yell that defendant had a knife. Clydoria came out again and defendant returned the knife to the kitchen. Clydoria asked Mason why he had not left. He replied that he had nowhere to go. Clydoria told him that he would have to stop "playing" if he stayed. Clydoria returned to her room but a minute later heard Wilson exclaim that defendant had stabbed Mason. When Clydoria came into the living room, Mason was seated, grasping his throat, and exclaiming that he could not believe "you" cut or stabbed him.

¶ 7 Charlie testified that he was outside shoveling snow when defendant and Mason came outside laughing and "horse playing" or "wrestling" with each other. They went inside and continued "horsing around in the house." Sometime later, Mason came outside grasping his neck and exclaiming "he cut me." When Charlie went back inside, defendant was standing in the living room near a blood-stained seat with a knife in his hand. Charlie acknowledged a 2008 burglary conviction and being a heroin user at the time of the incident. He did not recall telling police that defendant and Mason were insulting each other as they wrestled.

¶ 8 Chillis testified that defendant, Mason, and another man were playing cards and began "wrestling" inside the house until Clydoria told them to stop. While Mason and defendant wrestled, they did not argue or strike each other. Defendant went to the kitchen for a knife and was "playing" with Mason, "like stabbing him." Clydoria told Mason to leave and defendant to put the knife away. Mason stepped outside while defendant was in the kitchen but, when Mason came back into the house, defendant grabbed the knife again. Clydoria confronted them again. Mason told her that it was cold and he had no place to go. He and Clydoria then sat together in the living room before Clydoria returned to her room. Mason was sitting and eating when defendant went into the kitchen again, returned with a knife, and stabbed Mason in the neck.

Chillis testified Mason had not been holding a weapon. He also stated that defendant and Mason both took ecstasy pills and drank alcohol that evening.

¶ 9 Chillis acknowledged three convictions for controlled substance offenses and that he was in prison for violating parole and had pending controlled substance charges. He was impeached with a statement he gave to defense counsel and an investigator in 2013. In the statement, he claimed that defendant and Mason fought with knives after Clydoria returned to her room and that Mason, upon returning to the house, went to the kitchen to get a knife before sitting down in the living room.

¶ 10 Defendant made a motion for a directed finding, which the court denied. The parties stipulated that a caller who identified himself as defendant made two phone calls to 9-1-1 reporting that he had a warrant against him and "everyone else over here got drugs" at 3:10 a.m. and 3:11 a.m. that night. The stabbing was reported to 9-1-1 at 3:20 a.m. The parties also stipulated that police officers would testify that Clydoria told police that night that she, defendant, and Mason had been playing cards and drinking in her home for the majority of the day. They would testify that Charlie told police that defendant and Mason were arguing and insulting each other, and he reported this to Clydoria.

¶ 11 Following closing arguments, the court found defendant guilty of second degree murder. It found that the evidence did not support that defendant acted in defense of dwelling but did support second degree murder, noting "virtually every witness" as well as Mason and defendant "appears to have been under the influence of alcohol" or drugs. The court subsequently denied defendant's post-trial motion challenging the sufficiency of the evidence and sentenced defendant to 15 years' imprisonment.

¶ 12 On appeal, defendant challenges the sufficiency of the evidence. He contends that the State failed to disprove his affirmative defense of defense of dwelling.

¶ 13 Defendant was convicted of second degree murder. A person commits second degree murder by committing first degree murder with the mitigating factor that "at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his or her belief is unreasonable." 720 ILCS 5/9-2(a)(2) (West 2014) (citing 720 ILCS 5/7-1 *et seq*. (West 2014)). For second degree murder, a defendant proves a mitigating factor by a preponderance of the evidence. The State must prove the elements of first degree murder and the absence of justifying circumstances, both beyond a reasonable doubt. 720 ILCS 5/9-2(c) (West 2014). Here, defendant argued the deadly force was justified in defense of his dwelling.

¶ 14 Section 7-2 of the Criminal Code (Code) (720 ILCS 5/7-2 (West 2014)) defines the justification of defense of dwelling as follows:

> "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon a dwelling. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if:
>
> (1) The entry is made or attempted in a violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to

> prevent an assault upon, or offer of personal violence to, him or another then in the dwelling, or
>
> (2) He reasonably believes that such force is necessary to prevent the commission of a felony in the dwelling." 720 ILCS 5/7-2(a) (West 2014).

The justification of defense of dwelling is an affirmative defense. When a defendant raises the justification and provides some evidence of it, the State must prove beyond a reasonable doubt that he or she did not act in defense of dwelling, in addition to the elements of first degree murder. 720 ILCS 5/7-14 (West 2014); *People v. Nibbe*, 2016 IL App (4th) 140363, ¶ 38.

¶ 15 On a claim of insufficiency of the evidence, we must determine whether, taking the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *In re Q.P.*, 2015 IL 118569, ¶ 24. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence, and it is better equipped than this court to do so as it heard the evidence. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We do not retry the defendant. *Q.P.*, 2015 IL 118569, ¶ 24. We do not substitute our judgment for that of the trier of fact on the weight of the evidence or credibility of witnesses and accept all reasonable inferences from the record in favor of the State. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Id.*

¶ 16 Here, taking the evidence in the light most favorable to the State as we must, we find any rational trier of fact could agree with the trial court that the evidence did not support finding defendant acted in defense of dwelling. It is apparent that defendant believed Mason's presence

in the house to be unlawful as, after Clydoria told Mason to leave, defendant phoned 9-1-1 in an attempt to bring the police to the house. When the police did not come, defendant re-entered the house and stabbed Mason. The issue before us is whether defendant reasonably believed Mason's entry to the home justified the use of deadly force.

¶ 17 Defense of dwelling requires that the victim made entry into the dwelling "in a violent, riotous, or tumultuous manner." 720 ILCS 5/7-2(a) (West 2014). Here, the evidence showed that defendant and Mason wrestled inside the house, outside the house, then inside again. Whether that wrestling was horseplay accompanied by laughter or fighting accompanied by insults, we do not consider the mutual grappling of defendant and Mason to reasonably constitute Mason's "violent, riotous, or tumultuous" unlawful entry to the house. Although Mason left the house at Clydoria's request and then returned, there is no evidence whatsoever that he made this entry violently, riotously, or tumultuously.

¶ 18 Moreover, a reasonable trier of fact could find from the evidence that Mason was unarmed and seated in the living room, eating and conversing with other residents of the house, when defendant stabbed him. A rational trier of fact could therefore conclude that defendant fatally stabbing Mason in the neck was not necessary "to prevent an assault upon, or offer of personal violence to" defendant or another occupant of the house. 720 ILCS 5/7-2(a) (West 2014).

¶ 19 Accordingly, the judgment of the circuit court is affirmed.

¶ 20 Affirmed.