2016 IL App (2d) 140855-U
No. 2-14-0855
Order filed December 12, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-1909
JUAN M. CUELLAR,	)	Honorable Daniel P. Guerin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not entitled to a reduction of his first-degree murder conviction to second degree murder, as a rational jury could find that defendant failed to prove by a preponderance of the evidence the existence of a mitigating factor; affirmed.

¶ 2 A jury found defendant, Juan M. Cuellar, guilty of first-degree murder and of using a firearm that proximately caused the death of the victim, Joshua Holmes, and defendant received a sentence of 55 years imprisonment. Defendant raises one issue on appeal. He asserts that we should reduce his conviction to second-degree murder because he proved by a preponderance of

the evidence that he had a subjective, albeit unreasonable, belief that his actions were in self-defense. We disagree and affirm the conviction and sentence.

I. BACKGROUND

¶ 3 On September 24, 2012, defendant drove past the victim who was walking with friends. After driving past the victim a second time, defendant parked his car, retrieved a gun from the trunk, loaded it, and drove back to the victim. The victim approached the car and exchanged words with defendant. Defendant then shot the victim five times. Afterwards, defendant got out of the car, stood over the victim's body, and asked, "Have you had enough?" Defendant tried to shoot the victim again, but the gun had no more bullets. Defendant later attempted to dispose of the evidence connecting him to the shooting. Defendant asserted the affirmative defenses of self-defense and defense of others.

¶ 4 At trial, Phil Marotta, Du Page County Sheriff deputy, testified that, on September 24, 2012, he responded to a dispatch regarding a shooting at the Hinsdale Lake Terrace apartment complex in Willowbrook, Illinois. Upon arrival, he saw the victim in the street. There were many people in the area, but Marotta did not see anyone remove anything from the victim's person and he did not see a weapon on the victim. The paramedics attending to the victim did not see a weapon fall out of the victim's sweatshirt when they cut off his clothing. The officer who recovered the victim's property from the hospital did not find a weapon on the victim either.

¶ 5 Emanuel Oliver, who had known the victim for one or two years, testified that, at the time of the shooting, he was with Tyler Blake, Antoine Massie, and several other people. A group of them went to McDonald's around 5 p.m. Others went to Baba's, a restaurant in the strip mall where McDonald's was located. Oliver stated that he knew that defendant's brother, Christopher Hernandez, worked at Baba's. After the group ate at McDonald's, they started

walking west on Honeysuckle Rose Lane towards the apartment complex. When they arrived at Lilac Lane, he saw defendant point angrily at the group while driving past them on Honeysuckle Rose. Oliver then saw defendant's car parked near the intersection of Hyacinth and Honeysuckle Rose. The group began to break up at that point, but the victim continued walking towards Hyacinth Drive. Oliver testified that someone told the victim not to walk toward defendant's car, but the victim said, "This is not out West."

¶ 6 Oliver saw the victim lean into the driver's side window and heard defendant and the victim's voices before he heard multiple gun shots. The victim attempted to run but could not get far before collapsing. Oliver saw defendant drive his vehicle to where the victim had fallen, get out of his car, and walk over to the victim. Defendant leaned over the victim before he returned to his car and drove away.

¶ 7 Oliver ran to the victim but left before the police arrived. Oliver testified that he and several others left the victim and went to Baba's to see Hernandez because he thought Hernandez caused the shooting. Oliver stated that he did not see a weapon on the victim and had never seen the victim with a gun.

¶ 8 Oliver stated that on September 6, 2012, he was with the victim when defendant and Hernandez came up to them. Defendant asked the victim for the money he owed Hernandez. Oliver stated that defendant pulled a clip and a handgun from his pockets, loaded the gun, and pointed it at the victim's face. Hernandez threw bricks at Oliver and the victim after defendant asked Hernandez what he was waiting for. Oliver testified that the victim ran away.

¶ 9 Christina Mitchell testified about the September 6, 2012, altercation. She was on her balcony when she observed a confrontation between two black males and two Hispanic males. One Hispanic male pulled out a gun, cocked it, and pointed it at the face of one of the black

males. The other Hispanic male threw a brick out of his pocket and one of the Hispanic males chased after the black men as they ran. Mitchell did not see any weapons on either black male.

¶ 10 Andre Fields testified that, at the time of the shooting, he lived in the apartment complex and had played basketball with the victim the day of the shooting. Several people, including the victim, went to eat around 4 p.m., but Fields went home for something to drink.

¶ 11 As Fields began walking down Honeysuckle Rose Lane, he saw the victim and others returning from the strip mall where they had gone to eat. He observed a white vehicle pass the victim on Honeysuckle Rose Lane before it turned and then returned to park by the intersection of Hyacinth and Honeysuckle Rose Lane. Fields stated that he saw the victim walk towards the white vehicle and heard gunshots. He saw the victim turn to run away, but he fell to the ground. Fields testified that defendant got out of the car, stood over the victim, and tried to continue to shoot, but no bullets fired from the gun. He did not see any weapon on the victim or anyone remove a weapon from the victim.

¶ 12 Tyler Blake also played basketball with the victim the day of the shooting. He went with the group, including the victim, to get food at Baba's after the basketball game. The group went in the restaurant to order but saw Hernandez working there. The victim and Hernandez made "eye contact" and someone in the group said that they did not want to eat there because Hernandez "might spit in [the victim's] food."

¶ 13 As the group walked back to the complex, Blake observed a white vehicle driving eastbound on Honeysuckle Rose Lane. Blake stated that the car made a U-turn after passing them. The car came up from behind them and Blake saw the driver and the victim make signals to each other. The car then proceeded westbound on Honeysuckle Rose Lane before turning onto another street.

¶ 14 Blake stated that the victim became angry after he exchanged signals with the driver and he told the group that, if the driver got out of the vehicle, he was going to fight him. Blake observed the victim walk up to the vehicle and he heard the driver and the victim exchange words for about "four to five seconds" before Blake heard gunshots. He heard the victim say that he was going to "kick [defendant's] ass." Blake did not see the face of the driver or see the victim grab his belt before the gunshots were fired.

¶ 15 Blake also testified about the incident that occurred on September 6, 2012, between the victim, defendant, and Hernandez. He warned the victim to stay home to be safe, but the victim said that he was not going to run and hide.

¶ 16 Antoine Massie testified that on September 24, 2012, around 3 to 4 p.m., he was outside the apartment complex with Blake and Oliver. While walking back to the complex after eating at McDonald's with the victim, Massie saw a white car drive past them and the driver yelled something to the victim. The victim yelled back and the car went past them and turned left. Massie relayed that the victim said he was going to beat up the driver and he began walking faster down the road. The white car stopped and the victim walked to the car. Some of the people in the group warned the victim not to walk up to the car alone, but the victim said that this area was not the city, it was the suburbs, and he "was not about that life." Massie stated that the victim believed defendant was not going to use his gun.

¶ 17 Massie testified that the victim walked up to the white car. When he was at the passenger window, the victim looked like he was pulling up his pants, and the victim made this movement about three times. Massie heard gunshots and saw the victim try to run. Massie saw defendant get out of the car and walk over to the victim, looking as if he was going to shoot the victim again.

¶ 18 Jonathan Pugsley, a forensic detective with the Du Page County Sheriff's Office, testified that, on September 25, 2012, the St. Charles Police Department recovered a hand barbell duct taped to a Glock pistol case from the Fox River. The case contained a receiver of a Glock pistol, magazine, and speed loader. Pugsley stated that the underneath front portion of the gun was significantly damaged and, normally, the area showed the manufacturer's serial number. The exhibit showed that defendant purchased the Glock pistol that was found in Fox River.

¶ 19 Kara Collins testified under a grant of use immunity. She is the mother of defendant's son. Two weeks before the shooting, defendant told her about the September 6, 2012, incident. Defendant told her that he did not want their son staying at defendant's mother's house in the apartment complex because he and Hernandez had confronted a person with a gun and it scared him. Collins testified that she received a phone call from defendant slightly after 7 p.m. on September 24, 2012. Collins met defendant at his aunt's house in Bensenville, Illinois.

¶ 20 Defendant told Collins that he had received a call from his mother or Hernandez's girlfriend who said there were "a lot" of guys outside of Hernandez's work and he was asked to check on Hernandez. Defendant went there, saw some guys and squealed his tires to scare them off. Defendant told Collins that most of the guys fled, but the victim stayed, approached him, and yelled something like, "Do you have a problem?" or "Hey what's up?" Defendant told Collins that the victim then grabbed his pants and stood there. Defendant "unloaded a clip" at the victim. Defendant said that he got out of his car, walked up to the victim, pointed the gun at him and asked, "Have you had enough?" Defendant did not say whether he believed the victim had a gun.

¶ 21 Defendant talked about getting rid of the gun and defendant's mother told him to throw it in the Fox River and leave for Mexico. Defendant and Derek Van Balen, Collins' mother's

boyfriend, filed off the serial numbers from the gun and defendant wiped down the bullets with alcohol. Collins helped defendant duct tape a dumbbell to the gun case that contained the gun. Collins then drove defendant, Hernandez, defendant's mother, and Hernandez's girlfriend to dispose of the items.

¶ 22 Collins stated that, as they drove to Fox River, defendant recounted the shooting, but he did not say that the victim had a gun. Collins testified "Defendant said that [the victim] held his pants *** [a]nd we had talked back and forth about why he would stand there if he knew that [defendant] had a gun. But [defendant] never told me that he was under the assumption that [the victim] had [a gun] on him." Defendant threw a white plastic bag in the river and threw the gun case in the river at a different spot. Collins then drove to Pan Fish Park and he threw bullets down one of the sewer openings. They returned to defendant's aunt's house and defendant burned a small manila envelope later, but Collins did not know what the envelope contained.

¶ 23 The police recovered the gun case near the area where defendant threw it. They also recovered bullets and the box in the bottom of a storm sewer where Collins reported defendant had thrown them.

¶ 24 Van Balen also testified under a grant of use immunity. He corroborated Collins's testimony about helping defendant remove the serial numbers off defendant's Glock pistol and wiping the bullets with rubbing alcohol. Van Balen stated that defendant told him that he wanted to take his gun apart because he had shot someone.

¶ 25 Dr. Jeff Harkey, a forensic pathologist who performed the autopsy on the victim, testified that the victim received five gunshot entry and exit wounds, one through the left buttock, one through the right buttock, one through the back of the left arm, one through the high left side of the back, and one through the high right side of the back. Harkey opined that, within a

reasonable degree of forensic scientific certainty, the victim's cause of death was multiple gunshot wounds.

¶ 26 Hernandez testified that, at some point prior to September 6, 2012, he tried to purchase cannabis from the victim for $90. The victim took the money and told Hernandez to wait but never returned. Hernandez told defendant about this incident.

¶ 27 On September 6, Hernandez and defendant saw the victim in the apartment complex and went to see him. Defendant told the victim that he wanted him to return the money. Defendant then took out his gun and clip from his pocket, inserted the clip, cocked the gun, and pointed it at the victim. Hernandez threw a brick at the victim after defendant said to do so and the victim ran away.

¶ 28 A few days after that, someone threw a brick through the window of the main door to Hernandez's apartment building. Hernandez stated that the brick looked like the one he had thrown at the victim. Hernandez pleaded guilty to attempt aggravated battery and unlawful use of a weapon as a result of the September 6 incident. A week before the shooting, Hernandez and his family drove to the library. He saw a gray car "pursue after them." Hernandez stated that one individual in the gray car was Eric, who was with the victim when Hernandez tried to buy cannabis.

¶ 29 Hernandez was working at Baba's on September 24. Around 6:13 p.m., a group of people came in but then walked out. Hernandez heard someone say, "He works here." The group returned 5 to 10 minutes later with the victim. The victim stated, "So you have something for me. I have something for you." The victim then pulled up his pants with his right hand. Hernandez felt threatened and believed the victim was carrying a gun but did not see one. He told his manager that the individuals were bullying him and called his girlfriend. His girlfriend,

mother, and younger sisters came to the restaurant and ordered food. They left the restaurant with Hernandez and, at that time, they knew someone had been shot. When he was arrested, Hernandez told the police that he did not know the victim.

¶ 30 Rishu Handa, the owner of Baba's, testified that, when Hernandez's family came to eat, they did not appear alarmed, disturbed, or frightened. Hernandez left due to a family emergency. Five or six men came into the restaurant later looking for Hernandez. Handa stated that they were angry so she closed the restaurant early because she was scared.

¶ 31 Defendant testified that he lived in the Hinsdale Lake Terrace apartment complex with his mother in September 2012. His brother told him about his attempt to purchase cannabis from the victim and defendant decided that he and Hernandez would confront the victim. Defendant stated that he did not intend to shoot the victim, but he brought his gun in case he got "jumped." Defendant took out his gun after the victim stated that he did not have Hernandez's money. Defendant testified that he put the clip in the gun, cocked it, and pointed it towards the victim's abdomen. He told Hernandez to throw the brick.

¶ 32 Defendant thought what they did was stupid and he told his brother to let it go. Defendant stated that he told Hernandez to stay inside and to call the police if something bad happened. Defendant began staying at his aunt's house in Bensenville because he was worried he would be arrested. Defendant also was worried for his family after Hernandez told him about a car following them and about the brick thrown in the apartment building window.

¶ 33 On September 24, 2012, at 6:20 p.m., defendant received a phone call from Hernandez's girlfriend, who asked him to come over to Baba's because a group of African-American guys had come to Baba's and threatened Hernandez. He began to worry after he tried to phone his mother and Hernandez's girlfriend, but neither answered.

¶ 34 Defendant stated that he was heading east on Honeysuckle Rose Lane when he drove past a group of African-American men walking. He did not recognize anyone as he drove past but turned around and drove past them again to see if the victim was in the group. Defendant may have squealed his tires when he turned around. When he passed the second time, he saw the victim in the group. He and the victim made eye contact and the victim pointed at him.

¶ 35 Defendant drove off, parked the car, retrieved his gun from the trunk, and loaded it. Defendant agreed that, instead of stopping his car and driving back to the victim, he could have driven out of the neighborhood. He saw the victim at the corner of Hyacinth and Honeysuckle Rose Lane when he drove back. Defendant opened the front passenger window. The victim was approximately eight feet in front of him. Defendant stated that he asked the victim "What's your problem?" when the victim was about five feet away. He believed the victim looked angry. Defendant also believed the victim had a gun because the victim knew defendant had a firearm, he walked so arrogantly toward defendant's car, and he waved all his friends away. Defendant stated that this "kind of gave [him] the feeling that he was maybe going to fire on me." But, defendant never saw a gun on the victim.

¶ 36 Defendant stated the victim said, "What's up," in a "challenging manner," which defendant took as fighting words. Defendant stated that the victim pulled his hoodie two to three inches up and saw the victim's right hand reach for his waistline. Defendant began to fire and kept firing when he saw the victim's hand reach for his waistline. He saw the victim run and fall. Defendant drove his car near the victim, and got out of the car and went over to the victim. Defendant said he wanted to call the police and ambulance but did not after he saw the victim shaking.

¶ 37 Defendant left and "vaguely" told Collins what happened and that he thought the victim had a gun. It was his mother's idea to get rid of the gun. He intended to erase the serial number from the gun so it could not be traced to him. He also wiped the bullets to remove his fingerprints. He threw the gun in the river and the bullets in the sewer.

¶ 38 Defendant corroborated the details given by Collins, but stated that he told her three to four times that he thought the victim had a gun and that he never saw a gun. Johnnie Holmes, the victim's brother, testified that the victim was left-handed and did everything but write his name left-handed.

¶ 39 The defendant asked for and received jury instructions for self-defense and second-degree murder. Following closing arguments, the jury found defendant guilty of first-degree murder and that defendant had discharged a firearm that proximately caused the death of another.

¶ 40 The trial court denied a motion for a new trial. Following a sentencing hearing, the court sentenced defendant to 55 years' imprisonment. Defendant timely appeals.

¶ 41 II. ANALYSIS

¶ 42 Defendant contends that we should reduce his conviction to second-degree murder because the evidence establishes that he acted under an unreasonable belief that the use of deadly force was justified. A second-degree murder conviction is appropriate where, *inter alia*, "at the time of the killing [the defendant] 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 [720 ILCS 5/7-1 *et seq*. (West 2012)], but his or her belief [was] unreasonable." 720 ILCS 5/9-2(a)(2) (West 2012). Defendant bears the burden of proving this mitigating factor by a preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2012). In other words, "[o]nce the State has proven first degree murder beyond a reasonable doubt, the defendant must prove by a preponderance of the

evidence *** that he believed that the circumstances justified using self-defense, but that his belief was unreasonable." *People v. Hawkins*, 296 Ill. App. 3d 830, 836 (1998); see *People v. Castellano*, 2015 IL App (1st) 133874, ¶ 148.

> "To establish self-defense, the defendant must show some evidence that unlawful force was threatened against him; the danger of harm was imminent; he was not the aggressor; that he actually believed that a danger existed, force was necessary to avert the danger, and the type and amount of force was necessary; and that his beliefs were reasonable. [Citations.] While the law does not require the aggressor to be armed for self-defense to be justified, it must appear that the aggressor is capable of inflicting serious bodily harm without the use of a deadly weapon, and is intending to do so. [Citations.]" *Hawkins*, 296 Ill. App. 3d at 837.

¶ 43 Defendant does not challenge the sufficiency of the evidence presented by the State. Rather, defendant disputes the jury's rejection of his argument that he committed second-degree murder. In this context, we must consider whether, when 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. *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996).

¶ 44 "Whether a killing is justified under the law of self-defense is a question of fact [citations], and the fact finder is not required to accept as true the defendant's evidence in support of that defense [citations.] Instead, the trier of fact is obliged to consider the probability or improbability of the evidence, the circumstances surrounding the event, and all of the witnesses' testimony. [Citations]" *People v. Huddleston*, 243 Ill. App. 3d 1012, 1018-19 (1993).

¶ 45 In the present case, defendant maintains that the evidence clearly shows that the victim was aggressive towards him. Defendant notes the following evidence in support of his argument: the victim (1) verbally challenged defendant; (2) pulled up his hoodie and reached for his waistline "appearing to reach for a gun"; (3) aggressively pursued defendant's car and vowed "to get this guy" and "kick his ass"; (4) motioned for his friends to disperse; (5) waved defendant to his location; and (6) confronted defendant in a "challenging manner."

¶ 46 It was within the province of the jury to find the evidence presented by the State's witnesses more credible than the evidence presented by defendant. Indeed, the record reveals several reasons the jury may have reasonably discredited defendant's evidence and testimony. Here, the victim was not armed on the date of the occurrence. In fact, it was defendant who earlier confronted the victim with a handgun. Although defendant testified that the victim reached for his waistline as if he was pulling out a gun, only one witness, Massie, partially corroborated this where he said the victim was pulling up his pants. None of the other witnesses saw the victim reaching for his waist. Moreover, the State introduced evidence which showed that defendant did not fear for his safety. There were numerous opportunities for defendant to drive away. Rather than driving away, defendant stopped his car, retrieved his gun, and drove back toward the victim. After shooting the victim, defendant stood over him, taunted him, and attempted to shoot him again. Later, defendant attempted to remove the serial number from the weapon and disposed of the evidence. According to Collins, defendant never said he believed that the victim was armed. In addition, the pathologist testified that all of the entry wounds were to the victim's back. Clearly, it was reasonable for the jury to disregard defendant's evidence and conclude that defendant did not have a subjective belief that he was acting in self-defense.

¶ 47 Defendant cites *People v. Estes*, 127 Ill. App. 3d 642 (1984), and *People v. White*, 87 Ill. App. 3d 321 (1980), to support his argument that the victim was the aggressor even though the victim was unarmed. In *Estes*, the court stated: "Where it is clear that the aggressor is capable of inflicting serious bodily harm on the defendant without the use of a deadly weapon, and it appears that he intends to, then it is not necessary that the aggressor be armed for the defendant to employ deadly force in self-defense." *Estes*, 127 Ill. App. 3d at 652. In *Estes*, evidence showed that the victim, who was the defendant's husband, beat the defendant, and at the time of the shooting, the defendant had bruising around her neck. *Id*. at 652-54. In *White*, uncontroverted evidence revealed that the victim previously had cut the defendant and made threats and aggressive conduct towards the defendant earlier that night. *White*, 87 Ill. App. 3d at 323-24.

¶ 48 Defendant also cites to *People v. Lee*, 213 Ill. 2d 218 (2004). In *Lee*, several witnesses testified that the victims were known to carry guns and were involved in various shootings, and the defendant testified that the victims previously had shot at him. *Id*. at 222. Here, however, there is no evidence that the victim was known to carry a gun or previously inflicted serious bodily harm on defendant. Rather, it was defendant who engaged in a threatening and aggressive manner towards the victim prior to the shooting. Based on the record before us, we conclude that the combined testimony of all of the witnesses provided ample evidentiary support for the conclusion that defendant did not act under an unreasonable belief in the need for self-defense. Accordingly, we hold that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant failed to show by a preponderance of the evidence the existence of a mitigating circumstance, and we reject defendant's argument to the contrary.

¶ 49 III. CONCLUSION

¶ 50 For the preceding reasons, we affirm defendant's conviction and sentence. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 51 Affirmed.