2017 IL App (1st) 143037-U

SIXTH DIVISION
February 24, 2017

No. 1-14-3037

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. 13 CR 7791
	)	
EMMANUEL KEE,	)	Honorable
	)	James B. Linn,
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 at trial established, beyond a reasonable doubt, that defendant did not act in self-defense. Accordingly, defendant cannot establish ineffective assistance of counsel, because he was not prejudiced by trial counsel's failure to "adequately" raise the issue of self-defense.

¶ 2 Following a bench trial, defendant Emmanuel Kee was found guilty of attempted armed robbery, aggravated discharge of a firearm, unlawful possession of a firearm by a felon and aggravated battery. The court sentenced him to concurrent prison terms of nine years for attempted armed robbery, nine years for aggravated discharge of a firearm, six years for unlawful possession of a firearm by a felon and five years for aggravated battery. On appeal, defendant

contends that he was not proven guilty of aggravated discharge of a firearm because the State failed to prove beyond a reasonable doubt that he was not acting in lawful self-defense when he fired a gun at men who were chasing him. In the alternative, defendant contends that he was denied the effective assistance of trial counsel by counsel's failure to "adequately" raise the issue of self-defense at trial. We affirm.

¶ 3 At trial, Alvaro Gonzalez testified that he worked at Simpson's Tavern in Chicago. On April 5, 2013, a man whom Gonzalez later identified as the defendant asked to come in and purchase a six-pack, but Gonzalez declined, stating that the bar was closed. Defendant left the bar "after a minute." Gonzalez then also left the bar to throw out trash and escort two women to their car. As Gonzalez was returning to the bar, Antonio Aguilar ran up to him, and stated that he had been "jumped." The two men ran west and encountered defendant, who was also running west. At this point, Gonzalez and Aguilar were joined by Dhandi Chibola and Julio Camarillo.

¶ 4 When the group caught up to defendant, defendant pulled out a gun and began to fire. The gun misfired twice, but fired the third time. The bullet went between Gonzalez's legs. Gonzalez's group then got defendant "on the ground" and Gonzalez tried to get the gun away from him. Gonzalez had a knife and planned to cut defendant's finger "like a cigar" to force defendant to drop the gun. Defendant ultimately relinquished the gun. While Chibola held defendant on the ground, Gonzalez flagged down a police officer.

¶ 5 During cross-examination, Gonzalez testified that he had "like three or four beers" while he was working. Gonzalez knew that Aguilar was also drinking. Unsure of the exact amount, Gonzalez estimated that Aguilar drank more than five, but not more than ten, beers between 10 p.m. and 2 a.m. Gonzalez wanted to catch the person who had tried to rob Aguilar, so he took off on foot. He lost sight of the man he was chasing for "about five seconds." After defendant was restrained, Gonzalez pulled out a knife and cut defendant's finger twice.

¶ 6 Antonio Aguilar testified that he arrived at the bar around 7 p.m., and left by himself to walk across the street to his home. A man, whom he identified as defendant, tried to rob him in front of his house. Defendant told him to "give up" his "stuff." Aguilar declined to do so and "swore a little bit." At this point, defendant pointed a gun at him and then hit him on the top of the head with the gun. Aguilar later received "staples" to treat his head injury.

¶ 7 When Aguilar tried to walk away, defendant attempted to pull him back. Aguilar "yanked back" and ran across the street to the bar. There, he told his friends what had happened and they chased defendant. Aguilar never lost sight of defendant and the group ultimately caught up to defendant. Although defendant "shot the gun off once," the group was able to hold defendant down. Aguilar then called the police. Aguilar admitted to having "about five" beers between 7 p.m. and 2 a.m. He did not hit defendant; rather, his friends hit defendant until he told them to stop.

¶ 8 The parties then stipulated that Dina Brucedo of the Cook County Health and Hospital System would testify that defendant was discharged from the hospital at approximately 3:20 a.m. on April 5, 2013, and that defendant had "minimally displaced nasal bone fractures," and received eight sutures to the face and seven sutures to the hand.

¶ 9 The court found defendant guilty of attempted armed robbery, aggravated discharge of a firearm, unlawful use of a weapon by a felon, and aggravated battery. The court imposed concurrent sentences as described above.

¶ 10 On appeal, defendant first contends that he was not proven guilty of aggravated discharge of a firearm because the State failed to prove beyond a reasonable doubt that defendant was not justified in his use of force against Aguilar, Gonzalez, and the other men. Defendant argues that he was running away and acted in self-defense when the group caught up to him. He further argues that no one was injured by the gunshots and that his use of force was not unreasonable

considering that Gonzalez planned to saw off his finger and his injuries required medical attention.

¶ 11 When reviewing a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *People v. Bradford*, 2016 IL 118674, ¶ 12. Accordingly, a reviewing court will not substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. *Id*. This court reverses a defendant's conviction only where the evidence is so unreasonable, improbable or unsatisfactory that a reasonable doubt of his guilt remains. *Id*.

¶ 12 "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 defend himself or another against such other's imminent use of unlawful force." 720 ILCS 5/7-1(a) (West 2012). Self-defense is an affirmative defense, and unless the State's evidence raises the issue, the defendant has the burden to present evidence sufficient to raise the issue. *People v. Everette*, 141 Ill. 2d 147, 157 (1990). "The elements of self-defense are: (1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable." *People v. Lee*, 213 Ill. 2d 218, 225 (2004). Self-defense is an affirmative defense, and once a defendant raises self-defense, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in

addition to proving all the elements of the charged offenses. *Id.* at 224. If the State negates any one of these elements, the defendant's self-defense claim must fail. *Id.* at 225.

¶ 13 Initially, we note that defendant acknowledges that trial counsel did not file written notice that the defense planned to raise the affirmative defense of self-defense at trial. However, defendant contends that the issue of self-defense was implicitly raised when the testimony of Gonzalez and Aguilar established that their group chased defendant "with the intent of making him pay for the attempted robbery." In other words, defendant concludes that he was justified in his use of force when "vigilantes" chased, threatened, and "ultimately" battered him.

¶ 14 The State responds that a claim of self-defense is not available to someone who is attempting to commit or fleeing after the commission of a forcible felony (see 720 ILCS 5/7-4(a) (West 2012)), and that defendant shot the gun as he was fleeing after attempting to rob and hitting Aguilar on the head with a gun. The State also argues that at the time defendant shot the gun he was merely being chased by the group and that he was not injured until after he fired the gun.

¶ 15 Here, the record reveals that defendant attempted to rob Aguilar, hit him on the head with a gun and then fled. Although defendant is correct that Gonzalez and Aguilar admitted that they chased defendant because defendant tried to rob Aguilar, the record reveals that defendant fired the gun before there was any physical contact between him and the other men. It was only after defendant fired the gun that the group restrained defendant and Gonzalez tried to cut defendant's finger in order to force defendant to release the gun. We are unpersuaded by defendant's argument that his use of force was justified by the fact that he was ultimately beaten and cut by Gonzalez and Aguilar's group. When he fired the gun, he was merely being chased. When a defendant shoots an unarmed victim, who was not in a position to cause great bodily harm, a fact finder may rationally conclude that the defendant's belief of imminent danger justifying the use

of deadly force was unreasonable. See *People v. Lewis*, 2012 IL App (1st) 102089, ¶ 17. See also *People v. Davis*, 33 Ill. App. 3d 105, 109-100 (1975) (the defendant's belief that an unarmed man was about to cause her great bodily harm was unreasonable, and she was not justified in shooting him, even after he threatened to kill her and grabbed her wig). In other words, defendant's preemptive use of force cannot be justified by the fact that force, even if unlawful, was *later* used against him.

¶ 16 We are also unpersuaded by defendant's reliance on *People v. McGrath*, 193 Ill. App. 3d 12 (1989). In that case, Robert Piunti was involved in an altercation in a bar with the defendants. Piunti then sat in the parking lot until the defendants left the bar. Piunti and five friends followed the defendants home. When Piunti saw the defendants on the street, he parked and walked toward them. Herbert fired a gun when Piunti was 10 to 12 feet away. Piunti and one of his friends suffered gunshot wounds. Herbert testified on his own behalf that a group of men chased and threatened to kill him, so he told the group to go home because he had a gun. Herbert then fired two warning shots in the air and again told the group to go home.

¶ 17 On appeal, the defendants asserted that they were justified in using force to protect themselves when they were pursued to their apartment complex at 3:00 a.m. by six men who had threatened them earlier. *Id.* at 26. The defendants also noted that they were not the aggressors, since the six men followed them in order to retaliate for the incident at the bar. *Id.* at 27.

¶ 18 The court determined that the evidence was insufficient to support the trial court's conclusion that the defendants were the aggressors and were not acting in self-defense when the record revealed that the six men pursued the defendants to Keith's place of residence, even though they had an opportunity to file a police complaint against the defendant while they were at the bar. *Id.* at 28. The court concluded that the evidence supported the conclusion that the defendants' use of force was necessary to avert the danger and was not excessive when, in

pertinent part, Herbert yelled that he had a gun and only fired when his statement did not deter the six men. *Id.* at 29.

¶ 19 Unlike *McGrath*, here Aguilar's group did not lie in wait for defendant and then follow him; rather, they immediately ran after defendant following the incident. Also, unlike *McGrath*, there is no indication that defendant warned Aguilar and Gonzalez and their friends that he had a firearm before firing the weapon. In other words, unlike Herbert, defendant did not fire the gun only when his statement that he had a gun failed to deter the men chasing him. See *id.* at 29.

¶ 20 Ultimately, even accepting defendant's argument that the trial evidence implicitly raised the issue of self-defense, it is clear that the State proved beyond a reasonable doubt that defendant did not act in self-defense. Defendant was fleeing from the location where he attempted to rob and struck Aguilar with a gun. When defendant fired the gun, he was merely being chased by Gonzalez, Aguilar, and their friends. See *Lee*, 213 Ill. 2d at 224 (once a defendant raises self-defense, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving all the elements of the charged offenses). Therefore, defendant's argument must fail.

¶ 21 In the alternative, defendant contends that he was denied the effective assistance of counsel by counsel's failure to "do enough to introduce the self-defense theory."

¶ 22 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, "a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 23 Here, defendant cannot establish that he was prejudiced by counsel's failure to "do enough" to present a self-defense theory at trial because the evidence established that defendant fired a gun as he was being chased by a group (which included the man he hit with a gun) following a failed robbery, and before any member of this group made physical contact with him. Because defendant has failed to show that there is a reasonable probability that the outcome of his trial would have been different if counsel had explicitly raised a self-defense theory at trial (see *People v. Evans*, 209 Ill. 2d 194, 220 (2004)), his claim of ineffective assistance of counsel must fail (see *People v. Enis*, 194 Ill. 2d 361, 377 (2000) (the failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel)).

¶ 24 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.