

2012 ILL App (1st) 103449

FOURTH DIVISION
January 19, 2012

No. 1-10-3449

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 09 C 331 006
)	
BO LUI,)	The Honorable
)	Kay M. Hanlon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Fitzgerald-Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction of aggravated unlawful use of a weapon affirmed where evidence did not show that he was acting in self-defense, defense of others, or to prevent commission of a forcible felony; affirmative defenses of "citizen's arrest" to prevent the escape of a fleeing felon and necessity waived.

¶ 2 Following a bench trial, defendant Bo Liu was convicted of aggravated unlawful use of a weapon (AUUW), and was sentenced to 30 months' felony probation. On appeal, defendant

claims that he was not proved guilty beyond a reasonable doubt because his use of force was justified and he had the legal right to conduct an arrest or detention. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Prior to trial, and in answer to the State's discovery, defense counsel asserted that he would present the following affirmative defenses: self-defense; defense of others; use of deadly force to prevent the commission of a forcible felony; and the use of deadly force to prevent the escape of a fleeing felon. During opening statements, defense counsel asserted that defendant's conduct was justified because he was acting in defense of another and in self-defense, and was preventing a fleeing felon from leaving. Counsel further argued that the "act is admitted with an affirmative defense alleging there's legal justification for use of the weapon under the immediate circumstances involved."

¶ 5 Officer Bruce Homfeldt testified that at 1:30 p.m. on November 28, 2009, he received a radio dispatch of a man with a gun in the Sheraton Suites' parking lot, at 121 Northwest Point, in Elk Grove Village. On his way there, the officer received another dispatch about a sexual assault. When he arrived at the hotel, the officer observed defendant standing 40 feet from Mario Moore, who was sitting in a vehicle with the door open. The officer also observed a young lady, Meng Qi Ye, kneeling down in a fetal position 10 feet away from defendant crying.

¶ 6 Officer Homfeldt further testified that defendant had his right hand in the pocket of his overcoat. As the officer approached defendant, Moore stated, "[h]e has a gun and pointed it at me." Defendant then told the officer several times that, "[h]e raped my friend." The officer told defendant to turn away from him, and not to move. The officer approached defendant, removed

his hand from his pocket, handcuffed him, then removed a gun from defendant's right pocket.

¶ 7 Officer Homfeldt also testified that as he was removing the gun from defendant, Officer Jay Suarez arrived, and removed a knife and a used condom from Moore. When Officer Homfeldt took Moore into custody, Ye shouted, "[h]e raped me." Officer Homfeldt attempted to interview Ye at the hospital, but had to end it because Ye was too distraught.

¶ 8 Meng Qi Ye testified that she is a masseuse, and that she met defendant at his massage parlor in Chicago, when she was looking for a job. On November 28, 2009, defendant called her and told her that he needed her to work for him because he was short staffed. Ye drove to defendant's massage parlor, then followed him to the hotel in Elk Grove Village. Ye got a room at the hotel, and while she was in there alone, a black male, Moore, entered and asked for a massage. After she massaged him for a while, he asked if she offered any other services. Ye told him no, he got angry, then raped and robbed her at knife point.

¶ 9 Ye further testified that when Moore left the room, she called defendant, told him that Moore raped and robbed her, and asked him to call police. Shortly thereafter, defendant called her back, told her that Moore had been caught, and asked her to come and identify him. When Ye went to the parking lot, she saw Moore, and began to cry.

¶ 10 Defendant testified that he was using the hotel to expand his massage business, and on November 28, 2009, he rented a room at the hotel and used the internet to book a massage to be done there by Ye. He, however, did not plan on getting paid for this massage because he just wanted to help Ye. Defendant thought the hotel would be safe because it had a security system.

¶ 11 Defendant also testified that after he dropped Ye off at the hotel, he was planning to leave, but received a call from her while he was still in the parking lot. Ye told him that she had

been raped and robbed by the "black guy." Defendant believed the person Ye was referring to was the customer he had talked to on the phone and directed to Ye's hotel room. Ye called defendant a second time, and told him to be careful because Moore had a knife. Ye wanted him to stop Moore from escaping and call the police.

¶ 12 Defendant further testified that he saw Moore exit the hotel nervously, looking back all the time, and running to his car. Defendant did not see a knife in Moore's hand, but thought Moore was the person who had raped Ye because there was no one else in the parking lot. When defendant saw Moore enter his car, and start it, he grabbed his gun from the trunk of his car and loaded it because his "life could be threatened, [Moore] could kill [him]." Defendant explained that he took the gun out because Moore had a knife and could kill him. He wanted to "stall [the] criminal" from escaping, and happened to have the gun with him because he was planning on practicing at the gun range. Defendant stated that he told Moore not to leave, called Ye to identify Moore, and also called the police. Ye came to the parking lot crying, and said that Moore was the man who raped and robbed her at knife point.

¶ 13 Defendant further testified that it does not matter that he is not a police officer because he needs to stop criminals. Defendant explained that he has to stop rapists and help people, and that he used his gun to stop Moore because he might have pulled out his knife.

¶ 14 During closing arguments, defendant argued the "affirmative defenses" of self-defense, defense of others, use of force to prevent a forcible felony, and the right of "police" to use deadly force to prevent a fleeing felon from escaping. In arguing that he acted in self-defense, defendant relied on *People v. Williams*, 57 Ill. 2d 239 (1974), in which defendant was found not guilty of unlawful use of a weapon where he drew a gun when he was confronted by a hostile,

threatening mob.

¶ 15 The court, however, was not persuaded, and subsequently found defendant guilty of AUUW. In doing so, the court noted that it found defendant's testimony incredible for several reasons. The court stated it was incredible that defendant set up the massage for no monetary gain for himself, and that it was a coincidence that he had the gun in his car because he planned on going to the shooting range after dropping Ye off at the hotel. The court then observed that this was not a self-defense or defense of other case because defendant was not in any imminent danger of harm. The court also found that Ye was raped and robbed, but that defendant was not justified in using deadly force because a forcible felony was not happening when he took out his gun. The court further found that defendant's reliance on *Williams* was misplaced as the defendant in that case was confronted by an angry, threatening mob. The court concluded that the State proved defendant guilty of AUUW beyond a reasonable doubt on the evidence showing that he knowingly carried on or about his person a firearm when he was not on his own land, abode or place of business, and that the firearm was uncased, loaded, and immediately accessible at the time of the offense.

¶ 16 Defendant filed a motion to reconsider alleging, in relevant part, the following defense theories: 1) self-defense; 2) defense of others; 3) "citizen's arrest"; 4) necessity; 5) apprehension of a fleeing felon; and 6) prevention of the commission of a forcible felony. The trial court denied the motion. Defendant timely appealed.

¶ 17 ANALYSIS

¶ 18 On appeal, defendant contends that the State failed to prove him guilty of AUUW beyond a reasonable doubt based on the enumerated affirmative defenses which, he claims, justified his

conduct. He maintains, *inter alia*, that his use of force was justified because he acted in self-defense and in defense of others to prevent imminent death or great bodily harm to himself or another and to prevent the commission of a forcible felony.

¶ 19 To establish self-defense or defense of others pursuant to section 7-1 of the Criminal Code of 1961 (Code) (720 ILCS 5/7-1 (West 2008)) defendant must show that: (1) unlawful force was threatened against him or another; (2) he believed the danger of harm was imminent; (3) he was not the aggressor; (4) the force used was necessary to avert the danger; and (5) his beliefs were reasonable. *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). The use of force which is intended or likely to cause death or great bodily harm, however, is limited to situations where the threatened force will cause death or great bodily harm or commission of a forcible felony. *People v. Stokes*, 185 Ill. App. 3d 643, 655-56 (1989); *People v. Williams*, 56 Ill. App. 2d 159, 165-66, 169 (1965). Once defendant offers some evidence tending to prove self-defense, the State must prove beyond a reasonable doubt that he did not act in self-defense. *People v. Rodriguez*, 336 Ill. App. 3d 1, 15 (2002). The State may satisfy its burden, however, by negating any one of the elements of the affirmative defense. *Jeffries*, 164 Ill. 2d at 128. The question of whether the State has met its burden is a question for the trier of fact, and we will not substitute our judgment on the issue unless the evidence is palpably contrary to the verdict or so unsatisfactory that it justifies a reasonable doubt of defendant's guilt. *People v. Ortiz*, 65 Ill. App. 3d 525, 530 (1978).

¶ 20 Here, the record shows that after the incident between Moore and Ye, Moore left the hotel and went to his car. While Moore was sitting in his car, defendant came up to him and pointed a loaded gun at him. At that point, however, there was no imminent danger of harm or

unlawful force threatened against defendant or Ye from Moore. The record also shows that Moore had abandoned his attack on Ye when he left the room she was in and went to his car (*People v. Dillard*, 319 Ill. App. 3d 102, 106 (2001)), and defendant became the aggressor in the parking lot when he displayed his loaded gun at Moore who was not threatening anyone at that time (*People v. De Oca*, 238 Ill. App. 3d 362, 367-68 (1992)). Furthermore, defendant's argument that he was acting in defense of others is baseless where Ye, although injured, had not been pursued and was in no further danger when defendant drew his gun. *People v. Durden*, 231 Ill. App. 3d 84, 86 (1992).

¶ 21 We also find, as did the trial court, that defendant's reliance on *Williams*, 57 Ill. 2d 239, is misplaced because in *Williams*, defendant was confronted by a hostile, threatening mob of people when he pulled out his gun, and thus, was acting in self-defense. Here, Moore did not confront defendant or Ye in the parking lot, but, rather, was confronted by defendant. Accordingly, in this case, the record supports the trial court's determination that defendant did not act in self-defense or defense of Ye when he pointed his loaded gun at Moore.

¶ 22 Defendant further contends that his actions were justified to prevent the commission of a forcible felony under section 7-3 of the Code (720 ILCS 5/7-3 (West 2008)). He maintains that Moore might have gone on a "violent crime spree[]" if he had not pointed a loaded gun at him, and held him for police, and that his actions were justified to prevent a further forcible felony such as robbery.

¶ 23 Section 7-3 of the Code states:

"Use of force *in defense of property*.

(a) 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 trespass on or other tortious or criminal interference with either real property (other than a dwelling) or personal property, lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony."

(Emphasis added.) 720 ILCS 5/7-3 (West 2008).

This affirmative defense is clearly related to the defense of property, which is not at issue in this case. Accordingly, we find that this defense does not apply. In addition, and contrary to defendant's contention, there was no imminent threat that Moore was going to commit a forcible felony where imminent refers to a present and not some future threat. *People v. Robinson*, 375 Ill. App. 3d 320, 337 (2007).

¶ 24 We also find that defendant's reliance on *People v. Coleman*, 367 Ill. App. 3d 394 (2006), is misplaced. In *Coleman*, defendant was convicted of battery and driving under the influence of alcohol on evidence showing that while driving, she hit a motorist, who, in turn, took defendant's car keys after noticing she was intoxicated. *Id.* In an attempt to get her keys back, defendant hit and scratched the motorist. *Id.* On appeal, defendant argued that her actions were justifiable under section 7-3 of the Code because the other motorist interfered with the lawful possession of

her property, namely, her car. *Id.* The reviewing court held that the motorist's action of withholding the car keys from defendant, who was intoxicated, was not tortious or criminal, but, rather, was a justifiable citizen's arrest, and thus, defendant could not seek relief under section 7-3 of the Code. *Id.*

¶ 25 *Coleman* clearly illustrates that section 7-3 of the Code applies to defense of property claims, and provides no support for defendant's contention here that he was justified in pointing a loaded gun at Moore. Furthermore, defendant could not have had a reasonable belief that his conduct was necessary where the crime had already occurred and there was nothing to prevent since Moore was simply sitting in his own car.

¶ 26 Defendant next contends that he had a right as a private person to detain or arrest Moore where he reasonably believed that Moore was a fleeing felon. Defendant, as he did below, once again relies on case law regarding when a *police officer* may use deadly force to prevent the escape of a fleeing felon. See *Onesto v. Police Bd. of City of Chicago*, 92 Ill. App. 3d 183 (1980); *Lamonte v. City of Belleville*, 41 Ill. App. 3d 697 (1976). These cases specifically refer to police officers in the line of duty, and not, as in this case, a civilian. Thus, these cases are distinguishable from the case at bar.

¶ 27 Nonetheless, defendant contends that pursuant to section 107-3 of the Illinois Criminal Code of 1963 (Criminal Code) (725 ILCS 5/107-3 (West 2008)) and section 7-6(a) of the Code (720 ILCS 5/7-6(a) (West 2008)), his conduct was justified because he had a legal right as a private person to arrest or detain Moore. The State maintains that defendant waived this issue for review because he did not raise it at trial.

¶ 28 To preserve an issue for review, it must be raised at trial and in a written post-trial motion

(*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), and here, defendant only raised the issue in a post-trial motion. Defendant responds that the issue cannot be waived because it is a sufficiency of the evidence issue.

¶ 29 We initially observe that the State has the burden of disproving an affirmative defense beyond a reasonable doubt only where the affirmative defense is raised by the State's evidence or through an offer of proof by the defendant. *People v. Warren*, 33 Ill. 2d 168, 173 (1965); *People v. Carter*, 135 Ill. App. 3d 403, 409 (1985). The State does not have the burden to disprove an affirmative defense unless sufficient evidence is presented on it at trial. Here, where there was no evidence or offer of proof that defendant was effectuating an arrest of Moore, or that Moore was committing an offense when defendant went up to him with a loaded gun (725 ILCS 5/107-3, 5/7-6(a) (West 2008)), there was nothing for the State to disprove (*People v. Smith*, 237 Ill. App. 3d 901, 907-08 (1992)). Accordingly, defendant waived for review the affirmative defense of a citizen's arrest as it was never raised at trial. *People v. Abrams*, 48 Ill. 2d 446, 458 (1971); *People v. Nugara*, 39 Ill. 2d 482, 488-89 (1968).

¶ 30 Defendant, however, claims that we can review this issue as plain error. Our supreme court has held that defendant forfeits plain error review where he fails to present argument on how either of the two prongs of the plain error doctrine is satisfied. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010). Thus, defendant's mere assertion that there was an error that affected his substantial rights is insufficient to warrant plain error review. See, e.g., *People v. McDade*, 345 Ill. App. 3d 912, 914 (2004); *People v. Rathbone*, 345 Ill. App. 3d 305, 311 (2003). Under these circumstances, we conclude that defendant has forfeited plain error review of this issue. *Hillier*, 237 Ill. 2d at 545.

¶ 31 Defendant also contends that his actions were justified under the affirmative defense of necessity. He maintains that he reasonably believed that he should thwart the escape of an armed rapist and robber, and hold him for police.

¶ 32 Under the affirmative defense of necessity, defendant must show that his conduct, which would otherwise be an offense, is justifiable because he was without blame in occasioning or developing the situation and reasonably believed his conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct. 720 ILCS 5/7-13 (West 2008). Although defendant raised the affirmative defense of necessity in his post-trial motion, he did not make an offer of proof at trial that he was without blame in occasioning or developing the situation, and thus, he cannot raise this affirmative defense on direct appeal. *Nugara*, 39 Ill. 2d at 488-89. Moreover, the evidence at trial showed that defendant occasioned and developed the situation with Moore where Moore was merely sitting in his car in the parking lot and not threatening defendant or anyone else when defendant elected to point a loaded gun at him.

¶ 33 In sum, we find that defendant was not acting in self-defense or defense of others when he pointed a loaded gun at Moore who had left Ye and was not in pursuit of her or anyone else while he was sitting in his car in the parking lot. We also find that defendant cannot assert an affirmative defense under section 7-3 of the Code (720 ILCS 5/7-3 (West 2008)) where he is not claiming that he was acting in defense of property, that case law protecting police officers who are acting in the line of duty to stop a fleeing felon are distinguishable from defendant's case as he is not in law enforcement, and that defendant has waived the affirmative defenses of citizen's arrest and necessity because he failed to offer evidence on them at trial.

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¶ 34 In light of the foregoing, we affirm the judgment of the circuit court.

¶ 35 Affirmed.