IN THE COURT OF APPEALS OF IOWA

No. 1999-546 (9-807) / 98-2214
Filed March 29, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL B. WEATHERSPOON,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart Scoles, Judge.

Michael B. Weatherspoon appeals his conviction of murder in the first degree contending the trial court erred in failing to grant his motion for judgment of acquittal based on the insufficiency of the evidence. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Paul Martin, County Attorney, Carlyle D. Dalen, Assistant County Attorney, and Thomas H. Miller, Assistant Attorney General, for appellee.

Considered by Streit, P.J., and Vogel and Peterson, S.J.*

* Senior Judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

PETERSON, S.J.

Michael B. Weatherspoon appeals his conviction of murder in the first degree contending the trial court erred in not granting his motion for judgment of acquittal based on the insufficiency of the evidence to support the conviction. It is his contention the trial court erred because the State failed to establish he did not act with justification. We affirm.

Background and Proceedings. A jury could find the following facts from the evidence at trial. Delona Webster was an exotic dancer at The Outer Edge, a dance club in Mason City, Iowa. On the evening of March 3, 1998, she met Jerry Dean, an Outer Edge patron. Dean gave her his address as room 125 in the Willow Run Annex.

After 1:30 a.m. that evening Michael Weatherspoon, Webster's companion, took Webster and her two children to the Willow Run Annex to rendezvous with Dean. After being invited in by Dean, Dean asked Webster about having sex and offered $200. She refused. Webster told Dean she was going to leave. After considerable negotiations, Dean agreed to a dance. Webster wanted payment before she danced. At that time, Weatherspoon came in the door and asked Webster if something was wrong. Dean and Weatherspoon began to argue about payment for the private dance. Dean picked up a sheathed knife on a table and approached Weatherspoon. Weatherspoon punched Dean, and a struggle began. Weatherspoon obtained control of the knife and stabbed Dean in the chest. Dean died as a result of the loss of blood due to fourteen separate stab wounds.

As Dean laid bleeding to death, Weatherspoon took Dean's billfold. Weatherspoon, Webster, and the kids left the area. On the way back to their motel Weatherspoon made a derogatory comment and threw Dean's billfold out of the window of the vehicle. Webster disposed of Weatherspoon's bloody clothes in a dumpster. On March 4, 1998, Weatherspoon paid $900 toward the purchase of a Cadillac automobile, using a false name.

Michael Weatherspoon was charged with first-degree murder in violation of Iowa Code sections 707.1 and 707.2(1) or 707.2(2) (1997). Weatherspoon relied on the defense of self-defense. The jury found Weatherspoon guilty of first-degree murder.

Discussion. On appeal, Weatherspoon contends the court erred in failing to grant his motion for judgment of acquittal based on insufficient evidence. He contends in argument that there was insufficient evidence to support a finding he was not justified in the actions he took. He also contends the court should have reduced the charge to voluntary manslaughter.

Claims of this nature are reviewed for errors at law. Iowa R. App. 4; *State v. Nichols,* 572 N.W.2d 163, 163 (Iowa App. 1997). A jury verdict of guilty is binding on appeal unless no substantial evidence in the record exists to support it, or it is clearly against the weight of evidence. *State v. Forsyth,* 547 N.W.2d 833, 834 (Iowa App. 1996). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *State v. Maghee,* 573 N.W.2d 1, 10 (Iowa 1997). In determining the sufficiency of the evidence, we review the record in the light most favorable to the

State. *State v. Milner,* 571 N.W.2d 7, 10 (Iowa 1997). All the evidence is considered, not merely evidence supporting the verdict. *State v. Walker,* 538 N.W.2d 316, 319 (Iowa App. 1995). Direct and circumstantial evidence are equally probative. Iowa R. App. 14(f)(16). Although a jury can base its verdict on circumstantial evidence, the evidence must raise a fair inference of guilt to each element of the crime. *State v. Casady,* 491 N.W.2d 782, 787 (Iowa 1992). Discrepancies in the testimony do not preclude proof beyond a reasonable doubt. *See generally State v. Phanhsouvanh,* 494 N.W.2d 219, 233 (Iowa 1992) (jury could adopt evidence if found credible); *Forsyth,* 547 N.W.2d at 836 (jury's function determines credibility and resolves conflicts in evidence). Even if evidence exists, we do not substitute our judgment for that of a jury. *State v. Taylor,* 516 N.W.2d 38, 41 (Iowa App. 1994).

A person is justified in the use of reasonable force when the person reasonably believes such force is necessary to defend oneself or another from any imminent use of unlawful force. Iowa Code § 704.3. When self-defense has been raised by a defendant in a case, the prosecution must establish its nonexistence beyond a reasonable doubt. *State v. Cruse,* 228 N.W.2d 28, 30 (Iowa 1975). This defense is two-pronged – an admission a prescribed act was done, and an establishment of an exculpatory excuse that takes the act out of the criminal law. Iowa Code § 704.3. To justify homicide on the ground it was committed in self-defense, four elements must be present:

> (1) the slayer must not be the aggressor in provoking or continuing the difficulty that resulted in the homicide;
> (2) he must retreat as far as reasonable and safe before taking his adversary's life, except in his home or place of business;

> (3) he must actually and honestly believe he is in imminent danger of death or great bodily harm and the action he takes is necessary for self-preservation, this danger need not be real, but only thought to be real in the slayer's mind, acting as a reasonable prudent person under the circumstances;
> (4) he must have reasonable grounds for such belief.

State v. Badgett, 167 N.W 2d 680, 683 (Iowa 1969).

Iowa Code section 704 1 defines reasonable force:

> Reasonable force is that force and no more which a reasonable person, in like circumstances, would judge to be necessary to prevent an injury or loss and can include deadly force if it is reasonable to believe such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, or it is reasonable to believe such force is necessary to resist a like force or threat Reasonable force, including deadly force, may be used even if an alternative course of action if available if the alternative entails a risk to life or safety, or the life or safety of a third party requires one to abandon or retreat from one's dwelling or place of business or employment.

Iowa Code § 704 1.

Dean was responsible for starting the confrontation when he picked up the sheath knife and approached Weatherspoon who then struck him and obtained possession of the sheathed knife. Weatherspoon continued the confrontation by stabbing Dean fourteen times with the knife. Dean was fifty-five years old and disabled by an obstructive pulmonary disease, hepatitis, and nerve damage to his right shoulder. At the time of the incident, he was intoxicated with a blood alcohol content of 0.127. Weatherspoon was twenty-eight years old.

Weatherspoon may have initially believed he was in imminent danger of death or injury and reasonable force was necessary to save himself or Webster. Once he obtained control of the knife, he did not have reasonable grounds for continuing that belief. Weatherspoon became the aggressor. Once

Weatherspoon obtained control of the knife, he could have left the premises. Substantial evidence supports the jury's finding Weatherspoon was not justified in the actions that resulted in the death of Dean.

Weatherspoon also contends the trial court should have partially granted his motion and reduced the charge to voluntary manslaughter. He did not preserve this issue for review because it was not raised in the district court, and he fails to cite any authority for this proposition. Iowa R. App. P. 14(a)(3). We deem this issue has been waived. We would note the jury was instructed on voluntary manslaughter and the verdict form contained a choice for this crime.

There is substantial evidence in the record to support the conclusion Weatherspoon was not justified in taking the life of Dean. The trial court was correct in denying Weatherspoon's motion for judgment of acquittal. We affirm.

AFFIRMED.