State v. Gukeisen, 2012 Ariz. App. Unpub. LEXIS 1531 (AZ Ct. App. 2012)
State: Arizona
Date: December 11, 2012
Defendant: Gukeisen
State v. Gukeisen, 2012 Ariz. App. Unpub. LEXIS 1531 (AZ Ct. App. 2012)
STATE OF ARIZONA, Appellee, v. DANIEL R GUKEISEN, Appellant.
1 CA-CR 11-0401
COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT D
2012 Ariz. App. Unpub. LEXIS 1531
December 11, 2012, Filed
COUNSEL:
Thomas C. Horne, Arizona Attorney General, By Kent E. Cattani, Chief Counsel, Criminal Appeals/Capital Litigation Section, Joseph T. Maziarz, Section Chief Counsel, Craig W. Soland, Assistant Attorney General, Phoenix, Attorneys for Appellee.
Coppersmith Schermer & Brockelman PLC, By James J. Belanger, Scott M. Bennett, Phoenix, Attorneys for Appellant.
JUDGES:
ANDREW W. GOULD, Judge. MICHAEL J. BROWN, Presiding Judge, DONN KESSLER, Judge, concurring.
MEMORANDUM DECISION
GOULD, Judge
Daniel R. Gukeisen appeals his conviction and the resulting sentence for manslaughter. Gukeisen challenges the sufficiency of the evidence and also argues that the trial court erred in denying his motion for new trial based on a claim of prosecutorial misconduct. We affirm.
BACKGROUND
Gukeisen was indicted for manslaughter, a class 2 felony and dangerous offense, stemming from the fatal stabbing of the victim during an altercation in front of Gukeisen's condominium. Upon trial to a jury, Gukeisen was convicted of manslaughter, but the jury found the offense to be non-dangerous. The trial court sentenced Gukeisen to a presumptive five-year prison term. Gukeisen timely appealed.
DISCUSSION
A. Sufficiency of Evidence
Gukeisen contends his conviction must be reversed due to insufficient evidence. Specifically, he argues that the evidence was insufficient to support a finding that he was not justified in using deadly force against the victim. We review claims of insufficient evidence de novo. State v. Bible, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).
"A judgment of acquittal is appropriate when 'no substantial evidence [exists] to warrant a conviction.'" State v. Nunez, 167 Ariz. 272, 278, 806 P.2d 861, 867 (1991) (quoting State v. Clabourne, 142 Ariz. 335, 345, 690 P.2d 54, 64 (1984)); see also Arizona Rules of Criminal Procedure 20(a). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." State v. Spears, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). In reviewing the sufficiency of the evidence, we do not reweigh the evidence to decide if we would reach the same conclusion as the jury. State v. Lee, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997). Instead, we view the

evidence in the light most favorable to upholding the verdict, resolving all reasonable inferences against the defendant. Id. "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." State v. Soto-Fong, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting State v. Scott, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

The trial court determined the evidence supported various justification defenses and instructed the jury on self-defense, defense of third party, defense of residence, and crime prevention. When evidence of justification is presented, the State must prove beyond a reasonable doubt that the defendant's acts were not justified. Arizona Revised Statutes ("A.R.S.") § 13-205(A); 1 State v. King, 225 Ariz. 87, 90, ¶ 14, 235 P.3d 240, 243 (2010).

"A person is justified in . . . using . . . deadly physical force against another . . . [w]hen and to the degree a reasonable person would believe that deadly physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly physical force." A.R.S. § 13-405(A). The same standard applies to use of deadly physical force in the defense of a third party and premises. A.R.S. §§ 13-406, 13-407(B). The use of deadly physical force is justified for the purpose of crime prevention "if and to the extent the person reasonably believes that . . . deadly physical force is immediately necessary to prevent the other's commission" of certain enumerated offenses, including first or second degree burglary, aggravated assault, and sexual assault. A.R.S. § 13-411(A). Thus, the self-defense, defense of third party, defense of premises, and crime prevention justification statutes all permit the use of deadly force only when and to the extent a reasonable person would believe it "immediately necessary" to prevent an enumerated offense under § 13-411, or to protect against the use, attempted use, or threatened use of deadly physical force.

Viewed in the light most favorable to sustaining the verdict, the evidence was sufficient to permit the jury to find that Gukeisen stabbed the victim with a knife in response to a single punch that grazed his head. Gukeisen claims the State failed to meet its burden of proving that he was not justified in using deadly force against the victim because there was evidence that when he stabbed the victim (1) the fight was two against one; (2) the victim and his friend were younger and stronger; (3) the victim and his friend started the fight; and (4) either the victim or his friend hit Gukeisen's brother in the head with a rock. The evidence regarding use of a rock to hit Gukeisen's brother was disputed and conflicting, however, and because Gukeisen did not testify, there was no evidence that he actually believed that his use of deadly force against the victim was "immediately necessary" to protect himself or his brother from any use or threatened use of deadly force by the victim. To the contrary, when interviewed by the police, Gukeisen made no claim that he stabbed the victim in self-defense and instead denied having a weapon. This denial could reasonably be considered as evidence of consciousness of guilt that the stabbing was not justified. See State v. Kountz, 108 Ariz. 459, 463, 501 P.2d 931, 935 (1972) (upholding instruction that false statements by defendant concerning the charge against him may be considered as consciousness of guilt).

In addition to the above circumstantial evidence that the stabbing was not justified, there was also direct evidence in the form of an admission by Gukeisen. As part of his statement to the police minimizing his participation in the altercation, Gukeisen stated that he knew use of deadly force would not have been appropriate in the situation.

We find no merit to Gukeisen's argument that the State cannot rationally contend his

statement to the police denying involvement in the stabbing was false and then use portions of that same statement to support the case against him. It does not always follow that when a person lies, everything said in connection with the lie is false. As for which portions of Gukeisen's statement were true and which were false, it is for the jury to weigh the evidence and determine credibility, and we will not substitute our judgment for that of the jury. State v. Williams, 209 Ariz. 228, 231, ¶ 6, 99 P.3d 43, 46 (App. 2004).

Considering the totality of circumstances, the jury could reasonably find beyond a reasonable doubt that Gukeisen was not legally justified in stabbing the victim. See State v. Fulminante, 193 Ariz. 485, 494, ¶ 26, 975 P.2d 75, 84 (1999) (applying totality of circumstances test for sufficiency of evidence). We therefore hold that there was sufficient evidence to support the jury's verdict.

B. Denial of Motion for New Trial

Gukeisen argues that the trial court erred in denying his motion for new trial based on a claim of prosecutorial misconduct. We review the denial of a motion for new trial for abuse of discretion. State v. Hoskins, 199 Ariz. 127, 142, ¶ 52, 14 P.3d 997, 1012 (2000).

During closing argument, defense counsel argued that the State had failed to prove that Gukeisen was the person who stabbed the victim, and that even if he had, the evidence showed that Gukeisen was justified in using deadly force. In his rebuttal argument, the prosecutor addressed the defense arguments:

Because think of this, what have we heard so far today, and basically throughout the entire case from the defense? I didn't do it. But if I did, it was in self-defense. You can't have both. You don't get to make that kind of argument, although that's what they've done here. He either did it and not in self-defense or he didn't do it at all.

The testimony is that Dan Gukeisen is the person who stabbed [the victim], and you should find him guilty.

No objection was made by Gukeisen to the prosecutor's argument before the jury commenced deliberations. The next day, however, Gukeisen moved for a corrective instruction or, in the alternative, a mistrial based on two claims of prosecutorial misconduct. One of the claims of misconduct raised by Gukeisen involved the prosecutor's comment during rebuttal argument that "You can't have both." Gukeisen argued that this was a misstatement of the law regarding his ability to assert alternative defenses and that the jury should be instructed that it was proper for him to rely on the self-defense without having to admit that he stabbed the victim.

On appeal, Gukeisen argues that the trial court erred by failing to correct the prosecutor's "misstatement of the law" concerning his alternative defenses and then by denying his motion for new trial raising the same issue. Contrary to Gukeisen's argument, however, the record reveals the trial court granted the motion for a curative instruction and instructed the jury precisely as requested by him:

Members of the jury, you are further instructed that no evidence has been presented in this trial that defendant Daniel Gukeisen has ever said, acknowledged or admitted to stabbing [the victim]. Further, it is proper under the law for the defendant to rely on the defense [of] self-defense and for the Court to instruct the jury on self-defense as it's done without the defendant admitting, claiming or otherwise acknowledging that he, defendant, is the person that stabbed [the victim].

Even if the prosecutor's remarks were deemed to constitute a misstatement of the law as

opposed to merely an effort to disparage the presentation of factually inconsistent defenses, which we do not decide, acts of prosecutorial misconduct may be cured by the trial court's instructions. State v. Means, 115 Ariz. 502, 505, 566 P.2d 303, 306 (1977). Gukeisen's proffer of an affidavit detailing post-trial statements by several jurors submitted with his motion for new trial to prove the prosecutor's rebuttal argument resulted in juror confusion notwithstanding the curative instruction is unavailing. Arizona does not permit juror testimony to impeach the verdict except in matters of juror misconduct, and even then, "[n]o testimony or affidavit shall be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict." State v. Nelson, 229 Ariz. 180, 191-92, ¶ 47, 273 P.3d 632, 643-44 (2012); State v. Dickens, 187 Ariz. 1, 15, 926 P.2d 468, 482 (1996); Ariz. R. Crim. P. 24.1(d).

On this record, the trial court could reasonably find the curative instruction requested by Gukeisen was sufficient to remedy any possible juror confusion caused by the prosecutor's rebuttal argument regarding the alternative defenses. See State v. LeBlanc, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996) ("Jurors are presumed to follow instructions."). Accordingly, there was no error by the trial court in denying the motion for new trial.

CONCLUSION

For the foregoing reasons, we affirm Gukeisen's conviction and sentence.

/s/ ANDREW W. GOULD, Judge

CONCURRING:

/s/ MICHAEL J. BROWN, Presiding Judge

/s/ DONN KESSLER, Judge

FOOTNOTES:

1 Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.