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IN THE
COURT OF APPEALS OF INDIANA

HAROLD SELLS,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 49A05-0907-CR-409
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Becky Pierson-Treacy, Judge
The Honorable Shatrese Flowers, Master Commissioner
Cause No. 49F19-0902-CM-22929

February 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Harold Sells appeals his conviction, following a bench trial, of battery, a Class A misdemeanor. Sells raises one issue for our review, which we restate as whether the trial court abused its discretion in excluding evidence Sells offered to support his claim of self-defense. Concluding the trial court did abuse its discretion in excluding the evidence, but in light of all the evidence presented, its error is harmless, we affirm.

Facts and Procedural History

On February 1, 2009, Sells attended a family dinner at the home of his father, Royce Sells ("Royce"), age seventy-nine, where Royce's step-great-granddaughter Alicia Brooks also lived. Alicia's mother Tanya Brooks ("Tanya") was also present, although Tanya lived at a homeless shelter, not Royce's house. Sells cooked dinner for the family and, after watching part of the Super Bowl with Royce, left around 8 p.m. to return to his home in Greenwood. After Sells left, Tanya asked Royce if she could use the shower. Royce said she could shower but had to leave the house afterward. Tanya took a shower but did not leave, and around 10 p.m., Royce once again asked Tanya to leave the house so he could go to bed. Tanya, again, refused to leave. Royce asked Tanya to leave a third time, and Royce and Tanya began a shouting argument in Alicia's room which lasted for "[f]ive or ten minutes." Transcript at 70.

While Royce and Tanya were arguing, Sells called Royce's cell phone to ask if he was still watching the football game. Royce answered the call but did not speak; Sells heard what he perceived as "struggling going on in the background" before Tanya knocked the cell phone from Royce's hand and Sells heard the phone hit the ground. Id.

at 76. Sells redialed Royce's cell phone and again heard the sound of Royce and Tanya shouting at each other. Then Sells heard the phone hit the ground and the call disconnect a second time. Sells dialed 911 and told the operator to dispatch the police to Royce's address because he believed Royce "was being assaulted by my niece, Tanya Brooks." Id. at 78. Intending to check on his father's welfare, Sells began the half-hour drive back to Royce's house.

Police officers responded to Royce's house and, after speaking with Royce and Alicia, asked Tanya to leave. Tanya drove away in her car and then the officers left. A few minutes thereafter, Tanya, upon realizing she had forgotten her cell phone and "coffee money," drove back to the house to retrieve them. Id. at 28. Tanya left her car running in the driveway, went to Alicia's bedroom window at the side of the house, and asked Alicia to retrieve her phone and money. Meanwhile, Sells neared the house in his car, parked the car down the street due to snow fall, and approached the house to find "everything was quiet." Id. at 79. Seeing Tanya's car parked in the driveway, and hearing the engine noise, Sells reached inside the car to turn off the engine.

As Sells was doing this, Tanya came back to the front of the house and yelled because she did not recognize Sells. Tanya ran toward Sells and, upon recognizing him, asked him where her keys were. When Tanya came within reaching distance of Sells, Sells punched her in the face. Tanya fell face-down into a snow bank, and Sells was on top of Tanya for "[a]bout twenty seconds" and punched her in the head and face six or seven times while Tanya struggled to get him off of her. Id. at 83. Alicia yelled at Sells, and Royce ran over and pulled Sells off of Tanya and asked him to leave. Tanya suffered

bruises and swelling to the back of her head and face, a black eye, and a cut to her lip. Later that evening, Sells was arrested for battery and told the arresting officer that Tanya had tried to assault him.

On February 10, 2009, the State charged Sells with battery, a Class A misdemeanor. The trial court held a bench trial, at which Sells admitted striking the first blow at Tanya and punching her while she was on the ground but argued he was acting in self-defense or defense of others based on his reasonable belief that Tanya was an initial aggressor. Sells testified he punched Tanya because "she was coming at me in a threatening manner" and he "wasn't looking for her to pass the first blow." Id. at 82. At four points during the cross-examination of Tanya, the trial court sustained the State's objection to defense counsel's questions regarding Tanya's relationship with Royce's household, her argument with Royce on February 1, 2009, and whether she was asked to leave by police following that argument. Additionally, the trial court sustained the State's objection to a portion of Sells's direct-examination testimony regarding why he believed a "struggl[e]" was ongoing at Royce's house based upon what he heard over the telephone. Id. at 76-77. The trial court found Sells guilty as charged and sentenced him to one year suspended to probation. Sells now appeals.

Discussion and Decision

I. Self-Defense

Sells claims he punched Tanya in self-defense or defense of another. Self-defense is a valid justification for an otherwise criminal act. Miller v. State, 720 N.E.2d 696, 699 (Ind. 1999). "A person is justified in using reasonable force against another person to

protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force." Ind. Code § 35-41-3-2(a). In addition, a person is justified in using reasonable force "if the person reasonably believes that the force is necessary to immediately prevent or terminate the other person's trespass on or criminal interference with property lawfully in the person's possession" or "lawfully in possession of a member of the person's immediate family." Ind. Code § 35-41-3-2(c). The phrase "reasonably believes" requires both a subjective belief that force was necessary and that such actual belief was one a reasonable person would have under the circumstances. Littler v. State, 871 N.E.2d 276, 279 (Ind. 2007). However, a person is not justified in using force if he or she enters into combat with another person or is the initial aggressor unless he or she withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action. Ind. Code § 35-41-3-2(e)(3).

The State bears the burden of disproving self-defense. Hirsch v. State, 697 N.E.2d 37, 40 (Ind. 1998). Thus, when the defendant has raised a self-defense claim, the State must disprove at least one of the following elements beyond a reasonable doubt: 1) the defendant was in a place where he had a right to be; 2) the defendant acted without fault; and 3) the defendant had a reasonable fear or apprehension of bodily harm. White v. State, 699 N.E.2d 630, 635 (Ind. 1998). The State may meet its burden of proof by rebutting the defense directly, by affirmatively showing that the defendant did not act in self-defense, or by simply relying upon the sufficiency of its evidence in chief. Brand v. State, 766 N.E.2d 772, 777 (Ind. Ct. App. 2002), trans. denied.

II. Admission of Evidence

A. Standard of Review

The admission or exclusion of evidence rests within the sound discretion of the trial court, and generally we review its rulings for an abuse of discretion. Hinds v. State, 906 N.E.2d 877, 879 (Ind. Ct. App. 2009). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id. If, however, the trial court's ruling turns on a misunderstanding of a rule of evidence, our review is de novo. Hirsch, 697 N.E.2d at 40.

B. Sells's Evidence

Sells argues the trial court erred in excluding, at five instances during the bench trial, evidence relevant to his self-defense claim and not otherwise inadmissible. Relevant evidence means evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401. Evidence that is not relevant is not admissible, but all relevant evidence is admissible except as otherwise provided by law. Evid.R. 402.

In evaluating a claim of self-defense, "[t]he question of the existence or appearance of danger to the defendant, the necessity of defending himself, and the amount of force necessary, must be determined from the standpoint of the accused at the time and under the existing circumstances as shown by the evidence." Gunn v. State, 174 Ind. App. 26, 365 N.E.2d 1234, 1240 (1977). Although it is ultimately the defendant's belief that is at issue in a claim of self-defense, "the beliefs of others may shed light upon

the reasonableness of the defendant's belief" that force was necessary. Hood v. State, 877 N.E.2d 492, 496 (Ind. Ct. App. 2007), trans. denied. When the defendant claims he acted in self-defense, "evidence legitimately tending to support his theory is admissible," and the defendant "is entitled to support his claim of self-defense by introducing evidence of matters that would make his fear of the victim reasonable." Brand, 766 N.E.2d at 780.

1. Tanya's Testimony

The trial court sustained the State's objection, on the grounds of relevancy, to cross-examination questions wherein Sells sought to elicit Tanya's testimony that she argued with Royce after Royce asked her to leave and that Royce's cell phone rang during their argument. Sells's counsel argued the testimony would "show what . . . Sells perceived" when he overheard the argument over the phone and the content of what Sells perceived was relevant to his claim of self-defense and defense of others. Tr. at 22. We agree. Any basis for Sells's perception that Tanya was acting in an aggressive or threatening manner toward Royce would have supported Sells's claim he reasonably perceived Tanya as an initial aggressor and, upon later discovering her on Royce's property, reasonably believed force was necessary to repel an attack upon himself or terminate Tanya's trespass upon Royce's property. Thus, Tanya's testimony was relevant to shed light upon the events and circumstances as they appeared to Sells and that motivated him to take the course of action he did.

Additionally, the trial court sustained the State's objection, also on the ground of relevancy, to Sells's cross-examination question regarding whether Tanya was living at a homeless shelter, not Royce's house, "to get yourself back on your feet." Id. at 21.

Sells's counsel argued the question was relevant because the relationship between Tanya and Royce "plays into what [Sells] perceived that night." Id. In sustaining the objection, the trial court effectively precluded Sells from inquiring further into the relationship between Tanya and Royce as a basis for Sells's perception that Tanya was a trespasser at Royce's house once she refused Royce's request to leave. Tanya's status as an invited guest or trespasser, as well as Sells's perception of that status, were relevant to Sells's claim of self-defense or defense of others because a person is justified in using reasonable force to terminate a trespass upon property in the lawful possession of the person or the person's immediate family member. See Ind. Code § 35-41-3-2(c). Therefore, we agree with Sells that the trial court erred in excluding this line of questioning.

Further, the trial court sustained the State's objection, on hearsay grounds, to Sells's cross-examination question of Tanya regarding whether police officers asked her to leave following her argument with Royce. The officers' command for Tanya to leave was not hearsay because it was not a statement offered for the truth of the matter asserted. See Evid. R. 801(c); see also Evid. R. 801(a) (defining a statement as an assertion or conduct intended as an assertion). Rather than as an assertion capable of being true or false, the officers' command was offered as evidence that Tanya no longer had a right to be at Royce's house. This evidence was relevant to Sells's claim of self-defense or defense of others because it would have corroborated the reasonableness of Sells's perception, upon later encountering Tanya on Royce's property, that Tanya was a

trespasser. Therefore, the trial court erred in excluding Tanya's testimony that the officers asked her to leave.[1]

2. Sells's Testimony

The trial court sustained the State's objection, on relevancy grounds, when Sells sought to testify regarding why he believed there was "struggling" and "fighting" between Tanya and Royce when he called Royce's cell phone. Tr. at 76. The trial court ordered stricken from the record Sells's testimony that what he heard over the phone resembled the sounds of fighting that he was familiar with from growing up in a violent home. Although Sells's counsel did not respond to the State's objection (it is not clear whether she was given an opportunity to do so), from the context of questioning it appears the testimony was offered to show the basis for Sells's belief that Royce "was being assaulted by . . . Tanya," id. at 78, and his decision to dial 911 and drive to Royce's house to investigate.

We agree with Sells that this testimony was relevant to his self-defense claim. Indiana law "ha[s] long emphasized the central importance of the defendant's testimony in a self-defense case." Hirsch, 697 N.E.2d at 42 n.10. Only the defendant is a competent witness to his own state of mind, and thus, Sells's testimony is crucial for the trial court to determine the reasonableness of his belief that the shouting argument between Tanya and Royce was actually a physical altercation in which Tanya was the aggressor. The reasonableness of Sells's belief is, in turn, crucial to evaluating his claim

[1] In addition, Sells argues the trial court abused its discretion in allowing Tanya to testify she told the police officer that Sells was the person who punched her. Assuming Sells is correct that Tanya's statement to the officer is inadmissible hearsay, Sells does not explain how the statement is relevant to his self-defense claim or to any disputed facts. Consequently, we find no prejudicial error.

he was acting in reasonable self-defense or defense of others when he punched Tanya after she approached him while upon Royce's property. Because Sells's testimony was relevant and not otherwise inadmissible, the trial court erred in excluding it.

C. Harmless Error

Our conclusion that the trial court erred in its evidentiary rulings does not end our analysis. Even if the trial court errs in admitting or excluding evidence, this court will not reverse the defendant's conviction if the error is harmless. See Hirsch, 697 N.E.2d at 41; Ind. Trial Rule 61. An error is harmless when the probable impact of the erroneously admitted or excluded evidence, in light of all the evidence presented, is sufficiently minor so as not to affect the defendant's substantial rights. Fleener v. State, 656 N.E.2d 1140, 1142 (Ind. 1995).[2] Sells argues his substantial rights were prejudiced because the trial court's evidentiary rulings denied him the ability to fully or effectively present his claim of self-defense or defense of others. We disagree.

First, through the direct-examination testimony of Royce, Sells was able to establish nearly all of the facts that the trial court's rulings precluded him from establishing through cross-examination of Tanya. Royce testified that Tanya was not living at Royce's home, upon refusing to leave as requested she began a "shouting match" with Royce and "slapped" the cell phone from his hand while he was attempting to answer Sells's call, tr. at 69, and that the police showed up and asked Tanya to leave. Thus, although the testimony of Tanya that the trial court improperly excluded was not

[2] Our supreme court in Fleener distinguished the foregoing harmless error standard, which applies to evidentiary and other state-law rulings, from the reasonable doubt standard that applies to errors affecting the defendant's federal constitutional rights. 656 N.E.2d at 1141-42. We apply the former standard here because Sells does not argue that the trial court's evidentiary rulings violated his constitutional rights.

cumulative when it was offered, it became cumulative with respect to Royce's testimony that was later allowed. See Sylvester v. State, 698 N.E.2d 1126, 1130 (Ind. 1998) ("Where the wrongfully excluded testimony is merely cumulative of other evidence presented, its exclusion is harmless error."); Smith v. State, 490 N.E.2d 300, 302-03 (Ind. 1986) (part of defendant's account of victim's threats that was erroneously excluded was cumulative of defendant's testimony as to threats that was allowed, so error was harmless). And because Royce's credibility, unlike Sells's credibility, was not a central issue in the case, Tanya's testimony was not important for the purpose of corroborating Royce on these points. Cf. Littler, 871 N.E.2d at 278-79 (defendant offered his mother's testimony to corroborate his contentions of prior bad acts by victim).

Second, Sells was permitted to testify regarding the entire sequence of events that preceded his altercation with Tanya. Sells testified that when he called Royce's cell phone,

> I heard the sound of struggling, I heard my father yelling get your damn hands off of me, out of my face. Then I heard another voice, Tanya's, screaming at him, give me back my house, and then I heard my dad yelling again, you don't have a house.

Tr. at 77-78. Sells was also permitted to testify that when he arrived at Royce's house, he saw Tanya was outside and running toward him, and he "though[t] what the heck is she still doing here" because "I fully expected that the police had arrested her." Id. at 81. According to Sells, Tanya "ran right up onto me" and "had her hands up," and "[s]he was right on top of me" before Sells punched her in the face. Id. at 81-82. Sells testified he punched Tanya "[b]ecause she was coming at me in a threatening manner" and

"I'd already heard what had happened over the telephone, and I wasn't looking for her to pass the first blow." Id. at 82. At no point during this testimony did the State object.

Our supreme court has declared that "[a]t least where the defendant's testimony to a critical factual element is wrongly excluded, the error is not harmless." Hirsch, 697 N.E.2d at 43. In Hirsch, the supreme court held reversible error occurred when the trial court excluded the defendant's account of the victim's refusal to stop fighting during the ultimately fatal encounter. Id. at 40-43; see also Hood, 877 N.E.2d at 496 (concluding it was reversible error to exclude eyewitness's account of victim reaching for gun, because such testimony would have corroborated defendant's account of the same critical fact). Here, by contrast, the only part of Sells's testimony that was excluded was an explanation of his state of mind – why he believed a physical struggle was ongoing between Tanya and Royce based upon what he heard over the phone. Sells was permitted to and did testify regarding his perceptions – the content of what he overheard over the phone when Tanya and Royce were arguing – and his subsequent course of conduct and state of mind – that he went to Royce's house to investigate and, upon finding Tanya there, believed she was an aggressor. Therefore, in light of all the evidence that was presented, we conclude the wrongly excluded evidence would not have significantly impacted the trial court's consideration of Sells's self-defense claim, and, as a result, the trial court's evidentiary error is harmless.

Conclusion

The trial court abused its discretion in excluding evidence Sells offered to support his self-defense claim, but in light of all the evidence that was presented, the error did not affect Sells's substantial rights. Therefore, we affirm the judgment of the trial court.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.