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IN THE
COURT OF APPEALS OF INDIANA

ANDRE PAYNE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0908-CR-435
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Jr., Judge
Cause No. 71D08-0901-MR-5

March 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Andre Payne appeals his convictions for voluntary manslaughter as a class A felony[1] and attempted murder, a class A felony.[2]

We affirm.

ISSUE

Whether the evidence was sufficient to rebut Payne's self-defense claim.

FACTS

During the early morning of October 26, 2008, Dominque Wells was driving his girlfriend's mother's Impala. Victorio Belcher and another man, known to Wells only as Robert, were passengers in the vehicle. At approximately 1:00 a.m., Wells drove to a Marathon gas station in downtown South Bend and parked next to a fueling pump.

Payne, Anthony Brown, Mark Murphy, and Quintin Ferrguson also were driving around that morning in Ferrguson's Oldsmobile. Brown possessed a .22 caliber handgun, and Payne possessed a .9 mm handgun. When they drove by the Marathon gas station, they noticed the Impala parked there. Believing that the Impala belonged to a female friend, they parked on the other side of the fueling pump.

Brown, Ferrguson, Belcher, and Wells, who all knew each other, exited their respective vehicles and began arguing. Wells noticed that Brown had a ".22 or something" caliber gun in his hand. (Tr. 259). Eventually, Brown got back in the

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[1] Ind. Code § 35-42-1-3.

[2] I.C. §§ 35-41-5-1; 35-42-1-1.

Oldsmobile's driver's seat; Ferrguson got in the front passenger's seat; and Payne got in the back seat, where Murphy had remained. When Brown got back into the Oldsmobile, he threw his gun "on the seat between [him] and [Ferrgusson]." (Tr. 308).

Belcher then approached the Oldsmobile "with his gun drawn out talking about, is that Murph, is that Murph," and pointing his gun at the occupants. (Tr. 308). Ferrguson therefore picked up Brown's gun and began shooting toward Belcher. Ferrguson and Belcher exchanged numerous rounds of gunfire. Both sustained gunshot wounds.

Brown, Payne, and Murphy immediately took Ferrguson to a hospital. Payne then drove Brown and Murphy to a friend's house to "get some more bullets" for Brown's gun. (Tr. 343).

At approximately 3:00 a.m., Brown, Murphy, and Payne left their friend's house and drove to Kelly's Pub, a bar located west of the Marathon gas station. Payne still possessed his .9 mm handgun, which he kept on his lap as he drove. When they arrived at the bar, they noticed Wells' uncle in the bar's parking lot. Brown shot at him from the still-moving Oldsmobile. Murphy then reloaded the gun with bullets and gave the gun back to Brown.

In the meantime, Wells had dropped Belcher and Robert off at a hospital and returned home. Shortly thereafter, Bradley Walls picked up Wells, and the two of them left in Bradley's vehicle. Bradley had a "small" gun, which he kept between the front seats. (Tr. 267).

At approximately 3:45 a.m., Bradley and Wells drove to a Taco Bell. They soon left after Wells observed Ferrguson's Oldsmobile. Payne, however, followed them out of the parking lot.

After leaving the Taco Bell parking lot, Bradley and Wells drove a short distance before stopping for a traffic light at an intersection. Payne stopped to the left of, but not even with, Bradley's vehicle. Thus, the Oldsmobile's "front passenger side window was even with the back driver's side window of" Bradley's vehicle. (Tr. 227).

Murphy, who was sitting in the Oldsmobile's front passenger seat, heard Payne say, "duck . . . ." (Tr. 335). Payne then began shooting "[a]cross" Murphy and out of Murphy's window, which had been "shot out already." (Tr. 336). Brown, who was sitting directly behind Murphy, also started shooting toward Bradley's vehicle. Brown fired eleven shots; "[a]ll [his] shots went to the door." (Tr. 401). Although Payne "said they had a gun," at no time did Murphy or Brown see any of the occupants of Bradley's vehicle with a gun. (Tr. 338).

When Wells realized that Payne had followed them, he immediately "dropped [his] head" because he "knew they were going to start shooting." (Tr. 267). Wells then heard "[s]omebody out of that car start shooting" but could not see who was shooting at him. (Tr. 268). Once the shooting began, Wells tried to fire Bradley's gun, but "the gun wouldn't shoot." (Tr. 269). He therefore threw the gun out of the vehicle. Wells heard Bradley say, "I'm hit . . . ." (Tr. 268). Bradley's vehicle then started moving forward approximately one block, until it struck a pole. Bradley died at the scene.

An autopsy revealed that Bradley sustained only one gunshot wound. The bullet entered his left side, traveled through several organs, and pierced his aorta, killing him. The forensic pathologist recovered "a bullet within the right chest wall area after it had gone through the ribs." (Tr. 438).

Officers collected shell casings from a .40 caliber semiautomatic handgun and a .22 caliber handgun at the Marathon gas station. Officer also collected a "spent .22 caliber single shell casing" in the parking lot of Kelly's Pub. (Tr. 464). Officers processing the scene at the intersection of Main Street and LaSalle Avenue collected ten spent shell casings from a .22 caliber weapon. Officers also discovered a ".32 caliber semiautomatic handgun . . . lying in the middle of LaSalle Street just west of the intersection of LaSalle and Main"; however, they did not discover any .32 caliber shell casings at the scene or in Bradley's vehicle. (Tr. 475).

Officers processing Bradley's vehicle counted fifteen bullet holes in the driver's side. They discovered several bullet holes in the "left quarter panel" of the trunk area; "the left rear passenger side door"; and the "left driver's door." (Tr. 482). Officers collected a ".22 caliber bullet fragment" from the "left rear quarter panel trunk area . . . ." (Tr. 484). They also collected "two partial projectiles and jacketing which ended up matching a .9 mm projectile" from the left-rear passenger door as well as "a single projectile in the bottom of the left driver's side door which also was a .9 mm . . . ." (Tr. 485). An analysis of the bullet hole in the driver's side door determined that the .9 mm projectile entered "almost perpendicular" to the door. (Tr. 488).

Officers processing the Oldsmobile discovered "bullet strikes on the left side of the vehicle . . . ." (Tr. 453). Officers found no damage on the right, or passenger, side of the vehicle. They also recovered a .40 caliber bullet from the Oldsmobile and another .40 caliber bullet from Ferrguson.

Detective Sergeant Ray Wolfenbarger, a firearm and tool mark examiner for the South Bend Police Department's Crime Laboratory, examined the .22 caliber shell casings recovered at the Marathon gas station, Kelly's Pub, and the intersection of Main Street and LaSalle Avenue. He determined all of the casings to be ".22 long rifle caliber casing[s] . . . marketed by Remington" and fired by the same weapon. (Tr. 512). He further determined that the bullet fragments collected from Bradley's vehicle were fired from a ".9 mm Lugar caliber." (Tr. 516). He also verified that the bullet removed from Bradley's body during his autopsy was consistent with a .9 mm Lugar caliber. Officers did not recover either Payne's or Brown's gun.

On January 22, 2009, the State charged Payne with Count I, felony murder; and Count II, attempted murder, a class A felony. On June 15, 2009, the trial court commenced a four-day jury trial.

Payne testified that as he pulled up along the side of Bradley's vehicle, he saw Wells "look[] back" and "reach over" as Bradley ducked his head. (Tr. 583). He also testified that he saw a gun in Wells' hand; heard Brown say that Wells had a gun; and that Wells then "started shooting . . . ." (Tr. 583). Payne further testified that he fired three shots.

The jury found Payne guilty of class A felony voluntary manslaughter and class A felony attempted murder. Following a sentencing hearing on July 14, 2009, the trial court sentenced Payne to consecutive sentences of thirty years for voluntary manslaughter and thirty years, with ten years suspended, for attempted murder.

DECISION

Payne asserts that the State failed to disprove his claim of self-defense. We disagree.

Regarding self-defense, Indiana Code section 35-41-3-2(a) provides as follows:

> 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. However, a person:
>
> (1) is justified in using deadly force; and
> (2) does not have a duty to retreat;
>
> if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

For a claim of self-defense to prevail, the defendant must show that "(1) he was in a place where he had a right to be; (2) he acted without fault; and (3) he had a reasonable fear of death or serious bodily harm." *Hood v. State*, 877 N.E.2d 492, 497 (Ind. Ct. App. 2007), *trans. denied*. The State bears the burden of disproving one of the elements of self-defense beyond a reasonable doubt once a defendant asserts such a claim. *Id.* "The State may meet this burden by rebutting the defense directly, by affirmatively showing

the defendant did not act in self-defense, or by simply relying upon the sufficiency of its evidence in chief." *Id.* "Whether the State has met its burden is a question of fact for the factfinder." *Id.* "The trier of fact is not precluded from finding that a defendant used unreasonable force simply because the victim was the initial aggressor."

> The standard on appellate review of a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. We neither reweigh the evidence nor judge the credibility of witnesses. If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed.

Id. (internal citations omitted).

Here, the evidence shows that after the shooting at the Marathon, Payne retrieved additional bullets for Ferrguson's gun. He then proceeded to drive through South Bend while in possession of a .9 mm handgun until he encountered Bradley and Wells in Bradley's vehicle. Payne then drove alongside Bradley's vehicle and opened fire on the occupants.

Murphy testified that Payne started shooting first. Both Brown and Murphy testified that they did not see either Bradley or Wells with a gun. Brown also denied saying that Wells had a gun.

Although Wells admitted to picking up Bradley's gun, he testified that he did not do so until after the occupants of the Oldsmobile began shooting. He also testified that Bradley's gun never fired. Officers subsequently discovered Bradley's gun near the scene of the crime but found no shell casings from that caliber of weapon, supporting

Wells' testimony that he had not fired it. Officers also discerned no damage to the Oldsmobile's right side, which would have been the side in the line of any fire from Bradley's vehicle.

Finally, Payne admitted that he fired his .9 mm handgun three times. Officers, however, recovered four .9 mm bullets: three from Bradley's vehicle and one from his body. Despite the discrepancy, the evidence shows that Payne fired multiple shots. Firing multiple shots undercuts a claim of self-defense. *Id.* (citing *Randolph v. State*, 755 N.E.2d 572, 575 (Ind. 2001)).

Payne's argument is merely a request to reweigh the evidence and judge the credibility of the witnesses, which we may not do. We find that the State presented sufficient evidence to negate Payne's claim of self-defense beyond a reasonable doubt.

Affirmed.

BAKER, C.J., and CRONE, J., concur.