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# ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR10-570

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| | **Opinion Delivered** JANUARY 26, 2011 |
| THEODORE METCALF<br>APPELLANT | APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SECOND DIVISION [NO. CR 2009-1779] |
| V. | HONORABLE CHRIS PIAZZA, JUDGE |
| STATE OF ARKANSAS<br>APPELLEE | AFFIRMED |

**ROBIN F. WYNNE, Judge**

Theodore Metcalf appeals from his conviction on a charge of first-degree battery. Appellant was tried by the Pulaski County Circuit Court, sitting without a jury. On appeal, appellant argues that the trial court erred by denying his motion to dismiss. Specifically, appellant argues that the State failed to prove that he was not justified in shooting the victim. We disagree and affirm.

On May 15, 2009, the State filed a felony information in which it charged appellant with one count of criminal attempt to commit first-degree murder. On January 6, 2010, the State filed an amended information in which it charged appellant with one count of battery in the first degree.

At trial, Officer Sean Ragan with the Little Rock Police Department testified that he

was dispatched to an apartment complex on April 9, 2009, at approximately 9:47 p.m. When Ragan arrived on scene, he saw appellant standing over another man, later identified as Charlie Craig, who was lying face-down on the sidewalk. According to Ragan, appellant told him that he and Craig were arguing over a cell phone and appellant "had knocked [Craig] out." Ragan testified that he did not observe any injury to appellant. Ragan further testified that appellant told him that he shot the victim in the chest. Ragan did not see any weapons on the victim, but he did see a twenty-two-caliber rifle inside appellant's apartment.

Sabrina Bogan, who lives in the apartment next to appellant's, testified that she heard an argument on the evening of April 9, 2009. Bogan heard a pop, and then appellant knocked on her door and asked her to call 911, telling her that he shot the victim and that the victim tried to break in and rob him. On cross-examination, Bogan testified that appellant's exact words to her were that Craig was going to try to roll over him because he was an old man and he was not going to let anybody roll over him because he was old. Bogan testified that she heard appellant yell "die bitch, die" to Craig before Officer Ragan arrived.

Stuart Bartlett, a crime-scene specialist with the Little Rock Police Department, testified that a Marlin twenty-two-caliber rifle was collected from appellant's apartment. A shell casing and drops of blood were also located inside the apartment. Detective Stuart Sullivan with the Little Rock Police Department testified that appellant's apartment did not appear to be in any kind of disarray and that there were no signs of anything that would indicate a struggle. Incidentally, there were a number of empty containers of vodka and beer strewn about the apartment. Detective Sullivan stated that the shell casing recovered from the

scene matched the rifle found in appellant's apartment.

Detective Sullivan took a recorded statement from appellant. In the statement, appellant stated that Craig lived in a neighboring apartment and that he had come to appellant's apartment asking to borrow his cell phone. According to appellant, when the victim indicated that he wanted to take the phone with him, appellant resisted, at which point the victim grabbed him around the throat and began cursing. Appellant let him take the phone. Approximately an hour later, appellant went to the victim's apartment to retrieve his phone, but the victim did not answer the door. The victim then later came into appellant's apartment and advanced toward appellant, who was asking him for the phone. Appellant retrieved his rifle from his bedroom while the victim remained in the living room; when appellant returned with the gun, the victim continued advancing towards appellant, at which point appellant shot him once in the chest. Detective Sullivan testified that he did not observe any injury to appellant on the night in question.

After the State rested its case, appellant moved to dismiss, arguing that the State failed to negate his defense of justification. The trial court denied the motion to dismiss. Appellant testified at trial that on April 9, 2009, Craig came to his apartment, asked to use his phone, and wanted to take it with him. When appellant refused to let Craig take the phone with him, appellant testified that Craig grabbed him by the neck, at which point appellant agreed to let him take the phone. Craig later came into appellant's apartment and, according to appellant, started coming toward him looking like he was "fixing to attack." Appellant retrieved his gun,

and Craig continued to advance towards him, so appellant shot Craig. Appellant testified that he believed he was in danger when Craig was advancing toward him. According to appellant, Craig never stated that he was going to harm or rob appellant, but his action was threatening. Appellant stated that he could have shot Craig anywhere he wanted to, and he was aiming for his chest. Appellant further stated that he did not lock his door after the first incident because he was not afraid of Craig.

After appellant rested his case, he renewed his motion to dismiss, which was denied. The trial court found appellant guilty of the offense of first-degree battery. In a judgment and commitment order entered on February 24, 2010, the trial court sentenced appellant to 120 months' imprisonment. Appellant filed a timely notice of appeal on March 8, 2010.

Appellant's sole argument on appeal is that the evidence produced at trial is insufficient to support his conviction because the State failed to negate his justification of self-defense. We treat a motion for directed verdict or a motion to dismiss as a challenge to the sufficiency of the evidence. *Wertz v. State*, 374 Ark. 256, 287 S.W.3d 528 (2008). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.*

Appellant was convicted of battery in the first degree. A person commits battery in the

first degree if, with the purpose of causing serious physical injury to another person, the person causes serious physical injury to any person by means of a deadly weapon. Ark. Code Ann. § 5-13-201(a)(1) (Supp. 2009). Appellant admitted to all of the elements of the offense in both his statement to the police, which was introduced into evidence through Detective Sullivan, and his own testimony at trial. Therefore, the only remaining issue is whether the trial court committed error in determining that appellant's actions were not justified.

Arkansas Code Annotated section 5-2-607(a)(2) (Supp. 2009) provides that a person is justified in using deadly physical force upon another person if he reasonably believes that the other person is using or is about to use deadly physical force. Justification is not an affirmative defense that must be pled, but it becomes a defense when any evidence tending to support its existence is offered to support it. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003). By statute, a justification, such as self-defense, is considered an element of the offense and, once raised, must be disproved by the prosecution beyond a reasonable doubt. *Id.*

Appellant argues that the State failed to produce any evidence affirmatively negating his claim of self-defense, and, as such, the trial court was required to resort to speculation in order to determine that his actions were not justified. We disagree. Whether justification exists is a question of fact for the trier of fact to resolve. *See Humphrey v. State*, 332 Ark. 398, 966 S.W.2d 213 (1998). In this case, the only evidence that appellant acted in self-defense comes from appellant himself. The fact that appellant's testimony was not contradicted by

other witness testimony does not mean that the trial court was required to accept it. The trier of fact has the right to accept that part of the defendant's testimony it believes to be true and to reject that part it believes to be false. *Stone v. State*, 43 Ark. App. 203, 863 S.W.2d 319 (1993).

Appellant admitted that he shot Craig with a twenty-two-caliber rifle. There was no evidence to indicate that Craig was armed when appellant shot him. Although appellant testified that Craig attacked him earlier in the day, there was no evidence of an injury to appellant. Appellant also testified that, following the initial attack, he was not afraid of Craig and even left his apartment door unlocked. Although appellant testified at trial that he was afraid that Craig was going to attack him at the time that he shot him, appellant never made a similar claim in his statement to the police following the incident. Viewing the evidence submitted at trial in the light most favorable to the State, as we are required to do, it was possible for the trial court to conclude that appellant was not justified in using deadly force against Craig without resorting to speculation. As such, the judgment of the trial court is supported by substantial evidence and is affirmed.

Affirmed.

ROBBINS and GLOVER, JJ., agree.