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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA10-417

Opinion Delivered MARCH 9, 2011

D.W. APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, ELEVENTH DIVISION [NO. JD 2009-1981]
V.	HONORABLE MELINDA RAE GILBERT, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOSEPHINE LINKER HART, Judge

Appellant, D.W., who is a juvenile, appeals from the circuit court's adjudication of him as a delinquent on one count of second-degree domestic battering. Appellant asserts that his motion to dismiss the State's petition should have been granted because the State failed to prove that he was not justified in committing the act. We conclude that substantial evidence supports the circuit court's decision and affirm.

The State's evidence consisted primarily of the testimony of appellant's father, who was the victim of the second-degree domestic battering. The father testified that on November 8, 2009, he and his girlfriend were at home with appellant when a woman came by and accused appellant of stealing from her. Appellant was already on probation. Appellant admitted to his father that he had broken his court-ordered 24/7 curfew the night before. As the father,

his girlfriend, and appellant discussed the matter, appellant became irate and began arguing. The father told appellant to go wash dishes in the kitchen, and appellant continued to argue. The father then went into the kitchen to calm appellant down, but appellant acted "[l]ike he wanted to fight." The father grabbed appellant and slung him to the floor. He then picked appellant up and brought him back into the living room, but appellant continued to talk, and the father put him back on the floor and sat on him, telling him to calm down and go to his room. Appellant then went to his room. After speaking with his girlfriend, the father then went to appellant's room to speak to him. They talked, and the father put his finger on appellant's forehead. The father's girlfriend then entered the room. The father turned to his girlfriend and asked her to move away. While the father was turned speaking to his girlfriend, appellant hit him in the back of the head with an eighteen-inch pipe that was part of a jack. The father was treated for the injury. It required approximately fifteen stitches and left a scar.

On cross-examination, the father described the first instance as a slam and that he knocked over a chair, while the second time he eased appellant to the floor. The father testified that the second time he took appellant to the floor, he lay on appellant. He stated that two minutes elapsed during the incident in the kitchen and the living room and that four or five minutes passed before he went into appellant's bedroom. He further testified that appellant also struck him on the shoulder and that appellant continued to try to hit him with the pipe. The father admitted that he had slapped appellant on a previous occasion when appellant refused to go to school and had cussed at appellant. During that incident, they wrestled and fell, and appellant cut his finger on window glass that he had broken.

Appellant did not testify, but he did present the testimony of his father's girlfriend. At the conclusion of the hearing, the circuit court adjudicated appellant a delinquent and specifically found that appellant's conduct was not justified. The court found that the victim and appellant were not in any type of altercation necessitating the use of deadly force. The court also found that appellant "escalated the force" and noted that appellant struck his father in the back of the head. The court further noted that the two were separated when appellant struck.

On appeal, appellant argues that the circuit court should have granted his motion to dismiss because the State failed to show that he was not justified in striking his father with a deadly weapon. We note that the statute on the defense of justification for using physical force provides in part that "[a] person is justified in using physical force upon another person to defend himself . . . from what the person reasonably believes to be the use or imminent use of unlawful physical force by that other person, and the person may use a degree of force that he . . . reasonably believes to be necessary." Ark. Code Ann. § 5-2-606(a)(1) (Supp. 2009). A "reasonable belief" is a belief "[t]hat an ordinary and prudent person would form under the circumstances in question" and is "[n]ot recklessly or negligently formed." Ark. Code Ann. § 5-1-102(18) (Supp. 2009). There are additional limits, however, on use of deadly physical force. Ark. Code Ann. § 5-2-606(a)(2). Particularly, those limits include that a "person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is . . . [c]ommitting or about to commit a felony involving force or

violence [or] . . . [u]sing or about to use unlawful deadly physical force." Ark. Code Ann. § 5-2-607(a)(1), (2) (Supp. 2009).

Justification is not an affirmative defense but rather becomes a defense any evidence tending to support its existence is offered to support it. *Metcalf v. State*, 2011 Ark. App. 55. Justification is considered an element of the offense and once raised must be disproved by the prosecution beyond a reasonable doubt. *Id*. Whether justification exists is a question of fact for the trier of fact to resolve. *Id*. On appeal, we determine whether, when viewing the evidence in the light most favorable to the State and considering only the evidence supporting the verdict, the evidence was substantial to support the circuit court's decision without resort to speculation and conjecture. *Id*.

Here, the circuit court could, without resorting to speculation or conjecture, conclude that appellant was not justified in using deadly force against his father. The court could have concluded that, based on the father's testimony, appellant could not have reasonably believed that his father was using or about to use deadly physical force or committing or about to commit a felony involving force or violence. Rather, the court may have considered the circumstances and concluded that appellant could not have reasonably believed that his father intended to do more than discipline him, as appellant had violated his court-ordered curfew, had just been accused of stealing from another person, and yet was unceasingly arguing with his father. Instead, appellant escalated the situation by using deadly physical force. Had the father, rather than appellant, been charged with a crime, he might well have been able to avail

himself of the justification defense of use of "reasonable and appropriate physical force upon a minor . . . when and to the extent reasonably necessary to maintain discipline or to promote the welfare of the minor." Ark. Code Ann. § 5-2-605(1) (Supp. 2009). Further, the court could have concluded that appellant could not have reasonably believed that the amount of force appellant used was necessary. The father had not resorted to use of a deadly weapon as did appellant; there had been an interlude of approximately five minutes since their last confrontation; and the father, at the time he was struck, had turned away from appellant. We further note that appellant did not testify regarding his own beliefs and whether he thought those beliefs were reasonable.

Appellant relies heavily on the testimony of the father's girlfriend to establish that his belief was reasonable. He asserts that the circuit court arbitrarily disregarded reasonable testimony that was not in conflict with any other testimony, supported other testimony, did not involve questions of credibility or physical impossibility, and had a reasonable probability of being true. He asserts that the girlfriend recounts more aggressive attacks against appellant than that testified to by the father. The circuit court, however, was not required to give it great weight, as the court was not obligated to accept the testimony. *Metcalf*, *supra*. And on appeal, we view the evidence in the light most favorable to the State. *Id*. Accordingly, the circuit court's decision is supported by substantial evidence and is affirmed.

Affirmed.

WYNNE and BROWN, JJ., agree.