

**ARKANSAS COURT OF APPEALS**

DIVISION III  
**No.** CACR 09-372

DERRICK DISHMAN

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** October 28, 2009

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT,  
[NO. CR 07-3829]

HONORABLE WILLARD  
PROCTOR, JR., JUDGE

AFFIRMED

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**COURTNEY HUDSON HENRY, Judge**

After a bench trial, the Circuit Court of Pulaski County found appellant Derrick Dishman guilty of second-degree murder and fixed his sentence at twenty years in prison. For reversal, appellant contends that the trial court's finding of guilt is not supported by the evidence. We hold that substantial evidence supports the trial court's decision, and we therefore affirm.

Our review of the record reveals that appellant shot and killed Leonard Hall on August 5, 2007. Indisputably, both appellant and Hall were armed with handguns, which they used to shoot one another. Hall died from a gunshot wound to the chest, and appellant sustained life-threatening injuries. The prosecuting attorney charged appellant with first-degree murder in connection with Hall's death. Appellant claimed that he shot Hall in self defense because Hall was the aggressor.

The testimony at trial established that the incident took place on a street outside the home of Hall's aunt, Jayne James. James testified that she was in her bedroom that day and walked outside because she heard an argument. Once outdoors, she saw appellant and Hall engaged in a confrontation. According to James, Hall took a few steps backward, and appellant raised his shirt, brandished a weapon, and fired upon Hall. James said that appellant drew his weapon first and that she did not see a gun in Hall's hand.

Stephen Aldridge, James's son, testified that he also witnessed the shooting. He said that appellant's gun was visible in his waistband. Aldridge believed Hall also had a weapon concealed in his pocket because Hall customarily carried one. Aldridge said that, as Hall was walking, appellant removed the gun from his waistband and the shooting began. Aldridge testified that he did not know which man fired the first shot but that appellant was the first to draw a weapon.

Appellant testified that Hall confronted him in the street about a previous shooting. During this conversation, one of appellant's friends arrived in a vehicle. Appellant said that his friend advised him that Hall had a gun, and the friend offered appellant a ride. Appellant declined the offer of transportation but accepted his friend's invitation to take a gun from under the car's seat. Appellant testified that he began to walk away while he and Hall continued to exchange words. Appellant said that he pulled out his cell phone, and Hall began shooting at him. Appellant said that he returned fire and kept firing as he fled.

After hearing the testimony, the trial court found that appellant was the first person to draw a weapon, thereby rejecting appellant's claim of self defense. The trial court considered

the charge of first-degree murder and the lesser-included offenses of second-degree murder and manslaughter. After reviewing the evidence, the court found appellant guilty of second-degree murder.

Appellant argues on appeal that, while the testimony shows that appellant drew his gun before Hall, the evidence fails to show why appellant brandished his weapon. Appellant asserts that it is possible that Hall threatened him verbally or that Hall made some threatening gesture to provoke his use of deadly force. Thus, appellant contends that the State failed to disprove his claim of self defense.

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 unlawful deadly force. A person is not justified in using deadly physical force if he was the initial aggressor. *See Craig v. State*, 70 Ark. App. 64, 14 S.W.3d 893 (2000). 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.*

When considering a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the State, considering only the evidence in favor of the guilty verdict, and we affirm if the conviction is supported by substantial evidence. *Mitchem v. State*, 96 Ark. App. 78, 238 S.W.3d 623 (2006). Substantial evidence is evidence

forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). The duty of resolving conflicting testimony and determining the credibility of witnesses is left to the discretion of the trier of fact. *Boyd v. State*, 369 Ark. 259, 253 S.W.3d 456 (2007).

In its ruling from the bench, the trial court assessed the credibility of the witnesses. The trial court found James's and Aldridge's testimony credible as to the events surrounding the shooting. By contrast, the court placed little credence in appellant's testimony. Based on its credibility determinations, the trial court found that appellant was the initial aggressor in the deadly altercation. With that finding, the trial court determined that the State disproved appellant's claim of self defense beyond a reasonable doubt, because one who is the initial aggressor cannot claim that he acted in self defense. *See Craig, supra*. If appellant reasonably believed that Hall was about to use unlawful deadly force based upon a spoken threat or physical gesture, he could have so testified. Instead, appellant testified that Hall shot him without provocation. Based on the evidence before us, we conclude that substantial evidence supports the trial court's decision, and we affirm appellant's conviction for second-degree murder.

Affirmed.

ROBBINS and KINARD, JJ., agree.