

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-596

DENNIS HUTCHINSON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered MARCH 10, 2010

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[CR-2008-983]

HONORABLE MARION A.
HUMPHREY, JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Richard Ivey was fatally shot when he entered appellant Dennis Hutchinson’s home on January 15, 2008. Hutchinson and accomplice Brenda Ivey, the victim’s wife, were subsequently charged with capital murder subject to sentence enhancement for using a firearm while committing the felony. Hutchinson was convicted by a jury of second-degree murder and was sentenced to prison under the enhancement provision for a total of 540 months. Hutchinson contends on appeal that the circuit court erred by refusing the jury instruction he proffered on self-defense, a non-model jury instruction reflecting language of Ark. Code Ann. § 5-2-620 (Repl. 2006). He acknowledges that this issue has been addressed in previous appellate decisions in Arkansas, but he asks that the issue be revisited. Under the precedent of those prior decisions, we affirm.¹

¹This case was assigned to our court despite Hutchinson’s asserting in his informational statement that jurisdiction lies with the supreme court because the appeal involves substantial

At trial the jury was instructed on justification and the use of deadly force in defense of a person under AMI Crim. 2d 705, our model instruction that reflects the following language of Ark. Code Ann. § 5-2-607:

(a) A person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is:

(1) Committing or about to commit a felony involving force or violence;

(2) Using or about to use unlawful deadly physical force; or

(3)(A) Imminently endangering the person's life or imminently about to victimize the person as described in § 9-15-103 from the continuation of a pattern of domestic abuse.

(b) A person may not use deadly physical force in self-defense if the person knows that he or she can avoid the necessity of using deadly physical force with complete safety:

(1)(A) By retreating.

(B) However, a person is not required to retreat if the person is:

(i) In the person's dwelling and was not the original aggressor[.]

Ark. Code Ann. § 5-2-607 (Repl. 2006).

Hutchinson asserts that an instruction tracking the language of Ark. Code Ann. § 5-2-620 is necessary to fully instruct a jury in a criminal case on the law of this state. The statute sets forth a legal presumption that force used to defend oneself and the lives of persons or property in one's home is justified unless overcome by clear and convincing evidence:

(a) The right of an individual to defend himself or herself and the life of a person or

public interest and a significant issue needing clarification or development of the law, or overruling of precedent.

property in the individual's home against harm, injury, or loss by a person unlawfully entering or attempting to enter or intrude into the home is reaffirmed as a fundamental right to be preserved and promoted as a public policy in this state.

(b) There is a legal presumption that any force or means used to accomplish a purpose described in subsection (a) of this section was exercised in a lawful and necessary manner, unless the presumption is overcome by clear and convincing evidence to the contrary.

(c) The public policy stated in subsection (a) of this section shall be strictly complied with by the court and an appropriate instruction of this public policy shall be given to a jury sitting in trial of criminal charges brought in connection with this public policy.

Ark. Code Ann. § 5-2-620 (Repl. 2006).

This court and the Arkansas Supreme Court have addressed Hutchinson's argument that the jury should have been instructed on the existence of a presumption that a person may use force to defend himself in his home unless that presumption was overcome by clear and convincing evidence. The supreme court has ruled that the presumption in the statute has no real effect in a case such as this because the State must prove guilt beyond a reasonable doubt and the clear-and-convincing-evidence standard for overcoming the presumption adds nothing to the State's burden. In *Hopes v. State*, 294 Ark. 319, 742 S.W.2d 561 (1988), as in the present case, the trial court refused to give a proffered jury instruction reflecting the language of Ark. Code Ann. § 5-2-620. Our supreme court rejected Hopes's assertion that our self-defense statute should be interpreted to say his actions were justified, explaining:

In *Doles v. State*, 280 Ark. 299, 657 S.W.2d 538 (1983), we discussed § 5-2-620 and concluded that there is a legal presumption that deadly force used in self-defense in one's own home is justified unless overcome by clear and convincing evidence. The comment to AMCI 4105 [now AMI Crim. 2d 705] discusses the statute and points out that it has no real effect, as the state must prove guilt beyond a reasonable

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doubt and that the “clear and convincing evidence” standard for overcoming the presumption adds nothing to the state’s burden. *See also Clark v. State*, 15 Ark. App. 393, 695 S.W.2d 396 (1985).

294 Ark. at 323, 742 S.W.2d at 564. *See, e.g., Doles, supra; Clark, supra; see also Comment, AMI Crim. 2d 705.*

The legislature is presumed to be familiar with the appellate courts’ interpretation of its statutes, and it can amend a statute if it disagrees with those interpretations; absent such an amendment, the interpretation of the statute remains the law. *Sawyer v. State*, 327 Ark. 421, 424, 938 S.W.2d 843, 845 (1997). Furthermore, it is well-settled that this court must follow the precedent of our supreme court. *Brewer v. State*, 68 Ark. App. 216, 6 S.W.3d 124 (1999). We find no merit to Hutchinson’s argument that mere technical changes to Ark. Code Ann. § 5-2-620 and its reaffirmation of the statute’s public policy somehow translate into legislative intent that juries in criminal cases “be instructed as to an individual’s right to defend himself or herself against a person intruding into his or her home.”

Here, the jury was instructed pursuant to AMI Crim. 2d 705, which required the State to overcome appellant’s reliance on self-defense of his person by a standard of beyond a reasonable doubt. Based upon the commentary to the predecessor to AMI Crim. 2d 705 and existing case law, the court did not err in refusing to give Hutchinson’s proffered jury instruction under Ark. Code Ann. § 5-2-620.

Affirmed.

VAUGHT, C.J., and KINARD, J., agree.