Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-012

AUGUST TERM, 2004

State of Vermont v. Thomas Fuss	}	APPEALED FROM: District Court of Vermont, Unit No. 3, Lamoille Circuit DOCKET NO. 232-4-03 Lecr Trial Judge: Alan W. Cheever

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a judgment of conviction, following a bench trial, of simple assault, in violation of 13 V.S.A. § 1023(a)(1). He contends: (1) the evidence failed to disprove beyond a reasonable doubt that his actions were in self-defense; and (2) the court erroneously placed the burden of proving self-defense on defendant. We affirm.

The material facts may be briefly summarized. Defendant lives near Brian and Angela Norder in the Town of Hyde Park. On the afternoon of April 9, 2003, Angela Norder observed defendant and his two dogs in the road as she drove home. She beeped her horn to encourage the dogs to move. As she drove past, defendant swore at Norder. She reported the incident to her husband, Brian, after which the two went out for a walk. They passed defendant, and Brian Norder and defendant exchanged words. The two were arguing in close proximity when Norder felt spittle from defendant and spit back in response. Norder testified that he then " saw [defendant' s] arm coming toward me." Norder testified that although he moved to get out of the way, defendant' s forearm struck him in the nose, knocking him to the ground. He described defendant' s action as " a swing of the arm that I interpreted to be intended to hit me full on in the face." Angela Norder recalled that defendant' s " arm came up and whacked [Brian] in the nose." Defendant testified at trial that he did not intend to strike Norder, that his arm movement was merely a " reflex action" in response to being spit at by Norder, that he merely " went to get the spit out of [his] face" and that Norder was not, in fact, struck in the nose but merely flinched and slipped in the snow. He claimed that Norder had faked an injury because of an on-going dispute between defendant and the Norders over a right-of-way.

In closing argument, defense counsel asserted that defendant had merely attempted to push Norder away in self-defense after being spit at, and noted that " once validly raised " the State is required to disprove self-defense beyond a reasonable doubt. The court found that defendant had recklessly caused bodily injury to Norder by striking him in the nose, in violation of 13 V.S.A. § 1023(a)(1), and rejected counsel' s claim that he was acting in self-defense, explaining: " That has not been established. [Defendant] could have moved away. He did not. So I do find that the State has proven guilt of the charge of simple assault." The court imposed a fine of $1000. This appeal followed.

Although captioned as one claim, defendant essentially posits two arguments on appeal. First, he contends the evidence was insufficient to disprove beyond a reasonable doubt that he acted in self-defense. See State v. Forant, 168 Vt. 217, 220 (1998) (" the State must disprove self-defense beyond a reasonable doubt"). While defense counsel argued self-defense, defendant' s testimony was not that his arm movement was defensive, but instead was simply a reflexive motion to wipe the spit from his face. Defendant' s testimony was not that he struck Norder in self-defense, but that he did not strike Norder at all. Hence, we are not persuaded that the evidence sufficiently raised the issue of self-defense to trigger the State' s burden of disproving the claim. See State v. Bartlett, 136 Vt. 142, 144 (1978) (once evidence raising issue of self-defense is introduced, burden is on State to disprove defense beyond a reasonable doubt).

Moreover, even if the evidence was sufficient to raise the issue, the evidence amply supported the judgment[1]. Two witnesses testified that defendant swung his arm at Norder, striking him in the nose, and the court was entitled to credit their testimony despite defendant' s denial. See State v. Lawrence, 2003 VT 68, & 9, 834 A.2d 10 (determining weight of the evidence and credibility of witnesses is primarily for finder of fact). Furthermore, the law and the facts also amply supported a finding that defendant' s reaction was in excess of the asserted provocation (being spit at), see State v. Campanelli, 142 Vt. 362, 365 (1982) (jury may reject self-defense claim where defendant acts with force in excess of what reasonably appeared necessary under the circumstances), and that defendant could easily have avoided committing the assault simply by walking away. See State v. Dragon, 128 Vt. 568, 570-71 (1970) (assailed may not use force if there are other means to avoid the assault that are sufficient and available). Thus, we discern no error in the court' s conclusion that the evidence disproved any self-defense claim beyond a reasonable doubt. See State v. Petruccelli, 170 Vt. 51, 64 (1999) (standard in determining sufficiency of evidence is whether evidence, viewed in light most favorable to the State and excluding modifying evidence, is sufficient to support finding of guilt beyond a reasonable doubt).

Defendant also contends the court erroneously assigned him the burden of proving self-defense. The claim is unpersuasive for two reasons. First, as noted, the evidence did not validly raise the issue sufficient to trigger the State' s burden. Second, the record, viewed in its entirety, shows that " while inartfully phrased " the court found that the State had disproved the self-defense claim beyond a reasonable doubt. Defendant had argued the correct legal standard, and the court found beyond a reasonable doubt that the State had shown that defendant had ample opportunity to avoid committing the assault. Accordingly, any error in failing to clearly articulate the proper standard was harmless. See State v. McGee, 163 Vt. 162, 167 (1995) (although instructions did not clearly state that prosecution bore burden of disproving self-defense, record showed any error was harmless).

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Paul L. Reiber, Associate Justice

Footnote

1. Although defendant claimed that he was merely attempting to wipe the spit from his face, he also stated at one point that he “just needed some distance,” which might arguably support an inference that his actions were defensive.