

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-147459-001 DT

04/25/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

ANDREA L KEVER

v.

DEBORAH S KORBITZ (001)

CINDY CASTILLO

REMAND DESK-LCA-CCC
WHITE TANK JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number JC 2010-147459.

Defendant-Appellant Deborah Korbitz (Defendant) was convicted in White Tank (Estrella Mountain) Justice Court of assault. Defendant contends the trial court erred in placing on her the burden of proving she acted with reasonable force, and contends the State failed to present sufficient evidence for the trial court to have found beyond a reasonable doubt that she was not justified in using physical force to the extent she did. For the following reasons, this Court reverses the judgment of the trial court and vacates sentence imposed.

I. FACTUAL BACKGROUND.

On September 5, 2010, Defendant was cited for assault, A.R.S. § 13-1203(A)(1). At the time of these events, Defendant and the victim, William Korbitz (William), were in the process of a marriage dissolution in Cause Number FN 2010-091043. (R.T. of Jun. 30, 2011, at 10, 82-83, 85.) September 5, 2010, was the date the court set for the parties to meet and exchange certain items of property, as awarded by the court, one of which was a 1996 Gold Wing motorcycle. (Cause Number FN 2010-091043, M.E. of Aug. 31, 2010, at 3; R.T. of Jun. 30, 2011, at 11, 12, 21-22, 84-85.) A sheriff's deputy had been called to make sure no problems arose. (R.T. of Jun. 30, 2011, at 11, 22.) William had previously threatened to file assault charges against Defendant in order to prevent her from continuing to practice nursing, and in the dissolution proceedings, the court had held him in contempt. (*Id.* at 31-34.)

On the morning of September 5, the parties discussed the license plate on the motorcycle, and the sheriff's deputy told William the license plate did not belong to him and had to stay on the motorcycle. (R.T. of Jun. 30, 2011, at 23, 48, 69, 100.) Because William had let the battery run down, Defendant was unable to start the motorcycle and drive it away. (*Id.* at 11, 23.) Defen-

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dant returned that afternoon with a flatbed tow truck to retrieve the motorcycle. (*Id.* at 12–13, 23–24.) Because Defendant was not going to be driving the motorcycle, William decided to remove the license plate. (*Id.* at 13, 25–26, 38–39.) Defendant told William two or three times not to remove the license plate, but William ignored her and continued to remove the license plate. (*Id.* at 13–14, 26–27, 50, 58, 60, 75.) Defendant then pushed William away from the motorcycle, with the result that William fell down and scraped his left arm and leg. (*Id.* at 14–16, 28.)

Defendant testified William had removed the license plate from the motorcycle earlier that morning, but had put it back on the motorcycle because it belonged on the motorcycle. (R.T. of Jun. 30, 2011, at 88, 99.) Defendant was unable to start the motorcycle because William had let the battery go dead. (*Id.* at 86, 97.) William told her she would have to remove the motorcycle or else he would have it towed and impounded. (*Id.* at 87.) She then called for a tow truck and returned that afternoon. (*Id.* at 88–89.) Because the motorcycle was not going to be driven, William decided to take the license plate. (*Id.* at 89.) Defendant told William the plate belonged to the motorcycle, which belonged to her, and told him “three plus times” not to remove the license plate. (*Id.* at 90.) Defendant said she was afraid of William because he “could get pretty ugly when he is—feels that he’s absolutely in the right.” (*Id.* at 90–91.) Because William was ignoring her request not to remove the license plate, Defendant felt it was necessary to push William away from the motorcycle, which she did. (*Id.* at 91.) As a result, William lost his balance and fell down. (*Id.*) Defendant said she would not have pushed William if he had not tried to remove the license plate, and said she believed the force she used was reasonable to keep William from taking her property. (*Id.* at 94, 96.) Because two of William’s friends were there and were now telling Defendant she could not take the motorcycle, Defendant left. (*Id.* at 92.) As of the date of the trial, William still had the motorcycle in his possession. (*Id.* at 12, 101.)

In final argument, the prosecutor stated the issue was whether Defendant was justified in using physical force in the defense of property and contended Defendant “could have done a myriad of different things” to keep the license plate, but did not explain what those “myriad of different things” were. (R.T. of Jun. 30, 2011, at 105.) The prosecutor noted William wanted to take the license plate “irrespective of who the rightful owner of those plates were.” (*Id.*) Defendant’s attorney contended the issue was “whether or not [Defendant] had a right under the circumstances, to use reasonable force in order to protect what was rightfully hers.” (*Id.* at 106.) She noted the deputy had told William not to remove the plate and that it went along with the motorcycle, and that the “State hasn’t indicated anything else [Defendant] could have done in order to prevent [William] from stealing those plates.” (*Id.* at 107.) After hearing arguments from the attorneys, the trial court took the matter under advisement. (*Id.* at 111.)

The trial court subsequently issued an Order finding Defendant guilty. (Order, dated Jul. 1, 2011.) Defendant’s attorney filed a Request for Reconsideration/Alternative Motion for New Trial. The prosecutor stated he chose not to respond to that Request/Motion. (R.T. of Sep. 29, 2011, at 5, 10–11.) At the time for sentencing, Defendant’s attorney noted William still had not returned the motorcycle to Defendant. (*Id.* at 15.) The trial court made the following ruling:

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I make at this time, so the record is clear, a factual finding from the evidence presented in this case that the person was not—the Defendant in this case was not justified using the physical force to the extent that she used it in this particular case and therefore that’s why I did not find that the defense was an appropriate defense in this particular case, and that’s why the Court at this time will, although reconsidering the matter, will find—will affirm its previous finding or verdict of a guilty [*sic*] in this case.

(R.T. of Sep. 29, 2011, at 5, 11–12.) The trial court then imposed sentence. (*Id.* at 19–21.) On October 6, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Did the trial court place on Defendant the burden of proving she acted with reasonable force.*

Defendant contends the trial court erred in placing on her the burden of proving she acted with reasonable force. On April 24, 2006, the Legislature amended A.R.S. § 13–205 to provide that, if a defendant provides evidence of justification pursuant to A.R.S. §§ 13–401 to –421, the state must prove beyond a reasonable doubt the defendant did not act with justification. *State v. Valverde*, 220 Ariz. 582, 208 P.3d 233, ¶ 2 n.1 (2009). In the present case, Defendant presented evidence that she was justified in using physical force in defense of her property pursuant to A.R.S. § 13–408. Although it is not entirely clear from the trial court’s statement on September 29, 2011, it does appear the trial court thought Defendant had the burden of proving she acted with reasonable force. If that was the trial court ruling, then the trial court was wrong. Because Defendant presented evidence that she was justified in using physical force in defense of her property, the State had the burden of proving beyond a reasonable doubt the defendant did not act with reasonable force.

B. *Did State present sufficient evidence for the trial court to have found beyond a reasonable doubt that Defendant was not justified in using physical force to the extent she did.*

Defendant contends the State failed to present sufficient evidence for the trial court to have found beyond a reasonable doubt that she was not justified in using physical force to the extent she did. In determining whether the state proved beyond a reasonable doubt defendant did not act with justification, the court uses the same test as used to determine whether the state proved beyond a reasonable doubt the elements of the offense. *State v. Lopez*, 230 Ariz. 15, 279 P.3d 640, ¶¶ 4–7 (Ct. App. 2012). The standard for addressing the sufficiency of the evidence is as follows:

We review a sufficiency of the evidence claim by determining “whether substantial evidence supports the jury’s finding, viewing the facts in the light most favorable to sustaining the jury verdict.” Substantial evidence is proof that “reasonable persons could accept as adequate . . . to support a conclusion of defendant’s guilt beyond a reasonable doubt.” We resolve any conflicting evidence “in favor of sustaining the verdict.”

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State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the trier-of-fact, but whether there is a complete absence of probative facts to support its conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

In the present matter, the trial court implicitly found Defendant was justified in using some level of physical force against William to stop him from stealing the license plate, but found instead Defendant was not justified using physical force to the extent she did:

. . . Defendant in this case was not justified using the physical force to the extent that she used it in this particular case

(R.T. of Sep. 29, 2011, at 5, 11.) This Court has reviewed the record in this case and had found a complete absence of probative facts to support that conclusion. The Family Court had awarded to Defendant the motorcycle, which would include the license plate, thus William was stealing Defendant's property. Because William was stealing Defendant's property, she was justified in using reasonable force to the extent necessary to prevent that theft. In the past, William had refused to comply with an order of the Family Court, so that court had to hold him in contempt. The deputy sheriff had told William that morning the plate belonged on the motorcycle and he was not permitted to take that plate, but William refused to comply with that directive. Defendant told William several times not to take the license plate, but William refused to comply with that request. The State failed to present any evidence of what Defendant could have done differently to keep William from stealing the license plate. While William was testifying, the prosecutor could have asked him what Defendant could have done to keep him from stealing the plate, but the prosecutor did not do so. Because there is a complete absence of probative facts, this Court concludes the State failed to prove beyond a reasonable doubt Defendant did not act with justification. This Court must therefore reverse this conviction.

III. CONCLUSION.

Based on the foregoing, this Court concludes the State failed to prove beyond a reasonable doubt Defendant did not act with justification.

IT IS THEREFORE ORDERED reversing the judgment of the White Tank Justice Court.

IT IS FURTHER ORDERED vacating the sentence imposed.

IT IS FURTHER ORDERED remanding this matter to the White Tank Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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