

COLORADO COURT OF APPEALS

Court of Appeals No. 10CA0665
Adams County District Court No. 08CR2001
Honorable John T. Bryan, Judge

The People of the State of Colorado,

Plaintiff-Appellant,

v.

David Owen Brady,

Defendant-Appellee.

RULING APPROVED

Division II
Opinion by JUDGE LOEB
Casebolt and Fox, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced February 24, 2011

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Brighton, Colorado, for Plaintiff-Appellant

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Appellee

The prosecution brings this appeal seeking review of the trial court's ruling granting defendant David Owen Brady's motion for judgment of acquittal on one count of first degree assault and two counts of menacing. We approve the trial court's ruling.

I. Background and Procedural History

At 7:22 a.m. on July 10, 2008, the Adams County Department of Social Services received a report of suspected child abuse and other unlawful conduct occurring at defendant's residence. That evening, two caseworkers drove to defendant's residence to investigate the report.

When the caseworkers were about two miles from defendant's residence, they requested the assistance of the sheriff's department. Testimony at trial established that such "civil assists" are routine for child protection investigations and that the caseworkers requested a civil assist on this particular occasion because it had become dark outside and because of the nature of the allegations prompting the investigation. Thus, a deputy sheriff was dispatched to meet the caseworkers, and they proceeded together to defendant's residence. The caseworkers led the way in their county

vehicle, followed by the deputy sheriff in a fully marked patrol car. It is undisputed that they did not obtain a warrant, nor did they give defendant advance notice of their arrival at his residence.

The caseworkers and the deputy entered defendant's property by way of a long, unpaved driveway, which was lined with multiple warning signs reading "ATTENTION – KEEP OUT – AUTHORIZED PERSONNEL ONLY." They stopped approximately one-quarter mile up the driveway shortly after they noticed defendant walking toward the vehicles with a shotgun.

Defendant approached the vehicles and demanded that all parties leave his property because they were trespassing. The deputy sheriff responded that they were "on official business." Defendant then asked the deputy sheriff if he had a warrant. Because he answered in the negative, defendant repeated his demand, stating, "If you don't have a warrant, get off my property." This exchange continued for several minutes, with the deputy sheriff trying to explain the reason for their visit and with defendant repeating his demand for them to leave. While defendant held his shotgun in a "ready gun type position," he did not point it toward the deputy sheriff or the caseworkers. After unsuccessful attempts

to gain defendant's permission to remain on his property, the parties backed down the driveway and left the property.

On July 22, 2008, the prosecution charged defendant with three felony counts as follows: (1) one count of first degree assault based upon defendant's conduct toward the deputy sheriff; and (2) two counts of menacing based upon his conduct toward the two caseworkers.

A jury trial commenced on March 8, 2010. After the prosecution presented its evidence, including the live testimony of the caseworkers and the deputy sheriff, defendant moved for judgment of acquittal as to all of the charges. The court granted defendant's motion, and this appeal by the prosecution followed.

II. Analysis

The prosecution contends the trial court erred by granting defendant's motion for judgment of acquittal because the evidence was sufficient to support the conclusion that defendant was guilty beyond a reasonable doubt of one count of first degree assault and two counts of felony menacing. We disagree.

At the outset, we note that this appeal is brought pursuant to section 16-12-102(1), C.R.S. 2010, which permits prosecutorial

appeals of “any decision of a court in a criminal case upon any question of law.” *See also People v. Moore*, 226 P.3d 1076, 1091 (Colo. App. 2009). Because the issue of sufficiency of the evidence involves a question of law subject to de novo review, the appeal is properly before this court. *See People v. Gonzales*, 666 P.2d 123, 126 (Colo. 1983).

However, because jeopardy has attached, retrial of defendant is prohibited, and the only function that our opinion serves is to approve or disapprove the court’s ruling under the facts of this case. *See Moore*, 226 P.3d at 1092 (citing *People v. Thompson*, 748 P.2d 793, 794 (Colo. 1988); *People v. Quintana*, 634 P.2d 413, 420 (Colo. 1981)).

Further, we are mindful of the supreme court’s guidance regarding prosecutorial appeals that, as here, concern sufficiency of the evidence claims and well-established points of law. In *People v. Kirkland*, 174 Colo. 362, 364, 483 P.2d 1349, 1350 (1971), the court cautioned that “an appeal after the trial judge has granted a motion for judgment of acquittal . . . on the ground that the evidence is insufficient, is in most instances, a completely non-productive exercise.” The court then explained that “[t]he purpose

of appellate review is essentially twofold: (1) to settle the controversy, and (2) to provide explanation of and to give clarity to questions of law by means of published opinions,” and that neither purpose is well served in appeals where the bar against double jeopardy prevents retrial of the defendant and where the court’s review of the evidence will shed no light on the broader question of sufficiency of the evidence. *Id.* at 364, 483 P.2d at 1350-51.

The supreme court has reiterated this position on subsequent occasions. *See People v. Martinez*, 780 P.2d 560, 561 (Colo. 1989) (“Appeals by the prosecution are limited to cases in which there has been a material error of law, which is prejudicial to the state, for which appellate review will have precedential value.”); *People v. Waggoner*, 196 Colo. 578, 578 n.1, 595 P.2d 217, 218 n.1 (1979) (“We reiterate and emphasize our position [that] . . . an appeal after a judgment of acquittal due to insufficiency of the People’s evidence is ordinarily an exercise in futility and serves no useful purpose.”); *People v. Samora*, 188 Colo. 74, 76, 532 P.2d 946, 948 (1975) (“Appeals by district attorneys should be avoided in cases which do not involve egregious error by the trial court.”).

Nevertheless, because of the prosecution’s statutory right to

bring this appeal pursuant to section 16-12-102(1), and our jurisdiction to hear this appeal pursuant to C.A.R. 1(a)(1) and 4(b)(2), we are obligated to turn to its merits.

A. Standard of Review

Crim. P. 29(a) governs motions for judgment of acquittal and provides in pertinent part as follows:

The court on motion of a defendant or of its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment or information, or complaint . . . after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses.

Thus, when a trial court is confronted with a motion for judgment of acquittal at the close of the prosecution's case, the court must determine "whether the evidence before the jury is sufficient in both quantity and quality to submit the issue of the defendant's guilt or innocence to the jury." *People v. Bennett*, 183 Colo. 125, 129, 515 P.2d 466, 468 (1973). The court must decide "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge

beyond a reasonable doubt.” *Id.* at 130, 515 P.2d at 469.

In ruling on such a motion, the court is bound by five well-established principles of law:

First, the court must give the prosecution the benefit of every reasonable inference, which might be fairly drawn from the evidence. Second, the determination of the credibility of witnesses is solely within the province of the jury. Third, the trial court may not serve as a thirteenth juror and determine what specific weight should be accorded to various pieces of evidence or by resolving conflicts in the evidence. Fourth, a modicum of relevant evidence will not rationally support a conviction beyond a reasonable doubt. Finally, verdicts in criminal cases may not be based on guessing, speculation, or conjecture.

People v. Sprouse, 983 P.2d 771, 778 (Colo. 1999).

B. Assault Charge

We first address and reject the prosecution’s contention that the evidence was sufficient to support the conclusion that defendant was guilty of first degree assault beyond a reasonable doubt, and as such, the trial court erred by granting defendant’s motion for judgment of acquittal as to this charge at the close of the prosecution’s evidence.

Defendant was charged with one count of first degree assault

pursuant to section 18-3-202(1)(e), C.R.S. 2010, based upon his conduct toward the deputy sheriff. This section provides as follows:

(1) A person commits the crime of assault in the first degree if:

. . . .

(e) With intent to cause serious bodily injury upon the person of a peace officer or firefighter, he or she threatens with a deadly weapon a peace officer or firefighter engaged in the performance of his or her duties, and the offender knows or reasonably should know that the victim is a peace officer or firefighter acting in the performance of his or her duties.

The trial court reviewed the evidence proffered by the prosecution, including the testimony of the deputy sheriff, and found that, as a matter of law, the evidence was insufficient to establish the charged offense. The court found as follows:

The prosecution has to prove beyond a reasonable doubt that with the intent to cause serious bodily injury upon the person of a peace officer or a firefighter, the defendant threatens, with a deadly weapon, a peace officer or firefighter engaged in the performance of his or her duties, and the offender knows or reasonably should know that the victim is a peace officer or firefighter acting in the performance of his or her duties.

I would have to say, at the outset, I don't think there's any sufficient evidence to find there was any intent to cause serious bodily injury. There's ample evidence that the defendant wanted the peace officer off of his

property, that he asserted his rights to eject the peace officer from his property.

....

[T]here's just no evidence from which a reasonable juror could find that there was any intent to cause an injury to the person of the peace officer. Had [defendant] intended to hurt him, he would presumably have fired the weapon, pointed it at the officer, at least, fired it if he could.

The fact that he didn't do so, I think, negates the fact that there was any intent to cause an injury, and so as to that element, that offense, I would have to find that the judgment of acquittal must be entered.

Based on our review of the record, and when the evidence presented by the prosecution is taken as a whole and viewed in the light most favorable to the prosecution, we agree with the trial court that the evidence was insufficient to support the conclusion that defendant was guilty of first degree assault as to a peace officer beyond a reasonable doubt. *See Sprouse*, 983 P.2d at 777. The deputy sheriff testified that defendant "never threatened to shoot [them]" and "never pointed a shotgun at [them] either." Although defendant held the shotgun across his body in a "ready gun type position," and although defendant raised the gun up by about six inches at one point, the deputy sheriff reiterated that defendant never pointed the shotgun at him or at the caseworkers. In our

view, the record is devoid of evidence of the requisite intent element of the charged offense — that defendant threatened the deputy sheriff with a deadly weapon with the “intent to cause serious bodily injury upon the person” of the deputy sheriff. § 18-3-202(1)(e).

Accordingly, we conclude that the trial court properly granted defendant’s motion for judgment of acquittal as to this charge. See *Bennett*, 183 Colo. at 132, 515 P.2d at 470 (“[T]he trial judge must determine whether a reasonable mind would conclude that the defendant’s guilt as to each material element of the offense was proven beyond a reasonable doubt. If the evidence is such that reasonable jurors must necessarily have a reasonable doubt, the judge must direct an acquittal, because no other result is permissible within the scope of the jury’s function.”).

C. Menacing Charges

The prosecution also contends the trial court erred by granting defendant’s motion as to the two menacing charges, because the evidence was sufficient to submit the issue of defendant’s guilt or innocence as to these charges to the jury. We disagree.

Defendant was charged with two counts of menacing pursuant to section 18-3-206, C.R.S. 2010, based upon his conduct toward

the two caseworkers. This section provides as follows:

(1) A person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury. Menacing is a class 3 misdemeanor, but, it is a class 5 felony if committed:

(a) By the use of a deadly weapon . . . ; or

(b) By the person representing verbally or otherwise that he or she is armed with a deadly weapon.

Prior to trial, defendant filed a notice of affirmative defenses in which he notified the prosecution of his intent to present the defense of “use of physical force in defense of premises” pursuant to section 18-1-705, C.R.S. 2010. *See* § 18-1-710, C.R.S. 2010 (“The issues of justification or exemption from criminal liability under sections 18-1-701 to 18-1-709 are affirmative defenses.”). Section 18-1-705 provides in pertinent part as follows:

A person in possession or control of any building, realty, or other premises . . . is justified in using reasonable and appropriate physical force upon another person when and to the extent that it is reasonably necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of an unlawful trespass by the other person in or upon the building, realty, or premises.

In Colorado, once a defendant presents an affirmative defense to an offense with which he or she is charged, the prosecution must prove the facts indicating the absence of the defense beyond a reasonable doubt, in addition to proving the elements of the offense itself. See § 18-1-407(2), C.R.S. 2010; *Vega v. People*, 893 P.2d 107, 111 (Colo. 1995).

Thus, as the trial court properly observed, the prosecution carried the burden to prove the offense of menacing beyond a reasonable doubt as well as to disprove the affirmative defense of defense of premises beyond a reasonable doubt.

Upon defendant's motion for judgment of acquittal at the close of the prosecution's case, the court found that the prosecution's evidence was sufficient to prove the elements of the menacing charges. However, because the court found that the prosecution failed to carry its burden of proof as to the affirmative defense, the court granted defendant's motion as to the two menacing charges as well. The court made the following findings that are pertinent to this appeal:

So then, turning to . . . the elements of
Menacing . . . the evidence is probably

sufficient to meet those, at least in the eyes of a reasonable juror, in the light most favorable to the prosecution.

. . . .

But 18-1-705 provides that a person in [defendant's] circumstances is entitled to use reasonable and appropriate physical force upon a person when and to the extent that it is reasonably necessary to prevent or terminate what, in this case, [defendant] believes to be the commission or attempted commission of an unlawful trespass by the other person, in or upon the building, realty, or premises.

Given that it was an unlawful entry, it is almost as a matter of law, that it was, in that sense, an unlawful trespass. But I would find that it is not possible for a reasonable juror to find beyond a reasonable doubt that [defendant] did not believe this was a commission . . . of an unlawful trespass, and that that belief was reasonable, especially in the light of the posting of his property, he, clearly, had the right to exclude them.

They ignored that, they came onto the property, he used a reasonable degree of force, I would have to stop and say it isn't even physical force, he intimidated them into leaving. He displayed a firearm, perhaps with the intent of enforcing his desire that they move off the property, perhaps it was incidental, it doesn't matter, in my mind. He had it, but he used an appropriate and reasonable degree of force to remove trespassers or unlawfully entered persons from his property.

This would be different, and I would probably let it go to the jury if he had pointed the gun at the officer or the case workers, and determine[] whether that was a reasonable

degree of force. But, in the bottom line of the analysis here, there really wasn't any physical force, and I think he's entitled to use some physical force even to eject them.

. . . .

But the bottom line is, I don't think the display of a firearm is an unreasonable degree of physical force because it isn't physical force at all, and I think it is permissible.

[I]t is well established that the motion for judgment of acquittal has to be granted to both counts of Menacing.

On appeal, the prosecution contends the trial court erred by determining that the caseworkers and deputy sheriff committed an unlawful trespass upon the private property of defendant. According to the prosecution, the parties did not commit an unlawful trespass, and therefore, the trial court further erred by determining that defendant's defense of his property was permissible as a matter of law. The prosecution contends the court should have instead submitted the issue of defendant's guilt or innocence as to the menacing charges to the jury. We disagree.

Initially, we need not address the prosecution's arguments concerning whether there was actually an unlawful trespass here because the trial court did not need to find there was an unlawful trespass in order to rule on the motion for judgment of acquittal.

Rather, under section 18-1-705, it only needed to determine whether the prosecution produced sufficient evidence to disprove the affirmative defense that defendant used reasonable force “to the extent it [was] reasonably necessary to . . . terminate what [defendant] reasonably [believed] to be the commission or attempted commission of an unlawful trespass” on his property.

Turning to that question, we agree with the trial court that the evidence presented was insufficient to submit the issue of defendant’s guilt or innocence on the menacing charges to the jury. Defendant had a statutory right, pursuant to section 18-1-705, to use reasonable and appropriate physical force as reasonably necessary to terminate what he reasonably believed to be an unlawful trespass by the caseworkers and deputy sheriff. Thus, as noted above, in order to submit the menacing charges to the jury, the prosecution was required to disprove that the elements of this affirmative defense beyond a reasonable doubt. *See Vega*, 893 P.2d at 111.

In our view, the evidence presented by the prosecution was insufficient to carry this burden. Like the trial court, we question whether defendant used physical force at all. Even if defendant’s

intimidation of the caseworkers qualifies as physical force, we are convinced that this intimidation amounted to reasonable and appropriate physical force that was reasonably necessary to terminate what defendant reasonably believed to be an unlawful trespass on his property, and we discern no evidence to the contrary. The caseworkers ignored defendant's posted warning signs. They chose not to leave the property upon defendant's first demands. And importantly, as described above, defendant never pointed the shotgun at any of the parties. One of the caseworkers testified that defendant was holding his shotgun only to convince the caseworkers and the deputy to leave his property, and that defendant did not threaten them. The caseworker stated, "I don't know why anyone would approach someone with a gun other than to get them to leave."

Under these circumstances, because we conclude there was insufficient evidence to disprove defendant's affirmative defense, we further conclude that the trial court properly granted defendant's motion for judgment of acquittal as to the menacing charges.

Because of our resolution of the prosecution's contentions as discussed above, we need not address the various constitutional

issues raised by the parties in their briefs on appeal. *See Ricci v. Davis*, 627 P.2d 1111, 1120-21 (Colo. 1981).

The trial court's ruling is approved.

JUDGE CASEBOLT and JUDGE FOX concur.