The State of New Hampshire
Superior Court

Hillsborough-North, SS.

STATE OF NEW HAMPSHIRE

v.

ISAIAH RIVERA-PEREZ

No. 216-2020-CR-01273

ORDER

The defendant, Isaiah Rivera-Perez, is charged with second degree murder and reckless conduct. See Indictments (Docs. 34-35). These charges arise out of the allegation that the defendant caused the death of Jaden Connor on July 14, 2020. On January 22, 2021, the defendant filed an assented-to motion for bail hearing pursuant to RSA 597:1-c. See Amend. Assented-to Mot. for Bail Hr'g (Doc. 44). On February 8, 2021, the defendant filed a supplemental Notice of Defenses, in which he notified the State and the Court that he may rely on various defenses at trial, including self-defense, RSA 627:4; competing harms, RSA 627:3, use of force in defense of premises, RSA 627:7; and use of force in property offenses, RSA 627:8. See Def. Supp. Notice of Defenses (Doc. 46). The Court held an evidentiary bail hearing on March 3, 2021.

FACTS

At around 11:00 p.m. on July 14, 2020, a man, known to the defendant by his nickname "OTB," arrived at the defendant's house to buy marijuana. The defendant let OTB into his house and the two engaged in conversation while they finalized the sale.

State Ex. 3 at 16:13-17:4, 30:16-21. OTB asked to use the defendant's bathroom, id. at 16:13-17:4, and the defendant told him where it was, id. at 33:17-18:2. The defendant went into his game room to wait for OTB so they could finish their transaction, when he heard the side door to his house open. State Ex. 3 at 16:3-17:4.

Three masked men armed with guns entered the defendant's home through the side door. Id. at 31:20-23, 48:12-15. The three men attacked the defendant, with one man hitting the defendant numerous times in the face with a revolver. Id. at 17:12-18:7, 38:17-39:7. The defendant estimated he was pistol-whipped at least twenty times. Id. at 38:12-16. The defendant could not get a good look at his assailants—the men told him not to look at them and kept hitting him in the face. Id. at 18:13-19:12. The defendant fought back and broke the handle off of the man's revolver. Id. at 46:4-18. At some point, the men turned to leave through the defendant's front door. The defendant stood up, grabbed his gun off of his desk, and went after the men. He tried to fire shots while in the home, but was unable to, because the gun was not cocked and/or because the safety was on. See id. at 51:7-21; State Ex. 4 at 74:11-15.

The defendant started shooting when the men were running out the front door. State Ex. 3 at 19:13-16. He stated that he was standing in the threshold of the front door on his porch, id. at 52:1-6; State Ex. 4 at 80:22-23, and that the men were in front of his fence when he shot at them, State Ex. 3. at 105:15-18; see also State Ex. 4 at 68:15-70:6, 80:18-21. The fence is approximately three feet in front of the defendant's porch.

As the men ran, they dropped a bag of marijuana outside of the defendant's fence. State Ex. 3 at 140:17-20. The defendant walked to the fence to retrieve the bag.

He then heard two gunshots coming from the direction the men fled, and fired his remaining four rounds in their direction. State Ex. 4 at 84:5-85:16. The defendant fired these shots while standing on the sidewalk in front of his fence. See State Ex. 3 at 116:12-22. He did not see if he hit any of the men. Id. at 20:21-21:2. The defendant stated during his police interview that approximately twenty seconds, if that, had passed between when he fired his first two shots from his porch and when he heard the return fire. State Ex. 4 at 86:17-87:7. Officer Alexander April testified at the hearing that witnesses heard different numbers of gunshots and some witnesses heard pauses in between the shots.

Officer April testified to video surveillance footage recovered from the area. He described the video depicting two people running outside of the defendant's house. The victim, Jaden Connor, ran up a sidewalk and in between two cars before he stumbled and fell into the street. The other man continued out of frame, but returned to Connor with his arm held out as if pointing a gun in the direction of the defendant. He bent down to pick something up. The police's investigation concluded that he likely picked up a firearm because no gun was found by Connor's body, even though witness statements established that all of the men at the defendant's house had firearms. Officer April testified that approximately five seconds had passed from the time the men ran out of the defendant's home to when Connor collapsed in the street.

The defendant retreated into his home, where he hid the bag of marijuana, put down his gun, and called 911. Manchester Police arrived around 11:35 p.m. See State Ex. 1. When police arrived, the defendant was sitting on the sidewalk in his front yard, bloodied and with visible injuries to his head and face, and explained to the officers

what happened that night and that he was the person who fired shots. See generally Def. Exs. A, B. At the scene the defendant told the police several times that he had a splitting headache from the attack and asked for medical treatment. Def. Ex. B at 13, 16, 22-23. He also stated that he was not sure if he had been shot. Def. Ex. B. at 12-13.

Evidence collected from the area revealed two shell casings found off of the defendant's porch that were consistent with ammunition fired from the defendant's gun. See State Ex. 1. An investigation also found matching shell casings in the immediate vicinity of the defendant's front gate and in a grassy area in the sidewalk in front of the defendant's fence. See id. Officer April testified that no other shell casings were found in the street, but that revolvers do not discharge shell casings.

Officer April testified that Connor was alive when police arrived, but died on the scene. The investigation revealed that Connor's cause of death was from a single gunshot wound to the trunk. The bullet recovered from Connor's body matched those that were fired from the defendant's gun.

The defendant was interviewed three times: at the scene, at the hospital where he was taken immediately after the first interview, and at Manchester Police Department on July 24, 2020. The police obtained an arrest warrant on August 10. The defendant had moved to Massachusetts following this incident. He told detectives that he left Manchester because he still was in fear of the men who had attacked him.

ANALYSIS

New Hampshire's bail statute, RSA ch. 597, begins with the presumption that all defendants are entitled to be released pending trial. See RSA 597:1. However, one

exception to that general rule is contained in RSA 597:1-c, providing "that if a person has been charged with a crime punishable by a sentence of up to life in prison and the State can show that 'the proof is evident or the presumption great' that the defendant will be convicted, the defendant must be held without bail pending trial." State v. Furgal, 161 N.H. 206, 210 (2010) (quoting RSA 597:1-c). The burden of proof is on the State to "show that the proof is evident or the presumption great by clear and convincing evidence." Id. at 216. "Clear and convincing evidence is an intermediate standard between the beyond-a-reasonable-doubt standard and the preponderance standard." Hawkins v. Comm'r, N.H. Dep't of Health & Human Servs., No. 99-CV-143-JD, 2010 WL 2039821, at *2 (D.N.H. May 19, 2010), aff'd sub nom. Hawkins v. Dep't of Health & Human Servs. for N.H., Comm'r, 665 F.3d 25 (1st Cir. 2012). "A party provides clear and convincing evidence when it proves in the mind of the trier of fact an abiding conviction that the truth of its factual contentions are highly probable." International Seaway Trading Corp. v. Walgreens Corp., 599 F. Supp. 2d 1307, 1303 (S.D. Fla. 2009) (quotation omitted), aff'd in part, vacated in part on other grounds, 589 F.3d 1233 (Fed. Cir. 2009); see also State v. Murphy, No. 2020-0365, 2020 WL 7232089, at *1 (N.H. Dec. 8, 2020) (non-precedential order) (citing Black's Law Dictionary 698 (11th ed. 2019) (defining "clear and convincing evidence" as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain")). The prosecutor asserted that the facts presented at the bail hearing must be taken in the light most favorable to the State. This is not, in fact, the appropriate standard of review. Rather, the State will satisfy its burden at a proof-evident-presumption-great hearing, "if all of the evidence, fully considered by the court, makes it plain and clear to the

understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed" the offense. Furgal, 161 N.H. at 217 (quoting Simpson v. Owens, 85 P.3d 478, 491 (Ariz. Ct. App. 2004)); see also Fry v. State, 990 N.E.2d 429, 449 (Ind. 2013) ("The magistrate must be shown information at the hearing from which he can make his own independent determination whether there is admissible evidence against an accused that adds up to strong or evident proof of guilt."). Thus, the Court must make its own independent judgment about whether the evidence presented by the State establishes that it is reasonably certain that the defendant will be convicted of a crime carrying a penalty of up to life in prison.

The defendant is charged with Second Degree Murder. "A person is guilty of murder in the second degree if: . . . [h]e causes such death recklessly under circumstances manifesting an extreme indifference to the value of human life." RSA 630:1-b, (I)(b). Here, the defendant has asserted various defenses, including self-defense. "[S]elf-defense and defense of others constitute pure defenses, and, thus, negating such a defense becomes an element of the offense that the State must prove beyond a reasonable doubt" at trial. State v. Etienne, 163 N.H. 57, 81 (2011). If the State has established through clear and convincing evidence all of the elements of second degree murder, and that the defendant did not act in self-defense, the Court shall not allow bail. See Furgal, 161 N.H. at 210 (noting that the trial court has "no discretion where the proof is evident or the presumption great" in denying bail).

At this juncture, there is no question that the defendant caused Connor's death. There is some significant question in the Court's view about whether the State can establish the *mens rea* of the second-degree murder charge, *i.e.*, whether the defendant

caused Connor's death recklessly and with an extreme indifference to the value of human life. See 40 C.J.S. Homicide § 114 (2020 update) (recognizing that under a so-called imperfect self-defense can negate the *mens rea* for murder, thereby reducing the crime to manslaughter "where a defendant had a genuine but unreasonable fear of imminent peril from the victim and killed the victim or where the slayer, although acting in self-defense, was not himself or herself free from blame"). Although the defendant argued at the bail hearing that the State could not prove the *mens rea* for Second Degree Murder, this issue was not fully briefed and argued. Analysis of this issue is much more complicated than the question of whether the defendant was entitled to use self-defense. The Court will assume for purposes of this order that the State has sufficient evidence to prove by clear and convincing evidence that the defendant possessed the *mens rea*. However, for the following reasons, the Court finds that the State is not able to disprove the element of self-defense by clear and convincing evidence.

"A person is justified in using deadly force against another person when he reasonably believes that the other person is about to use unlawful deadly force against himself or a third person and he reasonably believes that the amount of force he uses is necessary under the circumstances." State v. Rice, 169 N.H. 783; see also RSA 627:4, II(a). "Implicit in this rule are the notions: (1) that deadly force should be used only when, and to the extent, 'necessary'; and (2) that the force used in response to the threat should not be excessive in relation to the harm threatened." State v. Warren, 147 N.H. 567, 569 (2002). "The immense value at which the law appraises human life makes it legally reasonable that the destruction of it, as a means of averting danger,

should be resorted to only when the danger is immense in respect of consequences, and exceedingly imminent in point of time." Aldrich v. Wright, 53 N.H. 398, 407 (1873). The issue for the Court at this stage is whether the State can disprove, by clear and convincing evidence, that the defendant "reasonably believed" that his assailants were "about to use unlawful, deadly force" against him or another person. RSA 627:4, II(a).

Throughout all three interviews the defendant maintained that he was reacting to an immediate, deadly threat and out of a desire to protect himself and others. He told police that he wanted to protect his son and his family. See State Ex. 3 at 74:18-75:1 ("[A]ll I could think of was my kids, first – 'cause I thought they were about to run upstairs."); State Ex. 4 at 152:13-20 ("I felt like they were still a threat because they were still in the area, so I shot, yes, I shot because they were still in the area, [to] defend my family."). He said that he wanted to protect his home. See State Ex. 3 at 86:16-20 ("Just getting them out of my property, that's my – that was my only, my – what I prioritized was getting them away from my house. The gunshots got them away from the house."), 123:18-21 ("I, I shot at them because I wanted to protect the house."). He repeatedly pointed to the brutal assault that he had just suffered. See id. at 122:21-123:12 ("This person ran into my crib, sir, violated me and my family. . . . Sir, he put a gun to my face."); State Ex. 4 at 152:21-153:9 (stating that they were still a threat because "of what they did to [him]").

During his police interviews, the defendant gave multiple other reasons for shooting at his assailants as well. The defendant stated at least once during his interviews that "[]f somebody comes into my crib I want my revenge," suggesting his response against the intruders was not motivated by a desire to protect himself or his

family, but an affirmative, aggressive stance. State Ex. 3 at 18:13-19:12. "The right of self-defense does not justify an act of retaliation or revenge. The self-defense concept is to protect person, not pride." People v. Woods, 410 N.E.2d 866, 869 (Ill. 1980); see also Aldrich, 53 N.H. at 402 ("When force, purely defensive at first, increases and becomes more than is reasonably necessary for defen[s]e, the excess is aggressive and not defensive.").

Nevertheless, accepting that less than five seconds had passed between when the men fled the defendant's home and when Connor collapsed—a period of time so short that the defendant hardly had time for reflective thought—the overwhelming evidence establishes that the defendant's actions were not motivated by revenge. Rather, the defendant was reacting instinctively and on impulse against the men who broke into his home and attacked him. The defendant explained his thoughts during these few seconds during his police interview:

> Detective Whelan: Did you, did you think at that point that there was any chance that they could turn around and come back at you, or come back at your family?
>
> Defendant: I thought I got shot at that point. I thought the reason why I didn't feel it was because [of] all the adrenaline.
>
> Detective Whelan: Oh, really.
>
> Defendant: My wife was screaming at me like I got shot.
>
> Detective Whelan: Okay.
>
> Defendant: So I reacted.
>
> Detective Whelan: Yeah.
>
> Defendant: I had blood all over me and believe they had guns all over. I didn't know what was going on. I was, I got hit so many times my ears were ringing. My vision's dazed.

> Detective Whelan: Um-hum.
>
> Defendant: I'm just trying to get them away from my family. And I reacted in front of the house on the property . . . .
>
> . . .
>
> Detective Whelan: Did you fear at that point that they would still try to hurt you, or your family?
>
> Defendant: I didn't know what the fuck they were doing. I didn't know what their intentions were. All I know is that I wanted them out of my hallway because that is first getaway right to my kids, the closest people from me and the – all the gentlemen that came through.

State Ex. 3 at 87:12-89:5; see also id. at 135:18-136:10 ("Whether it was my life or theirs, I had to make that decision at that point. These gentlemen violated me, stole everything from me. I could have been shot at the time and I had so much adrenaline rushing through my body I didn't know."). Even Officer April agreed at the bail hearing that the attack on the defendant in his own home while his wife and children were present was "brutal" and "savage." Given this, all of the aforementioned motivations could have been present. The Court cannot conclude, at this stage, that retaliation was the defendant's primary motive.

Furthermore, the defendant repeatedly stressed his fear of his assailants to the police. He was familiar with the men and knew that they are gang-affiliated. See State Ex. 4 at 36:7-37:13 (stating that OTB is "known for taking, for hitting licks on people all the time, and there's a lot of people that want his head . . . and that's why I don't want to be mean to say names or for me to . . . give any type of information on his side because I know the type of people he fucks with"). It is clear from the police interviews that this fear of retaliation by gang members—particularly if the defendant misidentified one of

the men who attacked him, thereby blaming another, unrelated, gang member—prevented him from providing the names of his assailants to officers. See, e.g, State Ex. 3 at 23:5-22, 103:10-19, 143:9-145:6. The defendant's fear of future retaliation continues, and is still so great that he has left his home to live out-of-state. The Court cannot discount this very real fear that the defendant possessed of these intruders. See, e.g., Pineda v. State, 88 P.3d 827, 834 (Nev. 2004) (noting that "[a] generalized sense of danger characteristic of gang interactions is relevant to Pineda's theory of self-defense that a reasonable person encountering [two gang members] under the circumstances described would entertain a belief of apparent imminent danger of losing his life or sustaining great bodily injury").

That being said, the defendant admitted to being the first one to fire gunshots, telling the police that "they just didn't start shooting until I shot at them," and that "[t]hey were shooting just simply 'cause I was shooting, shooting at them." State Ex. 3 at 114:6-12; see also id. at 113:6-8 ("They were running from me. I shot, they turned around, tried to shoot. I ran inside."); State Ex. 4 at 71:19-72:21 ("They shot two times, pow, pow, and then I got up and I was like shooting, boom, boom, or I emptied the clip, and they were gone, gone after that.").

The State makes much of the fact that the defendant only fired at his assailants while they were running away from him. This fact, viewed in isolation, would defeat a claim of self-defense. See Jester v. State, 551 N.E.2d 840, 844 (Ind. 1990) ("We also would observe that appellant's claim of self-defense fails in this case because although the victim was the instigator of the altercation, there came a time when he expressed his desire to quit and attempt to flee from appellant who pursued him and did not

surrender his knife until the victim was on the floor and bleeding profusely."); People v. Keys, 145 P.2d 589, 596 (Cal. Ct. App. 1944) ("When that danger has passed and when the attacker has withdrawn from the combat, the defendant is not justified in pursuing him further and killing him, because the danger is not then imminent, and there is no apparent necessity to kill to prevent the death of or serious bodily injury to the defendant."). There is no argument that the defendant was justified in using deadly force merely because the intruders were fleeing, violent felons. See RSA 627:6, II (setting forth conditions for justifiable use of deadly force by a law enforcement officer against a fleeing felon).

But the mere fact that the assailants were running away does not automatically invalidate the defendant's use of deadly force in self-defense. Deadly force is justify if there was a real and reasonable fear that they could immediately resume their assault of the defendant or threaten his family at any moment. Courts recognize that a defendant is justified in using deadly force in self-defense even when the defendant has to pursue the initial aggressor to end the threat.

> In the exercise of his right of self-defense [a defendant] may stand his ground and defend himself by the use of all force and means apparently necessary and which would appear to be necessary to a reasonable person in the same situation and with the same knowledge; and he may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This rule applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.

People v. Collins, 11 Cal. Rptr. 504, 513 (Ct. App. 1961) (emphasis added); see also People v. Brown, No. F077723, 2020 WL 3396753, at *7 n.5 (Cal. Ct. App. June 19, 2020) ("So, too, under such circumstances, he may pursue and slay his adversary. But the pursuit must not be in revenge, not after the necessity for defense has ceased, but

must be prosecuted in good faith to the sole end of winning his safety and securing his life." (quoting People v. Hecker, 42 P. 307, 312 (Cal. 1895)) (emphasis added); cf. RSA 627:5, III (there is no duty to retreat if the defendant was not the initial aggressor and he was in a place he had the right to be). Other jurisdictions likewise recognize this principle:

> If in the exercise of the right of self-defense it becomes necessary that the person assailed pursue his or her adversary he or she may lawfully do so as long as for the protection of his or her own life, the necessity continues. Such person may inflict on the assailant such violence as appears necessary in his or her defense if the person believes that the assailant is maneuvering to gain some advantage. The pursuit must not, however, be carried beyond the point of self-defense. A person has no right of pursuit after all apparent danger to him or her has ceased.

21 Tex. Jur. 3d Criminal Law: Defenses § 121 (2020 update) (footnotes omitted); see also Taylor v. State, 947 S.W.2d 698, 705 (Tex. App. 1997) ("If, in the exercise of a right of self-defense, it becomes necessary that one assailed pursue his adversary, he may lawfully do so as long as, for the protection of his own life, the necessity continues. That propriety, however, is conditioned on the deceased's retreating to a vantage point from which to renew the attack or threatened attack. To merit such a charge, the defendant's life must still be in danger from attack by the (now) deceased.") (citations omitted).

Here, the defendant's assailants were armed, did not drop their weapons, and remained wholly capable of turning around and shooting at the defendant as they ran. The defendant understood as much, telling the police in his interview that they still felt like a threat: "[T]hese men are still armed. It doesn't matter if they're running away from me. They're still armed. They still have weapons. They still have weapons that are loaded. They're not just little play toys . . . ." State Ex. 3 at 150:16-21; see also State

Ex. 3 at 124:19-21 (stating that he felt as though the men were still a threat to him); State Ex. 4 at 71:19-72:21 ("My first reaction after I emptied the clip was run inside 'cause now I'm defenseless. You know, they could still shoot at me. They probably still got more rounds. They probably can shoot at me.").

Indeed, after the defendant fired two shots, the men shot back, prompting the defendant to fire four more rounds. Furthermore, after Connor was shot, one of the assailants stopped running, picked up Connor's gun, pointed his own firearm in the defendant's direction, and continued running. While these actions by one of the assailants occurred after the defendant fired his first shots, they corroborate the reasonableness of the defendant's belief that the threat was not over when the men left his house. Accord Aldrich, 53 N.H. at 402 ("[I]mminent danger is relative, and not absolute, and is measured more by the nature of consequences than by the lapse of time."). Furthermore, this is not a case where the defendant retreated for the purpose of arming himself to pursue his attackers. See State v. Bray, 818 S.W.2d 291, 293 (Mo. Ct. App. 1991) (finding no error with the trial court's failure to submit a self-defense instruction where the defendant "retreated from the altercation, entered his home, obtained the gun and returned to the altercation to kill" the victim). As noted above, the reacted to a violent attack on instinct and the entire fatal sequences of events was over in a matter of seconds. Given these circumstances and coupled with the defendant's fear of his attackers, as detailed above, the defendant's perception that the men still posed an imminent threat is not unreasonable. Cf. State v. Holt, 126 N.H. 394, 397 (1985) ("A belief which is unreasonable, even though honest, will not support the defense.").

CONCLUSION

In sum, the State did not show, through clear and convincing evidence, that the defendant's actions were motivated by revenge as opposed to a desire to protect himself or his family. Further, the State did not show, through clear and convincing evidence, that the defendant did not face an imminent, deadly threat from his assailants even as they ran from the house. In other words, the Court is not convinced that "the proof is evidence or the presumption great" that a jury will convict the defendant of Second Degree Murder. RSA 597:1-c.

The Court, therefore, finds that the defendant cannot be held without bail. Rather, he is entitled to be considered for release on bail pursuant to the framework set forth in RSA 597:2. While the defendant proposed some conditions for his release, neither party has presented coherent evidence or arguments about what bail conditions are necessary to ensure that the defendant will appear for court hearings, will not endanger the public, and will otherwise abide by court orders. For example, there is strong evidence that the defendant was engaged in the large scale sale of marijuana from his home. The Court must hear further evidence and arguments from the parties about whether it can craft conditions for the defendant's release to ensure that he abides by the law if he is granted bail. Accordingly, the Court will schedule a further bail hearing pursuant to RSA 597:2 at the earliest opportunity available on the docket.

SO ORDERED.

3/26/2021
_____
DATE

N. William Delker
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 03/26/2021