

HILLSBOROUGH COUNTY
Northern District

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Docket No. 216-2023-CR-00147

State of New Hampshire
v.
John Delee

RSA 597:1-c ORDER

The defendant, John Delee, is charged with Second Degree Murder and with Reckless Conduct. In the Second Degree Murder charge, the State alleges that on January 28, 2023 Mr. Delee recklessly cause the death of Timothy Pouliot under circumstances manifesting an extreme indifference to the value of human life by shooting him. In the Reckless Conduct charge, the State alleges that at on the same date Mr. Delee engaged in conduct which placed or may have placed another in danger of serious bodily injury, by means of a deadly weapon, by firing a gun in the area of pedestrians. Mr. Delee has entered pleas of not guilty. He is presently being held in pretrial custody pending an evidentiary bail hearing under RSA 597:1-c. That hearing was held on February 24, 2023. Upon consideration of the testimony, exhibits, and arguments submitted at the hearing, and upon consideration of the applicable law, the court orders Mr. Delee shall not be allowed bail, determining and ordering as follows.

The State asserts that Mr. Delee should be held until trial under RSA 597:1-c, which provides that a person accused be denied bail upon a showing by clear and convincing evidence that the person is charged with a crime punishable by up to life in prison and that the proof is evident or the presumption is great. The defense objects, asserting that the State cannot show by clear and convincing evidence that the proof is evident, and in particular that the State cannot disprove that Mr. Delee acted in self-defense.

RSA 597:1-c provides that “[a]ny person arrested for an offense punishable by up to life in prison, where the proof is evident or the presumption great, shall not be allowed bail.” “The plain language of the statute thus requires the State to show first that the person is charged with an offense punishable by up to life in prison and then show that the proof is evident or the presumption great.” *State v. Furgal*, 161 N.H. 206, 211 (2010). The State bears the burden of showing that the proof is evident or the presumption great by clear and convincing evidence. *Id.*

at 211, 216. “The ‘proof is evident’ analysis focuses solely upon the strength of the evidence against a defendant charged with a crime punishable by life in prison” while the “presumption great” means that “the circumstances are such that the inference of guilt naturally to be drawn from them is strong, clear, and convincing.” *Id.* at 211 (citations omitted).

It is uncontested that a Mr. Delee is charged with a crime punishable by life in prison. RSA 630:1-b, II (“Murder in the second degree shall be punishable by imprisonment for life or for such term as the court may order”). It is also uncontested for the purpose of this bail proceeding that Mr. Delee shot Mr. Pouliot and that Mr. Pouliot died from the gunshot wounds. What is at issue in this proceeding is whether, in shooting Mr. Pouliot, Mr. Delee acted in self-defense.

“[S]elf-defense becomes an element of the crime charged when evidence of that defense is admitted at trial.” *State v. Munroe*, 173 N.H. 469, 478 (2020) (citation omitted). “[B]ecause the State must prove all elements of the crime beyond a reasonable doubt, self-defense must be disproved by the State.” *Id.* (citation omitted). At trial, the State bears the burden of disproving self-defense by proof beyond a reasonable doubt. *Id.* In a bail proceeding under RSA 597:1-c such as this, the State bears the burden of disproving self-defense by clear and convincing evidence.

Mr. Delee used deadly force against Mr. Pouliot. The portion of the statute concerning self-defense, RSA 627:4, which addressed the use of deadly force provides, in full, as follows:

II. A person is justified in using deadly force upon another person when he reasonably believes that such other person:

- (a) Is about to use unlawful, deadly force against the actor or a third person;
- (b) Is likely to use any unlawful force against a person present while committing or attempting to commit a burglary;
- (c) Is committing or about to commit kidnapping or a forcible sex offense; or
- (d) Is likely to use any unlawful force in the commission of a felony against the actor within such actor's dwelling or its curtilage.

II-a. A person who responds to a threat which would be considered by a reasonable person as likely to cause serious bodily injury or death to the person or to another by displaying a firearm or other means of self-defense with the intent to warn away the person making the threat shall not have committed a criminal act.

III. A person is not justified in using deadly force on another to defend himself or herself or a third person from deadly force by the other if he or she knows that he or she and the third person can, with complete safety:

- (a) Retreat from the encounter, except that he or she is not required to retreat if he or she is within his or her dwelling, its curtilage, or anywhere he or she has a right to be, and was not the initial aggressor; or
- (b) Surrender property to a person asserting a claim of right thereto; or

- (c) Comply with a demand that he or she abstain from performing an act which he or she is not obliged to perform; nor is the use of deadly force justifiable when, with the purpose of causing death or serious bodily harm, the person has provoked the use of force against himself or herself in the same encounter; or
- (d) If he or she is a law enforcement officer or a private person assisting the officer at the officer's direction and was acting pursuant to RSA 627:5, the person need not retreat.

RSA 627:4, II, II-a,¹ III.

The State asserts that the evidence it submitted at the hearing by clear and convincing evidence disproves that Mr. Delee reasonably believed that Mr. Pouliot was about to use unlawful, deadly force against him.² The State asserts that, accordingly, under RSA 627:4, II(a) Mr. Delee was not justified in using deadly force against Mr. Pouliot. Because the court concludes that there is clear and convincing evidence that Mr. Delee could not have reasonably believed that Mr. Pouliot was about to use deadly force against him, the court agrees that Mr. Delee was not justified in using deadly force against Mr. Pouliot. *See State v. Holt*, 126 N.H. 394, 397 (1985) (a defendant's belief which is unreasonable, even though honest, will not support a defense of justification for use of deadly force.)

By clear and convincing evidence submitted at the February 24, 2023 hearing, the important events of the evening of January 27 into the early morning of January 28, 2023 are as follows.³

Mr. Delee and his friends Mr. Soldano and Mr. Chandler were all at The Goat night club on Old Granite Street in Manchester, as were Mr. Pouliot and his friends Mr. Mendoza and Mr. Nash. Also at The Goat are a friend of Mr. Delee, Ms. Elliott-Orr and two of her friends.

The first interaction between Mr. Delee and Mr. Pouliot occurred when, according to Ms. Elliott-Orr, Mr. Pouliot and one of his friends were "a little to close" to Ms. Elliott-Orr and her friends. According to Ms. Elliott-Orr, Mr. Delee and Mr. Pouliot had some "heated words" and then shook hands and Mr. Pouliot walked away.

¹ To be clear, RSA 597:4, II-a does not apply here because Mr. Delee not only displayed a firearm, but discharged it, shooting Mr. Pouliot. *See e.g. State v. Rice*, 169 N.H. 783, 793 (2017).

² The State argues in the alternative that it has shown by clear and convincing evidence that Mr. Delee was not justified in using deadly force because, under RSA 627:4, III(a) he could, with complete safety, retreat from the encounter, and that he was the initial aggressor. Because the court finds that the State has met its burden by clear and convincing evidence of disproving under RSA 627:4, II(a) that Mr. Delee reasonably believed that Mr. Pouliot was about to use unlawful deadly force against him, the court does not reach or decide this issue.

³ Much of what follows is observable on surveillance or cell phone videos submitted at the hearing; some is from witness statements provided as hearing exhibits or testified to at the hearing.

Later, according to Ms. Elliott-Orr, she heard Mr. Pouliot say words to the effect that he could punch “that big kid over there,” meaning Mr. Delee, in the face and knock him out with one punch, and that he was a professional fighter. She also reports that she heard Mr. Pouliot’s friend Mr. Mendoza say that he was going to knock him, meaning Mr. Delee, out before the end of the night. Ms. Elliott-Orr reports that she told Mr. Delee about what she heard, that Mr. Delee flashed his gun and said that “I’m not worried, I have protection.”

In the next relevant interaction, Mr. Delee approached Mr. Pouliot at the bar and they exchanged words for a bit over half a minute. A person Mr. Pouliot had been talking with reports that during this exchange Mr. Delee challenged Mr. Pouliot to go out and fight. At the end of this exchange, Mr. Delee pushed Mr. Pouliot. Bouncers intervened and escorted Mr. Delee away.

A little less than two minutes later, Mr. Pouliot’s friend Mr. Mendoza approached Mr. Delee and punched him in the face,⁴ and they then wrestled onto the floor. During this altercation Mr. Delee sustained a visible cut to the face. Bouncers intervened and escorted Mr. Delee out of The Goat. While Mr. Delee was being escorted out, and after he reached the sidewalk outside, he was visibly agitated, repeatedly and loudly yelling words to the effect, “who punched me, who punched me in the face,” “I’ll fight you,” and the like.

While Mr. Delee and his two friends were on the sidewalk to the right of the entrance to The Goat, Mr. Pouliot exited The Goat and walked away to the left. Mr. Pouliot’s two friends, Mr. Mendoza and Mr. Nash, exited The Goat, crossed the street, and got into a car. Mr. Nash, smoking a cigarette, then exited the car and crossed the street towards Mr. Delee and Mr. Delee’s friends. Mr. Delee and Mr. Nash exchanged words, and Mr. Delee then punched Mr. Nash. They exchanged a few more words, then Mr. Delee visibly offered to shake Mr. Nash’s hand. Mr. Nash visibly declined, and Mr. Delee then hit Mr. Nash with a second punch. At no point did Mr. Nash resist or fight back.

At that point, Mr. Mendoza had exited the car and crossed the street to approach Mr. Delee and his friends. Mr. Mendoza pointed what has been determined to be a pepper spray canister at Mr. Delee, in close proximity. Mr. Delee pulled a firearm out of his waistband,

⁴ Whether Mr. Mendoza’s punch landed is disputed. The State’s witness asserts that other video angles show that the punch did not connect, but from the video in evidence it appears that the punch did hit Mr. Delee’s face.

dropped it, picked it up, and “racked” it.⁵ He does not appear from the video evidence to have pointed the gun directly at Mr. Mendoza. Mr. Mendoza backed off, and Mr. Delee’s friends pushed Mr. Delee, escorting him away, northward up the sidewalk.

Mr. Delee reached the alley way to the north of the SoHo night club. By then, he had put the gun back into his waistband. That alley led to the parking lot where Mr. Delee and his friends had left their car. Mr. Delee walked down the alley, but then started walking back, drew the gun, then put the gun away again. One of his friends pointed and pushed him in a visible effort to get Mr. Delee to walk down the alley towards their car.

In the meantime, Mr. Pouliot’s friends Mr. Mendoza and Mr. Nash had followed Mr. Delee and his friends to the north, to a location across the street from the alley entrance. At about the same time, Mr. Pouliot had reversed direction and, despite Ms. Elliott-Orr’s efforts to stop him, and despite Mr. Mendoza yelling “he’s got a gun,” walked back past The Goat to approach Mr. Delee and Mr. Delee’s friends near the entrance to the alley.

As is apparent on Exhibit 9, a bystander’s cell phone video, at that point Mr. Delee, Mr. Pouliot, and at least three of Mr. Delee’s and Mr. Pouliot’s friends were standing in a rough circle. What was being said cannot be heard, but Mr. Pouliot can plainly be seen punching Mr. Delee in the face. Mr. Delee immediately raised his gun and fired multiple shots into Mr. Pouliot. As Exhibit 6 shows, Mr. Delee then walked down the alley with his gun still out, but then turned back, with the gun put away, and put his hands up.

After Mr. Delee was arrested, he volunteered to the effect that “those kids tried to fight us for some reason” and “is there some legal defense to getting punched in the face, I just reacted” and “I can’t believe I just f____d everything up.”

There is not a legal defense to shooting someone in response to a punch in the face, at least on the evidence presently before the court. Just as Mr. Mendoza’s punch to Mr. Delee inside The Goat would not have reasonably justified the use of deadly force by Mr. Delee in defense, just as Mr. Delee’s first punch to Mr. Nash on the sidewalk outside The Goat would not have reasonably justified the use of deadly force by Mr. Nash in defense, just as Mr. Delee’s second punch to Mr. Nash on the sidewalk outside The Goat would not have reasonably justified the use of deadly force by Mr. Nash in defense, Mr. Pouliot’s punch to Mr. Delee near the

⁵ “Racking” the slide of a semi-automatic pistol loads the first round from the magazine into the chamber. Cf. *Merriam-Webster’s Unabridged Dictionary*, <https://unabridged.merriam-webster.com/unabridged/rack> (last accessed 27 Feb. 2023) (to supply, or to place, or to fill).

entrance to the alley did not reasonably justify the use of deadly force by Mr. Delee in defense.

Notwithstanding Mr. Pouliot's earlier assertion overheard by Ms. Elliott-Orr to the effect that he was a professional fighter and that he could knock Mr. Delee out with one punch, in the event, it does not appear that Mr. Delee – who was a foot taller than Mr. Pouliot and outweighed him by around 200 pounds – was fazed by Mr. Pouliot's punch, *see* Exhibit 9.

Summarizing the critical interactions between Mr. Delee and Mr. Pouliot the evening of January 27 into the early morning of January 28, 2023: While Mr. Pouliot was talking in close proximity with Mr. Elliott-Orr and her friends, Mr. Delee approached and he and Mr. Pouliot had heated words, after which they shook hands and Mr. Pouliot departed. Later, Mr. Pouliot bragged about knocking Mr. Delee out and being a professional fighter, information which was conveyed to Mr. Delee. Mr. Delee then approached Mr. Pouliot at the bar, challenged Mr. Pouliot to go outside and fight, then pushed Mr. Pouliot. Outside, Mr. Pouliot approached Mr. Delee and punched him in the face. Mr. Delee immediately raised his firearm and shot Mr. Pouliot eight times.

The court concludes that, based on the evidence presented at the February 24, 2023 hearing, the State has shown by clear and convincing evidence that Mr. Delee could not have reasonably believed that Mr. Pouliot was about to use deadly force against him and that, accordingly, Mr. Delee did not act in justifiable self-defense when he shot Mr. Pouliot.

The court finds on the totality of the evidence presented on the record of February 24, 2023 that the State has met its burden of demonstrating that Mr. Delee is charged with Second Degree Murder, an offense punishable by up to life in prison, and that, by clear and convincing, the proof is evident that Mr. Delee committed that offense and that he was not justified by self-defense in doing so. Accordingly, RSA 597:1-c mandates that Mr. Delee shall not be allowed bail.

So Ordered.

February 27, 2023



Steven M. Houran
Presiding Justice