STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ALONZO WALLACE, JR.,

Defendant-Appellant.

UNPUBLISHED

No. 178917
Wayne Circuit Court
LC No. 93-031871

Before: Wahls, P.J., and Young and H.A. Beach,* JJ.

YOUNG, J. (DISSENTING).

I respectfully dissent. The trial court's failure to give a sua sponte modified self-defense instruction related to fear of criminal sexual conduct does not, under the facts of this case, constitute manifest injustice. Hence, I would affirm.

Unlike the majority, I find this case indistinguishable from *People v Landrum*, 434 Mich 482; 456 NW2d 10 (1990), the companion case to *People v Heflin*, 434 Mich 482; 456 NW2d 10 (1990). Landrum's defense counsel did not object when the trial court read the standard jury instruction on self-defense nor did he request a special jury instruction. To determine whether the absence of a sua sponte modified instruction on self-defense constituted manifest injustice, the Court reviewed the defense counsel's voir dire and closing argument. *Landrum*, 434 Mich 513-514. In voir dire, Landrum's defense counsel questioned potential jurors whether they had any doubt that rape is an act of great bodily harm. *Id*., 513. In closing, Landrum's defense counsel argued that his client was defending herself against a rape which gave her an absolute right to prevent rape or great bodily harm, and that the trial court would instruct jurors that she had a right to do anything to protect herself even to the point of taking a life. *Id*., 514. The Court noted that these statements in conjunction with the trial court's self-defense instruction adequately presented the defendant's theory of her case to the jury. *Id*. Therefore, the Court held that absence of a sua sponte modified instruction on self-defense did not constitute manifest injustice. *Id*.

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* Circuit judge, sitting on the Court of Appeals by assignment.

As in *Landrum*, defendant's counsel did not object when the court read the standard jury instruction on self-defense nor did she request a special instruction. Unquestionably, the theory of defense was that defendant struck and killed the decedent in an effort to repel the decedent's homosexual attempted rape. Defendant testified at length about the attack and his relative disadvantage, given his broken hand and decedent's larger size and aggression initiated while defendant was asleep. The jury was well aware, based upon defendant's testimony, that self-defense was his principle answer to the charges brought against him. Moreover, in closing, defense counsel made arguments similar to those made by Landrum's defense counsel. The majority suggests that this case is distinguishable from *Landrum* because defense counsel in this case made only one statement in closing relevant to defendant's claim of self-defense. On the contrary, a fair reading of defense counsel's closing argument indicates that defense counsel argued as, if not more, vigorously than the defense counsel in *Landrum* that defendant was only defending himself against a sexual assault.

In fact, defense counsel made the following salient points in support of defendant's claim of self-defense. She emphasized that defendant was terrorized when the larger, stronger, and younger decedent attempted to have sex with defendant. Counsel explained that, in response to this terror, defendant grabbed the first object within reach to fend off decedent's advances and escape his grasp. Finally, she emphasized that "this is nothing more than a case of self-defense. . . . [T]he judge will tell you . . . that if Mr. Wallace has a reasonable belief that something is going to happen – that he is going to be sexually penetrated or sodomized – that he has a right to protect himself."

As such, the theory of the defense was put squarely to the jury. I find that the facts of this case fall squarely within the Supreme Court's holding in *Landrum*. Consequently, I would hold that the trial court's failure sua sponte to provide a modified self-defense instruction did not result in manifest injustice, and that defendant's conviction and sentence should be affirmed.

/s/ Robert P. Young, Jr.