STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEWIS HARRIS,

Defendant-Appellant.

UNPUBLISHED
April 3, 1998

No. 196775
Recorder's Court
LC No. 95-004796

Before: Gribbs, P.J. and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm his convictions and sentences, but remand for correction of the judgment of sentence.

On March 27, 1995, defendant, a student at Pershing High School in the City of Detroit, shot a fellow student seven times. Apparently, the victim had been threatening defendant about joining his gang prior to the shooting. Several other students were present and saw the shooting in the school.

I

Defendant first argues that his convictions are not supported by sufficient evidence in that the prosecution failed to prove beyond a reasonable doubt that he was not acting in self-defense. We disagree. We review a claim of insufficiency of the evidence by considering the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reeves,* 222 Mich App 32, 34; 564 NW2d 476 (1997).

The elements of assault with intent to do greatly bodily harm less than murder are: (1) an attempt or offer with force or violence to do corporeal harm to another, (2) with an intent to do great bodily harm less than murder. *People v Pena,* 224 Mich App 650, 659; 569 NW2d 871 (1997). The defense of self-defense exists when: (1) the defendant honestly and reasonably believed that he was in

danger, (2) the degree of danger which he feared was serious bodily harm or death, (3) the action taken by the defendant appeared at the time to be immediately necessary, and (4) the defendant had done all that was reasonably possible to avoid using deadly force by retreating, if retreat was safe. *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990); *People v Stallworth*, 364 Mich 528, 535; 111 NW2d 742 (1961); *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985).

Here, numerous witnesses testified that they saw defendant shoot the victim seven times in the school hallway. Viewing that evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of assault with intent to do great bodily harm had been proven beyond a reasonable doubt. Regarding the self-defense claim, although there was evidence that the victim threatened defendant and defendant could have had a reasonable and honest belief that he was in danger, the other elements of self-defense are not supported by the evidence. No evidence was presented that the victim had a weapon, and the evidence suggested that the victim was merely leaning against the wall when he was shot. Thus, there was no immediate threat and defendant could have avoided the confrontation by walking away. Therefore, defendant's conviction of assault with intent to do great bodily harm less than murder was supported by sufficient evidence.

II

Next, defendant contends that he was denied the effective assistance of counsel because his counsel did not request a duress instruction or an instruction on the victim's prior acts of violence. Defendant also argues that the trial court should have sua sponte given these instructions. We disagree. To establish a denial of effective assistance of counsel, the defendant must prove that counsel made errors that are so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that this deficient performance prejudiced the defendant's trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

These issues were not preserved at trial. In the absence of an objection to, or request for, a jury instruction, our review is limited to whether relief is necessary to avoid manifest injustice. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

A

The defense of duress is appropriate when a defendant presents evidence from which a jury could conclude: (1) there was threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, (2) the conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant, (3) the fear or duress was operating upon the mind of the defendant at the time of the alleged act, and (4) the defendant committed the act to avoid the threatened harm. *People v Terry*, 224 Mich App 447, 453; 569 NW2d 641 (1997). The threatening conduct or act of compulsion must be "present, imminent, and impending." A future threat of injury is not enough. *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997).

Here, counsel's failure to request a duress instruction did not deny defendant the effective assistance of counsel because the evidence at trial did not support a duress instruction. One of the

witnesses testified that the victim threatened to hurt the defendant the *following* day. Because the threat of harm was in the future, defendant was not entitled to a duress instruction and thus, counsel's performance was not deficient.

B

At trial, evidence was presented that the victim had the reputation as a gang member. However, no evidence was presented that he committed acts of violence or cruelty in the past. Therefore, the evidence did not support an instruction on the victim's prior acts of violence and counsel's performance was not deficient for failing to request this instruction.

III

Next, defendant argues that the trial court abused its discretion when it excluded evidence that the victim made threats against defendant after the shooting. We see no abuse of discretion.

Although the character of the victim may be offered by the accused to demonstrate that the victim was the aggressor, MRE 404(a)(2), the *subsequent* acts of the victim in this case are not relevant. First, the proffered evidence of subsequent threats made by the victim are not material to the issue of self-defense in this case. As discussed above, the evidence must demonstrate that defendant had a honest and reasonable belief that he was in danger *at the time* that he acted in self-defense. Furthermore, these subsequent threats have no probative force, because they do not tend to make the existence of defendant's honest and reasonable belief of danger at the time of incident more or less probable. Furthermore, as the prosecutor argued, the subsequent threats could have resulted from the shooting itself. Therefore, the trial court did not abuse its discretion when it excluded evidence of the victim's subsequent threats against defendant.

IV

Defendant finally contends that the trial court abused its discretion when it determined that defendant's father's testimony was inadmissible hearsay evidence. We see no abuse of discretion. Defendant made the following offer of proof regarding defendant's father's testimony:

> Yes, Your Honor. Just for the record, we had a side bar discussion regarding the last witness I intended to call, which was Mr. Lewis Perkins, the defendant's father. And as an offer of proof, I intended to show that some time prior to the shooting Mr. Harris came home frightened and informed his father that this Mr. Plummer was threatening him, and that in response to that Mr. Perkins, his father, went up to the school to investigate. The court indicated - - well, actually Mr. Page [Prosecutor] objected on hearsay grounds, and the court indicated that it would sustain the objection and prevent me from introducing any of that evidence.

While defendant's state of mind on the date of the shooting was in issue (as an element of self-defense) the proferred evidence was not specific as to *when* the statement was made, and therefore the statement was of dubious relevancy. Furthermore, the proferred evidence did not establish all of the elements of self-defense.

V

Upon review of the lower court file we discovered what appears to be an error in the amended judgment of sentence entered by the trial court. Defendant was sentenced on April 26, 1996; however, the amended judgment of sentence reflects that he was sentenced on April 12, 1996. Therefore, pursuant to MCR 7.208 we remand for correction of the amended judgment of sentence.

Defendant's convictions and sentences are affirmed. We remand for correction of the amended judgment of sentence. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Henry William Saad