STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS P. O'BRIEN,

Defendant-Appellant.

UNPUBLISHED
December 11, 1998

No. 203818
Oakland Circuit Court
LC No. 96-148049 FH

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to two to fifteen years' imprisonment. The court then vacated that sentence and sentenced defendant, as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to two to fifteen years' imprisonment. Defendant now appeals as of right. We affirm.

On August 27, 1996, Marvin English, Daniel Malloy, Patricia Gracy, and Tom Welch were drinking beer and talking in the kitchen of English's house. Defendant, who rented a room from English, arrived home between 10:30 p.m. and 11:00 p.m. Defendant began arguing with the occupants of the kitchen. The argument became violent and defendant was punched in the face at least once. Eventually, English, Malloy, Gracy, and Welch left the house. Malloy and Gracy remained in the yard. Defendant initially armed himself with a hatchet and then a knife. The testimony conflicted regarding whether defendant stayed in the house with the hatchet and the knife or whether he went outside into the yard and chased Malloy with the hatchet and knife.

Defendant first argues on appeal that the trial court abused its discretion in denying his motion for JNOV and that the evidence was insufficient to support the verdict. To the extent that defendant argues the verdict is against the great weight of the evidence, the issue is not preserved because defendant did not move for a new trial on this basis. *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997). Defendant's motion for a judgment notwithstanding the verdict (JNOV) was only based on an instructional error. Therefore, we decline to review the great weight issue.

In reviewing the sufficiency of the evidence in a criminal case, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Godbold*, 230 Mich App 508; 585 NW2d 13 (1998), citing *People v Wolfe*, 440 Mich 508, 515, n 6; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). The evidence is sufficient if, in the face of whatever contradictory evidence the defendant may provide, the prosecution proves its theory beyond a reasonable doubt. *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991).

Defendant did not dispute that he committed a felonious assault on Malloy, but argued that he acted in self-defense. A defendant who argues self-defense implies that his actions were intentional, but the circumstances justified his actions. *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992). To prevail on his claim of self-defense, defendant had to show that: (1) he had an honest and reasonable belief that he was in danger, (2) his life was in imminent danger or a threat of serious bodily harm existed, and (3) he only used the amount of force necessary to defend himself. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995), citing *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

The prosecution presented testimony which, although contradicted by defendant and his girlfriend, showed that prior to defendant picking up the hatchet, Malloy, Gracy, and Welch had voluntarily left English's home and were outside in the yard. After defendant picked up the hatchet, he chased an unarmed Malloy around a tree while holding the hatchet raised in his hand. Defendant could have locked the doors of the home and called the police, but instead chose to leave the premises and pursue Malloy. This testimony was sufficient to show that defendant could not reasonably and honestly have believed he was in imminent danger at the time he picked up the hatchet, therefore allowing reasonable minds to conclude that defendant did not act in self-defense.

Although defendant and his girlfriend presented a different version of these events, the role of determining the credibility of witnesses was for the jury and this Court should not interfere. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997). Therefore, we conclude that the prosecution presented sufficient evidence, when viewed in a light most favorable to the prosecution, for a rational factfinder to find the essential elements of felonious assault were proven beyond a reasonable doubt and to not find the requisite elements of self-defense.

Next on appeal, defendant argues that the jury was precluded from properly considering his claim of self-defense because the jury instruction regarding the use of deadly force in self-defense, CJI2d 7.15, was given without the instruction regarding the use of non-deadly force in self-defense, CJI2d 7.22. This issue was not preserved for appeal since defendant not only failed to object to the omission of the instruction regarding the use of non-deadly force, but when it was initially included in the proposed jury instructions, requested that it be replaced with the instruction regarding deadly force. Therefore, defendant waived appellate review of the jury instructions unless this Court finds relief is necessary to avoid manifest injustice. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920

(1997). We find no injustice because the jury instructions, when viewed as a whole, provided valid consideration of material issues, defenses, and theories for which there is evidence in support.

Next, defendant claims the trial court erred in denying his request to introduce evidence of Malloy's history of violence. In addition, defendant requested the jury be instructed on CJI2d 7.23, past violence by complainant or decedent. The trial court denied defendant's request.

This Court reviews the trial court's admission of evidence under the abuse of discretion standard. *People v McMillan*, 213 Mich App 134, 137; 539 NW2d 553 (1995). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Hoffman*, 225 Mich App 103, 104; 570 NW2d 146 (1997).

Prior acts of violence by the victim may be relevant to a defendant's claim of self-defense. *People v Taylor*, 195 Mich App 57, 61; 489 NW2d 99 (1992). The prior acts of violence are relevant to the defendant's ability to present important evidence regarding his motive and intent. MRE 404(b). *Id.* The trial court may exercise its discretion under MRE 403 in deciding how much of this evidence to admit. *Id.*

In this case, defense counsel offered defendant's testimony that Malloy "liked to mix it up," that he had heard of a couple of instances where Malloy had "mixed it up" and that he had heard Malloy had been charged with domestic violence and had an aggressive nature. Defendant argues that this evidence was offered to show his state of mind prior to the acts of violence. The evidence was not in fact initially offered to show that Malloy was likely to have badly injured defendant, but rather to show that defendant honestly and reasonably believed he was in danger when he picked up the hatchet. This was legitimate and material grounds to offer the evidence. Moreover, the evidence was more probative than prejudicial. Malloy admitted that he punched defendant. Therefore, it was not offered to show that Malloy would punch defendant.

We conclude that the trial court abused its discretion in not allowing defendant to testify regarding his knowledge of Malloy's prior assaultive actions. This testimony was relevant to defendant's claim of self-defense and affected his ability to present evidence regarding his state of mind. However, the error was harmless. An error is harmless if it is highly probable that, in light of the strength and weight of untainted evidence, the tainted evidence did not contribute to the verdict. *People v Gearns*, 457 Mich 170, 206; 577 NW2d 422 (1998). In this case, it was undisputed that Malloy, Welch, Gracy, and English had left the house and were making no attempt to regain entry, prior to defendant picking up the hatchet and the knife. Although defendant testified that he was afraid of being attacked again, no testimony was presented to show that Malloy, Welch, Gracy, or English were making any move to enter the house and attack defendant. Under these circumstances, defendant could not have honestly and reasonably believed that he was in danger of being seriously injured.

Finally, defendant argues on appeal that his habitual offender conviction should be vacated and he should be resentenced only on the underlying offense because he never tendered a plea of guilt to the habitual offender charge and the trial court never made a determination of the existence of his prior

convictions as required by MCL 769.13; MSA 28.1085. Because this issue was not raised below or addressed by the trial court, it was not preserved for appellate review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). In addition, pursuant to MCL 769.13(5)(c); MSA 28.1085(5)(c), defendant's prior convictions may be established by information contained in the presentence report. *People v Green*, 228 Mich App 684, 700; 580 NW2d 444 (1998). During sentencing, defense counsel had an opportunity to comment on the information contained in the presentence report, but at no time did either defense counsel or defendant challenge the prior convictions listed therein. The trial court indicated prior to sentencing defendant that it had an opportunity to review the presentence report and that it had looked at defendant's extensive record as an adult. Therefore, the trial court made a determination through the presentence report of defendant's prior convictions and properly sentenced defendant in this case.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Richard A. Bandstra