

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN K. GABLE,

Defendant-Appellant.

UNPUBLISHED

March 30, 1999

No. 202989

Oakland Circuit Court

LC No. 96-147688 FH

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to ninety days in jail. He appeals as of right. We affirm.

Defendant argues that his trial counsel's failure to request, or object to the absence of, jury instructions regarding defense of property and defense of others deprived him of his right to effective assistance of counsel. To establish whether a defendant's right to effective assistance of counsel "was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's representation . . . so prejudiced the defendant as to deprive him of a fair trial." *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Jury instructions "must include all elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them." *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992) (citing *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991)). When evaluating whether sufficient evidence has been introduced to necessitate an instruction, the operative inquiry is not whether some evidence merely referring to a defense has been asserted. Instead, evidence that truly supports the defense must be presented at trial. See *People v Cross*, 187 Mich App 204, 206-210; 466 NW2d 368 (1991); *People v Squire*, 123 Mich App 700; 333 NW2d 333 (1983).

In the present case, the record indicates that very limited evidence introduced at trial related to defense counsel's contention that defendant acted to protect his property and others from injury. Instead, the vast majority of the evidence established that defendant could not have reasonably believed that any danger to others or his property necessitated his use of a loaded shotgun. It is well established that one may not use deadly force to defend his property. *People v Shaffran*, 243 Mich 527, 528-529; 220 NW 716 (1928); see also *People v Doud*, 223 Mich 120, 130; 193 NW 884 (1923). Moreover, there is no evidence that any party present during the argument used or threatened to use deadly force against defendant or others. Due to the lack of evidence introduced at trial to support the two defenses, we conclude that defendant's counsel's failure to request instructions on the defenses or to object to the lack of such instructions was not objectively unreasonable conduct.

Defendant also argues that the trial court erred by failing, on its own initiative, to instruct the jury on the two defenses. This issue has not been preserved for this Court's review because defendant failed to include it within the statement of questions involved in defendant's brief on appeal. MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). However, because the evidence did not support the instructions, the court did not have a duty to give them.

Affirmed.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Brian K. Zahra