

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILIP JUDSON-SIMON PIASECZNY,

Defendant-Appellant.

UNPUBLISHED

March 30, 1999

No. 206598

Oakland Circuit Court

LC No. 96-148243 FH

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and sentenced to two years' probation, with the first ninety days to be served in the county jail. Defendant now appeals as of right. We affirm.

Defendant first argues that the trial court erred in refusing to provide a jury instruction on self-defense. We do not agree. A trial court need not give requested instructions that the facts do not warrant. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). The determination whether a jury instruction is applicable in view of all the factors present in a particular case lies within the sound discretion of the trial court. *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996).

Self-defense requires both an honest and reasonable belief that the defendant's life was in imminent danger or that there was a threat of serious bodily harm. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). The defendant may not use force beyond that necessary to protect himself, and he must not be the initial aggressor. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). In the instant case, defendant presented absolutely no evidence that would support a theory of self-defense. It is undisputed that defendant was the aggressor. The victim did nothing to cause defendant to reasonably fear for his safety. The instructions provided by the trial court, when viewed in their entirety, sufficiently protected defendant's rights and fairly presented the issues to be tried. The trial court's refusal to give the self-defense instruction was not erroneous. *People v McFall*, 224 Mich App 403, 414-415; 569 NW2d 828 (1997); *Piper*, *supra* at 650.

Defendant also argues that he was denied a fair trial due to the prosecutor's improper remark that "[t]he defendant's a liar." This issue is without merit. Where, as in this case, no objection was made at trial, nor any cautionary instruction requested, review of the allegedly improper comment is precluded unless the misconduct was so egregious that no curative instruction could have removed the prejudice to the defendant or if failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). In this case, because defendant testified that he had lied to the police, the prosecutor's statement was specifically supported by the trial testimony. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); see also *People v Wright*, 58 Mich App 735, 746; 228 NW2d 807 (1975).

Next, defendant argues that the trial court abused its discretion in sustaining the prosecutor's objections to defense counsel's questions to defendant regarding the events prior to the assault. He claims that he was thereby precluded from introducing evidence that he was functioning under stress due to the death of a coworker, which was relevant to the issue of whether he possessed the requisite specific intent for the crime of felonious assault. The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Warren*, 228 Mich App 336, 341; 578 NW2d 692 (1998).

There is no merit to this issue. Defense counsel gave no indication at trial that he wished to introduce evidence of a stressful condition, or that his questions to defendant were relevant to any matter in issue at trial. Defendant has not demonstrated how the proffered evidence is relevant to the element of specific intent. Because defendant has failed to establish that the excluded evidence could have been decisive of the outcome, this Court need not consider this unpreserved issue. *People v Belanger*, 454 Mich 571, 575-576; 563 NW2d 665 (1997).

Finally, defendant maintains that the trial court erred in denying his request for an evidentiary hearing to determine whether he was denied the effective assistance of counsel because of trial counsel's failure to move for the suppression of his statements to the police. A defendant who claims ineffective assistance of counsel must establish that (1) the performance of counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998).

The prosecution may not use statements stemming from a custodial "interrogation" without demonstrating the use of procedural safeguards to secure the privilege against self-incrimination. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). For purposes of *Miranda*, interrogation refers to express questioning or its "functional equivalent." *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980); *People v Kowalski*, 230 Mich App 464, 479; 584 NW2d 613 (1998). Statements made voluntarily by persons in custody do not fall within the

purview of *Miranda*. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). In the present case, the record is devoid of evidence that defendant's statements at the police station were the product of interrogation and defense counsel was not ineffective for not asking that the statement be suppressed.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Roman S. Gibbs

/s/ Kurtis T. Wilder