

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENDALL D. MIXON,

Defendant-Appellant.

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UNPUBLISHED  
September 8, 2000

No. 212105  
Recorder's Court  
LC No. 98-000659

Before: O'Connell, P.J., and Kelly and Whitbeck, JJ.

PER CURIAM.

Defendant appeals from his bench trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to a term of fourteen to thirty-five years' imprisonment for the second-degree murder conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that the trial court erred in failing to reduce his second-degree murder conviction to voluntary manslaughter. According to defendant, the trial court made a specific finding that he acted in imperfect self-defense. We disagree.

We review a trial court's findings of fact in a bench trial for clear error. *People v Hermiz*, 235 Mich App 248, 255; 597 NW2d 218 (1999); *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). A finding is clearly erroneous "if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *Gistover, supra* at 46. "In the application of this principle, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). We review questions of law de novo. *Hermiz, supra* at 255.

For self-defense to apply, the defendant must honestly and reasonably believe that his life is in imminent danger or under a threat of serious bodily harm. *People v Daniels*, 192 Mich App 658, 672; 482 NW2d 176 (1991). Self-defense is not available when a defendant is the initial aggressor "unless he withdraws from any further encounter with the victim and communicates such withdrawal to the

victim.” *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). Self-defense is also unavailable if a defendant uses excessive force. *Id.* at 322. However, the doctrine of imperfect self-defense is available in some circumstances to mitigate second-degree murder to voluntary manslaughter. *Id.* at 323; *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). Imperfect self-defense serves as a method of negating the element of malice in a murder charge. However, the doctrine is available only where the defendant cannot invoke the theory of self-defense because he used excessive force or was the initial aggressor. See *People v Heflin*, 434 Mich 482, 507; 456 NW2d 10 (1990); *Kemp*, *supra* at 323; *People v Deason*, 148 Mich App 27, 32; 384 NW2d 72 (1985) overruled in part on other grounds, *Heflin*, *supra* at 503 n 16.

We note that defendant did not raise imperfect self-defense as a possible defense during closing arguments. Viewed in context, the trial court’s references to “imperfect” self-defense were an expression of the court’s rejection of defendant’s self-defense theory, not a finding that defendant established the qualified defense. Simply put, we reject defendant’s attempt to characterize the trial court’s casual use of the term “imperfect” as an express legal conclusion that defendant acted in imperfect self-defense in this case.

Further, the trial court’s factual findings establish that imperfect self-defense was not available as a matter of law. In particular, the trial court stated that “[t]here’s really not enough to show that [defendant] was in danger of being killed.” The court further found that “[t]here wasn’t enough of actions on behalf of [the victim] to call for the shooting in self-defense.” The court cited the lack of evidence that defendant saw the victim with a weapon at the time of the shooting. In fact, the court pointed out that the victim, rather than defendant, would have had a more legitimate claim for self-defense. From these findings, it is apparent to us that the trial court determined that defendant did not have an honest and reasonable belief that he was in imminent danger. Our review of the record leads us to conclude that this determination was not clearly erroneous. The evidence presented at trial established only that the victim made a “sudden movement” before defendant shot him. Thus, defendant could not assert self-defense, imperfect or otherwise, because the trial court found that he did not honestly and reasonably believe that he was in imminent danger.

Affirmed.

/s/ Peter D. O’Connell

/s/ Michael J. Kelly