

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENDALL D. MIXON,

Defendant-Appellant.

UNPUBLISHED
September 8, 2000

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

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

WHITBECK, J. (dissenting).

I respectfully dissent. Kendall Mixon's confession, admitted into evidence at trial, sufficiently raised the issue of imperfect-self defense. Further, the trial court may have misapplied the legal standard necessary to determine whether that defense applied in this case. Minimally, in my opinion, this case requires a remand to the trial court so that it can clarify how it reached its conclusion that imperfect self-defense did not apply in this case, based on the evidence of Mixon's honest and reasonable belief at the time of the shooting.

I. Imperfect Self-Defense

To establish the crime of second-degree murder, the prosecutor must "prove that [the] defendant caused the death of the victim and that the killing was done with malice and without justification or excuse."¹ "Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. Malice may be inferred from the facts and circumstances of the killing."²

However, "the killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily

¹ *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991).

² *Id.*

harm.”³ Imperfect self-defense is a variation on the self-defense doctrine and applies when a defendant would be entitled to claim self-defense except that the defendant was the aggressor.⁴ If an imperfect self-defense does apply, it negates malice.⁵ Accordingly, “[i]mperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter” by eliminating any inference of malice.⁶ The defense, however, applies only under circumstances in which the defendant does not instigate the fatal altercation already intending to kill or inflict great bodily harm.⁷

Generally speaking, then, if person A starts a fight with person B without malice, but person B escalates the fight to the point where person A honestly and reasonably fears for his life, person A would commit manslaughter, not murder, if he killed person B at that time. That person A is the original aggressor bars a claim of self-defense, but not imperfect self-defense. The distinction between the two types of self-defense is that perfect self-defense leads to complete exculpation, while imperfect self-defense only mitigates the severity of the killing.

II. The Trial Court’s Analysis

The trial court’s apparent, although not crystal clear, decision to reject imperfect self-defense in this case is troubling because the record does not indicate whether it considered whether Mixon honestly and reasonably feared that his life was in imminent danger when he shot Anthony Hemphill. Rather, the trial court apparently relied on the absence of evidence that Hemphill was armed at the time of the shooting in order to emphasize that Mixon was not justified in acting as quickly as he did. However, not only is the evidence ambiguous on this issue even now, the trial court did not attempt to put itself in Mixon’s place when evaluating the imperfect self-defense claim. The proper perspective on this issue does not involve hindsight, but must be viewed from the defendant’s perspective at the time of the killing.⁸ In this case, there simply is no evidence on the record demonstrating whether Hemphill was unarmed at the time of the shooting or if Mixon knew whether he was armed.

Furthermore, to the extent that the trial court may have believed that Mixon was not entitled to claim imperfect self-defense in this case because he was the aggressor, the trial court plainly misapplied the law. Imperfect self-defense specifically applies to aggressors who start an altercation without intending to kill the opponent.⁹ Because the trial court found that Mixon did not go to the building

³ *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

⁴ *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992).

⁵ *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993).

⁶ *Id.*; see also *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), *aff’d* 461 Mich 986 (2000).

⁷ *Kemp*, *supra* at 324.

⁸ See *People v Truong*, 218 Mich App 325, 337; 553 NW2d 692 (1996) (“Here, while defendants had reason to fear the decedent on the basis of prior assaults and threats, the evidence did not indicate that they were in imminent danger from him *at the time they shot him.*”) (emphasis supplied).

⁹ *Butler*, *supra*.

intending to kill Hemphill, it had to go to the next stage of the analysis in which it would determine if Mixon's fear for his life was honest and reasonable in light of the existing circumstances when he killed Hemphill.

The lead opinion may be correct that the trial court intended its other factual findings surrounding the circumstances of this offense to apply to its analysis of imperfect self-defense. However, that intent is not clear from the record and those findings fall far short of a "determin[ation] that defendant did not have an honest and reasonable belief that he was in imminent danger."¹⁰ Thus, there is insufficient explanation of the trial court's reasoning on the record from which this Court can conclude what, in fact, the trial court found on this element of the legal test for imperfect self-defense and whether that finding was clearly erroneous. That the majority concludes that the way the trial court used the word "imperfect" was not "an express legal conclusion that defendant acted in imperfect self-defense in this case"¹¹ only underscores how inadequate the current record is for appellate review.

III. Conclusion

If the trial court actually engaged in this proper analysis, it is not apparent from the record. Accordingly, I would remand pursuant to MCR 7.216(A)(7) for clarification of the trial court's reasoning, while retaining jurisdiction. Specifically, I would instruct the trial court to articulate whether it concluded that Mixon had a reasonable and honest belief at the time of the shooting that his life was in imminent danger in light of the facts of this case as they appear from the trial evidence on the record.

/s/ William C. Whitbeck

¹⁰ Majority, *ante* at 3.

¹¹ *Id.*