

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD GEETER,

Defendant-Appellant.

UNPUBLISHED

August 27, 2002

No. 233310

Wayne Circuit Court

LC No. 00-003958

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by jury of assault with intent to commit great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b.¹ The trial court granted defendant's motion to set aside defendant's first sentence on the basis of error concerning the sentencing guidelines, and the trial court resentenced defendant as a fourth-offense habitual offender, MCL 769.12, to nine to twenty years' imprisonment on the assault conviction to be served consecutive to a two-year term of imprisonment on the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's conviction arose out of an incident that occurred at an adult entertainment nightclub in Detroit in November 1999. The prosecution alleged that as defendant was leaving the nightclub, following an incident where he had slapped a female dancer on her buttocks, defendant encountered the victim and a verbal confrontation ensued. In the midst of the confrontation, defendant pulled out a handgun and shot the victim twice.

On appeal, defendant first argues that the trial court deprived him of his right to present a defense when it improperly refused to instruct the jury on self-defense. We disagree. This Court reviews jury instructions in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *People v Riddle*, __ Mich __, __; __ NW2d __ (2002) (Docket No. 118181,

¹ The trial court granted defendant's motion for a directed verdict of acquittal on a charge of assault with intent to commit murder, MCL 750.83, with respect to a police officer, and the jury acquitted defendant of a charge of second-degree murder, MCL 750.317.

issued July 31, 2002). The trial court should not give an unsupported instruction. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

A person has the right to defend himself and that right, under certain circumstances, includes the use of deadly force. See, e.g., *Riddle, supra*; *People v Eisenberg*, 72 Mich App 106, 112-113; 249 NW2d 313 (1976). To be lawful self-defense, the evidence must show that the defendant honestly and reasonably believed that he was in danger of death or serious bodily injury, the action taken appeared at the time to be immediately necessary, and the defendant was not the initial aggressor. *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990); *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995); *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985).

In the present case, defendant maintained at trial that the victim was armed with a gun and was at the nightclub that evening for the purpose of committing a robbery with some other individuals. Further, defendant claimed that the victim initiated the confrontation with defendant to create a diversion for the robbery. In this context, defendant asserted that during the confrontation with the victim, the victim produced the weapon, defendant took it from him and then used it to shoot the victim in self defense. In support of this theory, defendant relied on Dwayne Smiley's testimony. Smiley recounted seeing defendant and the victim arguing face to face and, according to Smiley, defendant stepped back and raised his arms with something chrome in his hand just before defendant shot the victim. Smiley also testified he did not see where the gun came from, but stated that defendant could have taken it away from the victim. Defendant also points to testimony of his brother, Charles Geeter, who said that on the day after the incident, defendant told him that he got into a scuffle and had to defend himself. Also, a police officer involved in the investigation testified that defendant's brother told her that defendant said that the victim wanted to fight with him, that defendant tried to walk away, but that the guy would not leave him alone, so he shot him.² Defendant also indicates that the victim's own testimony conceded that he bumped into defendant and angry words were exchanged before the shooting occurred. Finally, defendant relies on the evidence from various witnesses that shortly after the incident the victim and others stole the cash register from the nightclub. All the evidence on which defendant relies was produced during the prosecution's case in chief; defendant offered no witnesses in his defense. On the basis of the prosecution's evidence, defendant requested a self-defense instruction. The trial court denied the request, concluding that no evidence in the record showed that defendant acted in self defense.

After examining the evidence on which defendant relies to demonstrate that he acted in self-defense, we agree with the trial court's conclusion. Defendant's claim that the victim first produced the gun during their encounter and that defendant disarmed him and then used the gun in self-defense is grounded in speculation. The only testimony that even remotely supports that theory is Smiley's testimony when he allowed, in response to a question on cross-examination,

² The officer's recollection of her conversation with defendant's brother was admitted, over defendant's objection, for impeachment purposes only. The prosecution argues that it therefore cannot be substantive evidence upon which to make a claim of self-defense. We find it unnecessary to resolve this issue on appeal and, consequently, decline to address the merits of the prosecution's claim.

that defendant could have taken the gun from the victim. However, he was not testifying to a fact; only a possibility. What Smiley did say that he actually observed is that he did not know where the gun came from and that the first time he saw the gun it was in defendant's possession. Also, there is no testimony that supports a finding that the victim threatened defendant with a gun or any kind of deadly force before defendant stepped back from the confrontation and shot the victim. Under these circumstances, we cannot conceive of any basis on which to conclude that defendant had an honest and reasonable belief that he was in danger of incurring death or serious bodily injury at the hands of the victim at the time of this incident. Consequently, the trial court properly denied defendant's motion to instruct the jury on self-defense.

Next, defendant argues that he was denied a fair trial when the trial court admitted irrelevant and unduly prejudicial evidence of defendant's prior bad acts. Defendant refers to testimony from a witness that the bouncer, who was checking patrons for weapons on the evening in question, failed to search defendant because several weeks earlier defendant had threatened the bouncer. According to the witness, defendant blamed the bouncer for not preventing his car from being stolen from the nightclub parking lot during a time when the bouncer was assigned to provide security there.

Defendant maintains that this testimony was improperly admitted pursuant to MRE 404(b) because no proper purpose exists for admitting this evidence, the evidence had no relevance to any issue in the trial, and the evidence was highly prejudicial. Defendant challenges the logical connection between the prior threat made against the bouncer and his ability to enter the nightclub without being searched.

For other acts evidence to be admissible under MRE 404(b), the evidence must be offered for a proper purpose under the rule, the evidence must be relevant, and its probative value must not be substantially outweighed by unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993). The admission of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Under the facts of this case, we find that the trial court did not abuse its discretion in admitting the challenged evidence. Where defendant's theory was that the gun belonged to the victim, the evidence at issue demonstrated that defendant had the intent and opportunity to bring a gun into the nightclub. How defendant could get a gun into this nightclub when employees of the club were searching each patron for weapons as they entered was a relevant issue. The prosecution maintained that this prior incident explained how defendant was able to manipulate the situation so that he could enter the club without being searched. We recognize that the conclusion that there is a connection between the two events is subject to varying interpretations; however, we do not find it to be so illogical as to amount to an abuse of discretion on the part of the trial court to admit the evidence.

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Jane E. Markey