STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS HARPER,

Defendant-Appellant.

UNPUBLISHED
December 10, 2002

No. 236322
Wayne Circuit Court
LC No. 00-012179

Before: Bandstra, P.J., and Zahra and Meter, J.J.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of three counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to thirty months' imprisonment for each count of assault with intent to do great bodily harm less than murder, and a mandatory two-year consecutive term for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court committed reversible error when it refused to instruct the jury on self-defense. We disagree. The failure to give a requested jury instruction is error requiring reversal only if the defendant establishes that the trial court's omission to give the requested instruction resulted in a miscarriage of justice. MCL 769.26; *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000); *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999). "The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable that not that the error was outcome determinative." *Riddle, supra*, 467 Mich 124-125. Moreover, whether a defendant had a duty to retreat is reviewed de novo. *Riddle, supra*, 467 Mich 124.

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *Riddle, supra*, 467 Mich 124. If a theory of self-defense is well within the range of the evidence, and the defendant requests such an instruction at trial, the trial court must give the instruction to the jury. *Riddle, supra*, 467 Mich 124; *Rodriguez, supra*, 463 Mich 472; *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995); *People v Jew*, 21 Mich App 408, 411; 175 NW2d 544 (1970).

The trial court denied the self-defense instruction because defendant himself testified that he accidentally tripped and the gun accidentally discharged; thus, defendant lacked the intent to shoot. An accident instruction and a self-defense instruction are not mutually exclusive. See *People v Harris*, 458 Mich 310, 320-321; 583 NW2d 680 (1998); *People v Rochowiak*, 416 Mich 235, 245; 330 NW2d 669 (1982); *People v Hess*, 214 Mich App 33, 40; 543 NW2d 332 (1995). However, the evidence presented at trial did not support a self-defense instruction.

Under a theory of self-defense, a defendant is justified in using deadly force if the defendant (1) honestly and reasonably believes that he is in imminent danger of death or great bodily harm and; that (2) it is necessary for him; (3) to exercise deadly force. *Riddle, supra,* 467 Mich 119. In the instant case, neither defendant's own testimony, nor any other evidence presented at trial supported a theory of self-defense because defendant (1) lacked the necessity element of self-defense and (2) did not exercise deadly force.

Evidence that a defendant could have safely avoided using deadly force is relevant in determining the necessity element of self-defense. *Riddle, supra,* 467 Mich 142. "However, (1) one who is without fault is *never* obligated to retreat from a sudden violent attack or to retreat when to do so would be unsafe, and in such circumstances, the presence of an avenue of retreat cannot be a factor in determining necessity; (2) our law imposes an affirmative "duty to retreat" only upon one who is at fault in voluntarily participating in mutual nondeadly combat; and (3) the "castle doctrine" permits one who is *within his dwelling* to exercise deadly force even if an avenue of safe retreat is available, as long as it is otherwise reasonably necessary to exercise deadly force." *Riddle, supra,* 467 Mich 139-140 (emphasis added). Additionally, the "castle doctrine" does not apply to open areas in the curtilage of a home that is not part of the dwelling, such as a yard. *Riddle, supra,* 467 Mich 138.

Defendant testified that he had a gun because he was scared and thought someone was trying to break into his house. Two of the victims testified that they were driving by the house, when defendant shot at them. Defendant testified that when he went out to his front porch, he saw the three victims running from the side of defendant's house to a van. Defendant then testified that he tripped and the gun discharged. No evidence supported that defendant was confronted with (1) a sudden violent attack; (2) participating in mutual nondeadly combat; or (3) assaulted within his dwelling. Therefore, even if it was believed that defendant intended to shoot because he was scared and feared an attempted break-in, he still had a duty to retreat after realizing the "assailants" were running away. Consequently, the evidence did not support a self-defense instruction.

Moreover, defendant's argument at trial was that the shootings were accidental. Defendant testified that he tripped and that the gun accidentally discharged. Defendant further testified that he did not pull the trigger. Defendant testified that he never intended to hurt anybody, nor did he intend to fire in anyone's direction. A theory of self-defense requires some type of affirmative action that is justified due to a belief of imminent danger or severe bodily harm. Defendant failed to offer into evidence proof that he exerted deadly force, and that force was justifiable under the conditions. Therefore, it would have been wholly inconsistent with defendant's testimony at trial to conclude that defendant exercised deadly force. Consequently, the trial court's omission to give the requested instruction did not result in a miscarriage of justice.

Defendant next argues that the trial court abused its discretion when it excluded testimony of one of the victim's past violent acts that bore on defendant's state of mind relating to his self-defense theory. We disagree. A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *People v Brownridge*, 459 Mich 456; 591 NW2d 26 (1999). An abuse of discretion is found only if an unprejudiced person, considering the fact on which the trial court acted, would say that there was no excuse for the ruling made. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001); *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

MRE 405(b) provides, "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of conduct." Specific acts of conduct may be admitted to establish reasonable apprehension of harm. *Harris, supra*, 458 Mich 319; *Cooper, supra*, 73 Mich App 665. When a defendant claims that he acted out of self-defense, "his state of mind at the time of the act is material because it is an important element in determining his justification for his belief in an impending attack" by the victim. *Harris, supra*, 458 Mich 310, 316; citing 2 Wigmore, Evidence (Chadbourn rev), § 246, p 50. A victim's reputation for violence, if known to defendant, is relevant in determining whether the defendant acted in self-defense. *Cooper, supra*, 73 Mich App 665.

Defendant contends that these prior bad acts were necessary to establish defendant's reasonable apprehension of harm from one of the victims. However, the evidence did not support a theory of self-defense. Furthermore, it cannot be concluded that the trial court abused its discretion in determining that a personal protection order against one of the victims by his sister, and an armed robbery conviction that was more than ten years old did not tend to show that "defendant's state of mind was such that he reasonably apprehended danger of serious bodily injury or death at the hands of his victim." *Cooper, supra*, 73 Mich App 665. At no time during trial was any evidence offered that established that any of the victims committed acts of physical aggression, or possessed a weapon. Further, defendant testified that he heard "somebody jarring at the front and rear door." Defendant did not testify that he had knowledge of who was attempting to break into his house, thus heightening his apprehension. Moreover, there is no evidence that defendant even knew that one of the victims committed an armed robbery more than ten years prior to trial.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter