STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2004
v	No. 251358 Washtenaw Circuit Court
LESTER L. ROBERSON, Defendant-Appellant.	LC No. 02-000876-FC

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 25 to 50 years' imprisonment on the murder conviction, 24 to 60 months' imprisonment each on the felon in possession and CCW convictions, all to be served concurrently, but consecutive to two years' imprisonment for the felony-firearm conviction. We affirm.

This case arises from the shooting death of the woman with whom defendant had a tumultuous long term, on-again-off-again relationship, with a history of physical and verbal assaults by both. Some testimony indicated that the victim had previously assaulted defendant with knives, pepper spray, her automobile, and other objects. On the day of the incident, the victim and her children had gone to a shopping center. While the victim and her son were putting packages into their car, defendant approached. The victim's son went into a store to tell his sisters of defendant's presence and then went back outside to watch. At that time, the victim was sitting in the passenger seat of defendant's truck and defendant was in the driver's seat. The victim's son saw the passenger door open and heard "four low echo noises," i.e., gunshots, and then the truck drove away with the door still open. The victim's son returned to his sisters and informed them that defendant had shot the victim. The victim was found in the parking lot, laying face-down in a pool of blood. Defendant drove away. In addition to two graze wounds, the victim also sustained gunshot wounds to the head, back, left hip area, and right buttock, and during the autopsy bullets were found in her liver and chest.

Later, the police arrested defendant and found a gun in his truck and blood spattered on the inside of the passenger window. Following his arrest, defendant made remarks concerning the victim attempting to stab him, and claimed that he shot the victim in self-defense. At trial,

defendant testified that while they were in his truck, he saw a gun in the victim's hand; he knocked the gun out of her hand and a struggle ensued. Defendant testified that the victim then grabbed a knife and attempted to stab him, but by then he had possession of the gun and fired it to protect his own life.

On appeal, defendant argues that he is entitled to a new trial because the trial court's instruction to the jury concerning "state of mind" denied defendant his constitutional right to due process. We disagree.

We review de novo claims of instructional error. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). This Court has explained:

> In reviewing claims of error in jury instructions, we examine the instructions in their entirety. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Aldrich, supra*. [*Milton, supra*.]

Constitutional questions are also reviewed de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

In the present case, with regard to state of mind, the trial court instructed the jury as follows:

> You must think about all the evidence in deciding what the [d]efendant's state of mind was at the time of the alleged killing. The [d]efendant's state of mind may be inferred from the kind of weapon used, the type of wounds inflicted, the acts and words of the [d]efendant and any other circumstances surrounding the alleged killing.
>
> You may infer that the [d]efendant intended to kill if he used a dangerous weapon in a way that was likely to cause death. Likewise, you may infer that the [d]efendant intended the usual results that follow from the use of a dangerous weapon.…

According to defendant, "this instruction is erroneous in that it improperly shifts the burden of proof to [defendant]" and eviscerates his claim of self defense because "the exact same type of conduct as described in the instruction as evidence of an intent to kill could also demonstrate the intent to defend oneself." Contrary to defendant's assertion, the trial court's instructions to the jury concerning state of mind did not result in an impermissible interference with the jury's function in determining issues of fact.

Examining the jury instructions in their entirety, we conclude that they did not have the effect of shifting the burden of proof to defendant to prove self-defense and lack of intent to kill. The challenged instructions that the trial court gave the jury are consistent with CJI2d 16.21 and

advise that defendant's state of mind "may be inferred from the kind of weapon used" and that "[y]ou may infer that the [d]efendant intended to kill if he used a dangerous weapon in a way that was likely to cause death." These instructions used the permissive term "may" and, therefore, did not improperly suggest that the jury must find that defendant had an intent to kill if it found that he used a dangerous weapon, nor did the instructions leave the jury with no alternative other than to find that defendant intended to kill. The trial court's instructions did not indicate that "the law presumes intent" from defendant's acts, only that the jury *may infer* intent from the circumstances. The intent to kill may be proven by inference from any facts in evidence, including the type of weapon used and the victim's injuries, and minimal circumstantial evidence is sufficient. See *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997) (Riley, J.); *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), modified 450 Mich 1212; 539 NW2d 504 (1995); *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974).

Further, the challenged instructions did not shift the burden of proof to defendant. "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). Here, the trial court's instructions did not indicate that the jury must make the inference of intent to kill unless other evidence showed a contrary intent. Indeed, the trial court instructed the jury concerning lawful self-defense and explicitly instructed the jury that defendant "does not have to prove that he acted in self-defense. Instead the [p]rosecutor must prove beyond a reasonable doubt that the [d]efendant did not act in self-defense."

In sum, the trial court's instructions did not violate defendant's due process rights. When read as a whole, the trial court's instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *Milton, supra*; *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995); *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993).

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra