

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICOLETTE TAKISHA DARDEN,

Defendant-Appellant.

UNPUBLISHED

November 29, 2007

No. 267725

Wayne Circuit Court

LC No. 05-006242-01

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Defendant was convicted of assault with a dangerous weapon, MCL 750.82. She was sentenced to two years' probation, with the first 60 days in jail. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that she was denied a fair trial by the trial court's failure to instruct the jury on self-defense, CJI2d 7.15. We disagree. This Court reviews issues of law arising from jury instructions de novo, and a trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The instructions must include all elements of the crime charged and any material issues, defenses, and theories for which there is supporting evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

Felonious assault is simple assault aggravated by the use of a weapon. MCL 750.82; *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). Self-defense is an affirmative defense, *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990), and an affirmative defense "admits the doing of the act charged, but seeks to justify, excuse or mitigate it," *People v Mette*, 243 Mich App 318, 328-329; 621 NW2d 713 (2000) (quoting 21 Am Jur 2d, Criminal Law, § 217, p 281). The burden of persuasion is on the defendant to establish an affirmative defense. *Id.* The defendant is not required to testify when asserting self-defense. *People v Hoskins*, 403 Mich 95, 97; 267 NW2d 417 (1978). "A finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions." *Heflin*, *supra* at 503.

Lawful self-defense using deadly force is justified if the defendant honestly and reasonably believes she is in imminent danger of death or great bodily harm and that it is necessary for her to use deadly force. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30

(2002). Deadly force is “necessary” only if a defendant is not able to defend herself using non-deadly force or is not able to safely retreat. *Id.* at 119. The force used must be proportionate to the threat. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993); *People v Oster*, 97 Mich App 122, 132-133; 294 NW2d 253 (1980).

Furthermore, a defendant is entitled to have the jury instructed on “any recognized defense for which there exists evidence sufficient for a reasonable juror to find in her favor.” *Taylor v Withrow*, 288 F3d 846, 852 (CA 6, 2002) (quoting *Mathews v United States*, 485 US 58, 63-64; 108 S Ct 883; 99 L Ed 2d 54 (1988)). Thus, in order to have the jury instructed on self-defense, defendant needed to establish that she assaulted Natoshia Davis using a knife or some other weapon, but was justified in doing so.

Defendant claims that if the jury found that defendant stabbed Natoshia, it would be reasonable to find that defendant honestly and reasonably believed that she was in danger of suffering serious bodily injury, and therefore, she was entitled to a self-defense instruction. However, to sustain an affirmative defense, the defendant cannot deny the criminal act charged and may not rely on evidence presented by the prosecution to show she committed the crime. *People v Lemons*, 454 Mich 234, 246 n 15, 249; 562 NW2d 447 (1997). Defendant in this case did not testify. Codefendant, Nicole Darden, upon cross-examination by defendant, specifically stated that defendant did not have a knife. Defendant did not present any evidence that she assaulted Natoshia with a weapon. Thus, defendant did not carry her burden of persuading the court that she acted in self-defense or defense of codefendant.

Defendant also claims that codefendant’s testimony that a crowd of Massey’s people rushed at them and started the melee would allow a jury to conclude that Natoshia and Rashika were the real aggressors. Defendant states that this evidence establishes that neither she nor codefendant started the fight. However, defendant’s claim of self-defense may be precluded even if she was not the initial aggressor. *Oster, supra* at 132-133.

Furthermore, the evidence here does not support defendant’s claim that she reasonably believed she was in danger of serious bodily injury and needed to use deadly force against unarmed aggressors. Defendant claims that she and codefendant were fending off a crowd of people that were swinging, punching, and scratching at them, and therefore, she reasonably believed that she and codefendant were in danger of serious bodily injury. On the other hand, the evidence established that codefendant received only a cut on her pinky finger. Natoshia, Rashika, and Tyla Massey testified that no one other than defendant and codefendant had weapons. Natoshia and Massey testified that defendant stabbed Natoshia with a knife, and Rashika testified that defendant stabbed her with the knife. Both Natoshia and Rashika required medical treatment, including stitches, while defendant presented no evidence that she or codefendant suffered any injuries. Thus, the evidence shows that defendant’s use of deadly force was not in proportion to the alleged threat. We hold that the trial court did not abuse its discretion in denying defendant’s request for a self-defense jury instruction.

Affirmed.

/s/ Henry William Saad
/s/ Christopher M. Murray