

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY QUARMARKIM ROWE,

Defendant-Appellant.

UNPUBLISHED

January 13, 2009

No. 280508

Oakland Circuit Court

LC No. 2007-213591-FC

Before: Murphy, P.J., and K.F. Kelly and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of armed robbery, MCL 750.529. Because the trial court did not abuse its discretion in refusing to give a self-defense jury instruction as requested by defendant, we affirm.

This case arose from a physical altercation that occurred between defendant and a male complainant, Raj Rajab, on January 25, 2007. The complainant had called a phone number in a newspaper advertisement described as “Lala transsexual” to arrange what he believed to be a “date” with a female prostitute. After arriving at an apartment in Southfield, the complainant met defendant, a transgender person dressed as a woman. Shortly thereafter, the complainant inquired regarding defendant’s sex, and learned that defendant had a penis. The complainant and defendant went to the master bedroom where defendant was to perform an erotic massage on the complainant. Allegedly, the complainant solicited anal sex from defendant and attempted to inappropriately grab defendant. When defendant refused, the complainant threatened to call the police and report defendant for prostitution. Defendant responded that “[w]e both can call them because I know I’m not doing prostitution, [and] you came to my house.” Apparently the complainant attempted to leave the apartment but defendant would not allow him to leave without paying for the scheduled date.

Defendant refused to pay and a physical altercation resulted when the complainant left the apartment and walked toward the elevator. The complainant testified that as he walked toward the elevator, defendant attacked him. A fight ensued among defendant, the complainant, and “Inga,” another transgender individual present at the apartment. During the fight, allegedly the complainant dragged the defendant on the ground by her long hair. The complainant testified that defendant then went back inside the apartment and emerged with a metal vase. Defendant allegedly struck the complainant with the vase approximately three or four times about his arms and left hand. The complainant sustained a cut on his hand. The complainant further testified

that defendant and Inga fled after striking him on the head with the vase. After they were gone, approximately \$70 to \$80 was missing from the complainant's possession. The complainant walked onto the elevator, encountered a lady downstairs and asked her to call 911.

Defendant's sole argument on appeal is that the trial court's refusal to give a self-defense jury instruction was an abuse of discretion and a deprivation of his Constitutional right to a fair trial. The prosecutor responds that there was no abuse of discretion because the evidence did not support a self-defense jury instruction, defendant was permitted to present an adequate defense without the instruction, and a self-defense instruction would have been confusing to the jury. Defendant preserved the issue for appeal by requesting a self-defense jury instruction with respect to assault, an element of armed robbery. Jury instructions that involve questions of law are reviewed de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). But, "a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *Id.* "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007). Imperfect instructions are not erroneous as long as the issues to be tried are fairly presented and the defendant's rights are sufficiently protected. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

At trial, the defense emphasized the fact that assault is an element of armed robbery and, therefore, defendant was entitled to a self-defense jury instruction regarding that particular element. The prosecution stressed the fact that armed robbery is not classified as an "assaultive" offense, and therefore, self-defense is not applicable. The trial court determined that a claim of self-defense was unavailable to a defendant charged with armed robbery. The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, and (3) while the defendant is armed with a weapon. *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). And, MCL 780.972(2) provides:

An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

MCL 780.972(2) transforms an otherwise unlawful use of force into an act that would have been lawful in the eyes of the Court, unless "[the act was] committed in self-defense but with excessive force or in which defendant was the initial aggressor" *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990). "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).

MCL 780.972(2) entitles an individual to use force in self-defense if she "has not or is not engaged in the commission of a crime at the time . . . she uses force" In this case, defendant claimed self-defense as a defense to the alleged commission of armed robbery. The jury was free to conclude from the evidence presented, as it did, that defendant committed an armed robbery. On the basis of defendant's involvement in an armed robbery as a principal or one who aided and abetted another in its commission, self-defense is unavailable.

Also, a defendant's belief that the use of force is necessary must have been honest and reasonable. MCL 780.972(2); *People v Truong*, 218 Mich App 325, 337; 553 NW2d 692 (1996). According to the record, neither defendant nor the complainant was armed when the physical altercation began. Defendant testified that the complainant "came in being aggressive." Nevertheless, defendant chose to confront the complainant at least twice and engage in a physical altercation. Defendant testified that she, the complainant, and Inga were all fighting simultaneously. An eyewitness, Jeffrey Powell, who happened to be on the sixth floor of the building during the altercation testified that he saw two "women" engaged in a confrontation with one man. After being dragged on the ground and having her hair pulled out by the roots, defendant decided not only to continue the fight, but to escalate it. At one point, defendant and Inga took turns fighting the complainant. Finally, defendant kicked the complainant and he fell to the ground. Perhaps defendant initially underestimated the complainant's strength, but ultimately concluded that she was not winning the fight. Despite defendant's rationale for engaging in the fight and continuing to fight, it is impossible to conclude on this record that defendant honestly and reasonably feared the complainant's attack to the extent that she or Inga found it necessary to arm themselves with a metal vase.

Moreover, defendant must not have used more force than necessary. MCL 780.972(2). Even if defendant was justified in her use of force during the physical altercation, she used more force than necessary when the complainant was hit with a metal vase. A police officer testified that he recovered a metal vase from behind a door near the elevator on the sixth floor. When defendant retrieved the metal vase from the apartment and struck the complainant with it, the amount of force escalated to a level that was greater than necessary to defend oneself or another individual.

Even assuming, arguendo, that the trial court erred in failing to give the self-defense instruction, a review of the jury instructions "in their entirety" does not require reversal in this case. See *Canales, supra* at 574. Applying the harmless error standard articulated in *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999), the Court must determine "whether it is more probable than not that a different outcome would have resulted without the error." See, also, MCL 769.26. This is the case because even without the self-defense jury instruction, the jury was free to assess the credibility of the testimony and assign weight to the evidence that defendant emphasized in support of her self-defense claim. The jury, as the trier of fact, was free to determine which testimony was most credible. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). The Court must not usurp the role of the jury in making such determinations. *Id.*

Finally, despite the court's refusal to instruct the jury on the elements of self-defense, defendant's rights were sufficiently protected. Clearly, the jury was free to adopt the defense's theory of the case. Defendant testified that neither she, nor Inga, took the complainant's property. Defendant also testified that neither she, nor Inga, struck the complainant with a metal vase. But, the complainant testified that defendant struck him with a metal vase and Inga took his property. The complainant's injury was also circumstantial evidence, which tends to make his testimony, that he sustained injury as a result of a blow from a metal vase, plausible. Although defendant testified that she did not take property from the complainant, nor did she "condone" the taking of his possessions, eyewitness, Powell, testified that both "women" stated to the complainant, "give us the money." Powell's testimony corroborated portions of the

complainant's testimony. The evidence supports the conclusion that, in the event that the trial court had given the requested self-defense jury instruction, it is not more probable than not that the jury would have found defendant not guilty of the direct commission elements of armed robbery or as one who aided and abetted another.

The evidence supports the reasonable conclusion that defendant or some other person with defendant's aid perpetrated an assault upon the complainant in the course of taking property from his presence. See *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). To convict defendant of armed robbery as one who aided and abetted, the court must have determined the following:

(1) [armed robbery] was committed by defendant or some other person, (2) defendant performed acts or gave encouragement that assisted the commission of [armed robbery], and (3) defendant intended the commission of [armed robbery] or had knowledge that the principal intended its commission at the time that he gave aid and encouragement. [*Id.* (citations omitted.)]

The jury instructions presented each element of armed robbery and did not exclude "material issues, defenses, and theories" that were supported by the evidence. *Canales, supra* at 574 ("Jury instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them.") A self-defense jury instruction, under such circumstances, was not material and failure to instruct accordingly was not an abuse of discretion by the trial court. The trial court's decision did not fall outside the range of reasonable and principled outcomes, and therefore, it was not an abuse of discretion. *Shahideh, supra* at 118.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio