STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2010
v	No. 288737 Saginaw Circuit Court
BOBBIE LEE JONES, Defendant-Appellant.	LC No. 07-029628-FC

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his conviction after a jury trial of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent life sentences for the first-degree murder and felon in possession convictions, and a consecutive two-year sentence for the felony-firearm conviction. We affirm defendant's convictions.

Defendant and the victim, Travell Staves, became neighbors in July of 2006. According to defendant, their relationship was friendly until October of that year, when defendant asked Staves about some stolen marijuana plants and Staves accused defendant of breaking into Staves's garage. Defendant testified that Staves threatened on multiple occasions to kill defendant and his family because he believed defendant had broken into his garage. At one point, defendant thought he saw Staves with a pistol and, on another occasion, Staves tried to run over defendant with his car. Defendant also testified that Staves threw rocks at his house on two occasions.

According to defendant, on May 29, 2006, while he was leaving a party store with his friend Jason Young, Staves ran his car into the back of defendant's car. Defendant testified that he believed Staves had a gun and that Staves threatened him, telling defendant that "him and Burt Street [a gang] were gonna come break into my house and kill everything that was moving." Defendant testified that he and Staves then went to their respective homes, but then Staves walked toward defendant's home, still threatening to kill defendant. Defendant testified that he did not call the police at this time because on previous occasions he had called and they had not responded. Defendant testified that he then took his .22 caliber rifle from his home, went into his backyard, positioned himself near the corner of his garage, and shot Staves. According to

defendant, he feared for his life at the time of the shooting, and felt that he would have been killed had he not killed Staves.

Defendant said that he panicked after shooting Staves. After first concealing his car license plate, he dropped it off at his fiancée's workplace, left a note in it, and then walked toward the police station to turn himself in. While defendant was walking to the police station, he said, he was stopped and arrested.

Young testified that he was aware that defendant believed Staves had stolen his marijuana plants and that he had observed the dirt trail leading "almost up to [Staves'] door" the morning after the plants were stolen. He testified that, months before the killing, Staves had threatened to "F [defendant's] crackhead ass up." Young testified that on the day of the killing, he was at the party store with defendant when some "commotion" broke out between defendant and Staves. Although Young testified that he did not actually see or hear whether Staves ran into the back of defendant's car, he said that Staves was repeatedly saying that defendant "don't know nothing about Burt Street, and I'm gonna kick his door and kill everything in there moving." Young tried to convince Staves to "squash" the feud between the men, but Staves only repeated his threats to "kill [defendant] and everybody in his house." Young said he left the party store a short time after defendant and Staves did, and when he reached defendant's house, defendant was in the street next to his car. Young said that defendant called to Young to close defendant's back door, which was open. Young closed defendant's back door, and then noticed Staves lying where he had been shot.

Johnny Batton testified that he could see defendant's property from his rear window and that on the day in question, he saw defendant leave his house with a long gun, position himself near the corner of his garage. Batton heard a car pulling into Staves's driveway, heard the car door shut, and saw and heard defendant fire two shots at Staves. According to Batton, Staves was not carrying a weapon and looked as though he had just gotten off from work. When Batton saw defendant shoot Staves, Staves was moving from his own driveway toward his own back door. He testified that defendant then moved toward the fallen Staves and fired at least four more shots. Peter Holm, whose home is cattycorner to defendant's, testified that he heard several shots fired on the day in question. Shortly after hearing the shots, Holm saw defendant running out of his backyard carrying a rifle.

Saginaw Police Department Officer Luis Vargas testified that he was the first officer on the scene after the shooting. He saw a man, later identified as Young, waving to attract his attention. Vargas testified that Staves was found in his own driveway "laying near the doorway and the grill." Vargas checked Staves for a pulse and for breath when he arrived, but detected neither. Vargas never saw a weapon "in the area of the body." Saginaw Police Department Detective James Vondette was told by a witness that defendant had been standing by his garage and found several fired cartridge casings in that area. Detective Sergeant Ryan Larrison, a Michigan State Police firearms analyst, testified that he was able to match the found cartridge cases to defendant's rifle. Although he could not match the bullets recovered from Staves's body to the rifle, Larrison testified that they matched the rifle's caliber.

Medical examiner Kanu Virani, MD, performed an autopsy on Staves and determined that Staves had five gunshot wounds and that two chest wounds penetrated vital organs and would have killed Staves within minutes, even with medical attention.

After defendant's conviction, he filed a motion for new trial, alleging that he had received ineffective assistance of counsel because his attorney had failed to object to the trial court's erroneous jury instruction regarding a duty to retreat. The trial court denied the motion.

Defendant first alleges that the trial court erred in denying his motion for new trial on the grounds of ineffective assistance of counsel. Whether counsel was ineffective is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error, but review de novo the constitutional question of whether defendant was deprived of his right to counsel. *Id.*

At trial, the court instructed the jury on the issue of self-defense, stating, "A person can use deadly force in self-defense only when it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed he needed to use deadly force in self-defense."[1] Defendant argues that he had no duty to retreat because he was within the curtilage of his dwelling at the time of the shooting and that his counsel was ineffective for failing to request an instruction indicating that he had no duty to retreat.[2]

Defendant argues that because he was within the bounds of the curtilage of his dwelling, he was entitled to an instruction that he had no duty to retreat, as provided in MCL 768.21c. We disagree. Before the jury could reach the question of whether defendant had a duty to retreat, it first had to conclude that defendant honestly and reasonably believed his life was in imminent danger when he acted. See *People v Riddle*, 467 Mich 116, 127; 649 NW2d 20 (2002) ("[T]he killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself."). On the record, we conclude that no reasonable juror could so find.

The evidence showed that Staves pulled up to his own home, in his own driveway. Defendant sat next to his garage with a rifle by his side, waiting for Staves. Defendant admitted that he had retrieved his rifle and took up his position next to his garage in time to see Staves exit the car. Staves was not carrying a weapon and defendant never saw Staves with a weapon on that, or any other, occasion. Defendant then shot Staves as Staves was still in his own driveway and walking toward his own backdoor. Defendant then shot Staves several more times after Staves was lying on the ground injured. The jury was also provided a jail telephone recording, in which defendant admitted that he went home and waited for Staves because he was "fed up" with Staves harassing him. As the trial court stated when it denied defendant's motion for a new trial, "the Court was convinced this gentleman was laying in wait . . . and drilled this victim . . . as he

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[1] We note that this is an almost verbatim version of CJI2d 7.16(1).

[2] CJI2d 7.16(2) provides:

> However, a person is never required to retreat if attacked in [his/her] own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to sudden, fierce, and violent attack.

pulled up, got out of his car and literally executed him and that there was no fear that he feared for his life."

Under the circumstances, no reasonable juror could find that defendant honestly and reasonably believed that his life was in imminent danger so as to necessitate deadly force to prevent such harm. *Riddle*, 467 Mich at 127. Absent an honest and reasonable belief that deadly force was necessary, a duty to retreat, or lack thereof, is irrelevant.

Indeed, even if defendant's counsel had requested CJI 7.16(2), we conclude that trial court would have properly denied the request. The language of the jury instruction provides that a person need not retreat "if attacked in [his/her] own home," "if the person reasonably believes an attacker is about to use a deadly weapon," or "if the person is subject to fierce, sudden, and violent attack." Even acknowledging that MCL 768.21c(1) extended the area to include the curtilage, the fact remains that there is no evidence defendant was attacked while in his curtilage. Indeed, there is no evidence that defendant was attacked *at all*. The common element to the exception to the duty to retreat, indeed the entire premise of self-defense, is predicated on being attacked. Furthermore, a person who is threatened elsewhere may not go to their own home and lie in wait for the threatener and claim self-defense under the castle-doctrine unless the threatener subsequently threatens the person at their dwelling or within its curtilage. Thus, because Staves did not threaten or attack defendant while defendant was within the curtilage of his home, defendant was not entitled to an instruction based on MCL 768.21c, namely CJI2d 7.16(2).

Based on this conclusion, defendant's counsel cannot be deemed ineffective for failing to either request the instruction be given or object to the trial court's failure to provide one sua sponte. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998) ("Trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile."). Therefore, the trial court did not err in denying defendant's motion for a new trial on this basis.

Because we have affirmed defendant's first-degree murder conviction, which provides for a life sentence, we do not need to reach the issue of whether defendant is entitled to resentencing on the felon in possession charge.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio